

**CITY OF MINNEAPOLIS
DEPARTMENT OF CIVIL RIGHTS**



**EVALUATION OF THE CITY OF MINNEAPOLIS
DEPARTMENT OF CIVIL RIGHTS
CONTRACT COMPLIANCE UNIT**

MAY 2007

PREPARED BY:

THE ROY WILKINS CENTER FOR HUMAN RELATIONS & SOCIAL JUSTICE
HUBERT H. HUMPHREY INSTITUTE OF PUBLIC AFFAIRS
UNIVERSITY OF MINNESOTA

DR. SAMUEL L. MYERS, JR., DIRECTOR
JUDGE LAJUNE THOMAS LANGE (RETIRED)
LAWRENCINA MASON ORAMALU, J.D.

TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY.....	ii
I. INTRODUCTION	1
A. The Purpose of the Study	1
B. The Context of the Study	5
C. The Civil Rights Ordinance	5
D. Organization of the Report.....	6
II. METHODOLOGY	6
A. Interviews	7
B. Document Review.....	7
C. Legal Analysis	10
i. Local Ordinance.....	11
ii. State and Federal Regulations.....	12
iii. Good Faith Standard	17
III. FINDINGS.....	20
A. Compliance	20
i. Contractor	20
ii. Minneapolis Department of Civil Rights (CCU).....	27
iii. Pre-Award Compliance Review	27
iv. Affirmative Action Plan Monitoring	28
v. City of Minneapolis Departments.....	38
B. Consequences.....	40
C. Communication.....	44
D. Clarity & Coordination	46
E. Capacity	51
F. Commitment	53
G. Community	57
IV. RECOMMENDATIONS.....	59
V. CONCLUSION	63
VI. APPENDIX	A-1

EXECUTIVE SUMMARY

This report addresses seven major issues that emerged from the consultant interviews, legal analysis, and document review. The major themes and findings are summarized below:

KEY ISSUE	FINDING
Compliance	Governmental and non-governmental entities governed by the Civil Rights Ordinance are NOT in full <i>compliance</i> with the hiring, contracting, reporting, monitoring, and enforcement mandates described in the contract compliance provisions of the Ordinance.
Consequences	The <i>consequences</i> outlined in the Civil Rights Ordinance for failure to comply with the provisions of the Ordinance are NOT being applied to firms that are in non-compliance.
Communication	<i>Communication</i> within the Civil Rights Department, between the MDCR and other City departments, as well as between MDCR and contractors needs to be improved.
Clarity & Coordination	There is inconsistent and ineffective <i>coordination</i> between MDCR and other City departments at the pre-bid, bid, and contract award stages of the contract compliance process, which may be the result of a lack of <i>clarity</i> regarding the roles and responsibilities of internal and external stakeholders.
Capacity	The CCU does not have the <i>capacity</i> to effectively fulfill its mandate.
Commitment	The excessive non-compliance, failure to implement consequences, poor communication, ineffective coordination, lack of clarity, and lack of resources needed to operate at full capacity and fulfill the mandate prescribed in the Ordinance do not convey a sincere <i>commitment</i> to achieve full compliance with the Ordinance.
Community	The City's diverse <i>community</i> deserves to have a government committed to fulfilling the social and economic goals of the Civil Rights Ordinance and the intent of the Civil Rights Ordinance through effective implementation and evaluation, thus ensuring that the civil rights policy has the impact it was designed to produce.

Each of these issues is important; however, some are more critical to the ultimate effectiveness of the Contract Compliance Unit. Although this report will address all seven issues, it will discuss the first two issues – compliance and consequences – in greater detail, as they are two of the most critical components of an effective compliance program. The recommendations can be found on pages 59 to 62.

I. INTRODUCTION

A. *The Purpose of the Study*

In 2006, the Interim Director of the Minneapolis Department of Civil Rights (MDCR) commissioned the University of Minnesota's Roy Wilkins Center for Human Relations & Social Justice to evaluate the MDCR's Contract Compliance Unit (CCU) to determine:

- (1) What are the administrative and enforcement policies and procedures the Contract Compliance Unit has been mandated to implement?
- (2) Is the Contract Compliance Unit effectively implementing these administrative and enforcement policy and procedures?
- (3) What strategies and recommendations for the Department of Civil Rights will assist the Contract Compliance Unit effectively comply with its mandate?

This report addresses these key questions and other related issues that emerged during the study. This report was commissioned to satisfy the City's obligation after a civil lawsuit and because the Interim Director had not received regular or consistent reports documenting the status of the CCU's activities. Report submittal is not only a critical operations task for the CCU, but more importantly, it is mandated by the Civil Rights Ordinance. The CCU's failure to submit regular reports is a critical issue that warranted attention and investigation.

Although this report seeks to provide a comprehensive evaluation of the CCU, there are likely other issues that need to be addressed but do not specifically fall within the scope of this project. One issue that will not be addressed in this report, but will be addressed in a subsequent study, is whether or not there is a disparity between the City's utilization of women and minority-owned firms and their relative availability in the City's narrowly defined geographical market. Although this issue is important, it does not fall within the purview of this project, which primarily focuses on the internal operations of the Contract Compliance Unit.

This project is a process evaluation, whereas the Disparity Study will be more of an outcome-based evaluation.¹ The Disparity Study will examine the actual goals that have been established by the City Council and whether the City has attained those goals. Some of the questions the Disparity Study will likely address are:

- (1) Is the City's Small & Underutilized Business Program (SUBP) legally defensible?²
- (2) Has the City followed the methodology approved by the courts to determine if there is a statistically significant disparity between the utilization of women and minority-owned firms in relation to their relative availability in the narrowly defined geographical market?³
- (3) If there is a disparity, are there legitimate reasons to explain the disparity such as qualifications of the firms, access to capital, bonding etc. or could the disparity be attributed to either active or passive discrimination?⁴

The primary purpose of this study is to evaluate the effectiveness of the Contract Compliance Unit in its implementation of the City's public policy that seeks to both protect traditionally disadvantaged groups from discrimination and to expand employment and economic opportunities to all city residents, regardless of race, ethnicity, gender, or disability.⁵

Implementation and evaluation are critical components of the public policy process needed to determine how effective a public policy is and whether it meets the intent of the policymakers. In his book, *Public Policy Making: Process and Principles*, author Larry Gerston discusses the role implementation and evaluation play in the public policy process.

¹ The MDCR is currently in the process of finalizing the Disparity Study along with Hennepin County.

² The U.S. Supreme Court has established criteria for developing a legally defensible minority, women, and disadvantaged business enterprise (M/W/DBE) goal program. In *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 504 (1989), the Court established a two-prong test for determining whether a city contracting program designed to increase the utilization of traditionally underrepresented groups, violates the Constitution. A legally defensible M/W/DBE goal program must address a "compelling government interest" and must be "narrowly tailored to remedy the effects of past discrimination." *Id.*

³ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 and *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003).

⁴ Passive discrimination involves situations where an agency or department engages in business with firms that participate in or industries where there is sizable discrimination against M/W/DBEs. The issue examined is whether the private marketplace is discriminatory. Active discrimination involves situations where the agency or department is observed to treat equally qualified M/W/DBEs and non-M/W/DBEs differently.

⁵ MINNEAPOLIS, MINN. CODE § 139 – 142 (2006).

According to Gerston: “Implementation represents the conscious *conversion of policy plans into reality*. It is the follow-through component of the public-policy making process.”⁶

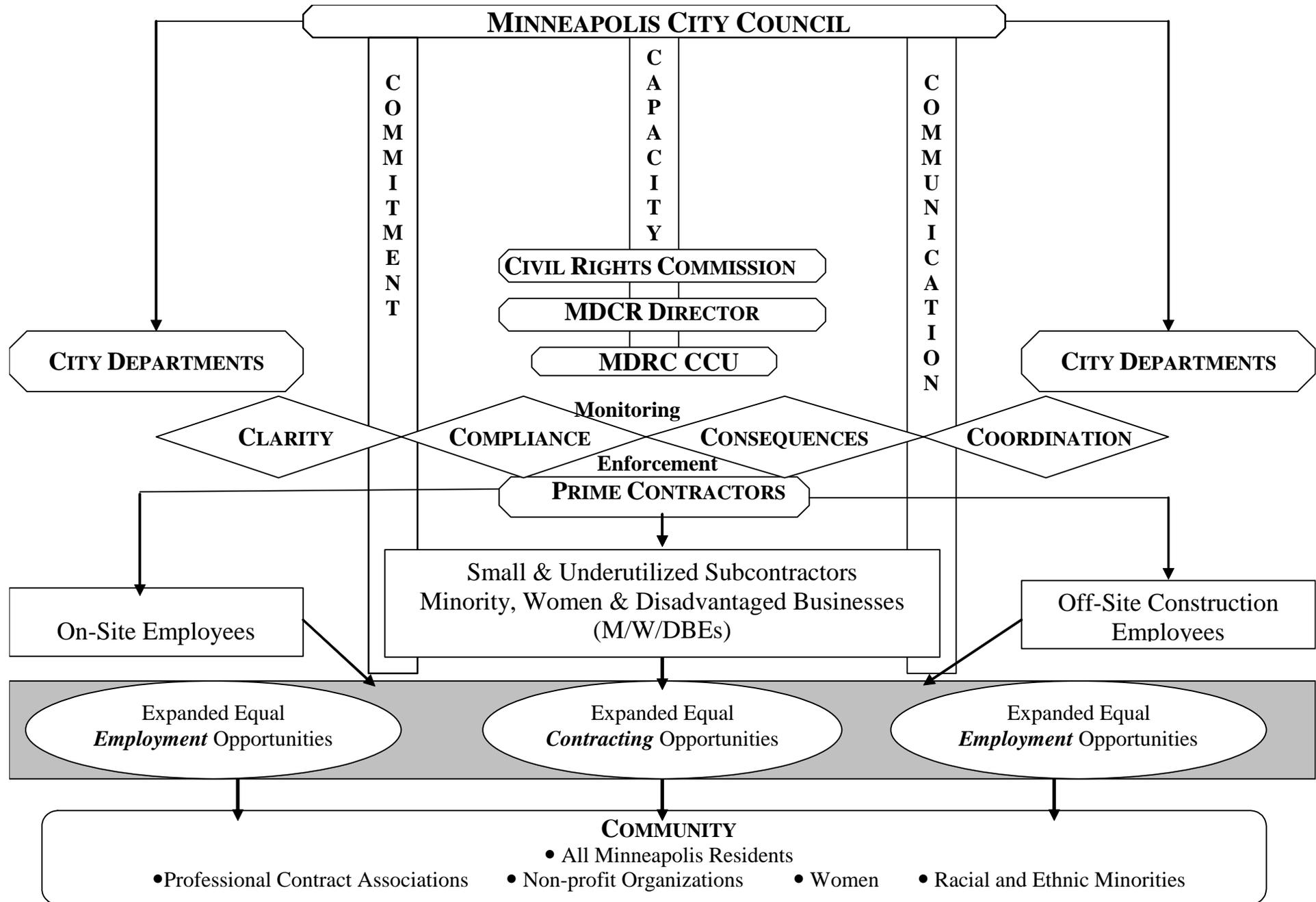
Gerston outlines three elements that must be in place in order for implementation to occur:

- (1) There must be an entity with sufficient resources assigned to carry out the implementation task.
- (2) The implementing agency must be able to translate goals into an operational framework.
- (3) The entity assigned the implementation task must deliver on its assignment and be accountable for its actions.⁷

For the purposes of this study, the entity assigned to carry out the implementation of the contract compliance process is the Minneapolis Department of Civil Rights’ Contract Compliance Unit (CCU). It must be able to translate the goals of the Minneapolis Civil Rights Ordinance, which include promoting and expanding employment and contracting opportunities to all Minneapolis residents, into an operational framework. Lastly, CCU must deliver on the assignments or mandates prescribed in the ordinance, and it must be held **accountable** for its actions, which includes the monitoring and enforcement of affirmative action plans, and the establishment and monitoring of small and underutilized business program goals. The chart on the following page describes the operational framework the consultant developed after conducting the evaluation of the CCU. The concepts presented in the below chart are again addressed in the “Executive Summary,” and in the “Findings” section of the report. Ultimately, this report will address the overarching question of how well the City’s Civil Rights policy, with regard to contract compliance, is being implemented.

⁶ Gerston, Larry, *Public Policy Making: Process and Principles*, 94. (New York: M.E. Sharpe, Inc.) (2004)(emphasis added).

⁷ *Id.* at 98.



B. The Context of the Study

This study is the third of three studies commissioned by the Minneapolis Department of Civil Rights (MDCR) to evaluate three of its units:⁸

- (1) Complaint Investigations;
- (2) Civilian Police Review Authority; and
- (3) Contract Compliance.

Michael K. Browne, Esq., the MDCR Interim Director, prepared studies of the first two units, prior to Mayor R.T. Rybak appointing him to his current position. The study, *Evaluation and Recommendations for the Civil Rights Complaint Investigations Process* was released in May 2005 and *A Study of the Policy and Process of the Minneapolis Civilian Police Review Authority*⁹ was released in February 2006. Both of these studies sought to evaluate the effectiveness of the respective units with the goal of identifying areas for improvement.

C. The Civil Rights Ordinance

The Minneapolis Civil Rights Ordinance outlines the mandate for the Contract Compliance Unit. The City Council first passed the Ordinance in 1967 and last revised it in June 2006.¹⁰ This report focuses on Section 139.50 of the Ordinance, which describes the duties and responsibilities of the respective parties involved in the contract compliance process including the MDCR Director, Contract Compliance staff, contractors working for the City, and other City departments. The effectiveness of the City's contract compliance efforts is dependent upon the actions of these internal and external stakeholders.

⁸ The MDCR consists of the Complaint Investigations Unit, the Civilian Police Review Authority, the Contract Complaint Unit, the Multicultural Services Unit, and the American-Indian Advocate.

⁹ Michael K. Browne, J.D., City of Minneapolis Department of Civil Rights, *A Study of the Policy and Process of the Minneapolis Civilian Police Review Authority* (2006), available online at: www.ci.minneapolis.mn.us/cra/docs/CRAReport_2006.pdf.

¹⁰ A Brief History of Civil Rights Protection in Minneapolis, available online at: www.ci.minneapolis.mn.us/civil-rights/docs/Civil-Rights-Brief-History.pdf (1997).

D. Organization of the Report

This report is divided into four major sections. **Section I, Introduction**, provides the background for this report including the purpose and context of the study. **Section II, Methodology**, briefly describes the methodology the consultants used to gather the information for conducting the evaluation. **Section III, Findings**, summarizes the results of the information obtained through interviews and document review and links this information to key themes that emerged during the study. **Section IV, Recommendations**, outlines recommendations for improving the effectiveness of the Contract Compliance Unit. The recommendations underscore the fact that the effectiveness of the Contract Compliance Unit is not just influenced by the actions of the CCU staff, but by the actions of ALL stakeholders. Compliance with the City contract compliance regulations is a shared legal responsibility that requires a commitment by all stakeholders in the contracting process.

II. METHODOLOGY

In order to identify the key issues surrounding the implementation and enforcement of Section 139.50 of the Civil Rights Ordinance, information was gathered through interviews, document reviews, and legal analysis.

A. Interviews

Interviews were conducted with all current CCU staff, as well as other experts in the field of contract compliance. In the interviews with the CCU staff, the consultants sought to gain insight into:

- (1) The staff's understanding of the Civil Rights Ordinance and the specific mandate given to the Contract Compliance Unit;
- (2) The staff's responsibilities as they relate to carrying out this mandate;
- (3) The level and effectiveness of communication within the Unit, within the Civil Rights Department, and with other City departments;
- (4) The types of reports submitted to, and submitted by, the Unit as well as the frequency by which these reports are produced;
- (5) The internal and external stakeholders involved in the contract compliance process and their opinions as to how they evaluate the CCU's effectiveness;
- (6) The way the Unit's effectiveness should be measured; and
- (7) Their perceptions of the Unit's effectiveness.

Several key issues emerged during the interviews and these themes were supported by the information gathered from the review of the Contract Compliance Access Database (Watson) and the review of documents relevant to this study.

B. Document Review

The consultants reviewed documents received from the CCU staff as well as information retrieved on-line and from other relevant sources. The CCU staff provided the consultants with a training manual, instruction manual(s) for developing affirmative action plans, CCU job descriptions, and an electronic database of contract compliance activities for contracts awarded from 1999 to 2006.

After receiving a copy of the contract compliance activities, the consultants submitted a supplemental data request to obtain additional information about specific contracts, in an effort to obtain additional data that documented the internal processes of the Contract Compliance Unit. Thirty (30) contracts were identified for further investigation - one-third of the contracts were valued under \$1 million, another one-third were valued between \$1 and \$10 million, and the remaining third over \$10 million. The list of contracts, contract amounts, contracting agencies, and CCU comments is provided in the Appendix (the contractor names are not provided). The CCU staff was unable to respond to all of the questions and data requests due to archiving and data retention practices. In addition, according to the staff, some of the requested supplemental information was not available from the MDCR. This list of the contracts was identified for further investigation (see Appendix).

After reviewing the contract compliance database, the consultants identified three major issues they wanted to investigate further. The first issue was **non-compliance**: in the comments section, CCU staff noted when a Letter of Agreement (LOA) or Letter of Conciliation (LOC) had been issued to a non-complying contractor or needed to be issued. The CCU issued LOAs in 16 of the 30 contracts identified for further investigation. In our supplemental data request to CCU, we requested a copy of the contractor's affirmative action plan (AAP), workforce analysis, final report, LOA/LOC, notes from the conciliation meeting, and the status of the contractor's affirmative action plan registration. The CCU provided a written response to each of the data requests, a copy of a few final reports, a copy of the LOA database, and the status of the contractor's current AAP registration. However, no affirmative action plans (AAPs) were provided.

The second issue dealt with **notification**: in the comments section, the CCU staff indicated that often times the awarding City agency did not notify them of a contract award. In one instance, a project had started more than 60 days prior to notification, which is not in compliance with the Ordinance. The Ordinance specifically states that City departments may NOT enter into a contract until receiving approval from the MDCR:

Neither the City of Minneapolis nor the Minneapolis Community Development Agency shall enter into contracts or amend any contract resulting in a cumulative contract award in excess of fifty thousand dollars (\$50,000) with any bidder or prospective **contractor until a written affirmative action plan has been approved** by the director or the director's designee and until the department has conducted a pre-award compliance review. ...The director or director's designated city staff shall, in a **pre-award compliance review**, examine evidence of the past performance of the entity under review regarding compliance with the provisions of subsection (a) of this section which should include, but not be limited to the following factors: The City of Minneapolis contract compliance rules and regulations, the books, records, payrolls ...; **documentary evidence of the implementation of each of the affirmative action standards** set forth in the specifications and evidence demonstrating whether or not the entity under review has complied with subsection (a)(1) of this section or similar equal employment opportunity clause in contracts with any other governmental body or any other entity. The director or director's designated city staff **shall have thirty (30) days after receiving notice of the proposed contract to complete the pre-award compliance review and approval or disapprove the affirmative action plan.**¹¹

The third issue dealt with **monitoring**: the review of the Contract Compliance Database revealed that there were several multi-million dollar contracts that were not being monitored or that did not have small and underutilized program goals. In one instance, an explanation in the comment section indicated that no monitoring was required due to the funding source. However, there were other instances where CCU staff did not input an explanation. Nevertheless, it is critical that all contracts, especially multi-million dollar contracts, are monitored.

¹¹ MINNEAPOLIS, MINN. CODE § 139.50 (d)(2006) (emphasis added).

Monitoring is necessary in order to ensure that the contractors are complying with the contract compliance provisions of the Ordinance, unless the contract is exempt from monitoring requirements. If an exemption is made, then documentation needs to be provided to support the reason. However, only the Director of Civil Rights can make an exemption.¹²

In addition to the documents received from the CCU staff, the consultants also retrieved documents on-line from the Department of Civil Rights website and other related sites. Some of the key documents reviewed by the consultants included, the MDCR Business Plan for 2006-2010, the Draft MDCR Business Plan for 2007-2010, the 2005 and 2006 Civil Rights Commission agendas and meeting notes, and proceedings from the City Council's Ways & Means/Budget Committee. Way and Means is the committee responsible for all contract awards and for overseeing the activities of the Contract Compliance Unit, along with the Health, Energy and Environment Committee, the Department's home committee.

C. Legal Analysis

The primary benchmark for evaluating the effectiveness of the Contract Compliance Unit is the Civil Rights Ordinance. In order to thoroughly understand the local mandate for contract compliance, the consultants analyzed the City's Civil Rights Ordinance as well as comparable state and federal contract compliance laws and regulations.

¹² See MINNEAPOLIS, MINN. CODE § 139.50 (a) (2006) (stating that contractors must adhere to all of the contract compliance provisions of the ordinance unless exempted by the Director).

i. Local Ordinance

The legal mandate for the Minneapolis Department of Civil Rights, Contract Compliance Unit (CCU), is Section 139.50 of the City's Civil Rights Ordinance. The Civil Rights Ordinance was first passed in the civil rights era of the 1960's, a period when local, state, and federal government enacted numerous legislation designed to protect the rights of people who traditionally had been discriminated against based on their race, ethnicity, national origin, and/or gender. The City of Minneapolis passed its Civil Rights Ordinance in August 1967 and the Ordinance was most recently revised in June 2006.¹³

The primary issues addressed in the Minneapolis Civil Rights Ordinance, as it relates to contract compliance are:

- (1) provisions to be included in all city contracts;
- (2) a description of what constitutes non-compliance and the associated penalties;
- (3) the application to subcontracts;
- (4) a written affirmative action plan requirement;
- (5) reporting requirements; and
- (6) the creation of the MDCR and responsibilities of its Director and staff. In addition to addressing the specific responsibilities of the MDCR staff, the Ordinance also addresses the role and responsibilities of other City departments involved in the contracting process.

Although this study focuses on compliance with the Civil Rights Ordinance, it is appropriate to examine the comparable state and federal regulations, since contract compliance is not just a local mandate.

¹³ MINNEAPOLIS, MINN. CODE § 139.50 (2006). The current Ordinance, which went into effect on July 1, 2006, and the previous Ordinance, which was enacted in August 28, 1998, are provided in the Appendix.

Government contractors should be subject to strict monitoring and enforcement of their compliance with affirmative action policies in all government contracts. Consistent monitoring and enforcement at the local, state, and federal levels would convey to contractors and constituents, that all levels of governments are committed to fulfilling the intent of affirmative action policies, and are committed to achieving the ultimate public policy goal of promoting equal opportunities in government contracting and employment.

ii. State and Federal Regulations

The provisions of state and federal contract compliance regulations are similar to those governing the City of Minneapolis' contract compliance program. Like the local ordinance, both the state and federal regulations proclaim that freedom from discrimination is a civil right. Specifically, the Minnesota Statute states:

It is **the public policy of this state** to secure for persons in this state, **freedom from discrimination**: in employment because of race, color, creed, religion, national origin, sex, marital status, disability, status with regard to public assistance, sexual orientation, and age. ... Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy. ...The **opportunity to obtain employment**...without such discrimination as is prohibited by this chapter is hereby recognized as and **declared to be a civil right**.¹⁴

The regulation that specifically addresses discrimination in government contracting can be found in Section 181.59, *Discrimination on Account of Race, Creed, or Color Prohibited in Contract*.

¹⁴ MINN. STAT. § 363A.02 (1)(a)(b) (2006) (emphasis added); see also note 100, *supra*.

The statute outlines the responsibilities of the state contractor as it relates to healthy practices (non-discriminatory) in its hiring and contracting, as well as addresses the penalties that can be imposed for violating the contract provisions:

Every contract for or on behalf of the state of Minnesota, or any county, city, town, township, school, school district, or any other district in the state, for materials, supplies, or construction shall contain provisions by which the contractor agrees:¹⁵

(1) that, in the hiring of common or skilled labor for the performance of any work under any contract, or any subcontract, no contractor, material supplier, or vendor, shall, by reason of race, creed, or color, discriminate against the person or persons who are citizens of the United States or resident aliens who are qualified and available to perform the work to which the employment relates;

(2) that no contractor, material supplier, or vendor, shall, in any manner, discriminate against, or intimidate, or prevent the employment of any person or persons identified in clause (1) of this section, or on being hired, prevent, or conspire to prevent, the person or persons from the performance of work under any contract on account of race, creed, or color;

(3) that a violation of this section is a misdemeanor; and

(4) that this **contract may be canceled or terminated** by the state, county, city, town, school board, or any other person authorized to grant the contracts for employment, and all money due, or to become due under the contract, may be forfeited for a second or any subsequent violation of the terms or conditions of this contract.

One of the key provisions of the local, state and federal regulations is the requirement of a written affirmative action plan. The City Ordinance, state statute, and federal regulations all state that a written affirmative action plan should be approved *prior to a contract being awarded*.

¹⁵ MINN. STAT. § 181.59 (2006).

According to the **state statute**:

For all contracts for goods and services in excess of \$100,000, **no department or agency of the state shall accept any bid or proposal** for a contract or agreement from any business having more than 40 full-time employees within this state on a single working day during the previous 12 months, **unless the commissioner is in receipt of the business' affirmative action plan** for the employment of minority persons, women, and qualified disabled individuals. No department or agency of the state shall execute any such contract or agreement **until the affirmative action plan has been approved** by the commissioner. Receipt of a certificate of compliance issued by the commissioner shall signify that a firm or business has an affirmative action plan that has been approved by the commissioner. A certificate shall be valid for a period of two years.¹⁶

The comparable **federal regulation** states:

Each prime contractor or subcontractor with 50 or more employees and a contract of \$50,000 or more is required to develop a written affirmative action program for each of its establishments (Sec. 60-1.40). If a contractor fails to submit an affirmative action program and supporting documents, including the workforce analysis, within 30 days of a request, the enforcement procedures specified in Sec. 60-1.26(b) shall be applicable. Contractors may reach agreement with OFCCP on nationwide AAP formats or on frequency of updating statistics.¹⁷

In addition to the written affirmative action requirement, the federal regulations also address other key issues; that is all federal government and federally assisted construction contracts are required to have an equal opportunity clause. Specifically, by accepting a federal contract, contractors agree to:

- (1) not discriminate against any employee or applicant;
- (2) post a non-discrimination policy;
- (3) communicate a non-discrimination policy to labor unions;
- (4) comply with ALL provisions of the regulation; and
- (5) furnish appropriate reports on employment and affirmative action activities and permit access to all records.¹⁸

¹⁶ MINN. STAT. § 363A.36(1) (2006) (emphasis added).

¹⁷ 41 C.F.R. § 60-1.20(e) (2006).

¹⁸ 41 C.F.R. § 60-1.4 (2006).

The regulation also addresses the issue of non-compliance and states that a “contract may be canceled, terminated or suspended” or a “contractor may be declared ineligible” if a contractor is found to be in non-compliance with any provisions of the regulation.

Monitoring and enforcement are two important functions of the local, state, and federal contract compliance regulations. In addition to the written affirmative action plan requirement, contractors are also expected to submit regular reports that document their progress toward achieving their hiring and contracting goals. Contract compliance staff receives and reviews these reports; compliance staff is also instructed to conduct compliance evaluations. According to the federal regulations, a compliance evaluation can include: (1) a compliance review; (2) off-site review of records; (3) compliance check; or (4) focused review:

The Department of Labor's Employment Standards Administration's **Office of Federal Contract Compliance Programs (OFCCP)** may conduct compliance evaluations to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, or national origin. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) **Compliance review.** A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor...

(i) A desk audit of the written AAP and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the AAP meets agency standards of reasonableness, and whether the AAP and supporting documentation satisfy agency standards of acceptability...

(ii) An on-site review, conducted at the contractor's establishment to investigate unresolved problem areas identified in the AAP and supporting documentation during the desk audit, to verify that the contractor has implemented the AAP and has complied with those regulatory obligations not required to be included in the AAP, and to examine potential instances or issues of discrimination...

(2) **Off-site review of records.** An analysis and evaluation of the AAP (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations;

(3) **Compliance check.** A determination of whether the contractor has maintained records consistent with Sec. 60-1.12; at the contractor's option the documents may be provided either on-site or off-site; or

(4) **Focused review.** An on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.¹⁹

Issues of non-compliance can be addressed through either conciliation or formal sanctions, but the regulations encourage compliance staff to first pursue conciliation:

Where deficiencies are found to exist, *reasonable efforts shall be made to secure compliance through conciliation and persuasion.* Before the contractor can be found to be in compliance with the order, it must make a *specific commitment, in writing*, to correct any such deficiencies. The commitment must include the precise action to be taken and dates for completion. The time period allotted shall be no longer than the minimum period necessary to effect such changes.²⁰

Although conciliation is the preferred first level response to a contractor's non-compliance, if it fails to achieve compliance, more formal sanctions may be imposed. The Minneapolis Civil Rights Ordinance also addresses the issue of non-compliance:

When the director or the director's designee shall have probable cause to believe the contractor is not in compliance ... the director or the director's designee shall notify the city department administering said contract and shall engage the contractor and the administering department in conciliation and persuasion to try to eliminate the acts or practices giving rise to such belief. Should conciliation and persuasion fail to eliminate the noncompliant acts or practices, the director or the director's designee shall either **request a hearing before the city council on the subject matter of the noncompliance or file a director's charge and refer said charge to the commission** demanding that a hearing panel of the commission be convened to hear the charge.²¹

¹⁹ 41 C.F.R. § 60-1.20 (2006).

²⁰ 41 C.F.R. § 60-1.20(b) (2006) (emphasis added).

²¹ MINNEAPOLIS, MINN. CODE § 139.50(b) (2006) (emphasis added).

Sanctions may be avoided if it is determined that the contractor made a “good faith” effort to comply with the regulations and to achieve the affirmative action goals in its AAP.

iii. “Good Faith” Standard

“Good faith” is a term that is often used to determine whether or not an entity has acted with honest intentions and without malice or the intent to defraud. The term is defined in the Black’s Law Dictionary, referenced in the Office of Federal Contract Compliance manual and discussed by the U.S. Supreme Court in recent affirmative action cases. According to the Black’s Law Dictionary “good faith” is:

an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual’s personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone.²²

The Office of Federal Contract Compliance defines “good faith effort” as:

a contractor’s efforts to make all aspects of its affirmative action plan work. Designing and implementing an effective affirmative action plan requires sustained attention. The contractor must analyze its employment and recruitment practices as they affect equal opportunity, identify problem areas, design and implement measures to address the problems, and monitor the effectiveness of its program, making adjustments as circumstances warrant...The basic components of good faith efforts are:

- (a) Outreach and recruitment measures to broaden candidate pools from which selection decisions are made to include minorities and women; and
- (b) Systematic efforts to assure that selections thereafter are made without regard to race, sex, or other prohibited factors.²³

The U.S. Supreme Court has addressed the issue of “good faith” in cases dealing with affirmative action issues in government contracting and procurement, as well as in higher education.²⁴

²² BLACK'S LAW DICTIONARY (6th ed. 1991).

²³ Available online at: www.dol.gov/esa/regs/compliance/ofccp/fccm/ofcpch1.htm (2007).

In *Grutter v. Bollinger*, the Court discusses the need for the University of Michigan to make a “good faith” effort to first pursue race-neutral alternatives to a race-based affirmative action program for admission. In *Concrete Works v. City and County of Denver*, the Court mentions the “good faith” standard that the City of Denver codified in its Ordinance.

Under the 1990 Ordinance, Denver’s City Council sets annual goals for the participation of minority business enterprises (MBEs) and woman-owned business enterprises in city contracting. The Mayor’s Office of Contract Compliance director then sets contract-specific goals for each covered contract. A prime contractor whose bid does not meet the goals will be disqualified, unless the prime contractor can show that it made a “good-faith effort” to do so--which requires satisfaction of 10 specific steps prescribed in the Ordinance.²⁵

The current Denver City Ordinance references in this case and now outlines steps that evidence a contractor’s “good faith” effort. The steps are:

- Requirement to solicit through all reasonable and available means: Acceptable contact modes for solicitation shall be letters, facsimile transmissions, telephone communication and e-mail.
- Requirement to solicit in sufficient time: Solicitation must be made at least ten (10) calendar days before bid date or proposal submission.
- Requirement to demonstrate appropriate steps to follow up initial solicitation: Appropriate steps may be demonstrated by second contact attempts by letter, facsimile transmission, telephone communication or e-mail, if bidder/proposer failed to make contact on its first attempt.
- Requirement to break out work into economically feasible units: The bidder or proposer makes an effort to break up scopes of work into smaller units that could be bid on by MBE/WBEs.
- Conditions of reasonably consistent with industry practice: The bidder or proposer shall make a moderate and reasonable adjustment to the normal and practiced industry standard that demonstrates a reasonable willingness to divide up scopes of work to provide more opportunities for MBE/WBEs to bid/quote.

²⁴ See *Concrete Works of Colorado, Inc., v. City and County of Denver*, 540 U.S. 1027, 1028 (2003) and *Grutter v. Bollinger et al.* 539 U.S. 306 (2003).

²⁵ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 540 U.S. 1027, 1028 (2003).

- Requirement of provision of timely adequate access: Such access shall be provided at least ten (10) calendar days before bid date or proposal submission.
- Requirement to negotiate in good faith: Good faith negotiation shall mean scheduled meaningful discussions that demonstrably seek to find reasonable ways to utilize the MBE/WBE on the contract, without preconceptions or assumptions which tend to discourage or defeat potential MBE/WBE utilization.
- Requirement that communications with MBE/WBE be consistent with industry practice: The communication shall be in accordance with normal and practiced standards in the industry for communication between bidders or proposers and prospective subcontractors or suppliers.
- Requirement of verification and verified statements: An attested transmittal of copies of actual bids received by the bidder or proposer that provide evidence that the MBE/WBE's bids/quotes that were received by the bidder or propose were not the lowest monetary bids in the scopes of work or supplies that the MBE/WBEs were competing for shall be supplied to the DSBO.
- Requirements of reasonable efforts to assist interested MBEs and WBEs. Reasonable efforts shall mean practical and rational attempts to refer MBE/WBEs to companies or organizations that provide direct services related to bonding, and insurance and financial institutions that assist small growing business, consistent with the bidder's or proposer's industry knowledge, experience and contacts.²⁶

The steps outlined in Denver's rules and regulations serve as a good framework that the City of Minneapolis could use to develop its own criteria for a "good faith" effort. The MDCR has recently established some steps contractors should follow to demonstrate that they are making a "good faith" effort to subcontract with minority, women and underutilized firms. These steps are outlined in the Small and Underutilized Program Staff Training Manual and are discussed in the Compliance Section of this report.

²⁶ Division of Small Business Opportunity Rules and Regulations for Interpretation, Administration and Enforcement of Divisions 1 and 3, Article III of Chapter 28, D.R.M.C. and Article VII of Chapter 28, D.R.M.C. (2007), which is also found at: www.milehigh.com//resources/custom/pdf/DSBO/DSBO_Rules_Regulations_1-12-07.pdf.

Although the steps outlined in the staff training manual is a good first step, the City should consider following Denver’s decision to codify the “good faith” standard. Having the standard codified in the rules and regulations should increase CCU’s monitoring and enforcement power, thus increasing contractor compliance with the Civil Rights Ordinance.

III. FINDINGS

A. *Compliance*

FINDING #1: Governmental and non-governmental entities governed by the Civil Rights Ordinance are not in full *compliance* with the hiring, contracting, reporting, monitoring, and enforcement mandates described in the contract compliance provisions of the Ordinance.

The Civil Rights Ordinance mandates government and non-government contractors to comply with specific instructions during the pre-bid, bid, award, monitoring, enforcement, and closeout stages of the contracting process.

ii. Contractor

By accepting a contract to do business with the City of Minneapolis, a contractor agrees to several important terms. According to the Ordinance, the contractor agrees to: (1) have a written affirmative action plan; (2) take affirmative steps in hiring; (3) make a good faith effort to achieve the established hiring and subcontracting goals; (4) report its achievement toward meeting these goals; (5) regularly update its affirmative action plan; and (6) make its records available to the City when requested.

More specifically, the Ordinance states that a contractor agrees to do the following:

1. **Not discriminate** against any employee or applicant for employment because of race, color, creed, religion, ancestry, national origin, sex, sexual orientation, disability, age (forty (40) to seventy (70)), marital status, or status with regard to public assistance.
2. **Take affirmative action** to ensure that all employment practices are free of such discrimination. Such employment practices include but are not limited to the following: Hiring, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff, termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
3. **Post** in conspicuous places, available to employees and applicants for employment, notices to be provided by the Minneapolis Department of Civil Rights (“MDCR”) setting forth the **provisions of this nondiscrimination clause**.
4. In all solicitations or advertisements for employees placed by or on behalf of the contractor, state that it is an **equal opportunity or affirmative action employer**.
5. **Comply with ALL provisions of Title 7** of the Minneapolis Code of Ordinances, and with all rules and regulations issued by the director of the MDCR (“director”) or the Minneapolis Commission on Civil Rights
6. Furnish and cause each of its subcontractors to **furnish all information and reports** by section 139.50 of the Minneapolis Code of Ordinances, and by the rules and regulations of the director or of the commission
7. **Permit access to its books**, records and accounts by the director, the director’s agent, or the commission, for purposes of investigation to ascertain compliance with the rules, regulations and provisions of Title 7.
8. **Take affirmative action** to afford business enterprises owned and controlled by women and minorities and certified by the MDCR, or the MDCRs agent, the maximum feasible opportunity to participate in the performance of this contract and resulting subcontracts ...²⁷

Since it states that contractors must comply with ALL provisions of Title 7, contract term number 5 is the most important instruction for contractors as it encompasses all of the other instructions.

²⁷ MINNEAPOLIS, MINN. CODE § 139.50(a)(1-6) (2006)(emphasis added).

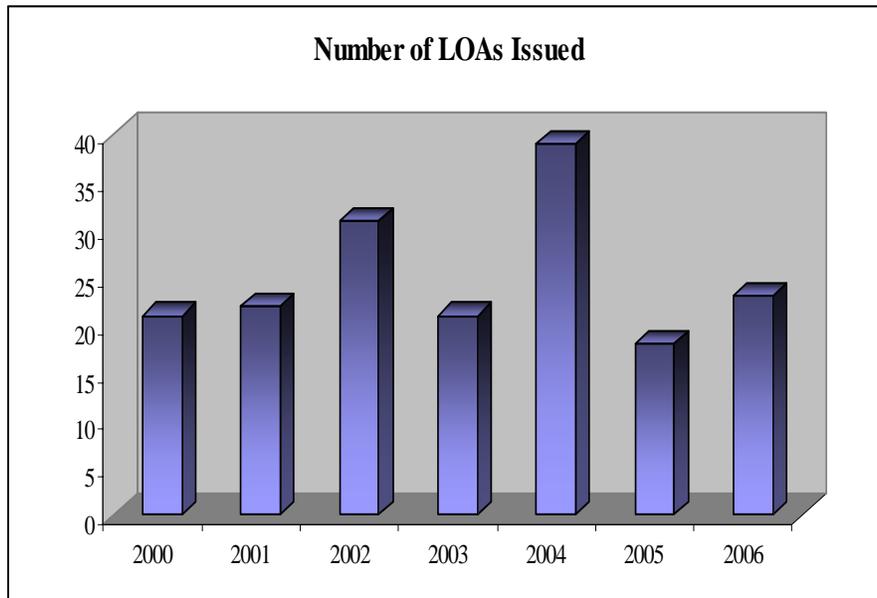
One of the key compliance requirements for contractors is that they meet the established labor hour and subcontracting goals established for their contract. The CCU establishes the goals after determining the contractor's ability to comply with the Ordinance, and the contractors must make a "good faith" effort to meet these goals. The interviews, databases and the document review revealed that not all contractors are meeting their goals, and there are several contractors that are perpetual non-compliers. During the interviews, staff commented:

There are some contractors that have not met requirements for employment. There are some companies that have 4-5 letters [Letters of Agreement] in their file.²⁸

The review of the Contract Compliance Activity Database revealed that many contractors are failing to meet their goals and confirmed that several contractors are repeat non-compliers. A Letter of Agreement (LOA) is an agreement between the non-complying contractor and the MDCR that outlines the deficiencies identified by the CCU and the good faith effort steps the contractor plans to take in order to remedy those deficiencies. For instance, the letter may indicate that the contractor failed to meet its women and/or minority labor hours and will suggest corrective action. The letter is to be signed by an authorized official for the contractor, as evidence of its commitment to take the corrective measures and comply with the contract compliance provisions of the Ordinance. However, the LOAs that were provided by CCU staff to the consultants were only signed by the contractor. If the LOA is an agreement between both parties, then an authorized official of the City should also sign it.

²⁸ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

Currently, the terms of the LOA appear to be negotiated between the CCU representative and a representative from the contracting firm. Here the enforcement power of the LOA would be stronger if the Director of Civil Rights signed it.²⁹ This would not only increase the enforcement power of the LOA, but also ensure that the Director is aware of the level and frequency of non-compliance. The chart below summarizes the number of Letters of Agreement that have been issued since 2000.



Source: Minneapolis Department of Civil Rights Contract Compliance Unit LOA Database

The MDCR records show several contractors that received LOAs were repeat non-compliers during the 2000 – 2006 period. According to the LOA database, 20 contractors received more than one LOA between 2000 and 2006, and six contractors received three or more LOAs. However, it appears that data entry into the LOA database was incomplete and may actually underestimate the number of LOAs that CCU staff issued.

²⁹ In fact, the CCU’s Manger directed the Unit as follows, “In order to keep [the interim director] abreast of what is going on please route all assignments and approvals through [the interim director]. [The interim director] might have questions so please prep yourself to be able to answer them.” Email from CCU Manager to Civil Rights Contract Compliance Staff, RE: while I am out II, (Sept. 13, 2006). It appears the Unit did not comply with this directive.

After the consultants reviewed the Contract Compliance Activity Database, it submitted a supplemental data request seeking for specific information about 30 contracts, one-third of which were valued under \$1 million, one-third of which were valued between \$1 and 10 million and one-third of which were over \$10 million. The documents received as part of our supplemental data request revealed that one of the companies that received a contract over \$10 million does not appear in the LOA database and was a serious non-complier. This contractor is not listed/entered in the LOA database, but was listed in the Contract Compliance Activity Database as not having met its goals. According to one of the CCU staff who monitored this contract, although the contractor had an AAP on file at the time of the project, and has a current AAP registration, the contractor has received 13 LOAs. The supplemental request also revealed that there are some contractors that have been issued LOAs, but the information has not yet been recorded in the database.

If a contractor is unable to meet the goals established for a project, but CCU determines that it made a “good faith” effort to meet the goals, then the contractor will not be labeled as non-compliant. Recently, the CCU developed a Contract Compliance Training Manual, which outlines several activities that a contractor can perform in order to be sure that its efforts will be deemed in “good faith.” The contractor’s efforts will be considered made in “good faith” if it:

- Contacted the Minneapolis Department of Civil Rights for information about utilizing the services of certified Women Business Enterprises (WBE)/Minority Business Enterprises (MBE) and W/MBE criteria.
- Advertised (or posted notices) in general circulation, community newspapers, and with service organizations such as the Urban League, Summit Academy OIC, MDCR, Minneapolis Public Housing Authority (MPHA), YouthBuild, MEDA, NAMC, Women in Construction, and Women Venture concerning subcontracting and employment opportunities.

- Utilized the services of women and minority contractor organizations, community organizations, recruitment resources, and business assistance agencies to provide assistance identifying and recruiting women-owned and minority-owned firms. Such service organizations include the Urban League, Summit Academy OIC, MDCR, MPHA, YouthBuild, MEDA, NAMC, and Women Venture.
- Provided written notice to a reasonable number of certified W/MBE firms that have the capability to perform the work of the contract that their interest in the contract is being solicited.
- Followed up initial solicitations of interest by contracting certified W/MBE firms to determine with certainty whether the W/MBE firms were interested.
- Selected portions of the work to be performed by certified W/MBE firms in order to increase the likelihood that W/MBE goals may be met.
- Provided interested certified W/MBE firms with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- Operate in good faith with interested certified W/MBE firms, not rejecting the firms as unqualified without sound reason(s) based on a thorough investigation of their capabilities.
- Other actions, not listed above, intended to secure participation of women and minority employees, and participation of certified W/MBE firms.³⁰

Determining whether or not a contractor made a “good faith” effort is a very important task; when a contractor does not make a “good faith” effort, then the appropriate consequences can be imposed (such as labeling them a non-complier). Likewise, when a contractor does make a “good faith,” effort then the mandate of the Ordinance is fulfilled. The Contract Compliance Staff Training manual states:

Our task of determining good faith efforts must be controlled by facts and not the numbers. It is sometimes a time consuming tasks; [sic] but necessary. In our approach, we must understand that at times W/MBE companies may not have the skill, capacity or financial structure to perform certain task or contracts. We must also understand that in an effort to deny participation, some general contractors may purposely contact the weakest W/MBE’s and ignore the ones capable of performing the job.³¹

³⁰ City of Minneapolis Small & Underutilized Business Program Contract Compliance Staff Training Manual (February 22, 2006).

³¹ *Id.*

During the interviews, a CCU staff member also discussed this problem:

The contractor is supposed to complete [a] pre-contractor file. We send out contract verification form[s] to contractors to see if they are achieving the goals... Now we are receiving complaints that minority contracts are saying contractors are saying they are giving them the contract but they are not. Now we are trying to figure that out. We are trying to figure out the loophole. One lady called and said they gave her the job and knew she did not have the tools to do it and when she came back they had given it to someone else.³²

Conducting a “good faith” evaluation allows CCU to determine whether or not the contractors are making sincere efforts to: (1) hire women and minority employees; and (2) to subcontract with women, minority, and other underutilized firms. The interviews revealed that some contractors are not making “good faith” efforts to include women and minorities on their projects. During the interviews one staff person attributed the non-compliance to both the contractors and CCU staff. They asserted the contractor was not making a “good faith” effort to hire women and minorities and held the CCU staff responsible for failing to effectively monitor the contractor’s compliance. The staff member explained:

People were not doing their job. No one was monitoring contractors. Vendors are saying they are using minorities but they were not using them. I would ride by and not see any minorities. I think it is a joke. I want to see [SUBP and CCU] work. I put a lot of energy into making it work.³³

³² MDCR Contract Compliance Employee F, November 6, 2006. Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

³³ MDCR Contract Compliance Employee E, November 6, 2006. Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

iii. Minneapolis Department of Civil Rights Contract Compliance Unit (CCU)

The Contract Compliance Unit is charged with carrying out several key functions as they relate to enforcing the City's equal opportunity and affirmative action policies. Specifically, CCU is responsible for: (1) conducting pre-award compliance reviews to evaluate bidders' ability to comply with the provisions of the Ordinance; (2) reviewing, approving, and monitoring contractor affirmative action plans; (3) establishing and monitoring contractor labor hour goals; (4) establishing and monitoring subcontracting goals; (5) working with other City departments to ensure contractor compliance with the Ordinance; and (6) submitting regular reports to the Civil Rights Director in order for the Director to submit regular reports to the City Council and the Commission on Civil Rights.

iv. Pre-Award Compliance Review

According to the Civil Right's Ordinance, the CCU should be involved in the contracting process during every stage of the contract. In May 2006, the National Association of Minority Contractors prepared a report, *Best Practices for Fostering Inclusion of Minority Businesses on City of Minneapolis Projects*,³⁴ in which it discussed the importance of including minority contractors at all six phases of the construction process:

- Phase I: Pre-Development – Include MBE Subcontractor and Supplier Inclusion Criteria
- Phase II: Negotiation of Development Agreements – Notification to Minneapolis Department of Civil Rights
- Phase III: Pre-Bid – Technical Assistance, Unbundling and Bid and Bidder's List Notification to MBEs and Partnering
- Phase IV: Bid Review
- Phase V: Award
- Phase VI: Close Out

³⁴ *Best Practices for Fostering Inclusion of Minority Business on City of Minneapolis Projects*, National Association of Minority Contractors (May 2006).

In order for the CCU to be involved in Phases I through IV, the Unit needs to be aware that a “Request For Proposal” (RFP) is being issued. The review of the Contract Compliance Database and the staff interviews indicated that CCU is **not always** notified about RFPs being issued or when contracts have been awarded. Staff reported:

- Once a department submits [the] RFP and selects a contractor, we do not receive any acknowledgement of who is selected. We are not able to monitor the contractor.³⁵
- Purchasing notifies [the] department that [a] contract has been [awarded]. That triggers some things that need to be done. That notification can be too late to three years too early.³⁶
- The minute the department is notified that there is a new contract, it is assigned to a contract compliance officer A form is sent to the [Manager] from the funding agency. He assigns contract to a contract compliance officer.

Hence, if CCU staff is not notified in a timely manner of when a RFP is issued or when a contract has been awarded, then they are unable to fulfill their mandate to conduct a pre-award compliance review.

v. Affirmative Action Plan Monitoring

Although the Ordinance still requires contractors to actually **submit** a written AAP for the CCU to review and approve, the CCU no longer requires contractors to submit an AAP. Rather, Contractors are only required to “register” their AAP, which is to include goals and timetables for the hire, promotion, retention of minorities and women.

³⁵ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

³⁶ MDCR Contract Compliance Employee C, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

Labor hour goals are 11% minority participation and 6% female participation.”³⁷ Not all CCU staff agrees with the change requiring contractors just to register their AAPs:

- We no longer accept affirmative action plans. We only register that they [the contractor] have a plan at their home office. As far as monitoring their process, we are not on top of that.³⁸
- Companies should commit to a plan of action to improve their underutilization. Without a plan in hand, then there is no real monitoring.³⁹
- The intent of the process is that companies that receive City funding will have a workforce that represents the availability of women and minorities in the market. We are side stepping the process.⁴⁰
- We had to cut back because we lost staff. What we all do now is more of a registration...We just do not have the staff to review all of the AAPs. It is more productive to get the staff out into the field than reviewing the plans.⁴¹

The City of Minneapolis is not the only government entity that no longer reviews AAPs. During an interview with a representative from the Office of Federal Contract Compliance, the representative admitted that the federal government does not review all AAPs for federal contractors.

OFCCP requires a plan but [a contractor] does not have to submit it unless we ask for it. We ask for it when we schedule a [compliance] review...We do not issue a certificate. We evaluate the plan and certain employment activity.⁴²

It appears as if the decision to not require the submittal of AAPs was made internally within the Department, before the Interim Director was appointed, and was not approved by the City Council since the Ordinance still stipulates that contractors are to submit AAPs to the MDCR.

³⁷ Available online at: www.ci.minneapolis.mn.us/civil-rights/compliance.asp (2007).

³⁸ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ MDCR Contract Compliance Employee I, February 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁴² OFCCP Interview G, February 7, 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

Projects are not to be awarded until an AAP has been submitted and registered (for construction projects, until a pre-construction plan has been completed).

A contractor's AAP registration expires after two years, at which time they must update and re-register their plan. According to the Affirmative Action Plan Guidebook prepared by the MDCR, continued approval of the contractor's AAP during the two years is "contingent upon [their] adherence to the commitments outlined in [their] affirmative action plan."⁴³ An affirmative action plan is to include:

1. Title Page
2. Description of Contract
3. Organizational Diagram
4. EEO/AA Policy Statement
5. Sexual Harassment Policy & Procedure
6. Reasonable Accommodation Statement
7. Statement of Fair Compensation
8. Pre-employment Medical Examination
9. Responsibilities of EEO Coordinator
10. Dissemination of AA Policy and Plan
11. Recruitment of Employees
12. Internal EEO Complaint Procedures
13. Workforce Analysis
 - a. Availability of Women and Minorities by Job Groups
 - b. Availability of Qualified Disabled persons by Workforce
 - c. Goals and timetables
14. Problem Area/Deficiency Identification and Analysis
15. Internal Audit and Reporting System
16. Signatures

⁴³ *City of Minneapolis Department of Civil Rights Affirmative Action Plan Guidebook for Development Projects, Construction Projects and Professional Goods and Services Contracts* (Vanne Owens Hayes, Executive Director) (no date provided).

The CCU staff is supposed to conduct on-site visits and audits to determine compliance with Chapter 139.50. According to the CCU staff, on-site visits are performed twice a month. After an on-site compliance review, the staff is to “prepare a written assessment of [the contractor’s] progress, which will include any deficiencies, along with suggestions for corrective action” as well as make a “recommendation of compliance or non-compliance.”⁴⁴ The assessment should indicate whether or not the contractor is on target to attaining its goals. At the end of the project, the CCU staff is to prepare a final report that indicates whether the contractor achieved its goals.

The CCU staff indicated that they have not had the opportunity to conduct regular audits during the past few years. One staff member indicated that one of her primary functions used to be to conduct audits, but with the staff reductions, she is no longer able to perform these tasks.⁴⁵ Although MDCR has not had the capacity to perform regular audits, CCU recently conducted an audit of a non-compliant contractor, in conjunction with other jurisdictions.

The Contract Compliance Unit is not only responsible for monitoring employment, as measured by the number of minority labor hours, women labor hours, and skilled minority labor hours, but its responsibilities have now expanded to also include establishing and monitoring small and underutilized (minority and women-owned) business enterprise goals. The Small and Underutilized Business Program (SUBP) used to be a separate program with its own staff; however, it is now folded into the Contract Compliance Unit. The SUBP is designed to monitor and increase the participation of small and underutilized businesses on City contracts.

⁴⁴ MDCR Contract Compliance Employee I, February 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁴⁵ *Id.*

In an effort to fulfill this goal, “Professional services contracts over \$50,000 and construction contracts over \$100,000 must participate in the Small & Underutilized Business Program.”⁴⁶ Prior to SUBP being folded into the CCU, there was a SUBP Manager charged with administering this program. However, now the manager of the CCU also manages the activities of SUBP. According to the SUBP Ordinance, the SUBP manager has several key responsibilities as they relate to establishing and monitoring goals, providing outreach activities to SUBP contractors, and reporting progress on goal attainment to the Director. Specifically, the Ordinance states that the SUBP Manager is to:

- Administer and direct the Small and Underutilized business Enterprise Program.
- Make all necessary efforts to **provide networking and informational resources** to the eligible business community and engage in all other feasible **outreach efforts** to develop and maintain contacts and relationships with the eligible business community.
- Establish and publish updated outreach requirements at the beginning of each fiscal year and the requirements for establishing good faith efforts and compliance with such outreach requirements.
- Analyze levels of participation on a project by project basis
- Establish **reasonable participation levels** for eligible business, which may include separate goals for SBEs, WBEs and MBEs
- **Prepare annual reports** to be submitted to the director of the MDCR.
- **Submit** quarterly reports to the Civil Rights director.⁴⁷

Since SUBP is no longer a separate program with its own staff, it is challenging to perform all of the functions outlined in the Ordinance; however, one of the primary functions that should be performed is the submission of reports to the Director.

⁴⁶ Available online at: www.ci.minneapolis.mn.us/civil-rights/compliance.asp (2006).

⁴⁷ MINNEAPOLIS, MINN. CODE § 423.60.

The Ordinance requires regular reporting that documents progress made in: (1) compliance; (2) labor hours; and (3) of SUBP goals. Although submission is one of the primary Ordinance provisions which is essential to determining whether contractors are in compliance and whether CCU is fulfilling its mandate, during the interviews, we received conflicting responses as to the type and frequency of reports submitted by CCU to the Director, the City Council and the Commission on Civil Rights. According to one staff person:

There is no report generated that shows if a contractor is not in compliance . . . There are no reports that go to the director that says what contracts are meeting their goals...There is a legal requirement that reports be generated to the Director.... No reports have been submitted to the director in four years. We are breaking the law.⁴⁸

Other staff commented:

- We can generate . . . monthly reports from the database . . . We do quarterly reports of all of the active projects and send reports to the Director and he submits them to the Council.⁴⁹
- We have a tracking report of every project. It is supposed to come through CPED and some come through Public Works – Fire, Building Commission. We keep a running record every month.⁵⁰
- [The report] used to be called monthly report. It goes to the Director. One of the problems is we have had several different directors and they want it reported differently. I tell them just tell me what you want. Some did not want it at all.⁵¹

⁴⁸ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁴⁹ *Id.*

⁵⁰ MDCR Contract Compliance Employee I, February 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁵¹ *Id.*

One staff member also raised concerns about the accuracy and integrity of the database and the data that is ultimately reported to the City Council:

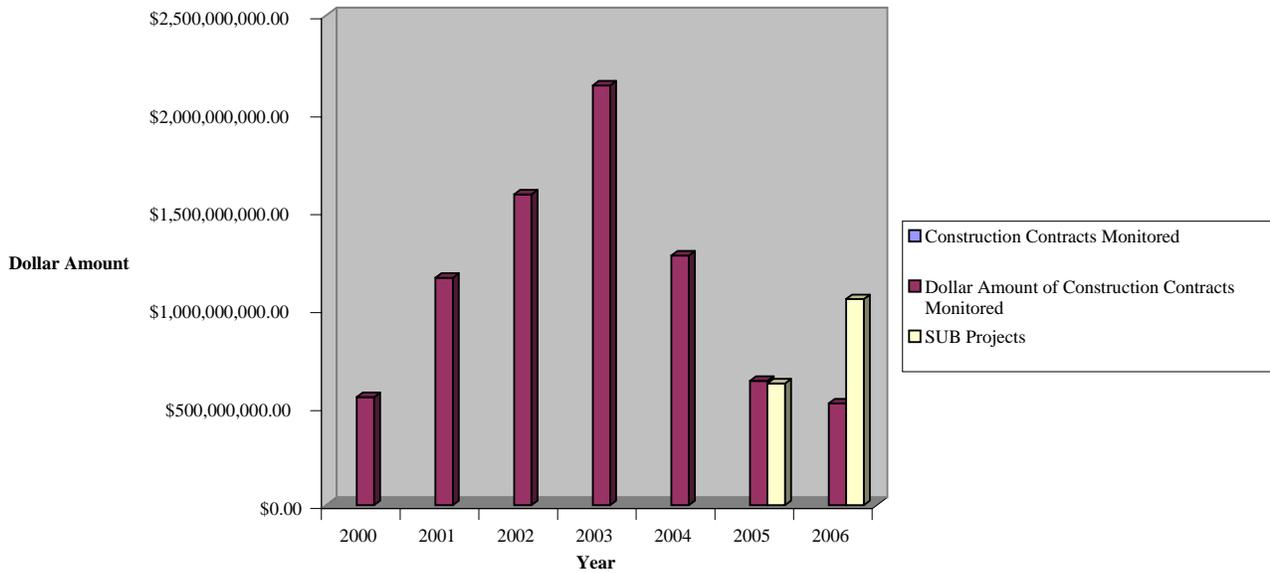
I used to submit manual reports and they would change the numbers. Then they would go to the City Council and present new numbers. They would change SUBP dollars per year and go to the Council...I do not see the annual report anymore. Quarterly and annual reports go to the manager and the manager might give them to the Director.⁵²

When the department submit reports to the Director and ultimately to the City Council and Commission on Civil Rights, it allows leadership to evaluate the results and determine whether administrative, budgetary, or policy changes are needed to achieve the desired results. If no report is produced and submitted then leadership is unable to make informed decisions. The consultants requested a copy of any reports that CCU staff has submitted to the Director, the Commission on Civil Rights or to the City Council. Electronic and hard copies of the contract compliance database that tracks contract compliance activity were provided, as was a copy of the MDCR Business Plan that was submitted to the City Council.

Reviewing the contract compliance database allowed the consultant to better understand the scale of projects CCU is responsible for monitoring. The City awards multi-million dollar contracts on an annual basis, and CCU is charged with the making sure these contracts are effectively monitored in order to ensure that women and minority laborers are employed on these projects at the level the City has established. The CCU seeks to establish labor hour goals based on the relative availability of laborers in a particular trade. Similarly, the SUBP seeks to establish small and underutilized subcontracting goals based on the relative availability of subcontractors in the particular industry. The chart on the following page shows the dollar amount of construction contracts CCU has monitored from 2000 to 2006.

⁵² MDCR Contract Compliance Employee E, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

Construction Contract Dollars Monitored By the MDCR CCU

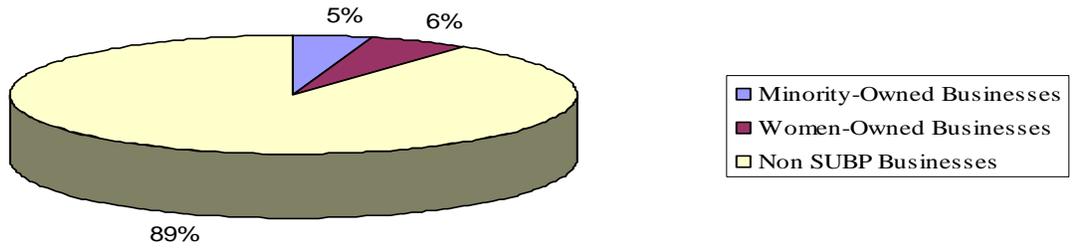


Source: MDCR Contract Compliance Database

Note: This chart shows the dollar value of contracts monitored. The dollar value of multi-year contracts will be reflected in the year contract was awarded until the contract is closed.

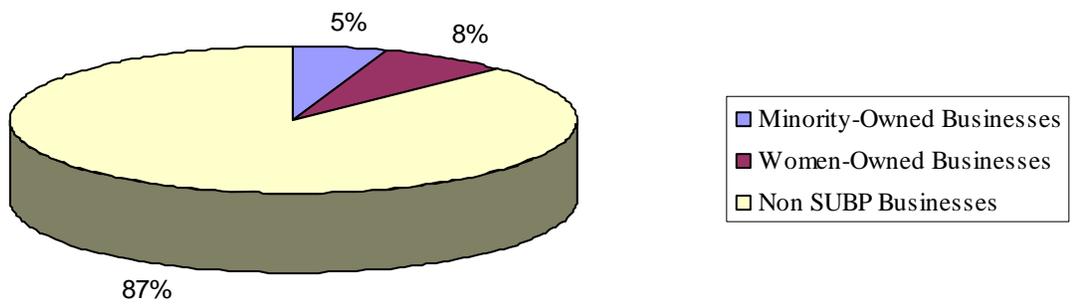
The following two charts on the next page show the percent of construction contract dollars awarded to small and underutilized businesses in 2005 and 2006.

**Percent of City Construction Contract Dollars Awarded to SUBP
Businesses in 2005**



Source: MDCR Contract Compliance Database

**Percent of City Construction Contract Dollars Awarded to SUBP
Businesses in 2006**



Source: MDCR Contract Compliance Database

According to the preceding charts, women and minority-owned businesses are receiving a small share of the City construction contract dollars. However, in order to determine if there is a disparity between the City's utilization of women and minority-owned firms in the City's defined geographical market and their availability in the market, it is necessary to conduct a Disparity Study, which is forthcoming. If a disparity is found, then the study will determine if the disparity can be explained by legitimate factors, such as the qualifications of the firm, access to bonding, access to financing, and other factors. However, if these or other factors cannot explain the disparity, then it is possible that the unexplained factor is either passive or active discrimination. This type of determination cannot be made until a Disparity Study is conducted.

Although the preceding charts showed a low percent of construction contract dollars being awarded to small and underutilized firms, the percent is even smaller when looking at all City contracts. According to the MDCR Business Plan for 2006-2010, "In 2005, women and minorities were awarded less than 1% of City contracts/subcontracts."⁵³ The 2005 and 2006 utilization numbers appear to be extremely low and might lead one to conclude that the City has an underutilization of women and minority businesses; however, a determination of underutilization cannot be made until the City conducts a Disparity Study of its government contracting and procurement process.

A Disparity Study will not only determine whether there is an underutilization of women, minority, and disadvantaged businesses, but it will also uncover the reasons for this occurrence, and propose recommendations to eliminate any statistical disparities.⁵⁴

⁵³ MDCR Business Plan 2006-2010, at 4, (October 4, 2005).

⁵⁴ See *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) and *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

iv. City of Minneapolis Departments

City departments that award contracts have a very important role to play in the contract compliance process. According to the Ordinance, the City's ability to administer an effective contract compliance process is a **shared responsibility**. Although the Civil Rights Department is specifically established to monitor contracts, its ability to comply with the contract compliance provisions of the Civil Rights Ordinance is effected by the other City departments.

City contracting agencies are required to involve the Contract Compliance Unit in the pre-bid, bid, award and close-out stages of the contract process. Involving CCU in all stages of the process will increase the likelihood a contractor will comply with their mandate. According to the Rules and Regulations established by Section 139.50, the City of Minneapolis contracting agencies have numerous functions to perform. Some of the key functions are:

1. Furnish each contractor with a copy of Section 139.50 (a) paragraphs (1) through (9) and with a copy of these rules and regulations.
2. **Promptly notify the Director and ESB Manager in writing** whenever an application for funds exceeding \$50,000 or a bid exceeding \$50,000 on a contract has been received and has been recommended for approval by the contracting agency.
3. **Removed debarred** or suspended contractors from its active contractor's list.
4. **Maintain an updated listing** of past and present debarred, terminated, or suspended contractors.
5. Withhold or order the proper City department to **withhold payment** of all or portions of the contract amounts from contractors and terminate or suspend contractors.
6. Cease the solicitation or consideration of bids or applications from contractors Debarred from City contracting.
7. Coordinate any **compliance reviews** with the Director as necessary.
8. Notify the City's ESB Manager before sending any requests for proposals of Profession Service contracts.

Based on the interviews and the review of the Contract Compliance Database, City departments are not in compliance with all of the functions they are mandated to perform. The primary issue that came out of the interviews and document review was the failure to provide timely notification about the issuance of an RFP or the awarding of a contract. This notification allows the CCU to establish the labor hour and subcontracting goals on projects prior to the contract being awarded, which is a process described in the Ordinance. One City department was mentioned on more than one occasion:

[CPED] do[es] not send me anything. Some people in CPED do a good job, but some do not. The majority of money goes to CPED [so] CPED needs to get it right.⁵⁵

Although compliance, or the lack thereof, is the main issue that emerged from this study, there are several other related issues that will be briefly addressed. Consequences must naturally be included in any discussion of compliance. The type, level, and implementation of consequences are based and tied directly to any non-compliance that is documented.

⁵⁵ MDCR Contract Compliance Employee E, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

B. Consequences

FINDING #2: The *consequences* outlined in the Civil Rights Ordinance for failure to comply with the provisions of the ordinance are not being applied to firms that are in non-compliance.

In order for compliance measures to be effective, there must be clear consequences for non-compliance and the consequences must be enforced. According to the Minneapolis Civil Rights Ordinance, the contractor is responsible for complying with the provisions of the Ordinance, the CCU is responsible for monitoring the contractor to determine if it is in compliance. In the event of non-compliance, the CCU staff is responsible for notifying the contracting City department. The relevant part of the Ordinance states:

In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations or provisions of Title 7, this contract may be canceled, terminated or suspended, in whole or in part, and the contractor may be declared ineligible by the Minneapolis city council for further city contracts in addition to other remedies as provided in Title 7.⁵⁶

Contractors can also be held liable for expenses, and the City can withhold up to fifteen (15) percent of a contract until the contractor is found be in compliance. Additionally, the ordinance allows the Director to obtain "liquidate[d] damages of five hundred (\$500.00) per day for each day the director shall determine there is probable cause to believe the contractor is in noncompliance."⁵⁷

Based on the staff interviews and the review of the contract compliance database, it appears that reports concerning non-compliance are not prepared with sufficient specificity to adequately monitor actions taken, and that the consequences that are imposed on non-complying contractors are extremely weak.

⁵⁶ MINNEAPOLIS, MINN. CODE § 139.50(a)(7) (2006).

⁵⁷ Id. at § 139.50(a)(7).

Based on the document review and the interviews, no contracts were suspended or contractors debarred between 2000 and 2006, the time period of this study. However, there have been several instances of documented non-compliance. One of the companies that had received five LOAs, according to the LOA database, received two large contracts in 2006.⁵⁸ One contract was for nearly \$2 million dollars.

It appears as though non-complying contracts are often given second and third chances to comply or try to meet their goals. While it is reasonable to give contractors a second chance, and to assist them in trying to meet their goals, there is no incentive to comply with contract compliance provisions, and to meet the labor hour or subcontracting goals, when a contractor knows there will never be any major consequences, other than the issuance of a LOA. The most common response to a contractor's non-compliance was to simply allow them to try to "make up" their goal deficiency on the next project. This was noted on numerous contracts in the LOA database and it was mentioned during the interviews:

- Sometimes a contractor has not awarded things at the tail end of the project and we see if there are opportunities to subcontract there. We require them to negotiate with MBE/WBEs. We require them to do something differently. If they are not successful on this project, then on the next project, we will look at them under a microscope.⁵⁹
- We need management that is going to do the right thing. There have been contracts where they are supposed to get recommendations from me before contract award. My manager has told [the] contractor -- on the next project, just do better. If they do not provide subcontract info, they can be considered non-responsive.⁶⁰

⁵⁸ July 17, 2006 and July 31, 2006, City of Minneapolis Ways & Means Committee Meeting notes.

⁵⁹ MDCR Contract Compliance Employee I, February 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁶⁰ MDCR Contract Compliance Employee E, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

Some CCU staff indicated that although there have been weak consequences in the past, consequences such as withholding approval of a payment or giving a contract to the second lowest bidder, are now being imposed:

- In the past, you may have a contract completed without [CCU]. Now they [agency] ask us if they can pay. Now the manager has to sign off on whether or not a check can be issued to a contractor.⁶¹
- There have been cases where Purchasing had to give [a contract] to second lowest bidder because the lowest bidder had not been in compliance in the past.⁶²
- The Letter of Agreement (LOA) is where we stop. Nothing happens if they [contractor] are not in compliance for multiple times. That decisive action is never taken. There are never any consequences. Nothing happens besides this ridiculous Letter of Agreement. If one time, the City Council took a project away . . . then that would take away hours I would need to spend.⁶³
- Some contractors take [the] attitude that the City is not going to tell me how to run my project.⁶⁴

The lack of enforcement of the contract compliance provisions in the Civil Rights Ordinance raise serious concerns as they relate to the proper implementation of the Civil Rights Ordinance. The Ordinance clearly outlines potential sanctions or consequences for non-compliant contractors, but it appears as if these consequences or rarely, if ever imposed. Not only are they not imposed, they are not communicated to the Director, to the Civil Rights Commission, or to the City Council. The leaders who have been elected to develop public policies and those who have been appointed or elected to implement the policies, and are ultimately accountable for making sure these policies are implemented, should be aware of the level of non-compliance and given the opportunity to impose the appropriate consequences.

⁶¹ MDCR Contract Compliance Employee A, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ MDCR Contract Compliance Employee I, February 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

A review of the 2005 – 2006 Civil Rights Commission agenda and meeting notes, revealed that the MDCR has not informed the Civil Rights Commission of the serious non-compliance, as measured by the number and frequency of LOAs received by some contractors that are still receiving large contracts. According to the Ordinance, the Director and the Commission are to be informed of non-compliance matters. The Ordinance states:

Should conciliation and persuasion fail to eliminate the noncompliant acts or practices, the director or the director's designee shall either request a hearing before the city council on the subject matter of the noncompliance or file a director's charge and refer said charge to the commission demanding a hearing panel of the commission be convened to hear the charge.⁶⁵

Here, conciliation and persuasion are the first course of action, but should this prove unsuccessful, more serious actions can be taken. A contractor that has repeatedly failed to comply with the contract compliance provisions of the Ordinance, despite attempts at conciliation and persuasion, should be subjected to a higher level of consequences than a fourth or fifth LOA. Hence, CCU needs to begin informing the Director of serious non-compliance and the Director should then report this information to the Commission and/or the City Council.

Commission action will not be necessary for all non-compliance matters; the Commission's Policy & Procedures Committee could develop a set of procedures for different levels of non-compliance. Only the more serious ones would likely require Commission action. Some egregious non-compliance might require City Council action such as the cancellation of a contract or debarment. Lower levels of compliance could continue to be handled by the issuance of a LOA and a conciliation meeting.

⁶⁵ MINNEAPOLIS, MINN. CODE § 139.50 (b) (2006).

The Office of Federal Contract Compliance (OFCCP) first attempts conciliation before pursuing more serious action. According to the OFCCP representative, the conciliation agreement is one of the ways OFCCP seeks to obtain compliance. He stated:

[We] insist that contractor, through conciliation agreement, stop whatever practices they found to be discrimination and make victims whole as it would have been before discrimination occurred . . . Debarment would occur if contractor does not meet terms of conciliation.⁶⁶

C. Communication

One of the key ingredients of successful organizations is communication. This is especially true in public organizations. It is imperative to have good communication: (1) within CCU; (2) between CCU and the other MDCR units; (3) between CCU and the other City departments; and (4) between CCU and contractors, as well as between the MDCR, the Commission and the City Council. From the interviews, it appears as if communication within CCU is good but the other lines of communication, both oral and written, need to be improved. CCU staff commented:

- I am so out of the loop. Nobody cares about my opinion. It is not healthy for department.⁶⁷
- The department meets once a month. Most communication is intra within division. Sometimes we know what is going on in other divisions.⁶⁸
- The division meets on a bi-weekly basis. They talk about progress and approval. In meetings, they have a list of pending approval.⁶⁹
- Communication within contract compliance is good but strained. Communication in department is bad. Contract Compliance is the step child.⁷⁰

⁶⁶ OFCCP Employee G, February 9, 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁶⁷ MDCR Contract Compliance Employee C, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁶⁸ MDCR Contract Compliance Employee A, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁶⁹ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

- [Communication] is very good within division. We know each other's projects. We have been working with each other for a few years.⁷¹
- Within division, it is good. It is a team effort and work well together. Communication outside is good and bad. On a need to know basis. Do not work with the other divisions.⁷²
- There is a whole lot of tension between units. Everybody in our division says they feel left out and not included... Our division has camaraderie. There is extra effort to keep us out of the loop.⁷³

From the document review, it does not appear as if written reports that document the activities of the CCU are submitted to the Commission or to the City Council on a regular basis, as required by the Ordinance:

The director or the director's designee shall, at least quarterly, report to the city council as to their contract compliance activities. Such report shall also be made to the mayor and the Minneapolis Commission on Civil Rights and shall contain only matter which is classified as public data pursuant to the Minnesota Government Data Practices Act.⁷⁴

The Minneapolis Civilian Police Review Authority recently released an annual report highlighting the Unit's activities; a similar annual report should be prepared by the Contract Compliance Unit.

⁷⁰ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁷¹ MDCR Contract Compliance Employee C, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁷² MDCR Contract Compliance Employee B, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁷³ MDCR Contract Compliance Employee F, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁷⁴ MINNEAPOLIS, MINN. CODE § 139.90 (2006).

In addition to discussing the quality of the communication within the Unit and within the Department, staff also discussed the communication and outreach to the community. According to one staff person, communication with the community used to be very good:

- Five years ago, we did a lot of outreach. We used to have luncheons...We would partner with B96. We had a program at high school. We funded a day for kids to come in and practice the SAT.⁷⁵
- I have been through four or five directors. Five years ago, this was the greatest place to work. It was diverse. The work we were doing was for a good cause.⁷⁶

This staff person's comments revealed a sense that the poor communication within the Department was affecting staff morale. Indeed, effective communication is critical to a Department's ability to provide a working environment where people feel a sense of purpose and are motivated to carry out the mission of the organization.

D. Clarity and Coordination

An organization that has good communication has clear roles, responsibilities and effective coordination. Likewise, a clear chain of command and clearly laid out roles and responsibilities are the vehicle for fostering good communication in the organization. In his book, *Public Policy Making: Process and Principles*, Larry Gerston discusses the need to have clear lines of responsibility and communication. He states:

Policies must be properly structured, funded, and directed so that the implementing bureaucracy has a clear framework for application. In other words, for policies to succeed, ***clear lines of transmission*** and jurisdiction must be drawn. Thus, policy makers have to be precise, while bureaucratic discretionary authority must be constrained. In addition, implementation requires willing ***cooperation*** by relevant actors and institutions along critical intersections ...⁷⁷

⁷⁵ MDCR Contract Compliance Employee F, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁷⁶ *Id.*

⁷⁷ Gerston, p. 117.

According to Gerston, contract compliance policies must be properly structured, funded and directed in order for an organization to have a clear framework for application.

In the case of the MDCR, policies have been structured through the Ordinance, *but CCU could benefit from additional funding in order to fully implement the policies.* In terms of operations, the lines of communication and decision making between the CCU and the MDCR Director are not clear. The CCU appears to have a high level of bureaucratic discretion, as decisions related to consequences for non-compliance are made at the *staff level* rather than the *Director or Commission level.* Some of CCU's activities indicate the Unit may tend to operate more autonomously than it should. It is a Unit within the MDCR, and as such, should send information up to the Director so it can then be transmitted to the Commission and the City Council.⁷⁸ Hence, efforts to develop appropriate lines of communication and decision making between the CCU and the Director need to be developed and enforced.

i. Internal Stakeholders

The Contract Compliance Unit, like most government units, must coordinate its efforts with other internal and external stakeholders. Their success is not just dependent upon their work, but is interdependent upon the work of others. The CCU staff expressed their desire to have better coordination with other City departments:

- We need to get departments to see our role as equally important as their role. Without their help, we cannot do a good job. It [the relationship] has improved over the years. I am impressed by people who ask me if they can start a project. There are still some of them who do not check to see if they can start a project. Most of them are appointed. Our goal is to follow the Ordinance.⁷⁹

⁷⁸ See also note 29, *infra*.

⁷⁹ MDCR Contract Compliance Employee A, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

- We need more of a relationship with CPED.⁸⁰
- Purchasing has been good in assisting us in making sure everything is working well.⁸¹
- Some of them [City departments] disagree with methods of withholding payments.⁸²
- In the past, there have been one or two instances where CPED did not inform us of a project. If they report real late when their projects are awarded then it is more difficult to report their goals.⁸³

CCU envisions compliance as a collaborative process that requires the active involvement of all parties, which are viewed as equally important contributors in assisting the City achieve its goals of expanding equal employment and economic opportunities, while prohibiting unlawful discrimination. All parties have a role to play in this process and the effective coordination of these roles will allow CCU to better fulfill its mandate to monitor and enforce the contract compliance provisions of the Ordinance.

Since City departments are also required to develop annual affirmative action goals. One staff member remarked:

Each department should interact and have annual goals. We have not done that. Our obligation is to sit down with fire department, attorneys office etc, and see what their needs are and to set annual goals for MBE/WBE. That is an internal function. That would generate a lot more activity.⁸⁴

This statement conveys CCU's desire to work with other departments to assist them in establishing appropriate affirmative action goals.

⁸⁰ MDCR Contract Compliance Employee C, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁸¹ MDCR Contract Compliance Employee B, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁸² *Id.*

⁸³ MDCR Contract Compliance Employee I, February 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁸⁴ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

ii. External Stakeholders

The City has taken a positive step by coordinating duplicated efforts with its external stakeholders. The CERT program is a “one-stop shop” for minority contractors seeking to do business in the Greater Twin Cities area. It is a collaborative between the City of Minneapolis, City of St. Paul, Hennepin County, and Ramsey County. The ultimate goal of the program is “to make it easier for businesses to participate in the business opportunities of the participating jurisdictions and the local marketplace. By doing so, the CERT Program seeks to promote market growth, increase competitiveness, and create jobs among participating businesses, as well as to improve the quality of life for area residents.”⁸⁵

The CERT Directory is a very useful tool, as it will assist prime contractors in identifying small, minority and/or women-owned businesses to consider as subcontractors. The Directory provides the following information for each firm:

1. Name
2. Address
3. Primary Contact
4. Phone Number
5. Fax Number
6. E-mail
7. Address
8. Brief Description of the Company’s Products/Services
9. SIC Code

⁸⁵ CERT Directory.

The Directory categorizes businesses by industry classification, which allows prime contractors to quickly find potential subcontractors in the needed industry. The categories include:

- Building Construction General Contractors and Operative Builders
- Heavy Construction other than Building Construction Contractors
- Construction Special Trade Contractors
- Printing, Publishing, and Allied Industries
- Electronic and other Electrical Machinery and Equipment, Except Computer Equipment
- Transportation Services
- Electric, Gas, and Sanitary Services
- Business Services
- Engineering, Accounting, Research, Management, and Related Services

The CERT Directory would be even more useful if it enabled an electronic search engine that would allow prime contractors to search for firms by description of company's services or industry classification. In addition, the industry classification should be changed from SIC (Standard Industrial Classification) Code to NAICS Code (North American Industrial Classification Standard), the new industry classification system used by the U.S. Census Bureau. The Census Bureau provides a table; however, in order to conduct a proper availability analysis, the City prime and SUBP contractors need to be assigned the appropriate primary and secondary NAICS Code, thus mirroring the classification used by the U.S. Census Bureau. One of the commonly used data sources for determining availability is the U. S. Census Bureau's Zip Code Business Pattern and County Business Pattern data.

E. Capacity

FINDING #5: The CCU does not have the *capacity* to effectively fulfill its mandate.

An organization's ineffectiveness is linked to its capacity, which includes staff, technology, and money. CCU needs an: (1) adequate number of staff to handle all of the contracts it is responsible for monitoring; (2) improved reporting procedures; and (3) training.

Over the past few years, CCU has experienced major staff reductions, which have impacted its ability to effectively carry out its mandate. The Contract Compliance staff has decreased from 8.5 in 2003 to 5 in 2006.⁸⁶ According to the draft MDCR Business Plan, "Several years of cutbacks and staffing shifts have contributed to the MDCR's climate as one that reacts rather than reflects resident's needs."⁸⁷ Being proactive rather than reactive would greatly increase CCU's ability to be more effective. In order to be proactive, the Department needs staff to perform the many functions the Unit is charged with carrying out. As a result of losing staff, some functions have been abandoned. For example, the Unit no longer reviews AAPs, although the Ordinance still requires AAPs to be reviewed and approved. Additionally, the Unit is no longer able to perform regular audits, although the Unit used to have a staff person whose primary responsibility was to conduct audits. In addition to the staff reductions, it is reported that MDCR "faces the risk of losing three staff through retirement in the next five years."⁸⁸ Hence, a staffing plan needs to be developed to respond this challenge.

Not only have the staff reductions influenced the Department's ability to effectively perform their functions, but the reductions conflict with the provisions of the Ordinance.

⁸⁶ 2007 MDCR Business Plan (2007-2011) (draft).

⁸⁷ *Id.*

⁸⁸ *Id.*

According to the SUBP Ordinance:

The Small and Underutilized Business Enterprise Program staff shall consist of a manager of the Small and Underutilized Business Enterprise Program, a Small and Underutilized Business Enterprise program technician, and all appropriate clerical staff.⁸⁹

Currently, there is no full-time SUBP Manager. In 2004, the person who formally held this position left; the Department then eliminated the position and reassigned their duties to the CCU Manager.

Staffing and other issues that were addressed in the interviews:

- The department should use technology to have interactive reports.⁹⁰
- We are spread so thin.⁹¹
- Appropriate use of technology would save a lot of time.⁹²
- I could use some more manpower. I spend a lot of time with data entry.⁹³
- I wish we had a few more people.⁹⁴
- The budget is killing us . . . It will be very difficult without computer or someone with knowledge of computers.⁹⁵
- In our Department, information is vital and we did not have anyone to do it . . . We need to be able to access information but if there is a cliché, then they are stuck. This is an important issue.⁹⁶
- We just do not have the staff to review all of the AA plans. It is more productive to get the staff out into the field than reviewing the plans.⁹⁷
- We have really been thinned out. If we lose anymore, they might close it down. There are not enough people to do it.⁹⁸

⁸⁹ MINNEAPOLIS, MINN. CODE § 423.60.

⁹⁰ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁹¹ MDCR Contract Compliance Employee C, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁹² MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁹³ MDCR Contract Compliance Employee F, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁹⁴ MDCR Contract Compliance Employee I, February 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁹⁵ *Id.* “Data compilation and evaluation” is listed as one of the qualification needed. *See also*, Contract Compliance Job Description.

⁹⁶ *Id.*

⁹⁷ *Id.*

F. Commitment

FINDING #6: The excessive non-compliance, failure to implement consequences, poor communication, ineffective coordination, lack of clarity, and lack of resources needed to operate at full capacity and fulfill the mandate prescribed in the Ordinance do not convey a sincere ***commitment*** to achieve full compliance with the Ordinance.

Organizational priorities are often measured by the time and dollars expended on an issue. Although time and money are not the only factors that convey an organization's priorities, they are two very important factors. According to Gerston:

...funding is a critical ingredient in the implementation of public policy commitments. Therefore, the absence of adequate financial resources can undermine the objectives set forth by decision makers. If necessary monies do not accompany (or follow soon after) a public policy commitment, the policy objectives is likely to suffer in some proportion to the absence of funds.⁹⁹

At this time, MDCR does not have the funding to work at full capacity in terms of staff and technology. Furthermore, it appears CCU staff does not request, or regularly utilize the many training opportunities the City and the Department offers.

By committing more time and resources to the promotion and enforcement of the contract compliance provisions of the Civil Right Ordinance, the City has an opportunity to demonstrate its commitment to remedy past discrimination. Foremost, the City has a commitment to civil rights because the Ordinance unequivocally acknowledges the existence of discrimination and the continued need for civil rights policies:

The council finds that discrimination in employment...adversely affects the health, welfare, peace and safety of the community. Such discriminatory practices degrade individuals, foster intolerance and hate, and create and intensify unemployment, substandard housing, undereducation, ill health, lawlessness and poverty, thereby injuring the public welfare...It is the public policy of the City of Minneapolis and the purpose of this title to recognize and declare that the opportunity to obtain employment, labor union membership...is a civil right.¹⁰⁰

⁹⁸ MDCR Contract Compliance Employee I, February 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

⁹⁹ Gerston, p. 111.

¹⁰⁰ MINNEAPOLIS, MINN. CODE §139.10 (a)(b) (2006).

In addition to declaring the City's policy on civil rights, the Ordinance also addresses how the Civil Rights Department should implement the policy. The policy is to be effectuated through:

- (1) Public information and education;
- (2) Mediation and conciliation; and
- (3) Enforcement.¹⁰¹

As described in the earlier sections of this report, the City is performing fairly in the first two areas of their policy; however, serious improvement needs to be made in the third area because enforcement is currently weak. Enforcement should not be limited to contractors; it should also apply to MDCR and other internal City departments.

The effectiveness of the City's contract compliance efforts is not merely dependent on the actions of contractors working for the City, CCU staff, and the MDCR Director. Rather, it is dependent on the actions and the commitment of all parties involved in the process. As with any organization, success is a function of several factors and one of the key factors is leadership.

There are several levels of leadership involved in the contract compliance program. The first level of leadership is the Contract Compliance Manager who is responsible for managing the contract compliance and SUBP staff. The second level of leadership is the MDCR Director. The third level of leadership is the Civil Rights Commission. The fourth level of leadership is Mayor and City Council. The City's commitment to the intent and effective implementation of the contract compliance provisions of the Civil Rights Ordinance needs to be communicated internally, throughout the organization, as well as externally, to the external stakeholders.

¹⁰¹ MINNEAPOLIS, MINN. CODE § 139.10(6) (2006).

In addition, this commitment needs to be evidenced by the actions of all parties involved in the contract compliance process. One key action is funding and building the capacity of those units charged with implementing affirmative action policies.

Leadership needs to be committed to communicating the importance of an effective contract compliance program, in addition to holding everyone accountable. The CCU staff needs to be held accountable for monitoring contract compliance. The CCU Manager needs to be held accountable for managing the contract compliance activities. The MDCR Director needs to be held accountable for results. Although the Director is not involved in the day-to-day operations of the contract compliance program, he or she is ultimately responsible for the Unit and is empowered to take the necessary steps to increase the Unit's effectiveness.

Accountability does not stop within the MDCR; there needs to be greater accountability at all levels of City government. It is not only a requirement to monitor contractor compliance with the external constituents, but also the internal City departments. Government cannot exempt itself from the same standards it expects its constituents to uphold. The Civil Rights Ordinance not only instructs contractors to develop and regularly update their affirmative action plans, but it also instructs City departments to do the same. The Ordinance states:

All City of Minneapolis departments, including the Minneapolis Community Development Agency . . . shall at least annually develop and submit to the city council a plan, including goals and timetables for the hire.¹⁰²

¹⁰² MINNEAPOLIS, MINN. CODE § 139.70 (2006).

The consultants submitted an oral and written request to the City of Minneapolis Human Resources Department requesting a copy of the City departments' most recent affirmative action plans. We were told that the plans are currently being developed and have not yet been approved by the City Council. We then requested a copy of the last affirmative action plans that were produced and were told that the departments have not produced affirmative action plans in nearly ten years. We then requested a copy of any materials that were publicly available. We were told the request would be forwarded to the supervisor; however, as of the printing of this report, we did not receive copies of any old or current affirmative action plans for any City departments. While it might be possible that some City departments have produced affirmative action plans within the past ten years, we did not make the request directly to any one department; rather, we submitted the request to the City's Human Resources Department, which would be the repository of all the City department plans.

Commitment is not only required by the leadership within the City, but commitment is also required by community leaders and the community, itself. During one of the staff interviews, the person discussed the Unit's attempts to reach out to the community. They stated:

We used to have outreach meetings but people did not show up. I told them I cannot help you guys if you do not show up.¹⁰³

In order for the contract compliance program to be successful, commitment is needed on the part of all parties involved in the process. Even if the proper policies and procedures are in place and are being properly implemented, if the community does not avail itself to the employment and contracting opportunities, then the program will not accomplish its goal of expanding opportunities for women and minorities.

¹⁰³ MDCR Contract Compliance Employee E, November 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

CCU needs to receive additional funding to reach full capacity and to ensure measures will be put in place to hold contractors, CCU, and City departments accountable to fulfilling their local, state and federal mandates. The community must do its part by taking advantage of the technical assistance and other opportunities that will enable them to either be employed by a contractor working for the City or receive a City contract or subcontract.

G. Community

Minneapolis is a richly diverse community as it is home to many different racial and ethnic groups. Over the past few years, the City's racial demographics have shifted and with this growth in the percentage of minorities, and the laws have changed to include these groups in the City's vast economic opportunities. The active participation of women and minorities in the City's economy not only benefits the residents who are employed or receive a city contract, but it also ultimately benefits the City. In order to take advantage of the economic opportunities available with the City, the community needs to be aware of these opportunities and they need to be prepared and have the capacity to accept the responsibilities. The community needs to have a positive relationship with City departments and especially with the Civil Rights Department. During the interviews, the consultants asked the CCU staff how they thought the community would rate their effectiveness. Responses included:

- The community has faith in me but not in the City. They would say the Department does not have good marks. They may think one or two individuals have tried to help them.¹⁰⁴
- Our function is to serve needs of the people who are looking for employment, but the process has deviated from that.¹⁰⁵

¹⁰⁴ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

¹⁰⁵ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

- The Ordinance was put into effect to assist groups of people that had been left out of our economic system. We assist in minority, females, and people with disabilities . . . [in acquiring City contracts] so that taxpayer money can be put forth to assist them so they can get a piece of the economic pie.¹⁰⁶
- We are trying to get communities, the Department, and City to correct injustice of the past. That is the most important thing.¹⁰⁷
- We cannot promise them work but we can get them in the mix. It went from less than 1 percent participation and now it is over 4 or 5 percent. That is just sitting down and meeting with these guys. We hope to do better.¹⁰⁸
- Contract compliance is a quality of life issue. If we do not get into microeconomics, then everyone suffers. Try to give people information on how to interact with the City. Sometimes the approach you take makes all the difference in the world. The CCU approach has been to cross I's and dot T's and not help businesses.¹⁰⁹
- They would say we are not effective. I have talked to minority contractors and they do not think CCU is monitoring. A lot of people are not satisfied.¹¹⁰
- You know you are successful, when women and minorities are making money. [The program] is supposed to remedy past discrimination and it is not.¹¹¹

¹⁰⁶ MDCR Contract Compliance Employee B, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

¹⁰⁷ *Id.*

¹⁰⁸ MDCR Contract Compliance Employee I, February 2007, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

¹⁰⁹ MDCR Contract Compliance Employee D, November 6, 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

¹¹⁰ MDCR Contract Compliance Employee E, November 2006, Interviewed by Judge LaJune Thomas Lange and Lawrencina Mason Oramalu.

¹¹¹ *Id.*

IV. RECOMMENDATIONS

The findings of this evaluation support the strategies that were outlined in the 2005 Department of Civil Rights Business Plan. According to the Plan, MDCR would employ the following tactics in its effort to support workforce diversity, establish goals and monitor employment:

- Define and improve workflow processes in Contract Compliance and SUBP to better manage all aspects of compliance over a project's life span.
- Monitor project affirmative action participation goals and onsite inspections in a consistent and vigilant manner.
- Conduct compliance reviews to ensure employers are engaged in non-discriminatory employment practices.
- Hold regular meetings with external stakeholders and organizations to improve understanding of compliance requirements. Provide coaching and guidance to stakeholders regarding consistent adherence to SUBP.¹¹²

In addition to these strategies that have already been proposed, based on the information gathered during this study, the consultants propose the following recommendations which address the three key areas identified at the beginning of the report: (1) non-compliance; (2) notification; and (3) monitoring.

The study revealed that the primary tool for addressing non-compliance is the LOA (Letter of Agreement), which specifies the contractor's deficiencies and outlines corrective measures. Currently, this letter appears to only be signed by an authorized official of the non-complying contractor. The degree of non-compliance is not being reported to the Director and the current Interim Director has not received any informative reports from CCU, documenting the contract compliance activities.

¹¹² Department of Civil Rights Business Plan (2006 – 2010).

This study revealed that the current reporting process within CCU is not effective since reports are not prepared and submitted on a regular or consistent basis, and critical information on non-compliance is not being forwarded to leadership, including the Director, the Civil Rights Commission and the City Council. A review of Civil Rights Commission agendas and minutes from the past two years revealed that the Department has not reported that LOAs had been issued to contractors. The CCU not only needs to improve tracking this information by making sure that all LOAs are recorded in the LOA database, but it also has to report this information to the Director. The Director should be aware of instances of non-compliance and “sign off” on the LOAs. The Commission also needs to be involved in this process. The Policy & Procedures subcommittee should examine the LOA process and develop procedures for responding to different levels of compliance.

The “good faith” standard appears to be the standard used to determine whether or not sanctions should be imposed on a firm. Earlier in this report, different definitions of “good faith” were discussed. Although MDCR has recently established a criteria for measuring “good faith” as described in the Small and Underutilized Business Staff Training Manual, it is recommended that the Civil Rights Commission’s Policy & Procedures subcommittee review the Denver MBE/WBE ordinance and the corresponding rules and regulations,¹¹³ in an effort to develop an appropriate “good faith” standard for the City of Minneapolis and then make a recommendation to the City Council as to whether or not a formal standard should be included in the Ordinance.

¹¹³ Available online at: www.milehigh.com/resources/custom/pdf/DSBO/DSBO_Rules_Regulations_1-12-07.pdf. (2007).

Compliance can be encouraged through positive means such as recognition and incentives, or through sanctions and negative consequences such as debarment. Hence, in addition to establishing consequences for non-compliance, it is also important to recognize firms that are “in compliance.” A staff member recommended that the MDCR establish a “Contractor of the Year” award. This will provide the contractor with positive publicity as well as send a message to the community that the City supports and encourages contract compliance. A “Contractor of the Year” award recognizes contractors and a similar program could be developed for City departments. The University of Minnesota developed a program that rewards departments that have a high utilization of women and minority-owned firms. Departments are given some discretionary funds as well as are recognized by the President of the University. The City could consider developing a program that rewards City departments that have a high utilization and/or improve their utilization of women and minority-owned firms.

The second key issue was notification, and the interviews revealed that CCU was not always notified of a contract award. In order to facilitate this process, it is recommended that an electronic system be developed that will automatically alert CCU when an RFP is put out for bid and when an RFP or a contract is awarded. In an effort to encourage City departments to notify CCU, the notification process could be linked to the other department’s performance evaluation. The CCU needs to continue to document when it is alerted of a contract being awarded, as well as if the contracting agency proceeds with awarding the contract prior to receiving approval from MDCR.

The third issue that came out the study is the lack of effective monitoring. Although the Ordinance still requires that affirmative action plans be submitted and reviewed by the MDCR, an internal decision was made to no longer require the submittal of affirmative action plans. Since this decision was not approved by the Council, it is recommended that the Commission review this decision and determine if the Ordinance should be revised eliminating the review of AAP, or if CCU should begin reviewing AAPs again. If CCU begins to review AAPs, the CCU should request the additional funding from the Council to increase the staff in order to handle this task.

In addition to these recommendations, the consultants also propose the following:

- Design and administer a survey to current, former, and potential prime contractors and subcontractors. The survey should address ways to improve the contract compliance process. Potential questions include:
 - Do you currently have a contract with the City?
 - When is the last time you had a contract with the City?
 - How many contracts have you had with the City in the past five years?
 - What is the largest contract you have received?
 - Have you had any encounters with the Contract Compliance Unit?
 - What type of encounters? (technical assistance, monitoring etc.)
 - Has your firm ever been determined to be in non-compliance with the civil rights ordinance? Why? Did not meet labor hour goals? Did not meet small and underutilized contracting goals?
 - Have you ever received a Letter of Agreement?
- Develop a realistic staffing plan based on the Unit's need to strengthen its monitoring and enforcement and improve the tracking and reporting process.
- Increase outreach activities to all contractors, specifically women and minority-owned firms.
- Prepare and publish an annual report, similar to the one recently released by the Civilian Police Civilian Authority, that documents contract compliance activities.

V. CONCLUSION

Expanding equal opportunities to all Minneapolis residents is not only good public policy, it is the right thing to do and will benefit the entire community. The City exhibits its commitment to equal opportunities through the promulgation of the Civil Rights Ordinance; however, this study has revealed that the City must focus attention on the implementation and enforcement of the Civil Rights Ordinance.

APPENDIX

City of Minneapolis Contracts Identified for Further Investigation

	Year	Contract Amount	Agency	Comments in CCU Database
Under 1M				
1	2000	\$75,000.00	MCDA	LOC
2	2001	\$88,500.00	MCDA	LOC
3	2000	\$96,000.00	MCDA	LOC
4	2001	\$120,000.00	MPB	LOC
5	2001	\$186,920.00	MCDA	LOC
6	2003	\$271,200.00	MCDA	No Monitoring
7	2000	\$300,000.00	MCDA	LOC
8	2000	\$481,358.00	MPB	LOC
9	2005	\$761,085.00	PW	Sole Source – 0% SUBP goals
\$1-\$10 M				
10	2005	\$1,296,315.00	PW	Sole Source – 0% SUBP goals
11	2000	\$1,750,000.00	MCDA	Started more than 60 days prior to notification
12	2003	\$1,900,000.00	MCDA	Meeting all goals
13	2006	\$2,000,000.00	CPED	Better #s on the way
14	2001	\$2,105,557.00	MPB	LOC
15	2003	\$2,200,000.00	Library	3 LOAs
16	2001	\$3,000,000.00	MCDA	Staff is working on LOC. Conciliation meeting being scheduled.
17	2004	\$3,242,000.00	CPED	Did not meet goals; LOA
18	2004	\$3,318,000.00	MPW	Did not meet female or unskilled goals; LOA
19	2004	\$3,900,000.00	CPED	Goals very good
20	2003	\$5,900,000.00	MCDA	Community concerns
21	2002	\$7,250,000.00	MCDA	Notice
22	2004	\$7,500,000.00	CPED	Determined that due to type of funding, we're not monitoring
Over \$10 M				
23	2002	\$10,000,000.00	MCDA	Notice
24	2000	\$11,485,744.00	MPW	Needs LOC and final report
25	2004	\$11,605,000.00	CPED	LOAs
26	2001	\$12,000,000.00	MCDA	LOC
27	2001	\$12,000,000.00	MCDA	No notice received
28	2000	\$ 22,950,000.00		Needs LOC; no notice received
29	2004	\$106,700,000.00	MCDA	Improving; now short 500 unskilled
30	2004	\$250,000,000.00	CPED	Not monitoring

Source: Minneapolis Department of Civil Rights Contract Compliance Unit database.

MINNEAPOLIS CIVIL RIGHTS ORDINANCE
Minneapolis, Minn. Code Section 139.50

139.50. Provisions required in contracts with city.

(a) *Required contract clauses.* Unless exempted by the director, all City of Minneapolis contracts shall include the following provisions, specifically or by reference:

During the performance of this contract, the contractor agrees as follows:

- (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, creed, religion, ancestry, national origin, sex, sexual orientation, disability, age (forty (40) to seventy (70)), marital status, or status with regard to public assistance. The contractor will take affirmative action to ensure that all employment practices are free of such discrimination. Such employment practices include but are not limited to the following: Hiring, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff, termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Minneapolis Department of Civil Rights (“MDCR”) setting forth the provisions of this nondiscrimination clause.
- (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that it is an equal opportunity or affirmative action employer.
- (3) The contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the MDCR, advising the labor union or workers’ representative of the contractor’s commitments under section 139.50 of the Minneapolis Code of Ordinances, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (4) The contractor will comply with all provisions of Title 7 of the Minneapolis Code of Ordinances, and with all rules and regulations issued by the director of the MDCR (“director”) or the Minneapolis Commission on Civil Rights.
- (5) The contractor will furnish and cause each of its subcontractors to furnish all information and reports by section 139.50 of the Minneapolis Code of Ordinances, and by the rules and regulations of the director or of the commission, and will permit access to its books, records and accounts by the director, the director’s agent, or the commission, for purposes of investigation to ascertain compliance with the rules, regulations and provisions of Title 7.
- (6) The contractor shall take affirmative action to afford business enterprises owned and controlled by women and minorities and certified by the MDCR, or the MDCR’s agent, the maximum feasible opportunity to participate in the performance of this contract and resulting subcontracts. As used in this contract, the term “business enterprise owned and controlled by women and minorities” means a business, at least fifty-one (51) per cent of which is owned and controlled by minority group members or women. For the purposes of this definition, “minority group members” are Black, Hispanic, Asian-Americans, and American Indians and Alaskan natives. This provision is not intended to limit in any manner the right of a contractor to enter into a contract with a subcontractor whose status as a business enterprise owned and controlled by women and minorities has not been determined by the MDCR.

- (7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations or provisions of Title 7, this contract may be canceled, terminated or suspended, in whole or in part, and the contractor may be declared ineligible by the Minneapolis city council for further city contracts in addition to other remedies as provided in Title 7. In addition, the contractor shall be liable for any costs or expenses incurred by the City of Minneapolis in obtaining from other sources the work and services to be rendered or performed or the goods or properties to be furnished or delivered to the city under this contract and for administrative costs incurred in seeking compliance. The city shall have the right to specific performance of this contract. Further, in the event there is probable cause to believe the contractor is in noncompliance with the nondiscrimination clauses of this contract or with any applicable rules or regulations, the city shall withhold up to fifteen (15) per cent of said contract amount until such time as the contractor is found to be in compliance or in the event that withholding a portion of the contract amount is not a feasible alternative, then liquidated damages of five hundred dollars (\$500.00) per day for each day that the director shall determine that there is probable cause to believe that the contractor is in noncompliance with this section shall be imposed, or is otherwise adjudicated to be in compliance.
- (b) *Noncompliance.* When the director or the director's designee shall have probable cause to believe that the contractor is not in compliance with any provision of subsection (a) paragraphs (1) through (7) or with the implementing rules, regulations, provisions or plans thereto, the director or the director's designee shall notify the city department administering said contract and shall engage the contractor and the administering department in conciliation and persuasion to try to eliminate the acts or practices giving rise to such belief.

Should conciliation and persuasion fail to eliminate the noncompliant acts or practices, the director or the director's designee shall either request a hearing before the city council on the subject matter of the noncompliance or file a director's charge and refer said charge to the commission demanding that a hearing panel of the commission be convened to hear the charge.

- (1) *Hearing before city council.*
- a. The president may refer the matter in conformance with council procedures to the appropriate standing committee, no later than its second next regular meeting, for public hearing on the alleged noncompliance and the committee shall report its findings to the council. The council may take final action including final imposition of sanctions under subsection (a)(7), direction to the director to obtain compliance or any other action it deems just and proper.
 - b. Should the director or the director's designee have probable cause to believe that the contractor remains in noncompliance, the director shall file a director's charge and refer said charge to the commission demanding that a hearing panel of the commission be convened to hear the complaint. The hearing panel shall be convened as set forth in 139.50(b)(2).
- (2) *Hearing before a panel of the commission.*
- a. The hearing on the director's charge shall be held within thirty (30) days of notification of the matter for hearing. The city attorney shall represent the director before the commission.
 - b. The chairperson of the commission on civil rights shall appoint a three-person panel, one (1) of whom shall be an attorney, who shall also be chairperson of the panel. The panel shall hold a public hearing on the director's charge and shall receive evidence pursuant to the provisions of MN Statutes §14.60.

The hearing panel shall make findings with respect to the contract, ordinance provisions, affirmative action plan or women and minority business enterprise plan. The hearing panel shall order final action including final imposition of sanctions under subsection (a)(7) of this section.

- c. Whenever, in the director's judgment a public hearing pursuant to subsection (b)(2) will take longer than two (2) full days to complete, the director shall certify such fact to the commission and the chairpersons of the commission shall appoint a person who is a lawyer and who may or may not be a member of the commission to conduct the public hearing. In such cases, the hearing examiner shall have the same duties, obligations and powers as a hearing panel.
- (c) *Subcontracts.* The contractor will include the provisions of subsection (a) paragraphs (1) through (7) in every subcontract or purchase order, specifically or by reference, unless exempted by rules, regulations or orders of the director or the commission, issued pursuant to chapter 141 of this title, so that such provisions will be binding upon each subcontractor or vendor.
- (d) *Written affirmative action plan.* Neither the City of Minneapolis nor the Minneapolis Community Development Agency shall enter into contracts or amend any contract resulting in a cumulative contract award in excess of fifty thousand dollars (\$50,000.00) with any bidder or prospective contractor until a written affirmative action plan has been approved by the director or the director's designee and until the department has conducted a pre-award compliance review. Neither the City of Minneapolis nor the Minneapolis Community Development Agency shall not close on any Development Contract until a written affirmative action plan from the recipient of assistance and any prospective contractor with a contract in excess of \$50,000.00 has been approved by the director or the director's designee and until the department has conducted a pre-award compliance review.

The director or director's designated city staff shall, in a pre-award compliance review, examine evidence of the past performance of the entity under review regarding compliance with the provisions of subsection (a) of this section which should include, but not be limited to the following factors: The record of the entity under review regarding observance of the City of Minneapolis contract compliance rules and regulations, the books, records, payrolls and other relevant documents including a list, separated by construction project or work site of all protected-class employees who worked for the entity under review during the period to be reviewed; documentary evidence of the implementation of each of the affirmative action standards set forth in the specifications and evidence demonstrating whether or not the entity under review has complied with subsection (a)(1) of this section or similar equal employment opportunity clause in contracts with any other governmental body or any other entity. The director or director's designated city staff shall have thirty (30) days after receiving notice of the proposed contract to complete the pre-award compliance review and approve or disapprove the affirmative action plan.

- (e) *Jurisdiction.* With regard to development contracts the jurisdiction of the city under this section shall extend for a period of three (3) years from the date of the development contract or until such longer period as may be stated in the development contract and shall include jurisdiction over owner-occupants of any project financed pursuant thereto. (Ord. of 12-30-75, § 5; 80-Or-021, §§ 1, 2, 2-8-80; 81-Or-211, §§ 1--3, 8-14-81; 82-Or-255, § 1, 12-23-82; 83-Or-324, §§ 1--8, 12-30-83; 84-Or-042, §§ 1, 2, 3-30-84; 88-Or-001, § 1, 1-15-88; 90-Or-012, § 1, 1-26-90; 93-Or-132, § 9, 8-27-93; 2006-Or-061, § 5, 6-16-06)

SMALL AND UNDERUTILIZED BUSINESS ENTERPRISE PROGRAM*
TITLE 16 - SECTION 423

*Editor's note: Ord. No. 99-Or-068, § 1, adopted June 25, 1999, repealed Ch. 423, §§ 423.10--423.100, which pertained to small business enterprise program. Ord. No. 99-Or-069, § 1, adopted June 25, 1999, amended the Code by adding provisions designated as a new Ch. 423, §§ 423.10--423.80, to read as herein set out. See the Code Comparative Table.

423.10. Purpose. This ordinance is enacted pursuant to information and evidence of past and ongoing discrimination against qualified and available women-owned and minority-owned business enterprises in the awarding of City of Minneapolis construction and development contracts and contracts for the provision of goods and services. The presence of ongoing discrimination against women-owned and minority-owned business enterprises is evidenced by the study completed by BBC Research and Consulting, in August of 1995 and submitted to the City of Minneapolis and the Minneapolis Community Development Agency. The presence of ongoing discrimination against women-owned and minority-owned business enterprises is also evidenced by the failure of neutral remedies to address the ongoing effects of past discrimination. This ordinance is being enacted to remedy the effects of past discrimination and prevent future discrimination against women-owned and minority-owned business enterprises contracting with the City of Minneapolis and the Minneapolis Community Development Agency. This ordinance is also being enacted to assist small, women-owned and minority-owned business enterprises in becoming viable and permanent participants in the regional economy. (99-Or-069, § 1, 6-25-99)

423.20. Policy. It is the policy of the City of Minneapolis and the Minneapolis Community Development Agency that the level of participation of qualified and available small ("SBE"), women-owned ("WBE") and minority-owned ("MBE") business enterprises in public contracts be increased by the implementation of the Small and Underutilized Business Enterprise Program. The City of Minneapolis and Minneapolis Community Development Agency shall set project goals for the participation of SBEs, MBEs and WBEs based upon their qualifications and availability. The level of participation of SBEs, WBEs and MBEs shall be reviewed by the manager of the Small and Underutilized Business Enterprise Program on no less than an annual basis to ensure that:

- (1) the Small and Underutilized Business Enterprise Program remedies no more than the effects of past discrimination;
 - (2) the Small and Underutilized Business Enterprise Program does not become an entitlement or quota program for any group; and
 - (3) the Small and Underutilized Business Enterprise Program does not limit, in any way, the participation of SBEs, WBEs and MBEs in the marketplace.
- (99-Or-069, § 1, 6-25-99)

423.30. Definitions. For the purposes of this chapter, the following words and phrases shall have the meanings set forth in this section, except where the context clearly indicates that a different meaning is intended. Commercially useful function means a function performed by a business enterprise that is responsible for the execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. Acting as a conduit to transfer funds to another business does not constitute a commercially useful function unless it is done as a normal business practice of a particular industry.

Construction and development contracts mean:

- (1) construction and development contracts; or
- (2) any contract involving the construction, alteration, painting or repair of a building or any structure on land; or
- (3) any contract involving the construction, building, alteration, reconstruction, modernization or improvement of any structure; or
- (4) any contract involving the improvement of, or addition to, any capital asset.

Dominant in its field of operation means a business having gross revenues that exceed the Minnesota Department of Administration Standard.

Industrial Classification (SIC) Code revenue standard for its SIC category.

Goods and services mean the purchase of material, supplies or equipment, or the purchase of trade, technical or professional services.

Marketplace means the geographical area of the Minnesota counties of Anoka, Benton, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Stearns, Washington, and Wright, and the Wisconsin counties of Pierce and St. Croix.

Minority means a citizen of the United States or lawfully admitted permanent resident who is Asian-American, Native-American, African-American or Hispanic.

Minority-owned business enterprise (“MBE”) means a qualified and available business concern, not dominant in its field of operation, with its principal place of business located in the marketplace at the time of bid opening or solicitation, that is at least fifty-one (51) percent owned by one (1) or more minority persons and is an individual, partnership, corporation, or joint venture that is an independent and continuing enterprise for profit, performing a commercially useful function.

Prime or prime contractor means a business engaging in construction and development projects by contractual agreement, or in prime contracts. The terms also include a developer that may enter into a contract for a particular construction and development project, and necessarily contemplates that the developer will also enter into other or further contracts for the completion of the said project.

Prime contract means a contract with a prime contractor for the completion of a construction and development project, as to which it is reasonably likely that the prime contractor will use, contract with, or seek bids from one (1) or more subcontractors. A prime contract also includes a prime contract with a developer, where such contract or project necessarily contemplates that the developer will enter into or further contracts for the completion of the project.

Principal place of business means the primary physical location at which or from which a business performs, is maintained, or operates.

Standard Industrial Classification (“SIC”) code means the Standard Industrial Classification code as promulgated and maintained by one (1) or more agencies or departments of the United States, and includes any code system which replaces or succeeds the code in existence on July 1, 1997. "SIC" or "SIC Code" shall also include classification codes considered more useful and appropriate by the manager of the Small and Underutilized Business Enterprise Program for carrying out the purposes of this program.

Small business enterprise (“SIC”) means a qualified and available business concern, with its principal place of business located in the marketplace at the time of bid opening or solicitation, that is a small business as defined by the Minnesota Department of Administration and is an individual, partnership, corporation, or joint venture that is an independent and continuing enterprise for profit, performing a commercially useful function.

Women-owned business enterprise (“WBE”) means a qualified and available business concern, not dominant in its field of operation, with its principal place of business located in the marketplace at the time of bid opening or solicitation, that is at least fifty-one (51) percent owned by one (1) or more women and is an individual, partnership, corporation, or joint venture that is an independent and continuing enterprise for profit, performing a commercially useful function. (99-Or-069, § 1, 6-25-99)

423.40. Applicability and enforcement. This ordinance applies to any construction contract or development project, or any part of combination thereof, in excess of one hundred thousand dollars (\$100,000.00) in a twelve (12) month period, and any contract for the provision of goods and services in excess of fifty thousand dollars (\$50,000.00) in a twelve (12) month period. Any bid, as to which there is or has been a material lack of compliance with the requirements of this ordinance, shall be deemed to be an unresponsive bid, and such lack of compliance shall be a sufficient basis for the rejection of that bid by the manager of the Small and Underutilized Business Enterprise Program. Every contract covered by this ordinance shall include provisions which:

- (1) obligate the prime contractor, developer, or other contractor or vendor to fully comply with the applicable outreach requirements imposed by the manager of the Small and Underutilized Business Enterprise Program;
- (2) provide that failure to so comply is a breach of such contract; and
- (3) provide remedies for such breach.

Every contract covered by this ordinance shall be drafted in such a way to comply with the terms of Section 139.50 of this Code, except to the extent that the terms of Section 139.50 conflict with the terms of this ordinance.

The manager of the Small and Underutilized Business Enterprise Program shall promulgate such rules, regulations and forms as may be needed to carry out the duties and responsibilities set forth herein. The manager of the Small and Underutilized Business Enterprise Program shall establish and make readily available to all potential contractors, vendors and developers the rules of compliance with this ordinance. Such rules shall set forth program methods for establishing participation goals, all outreach requirements for prime contractors and developers to eligible SBEs, WBEs and MBEs, and all other requirements for demonstrating good faith attempts at compliance with the requirements of this ordinance and the rules set forth by the manager of the Small and Underutilized Business Enterprise Program. (99-Or-069, § 1, 6-25-99).

423.50. Eligible businesses. Any business which seeks to participate in, or avail itself of the benefits of the Small and Underutilized Business Enterprise Program must be certified as eligible by the manager of the Small and Underutilized Business Enterprise Program, or the manager's designee. The manager of the Small and Underutilized Business Enterprise Program shall maintain a list of eligible businesses. Once a business is certified as eligible by the manager of the Small and Underutilized Business Enterprise Program, or the manager's designee, such eligibility is valid for the following two (2) calendar years from the date of eligibility. Eligible businesses may reapply for eligibility before the expiration of their current eligibility.

The manager of the Small and Underutilized Business Enterprise Program may waive all or part of the eligibility requirements as to any business that has been certified under a program that is substantially similar to this Small and Underutilized Business Enterprise Program.

The manager of the Small and Underutilized Business Enterprise Program, or the manager's designee may terminate the eligibility of any business that no longer meets the eligibility requirements for participation in the Small and Underutilized Business Enterprise Program. Any business that is removed from the eligibility list may appeal such removal pursuant to rules regarding eligibility no later than ten (10) business days after the business receives notification that it has been removed from the eligibility list.

The manager of the Small and Underutilized Business Enterprise Program, or the manager's designee, shall have the authority to verify that the businesses certified as eligible remain eligible, are actually performing the services or providing the goods contracted for, and shall have the authority to conduct on-site inspections of the SBEs, WBEs, or MBEs place of business. Each eligible business shall, upon request, permit access the business' site, business, books, records and files to the manager of the Small and Underutilized Business Enterprise Program, or the manager's designee. Such access shall be during normal business hours and shall only be for the purpose of determining eligibility. (99-Or-069, § 1, 6-25-99)

423.60. Administration.

- (a) The Small and Underutilized Business Enterprise Program staff shall consist of a manager of the Small and Underutilized Business Enterprise Program, a Small and Underutilized Business Enterprise program technician, and all appropriate clerical staff.
- (b) The manager of the Small and Underutilized business Enterprise Program ("Manager") shall report to the director of the Minneapolis Department of Civil Rights. The manager shall administer and direct the Small and Underutilized business Enterprise Program.
- (c) The manager shall make all necessary efforts to provide networking and informational resources to the eligible business community and engage in all other feasible outreach efforts to develop and maintain contacts and relationships with the eligible business community.
- (d) The manager, or the manager's designee, shall establish and publish updated outreach requirements at the beginning of each fiscal year and the requirements for establishing good faith efforts and compliance with such outreach requirements.
- (e) Each contract will be analyzed by the manager on a project by project basis and such levels of participation shall be adjusted as deemed necessary. The desired levels of participation of eligible businesses shall be established and adjusted based on the availability of qualified and eligible businesses. In determining such levels of participation, the manager, or the manager's designee, shall take into account and remove from consideration those part of each contractor which cannot be performed or supplied by qualified and eligible businesses. The manager shall establish reasonable participation levels for eligible business, which may include separate goals for SBEs, WBEs and MBEs.

- (f) The manager shall prepare annual reports to be submitted to the director of the Minneapolis Department of Civil Rights. The director of the Minneapolis Department of Civil Rights shall distribute the annual reports to the city council and the mayor, summarizing the information gathered pursuant to this program, including information about any other activities undertaken by or on behalf of the city to further the objectives of the Small and Underutilized Business Enterprise Program. The annual reports shall be made readily available to any member of the public. The manager shall submit quarterly reports to the Civil Rights director. (99-Or-069, § 1, 6-25-99)

423.70. City departments. All departments and offices of the city, including the Minneapolis Community Development Agency, shall share in the responsibility for accomplishing the goals and objectives of the Small and Underutilized Business Enterprise Program. The manager of the Small and Underutilized Business Enterprise Program shall work jointly with each city department and office to establish levels of utilization of eligible businesses in the provision of goods or services to each department or office. Each city department shall designate one (1) employee of the respective department to act as liaison with the Small and Underutilized Business Enterprise Program. (99-Or-069, § 1, 6-25-99)

423.80. Expiration of Chapter 423. This chapter of the Minneapolis Code of Ordinances, Chapter 423, shall expire and, absent other action by the city council based on an analysis of the continuing need for the Small and Underutilized Business Enterprise Program, the Small and Underutilized Business Enterprise Program shall cease all operations on June 30, 2007. (99-Or-069, § 1, 6-25-99; 2004-Or-075, § 1, 6-18-04; 2005-Or-133, § 1, 12-2-05)

