

CITY OF SAINT PAUL

REVIEW AND PERFORMANCE AUDIT OF
CITY OF SAINT PAUL
/HOUSING AND
REDEVELOPMENT AUTHORITY
EFFORTS RELATED TO
INCLUSION IN CITY/HRA
ECONOMIC OPPORTUNITIES

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	v
I. INTRODUCTION	1
II. BACKGROUND.....	2
III. METHODOLOGY	4
IV. COMPLIANCE REQUIREMENTS	6
V. THE CONTRACTING ENVIRONMENT.....	11
VI. REVIEW OF INCLUSION EFFORTS AND PRACTICES	
A. Department of Planning and Economic Development (PED)	13
(1) PED Inclusion Initiatives	13
(2) Contracting Process	14
(3) Compliance Procedures for Vendor Outreach Program (VOP) and Affirmative Action	15
(4) VOP and Department of Human Rights (DHR) Compliance Issues	17
(a) Projects with Control Over Payments	17
(b) Projects With No Control Over Payments	23
(5) HUD Requirements	25
(6) Other Programs and Initiatives	31
(7) Compliance Reporting	33
B. Division of Contract and Analysis Services (CAS) of the Office of Financial Services	34
(1) The Vendor Outreach Program (VOP)	34
(a) PED/Housing and Redevelopment Authority (HRA) Contracts for Which CAS Provides Services	34

(b)	The Need for Early VOP Program Involvement	43
(c)	Monitoring and Reporting on VOP Program Results	46
(d)	Vendor Contracts	54
(e)	VOP Staffing	56
(2)	Certification	56
(a)	Qualifications for Certification	57
(b)	The CERT Program	58
(c)	Joint Certification	61
(d)	Processing of Certification Requests	63
(3)	Outreach to Businesses Owned by Persons With Disabilities.	64
(a)	Saint Paul’s experience with targeting “handicapped-owned” businesses	64
(b)	Increasing opportunities for participation of businesses owned by persons with disabilities	64
(c)	Certification of businesses owned by persons with disabilities	65
(d)	Defining businesses owned by persons with disabilities	65
(e)	Non-profits that employ persons with disabilities	67
(f)	Goal setting for businesses owned by persons with disabilities	67
C.	Department of Human Rights (DHR).	69
(1)	Description of DHR Activities	69
(a)	Affirmative Action Plan	69
(b).	Contractor Audits	69
(c)	Monitoring Construction Projects	70
(d)	Investigation of Discrimination Claims	71

(2) Issues which impact the effectiveness of the DHR	71
(a) Budget	71
(b) Staff Changes	72
(c). Structure of office	72
(d) Lack of experience and training	73
(e) No monitoring of contracts adding up to \$50,000 over 12 months . . .	75
(f) Current Implementing Rules of Section 183	75
(g) Utilizing the Enforcement Tools	76
(h) Communication with other Departments	77
(i) Delays in Signing Contracts with the DHR	78
(j) Management Structure	79
(3) New areas of responsibility	80
(a) Disability Employment Goals	80
(b) Apprenticeship Opportunities Pilot Project	83
VII. SUMMARY OF FINDINGS AND RECOMMENDATIONS	86
A. Increasing Effectiveness and Enforcement.	86
B. Resolutions and Rule Changes	91
C. Process Clarification and Communication	93
D. Documentation.	95
E. Budget and Staffing	97
F. Training	97
G. Reporting	98

H.	Additional Recommendations and Proposed “Best Practices”	100
VIII.	APPENDIX A through J	

EXECUTIVE SUMMARY

This review and performance audit assesses the efforts of the City of Saint Paul Department of Planning and Economic Development (PED) and its Housing and Redevelopment Authority (HRA) to include women, minorities and persons with disabilities in economic development opportunities. The period covered by the audit is approximately 2002 to the present. This report contains the results of the study and evaluation of the practices of the City and Housing and Redevelopment Authority, along with findings and recommendations for improvement.

Overall, the audit confirms that the City and Housing and Redevelopment Authority engage in considerable activities designed to meet the objectives of the applicable laws. While there is no one measure to determine effectiveness of these efforts, the results in terms of contract dollars that certified vendors receive demonstrate that improvements need to be made in order to meet the policy objectives of the City's inclusion efforts. In 2006, less than 7 % of over \$220 million in contract dollars went to MBEs and WBEs (6.6%). MBEs received less than 3 % of contract dollars. WBEs received less than 4 % of contract dollars.¹ For 2006, African-American owned MBE's received only .3% of contracts processed by Contract and Analysis Services (CAS), a little over \$300,000 of over \$94 million.² Hispanic owned businesses received less than \$50,000, .05%.³ Asian-American owned businesses received less than \$200,000, .2%.⁴ In 2006, only Native-American owned businesses received more than a percent of CAS processed contract dollars. They received over \$1.3 million, 1.4%.⁵ Taken together, MBEs received less than \$2 million, 2% of the CAS processed city contracts. For contracts processed by PED/HRA, MBEs received 3.2% and WBE's 4.0% of the \$128 million in contracts awarded in 2006. PED/HRA does not provide figures separately for African-American, Hispanic, Asian and Native American businesses.

Well over half of the contract dollars spent in 2006 are on contracts processed by PED/HRA. HRA, however, has not adopted the provisions of the Vendor Outreach Program (VOP) ordinance, Chapter 84, or the Affirmative Action in Employment ordinance, Chapter 183. The lack of a firm, clear commitment of HRA to apply all of the provisions of these ordinances has contributed not only to confusion and inefficiency, but also to lost opportunities for more completely accomplishing inclusion goals. No one takes responsibility for monitoring and enforcement of the VOP and AA requirements of contracts processed by HRA. HRA does not require a business with which it contracts to either demonstrate before the contract is signed that it has made arrangements with certified vendors that meet participation goals, or to document it has and will take the very specific steps prescribed by the VOP ordinance for outreach designed to meet the participation goals. A clear commitment by HRA to adoption and implementation of Chapters 84 and 183 is essential.

Generally speaking, we found a lack of monitoring and enforcement procedures and practices on PED/HRA contracts, both those PED/HRA processes itself and those processed by CAS. Effective monitoring and enforcement are essential to the credibility of the City/HRA's inclusion efforts. Those who do business with the City/HRA need to know that the City and HRA are serious about their inclusion policies, and that compliance is not just a "paperwork" requirement.

Currently, duties and responsibilities for inclusion efforts on PED/HRA contracts are divided among three departments, CAS, the Department of Human Rights (DHR) and PED/HRA. While

generally speaking the division of responsibilities is appropriate, communication and coordination needs significant improvement. Our report discusses the specific areas where we identified communication and coordination deficiencies and our recommendations are designed to improve how the City/HRA as a whole achieves its inclusion objectives. A particularly significant matter is improvement of monitoring after contracts are let and enforcement when deficiencies are identified. We recommend steps designed to ensure that all participants in the inclusion effort understand the importance of what they are doing and how it fits with the efforts of others. We recommend steps that will increase sharing of experience among inclusion staff.

As with any effort, it is important to maintain an overview and to be able to identify opportunities for improving how the program operates as a whole. During this audit, consultants endeavored to determine the overall operation of the effort. By taking this approach we were able to identify communication and coordination deficiencies and needs for revision of policies and procedures to better meet program objectives. We recommend that the City identify a City staff person of appropriate rank who will have the continuing responsibility for maintaining an overview of the inclusion programs and their components and coordinating the inclusion effort. Our audit also benefitted from consultants' points of view as outsiders, not part of the system being audited. In the future, such outside review will also benefit the programs. We recommend that outside performance audits be conducted every three years.

It is very important to achieving the policy objectives of the inclusion programs for the City and HRA to contract with businesses with a strong record of inclusion of certified vendors and of affirmative action in employment. We recommend more systematic evaluation of and consideration of contractors' inclusion efforts on their St. Paul, other government and private business when identifying and selecting developers and prime contractors.

The changes and improvements we recommend will require devotion of additional staff and budget. The current staff level devoted to inclusion is inadequate to meet the expectations that have been identified prior to this audit. Implementing the recommendations in this audit for improving the effort will require even more staff and budget. The priority afforded by the City and by HRA to these programs, however, is reflected in the willingness of the City and HRA to provide staff and budgets for them. To spur affirmative action in employment, DHR must have additional staff to monitor contractors and to work with them to achieve affirmative action goals.

We recommend rule, procedure, and policy changes that will mean new and improved training for staff.

To be successful, inclusion efforts require public understanding and support. We make recommendations for improving public understanding of the inclusion programs. We recommend improvements in reports and obtaining access to them. We also recommend that at least once a year the primary people involved with the City/HRA inclusion efforts meet with the public to exchange information on what the programs' operations and results have been and to hear from the community perceptions and concerns that hold promise for better meeting program objectives.

There are several recommendations that specifically address the issue of what steps may be taken to increase contracting opportunities for businesses owned by persons with disabilities and

employment opportunities for persons with disabilities. There are many factors to consider which are discussed in the report. The recommendations are measured. Our research establishes that the City of Saint Paul is, in fact, a leader in this area and, accordingly, its policies are more progressive than those of most municipalities. Among the municipalities that have progressive policies in this area are Chicago and Montgomery County, Maryland. The report includes discussion and suggestions gleaned from our review of the efforts in those and other municipalities, as interpolated with the efforts in Saint Paul. We believe that the establishment of a task force is a prudent way to study and consider the various factors identified and discussed, including legal and “definition” issues, and to provide policy makers with a sound basis for making decisions.

In order to adopt and implement the recommendations in this report, those who are concerned about inclusion will need to come together to develop and execute an implementation strategy. We recommend that the City and HRA create an implementation task force. The task force should include key City/HRA staff and officials and public members who can devote their expertise and experience to making the improvements recommended in this report a reality. Representation should include prime contractors and subcontractors and certified vendors committed to increased inclusion. There also should be representation from the Coalition for Diversity to further adoption and implementation of the recommendations related to increased inclusion of persons with disabilities.

We trust that this audit will serve the purpose of increasing economic opportunities for women, minorities, and persons with disabilities, and that it will be useful to the City of Saint Paul, the Housing and Redevelopment Authority and the community.

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1 MBEs received \$1,902,600 of the \$94,222,285 of contracts processed by CAS (2.0%) and \$4,156,440 of the \$127,913,670 of contracts awarded in 2006 on PED/HRA processed contracts (3.2%). WBEs received \$3,513,399 of the \$94,222,285 of contracts processed by CAS (3.7%) and \$5,074,497 of the \$127,913,670 of contracts awarded in 2006 on PED/HRA processed contracts (4.0%). In 2006 PED/HRA provided assistance to projects with over \$480 million in total development costs but only \$128 million of contracts were awarded on these projects in 2006. Sources: VOP Detail Report for 2006, HRA/PED Projects Compliance Report Card Dec. 31, 2006

2 \$306,978 of \$94,222,285. 0.3% VOP Detail Report for 2006

3 \$46,637 of \$94,222,285. 0.05% VOP Detail Report for 2006

4 \$192,651 of \$94,222,285. 0.2% VOP Detail Report for 2006

5 \$1,356,334 of \$94,222,285. 1.4% VOP Detail Report for 2006

I. INTRODUCTION

On June 2, 2005, the Saint Paul City Council adopted a resolution to conduct a review and performance audit relating to certain economic development activities.¹ The review and performance audit was to be conducted by an outside entity which would assess whether the City of Saint Paul (the City) Department of Planning and Economic Development (PED) and its Housing and Redevelopment Authority (HRA) meet the objectives of applicable laws related to the inclusive participation of women, minorities and persons with disabilities in various City funded construction projects, contract procurement, developer selection, program services and initiatives. The purpose of the review and audit is to identify actions that the City can take to maximize inclusive participation in economic development opportunities under the jurisdiction of PED and HRA and to eliminate problems, barriers and impediments to inclusion. This report is the result of that review and audit process.

This report is comprised of seven sections. Section II discusses the background facts and chronological history that provides the context for the audit. Section III explains the methodology used by the Consultants in connection with the audit. Section IV reviews the applicable City ordinances, state laws and federal regulations that establish the policies and requirements for inclusion with respect to minorities, women and persons with disabilities. Section V describes the administrative structure of the City and PED/HRA, the roles and responsibilities of City and HRA staff and the involvement of third parties such as contractors and other entities outside of the City with the contracting process. Section VI details the results of the Consultants' actual review of the practices and administrative implementation as reflected through performance of staff, primarily in the City's Division of Contract and Analysis Services of the Office of Financial Services (CAS), Department of Human Rights (DHR), PED and the staff of HRA. Section VII contains the findings of the Consultants. This section includes recommendations and proposed "best practices" intended to assist the City and HRA in accomplishing the stated goals of the applicable laws and policies.

¹June 8, 2005 Saint Paul City Council Resolution, council File #05-412.

II. BACKGROUND

The City has operated programs to encourage participation of minority owned, women owned and small business enterprises, (MBE's, WBEs and SBEs) in public contracting for many years. In 1997, the City passed Chapter 84 of the Administrative Code designed to promote inclusion and to prevent discrimination on account of race and gender, against vendors and contractors who provide goods and services to the City or engage in construction contracts to which the City is a party. The ordinance, entitled the "Vendor Outreach Program" (VOP) was based on and responded to information and evidence of discrimination documented by the study submitted by BBC Research & Consulting, September 1995, to the City and the study submitted by the Institute on Race and Poverty, February 1996, to the City.² This new ordinance provides an administrative approach to remedy the effects of past discrimination identified in the studies.

Notwithstanding passage of the ordinance, participation of women owned and minority owned businesses continued to be low. For example, according to the Pioneer Press, statistics showed that the percentage of City contracts that went to minority owned firms decreased from 8% in 2002 to 1.1% in 2004 and 5.1 % in 2005.³ In further response to ongoing community concern about this issue, the City held a public hearing in 2003 to address its contracting process with minority and women owned businesses. A Task force, called the Equal Access Working Group, was appointed by the City to provide input. The Equal Access Working Group was originally comprised of interested community members and City employees. In 2004, Saint Paul Mayor Randy Kelly implemented 15 recommendations from a Minority Business Task Force that he had appointed. The recommendations were designed to increase the participation of minority and women owned businesses in business opportunities generated by the City and HRA.⁴ In 2005, the Equal Access Working Group (at this time comprised of only the community members) made additional recommendations intended to increase participation of women, minorities and persons with disabilities in City and HRA contracting opportunities. It also recommended an independent examination that would evaluate the City's administrative practices pertaining to such businesses and recommend actions to eliminate problems, barriers or impediments to inclusion.⁵ The City Council passed a resolution on June 8, 2005 to conduct such an examination and this audit is the result.

In November 2006, the City executed a contract with MGT of America to conduct a comprehensive review and disparity study relating to City and HRA contracting practices. The disparity study commenced on December 7, 2006 and is expected to be completed in November 2007. The disparity study will provide the City and HRA with information needed to review, evaluate and, if necessary, update the VOP pursuant to the criteria established by the U.S. Supreme Court for implementing legally defensible minority, women and disadvantaged business enterprise

²Saint Paul Administrative Code, Chapter 84, Section 84.01 Declaration of Policy and Purpose.

³Article in Pioneer Press, entitled "Task Force Urges Study on Minority Contracts", dated April 28, 2006.

⁴Mayor Kelly's Minority Business Outreach Task Force Recommendation, Effective October 27, 2004.

⁵Equal Access Working Group Recommendation, April 28, 2005.

(M/W/DBE) goal programs.⁶ By contrast, the objectives of this performance audit are to conduct an internal review of PED/HRA contracts and projects for administrative compliance with specific policies, to identify areas of performance and non-performance and reasons for such non-performance and to recommend changes in procedures, practices and strategies that will assist the City/HRA to better accomplish the purpose of the specified policies.⁷

⁶*City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 504 (1980).

⁷City of Saint Paul Request of Proposal #A-25683-1 For a Review and Performance Audit of City/HRA Efforts Related to Inclusion in City/HRA Economic Opportunities.

III. METHODOLOGY

Performance audits typically evaluate the consistency and efficiency of an organization's practices compared to applicable and existing policies to determine the effectiveness of policy implementation. In approaching our work, we have adhered to the principles contained in Government Auditing Standards (also referred to as the *Yellow Book* standards) promulgated by the U.S. Government Accountability Office applicable to performance audits.⁸ Those standards include criteria pertaining to the auditor's independence, internal controls, field work, testing for compliance, findings and reporting. In our analysis of the City's and HRA's performance, we are also aware of and have taken into consideration the assessment tools of the Malcolm Baldrige National Quality Award, which are designed to help organizations use an aligned approach to organizational performance.⁹

In order to utilize a comprehensive approach to this audit, we started by reviewing the applicable laws and ordinances prescribing compliance. See Section IV, below. The objective of this review was to gain knowledge and understanding of the legal requirements to be applied. At the outset of our investigation, we interviewed the City staff responsible for administrative compliance with the policies. We specifically interviewed the department heads as well as line staff with responsibility in each area. This included staff at CAS, DHR and PED. We also met with certain policy makers, including the Mayor, Chris Coleman and City Council President, Kathy Lantry. In addition, we met with the City Attorney and Assistant City Attorneys with specific responsibility for contracting with the targeted groups and/or responsibility for the audit. The objectives of these interviews was to document their understanding of the applicable policies and requirements, to gain knowledge of their practices, processes and procedures and to identify any challenges or problems pertaining to implementation.

After conducting the preliminary interviews of City staff, we requested documents relating to selective contracts and projects. The requested documents included contracts, reports and audits, training manuals, procedures, job descriptions, brochures, promotional materials and related items over the previous period from approximately 2002 through 2007. We sought to initially review the databases in each area. Several methods were used to decide the contracts and projects for review, including random selection. We made it a point to review contracts and projects of various types (e.g. commercial development, housing, business relocation, or loan agreements as well as development agreements) and to identify some contracts or projects for review at each of the departments, CAS, DHR and PED, in order to evaluate the inter-related administrative applications. We systematically reviewed the requested documents in the offices of CAS, DHR and PED and obtained copies of various documents for further review and analysis. We reviewed approximately 13 project files with 9 different project managers in the offices of PED/HRA. We reviewed 16 files at CAS, which included VOP files as well as bid files. A Total of 15 project files and 27 contractor files were reviewed at DHR.

⁸Government Auditing Standards (2003 Revision), GAO-03-673G, June 2003, effective for performance audits beginning on or after January 1, 2004.

⁹ The Malcolm Baldrige National Quality Improvement Act of 1987 - Public Law 100-107.

In conducting the interviews of City staff and document review, we focused on several specific themes. These themes included communication, training, monitoring and tracking, consistency in interpretation and application and other performance indicators.

The next phase of our work involved conducting interviews with individuals other than City staff. We met with general contractors, sub-contractors, women and minority contractors. The objective was to obtain anecdotal information from individuals relating to their experiences with the practices and processes involved in contracting with the City and HRA. In connection with this aspect of our investigation, we circulated a questionnaire in the community designed to solicit input from minorities, women and persons with disabilities concerning their experiences with contracting or employment on PED or HRA projects. The questionnaires were widely distributed as handouts, through e-mail and at specific events. We followed up with respect to information received as a result of the questionnaires.

A community briefing was held on July 12, 2007 at the Dr. Martin Luther King Center during which we participated along with Council President Kathy Lantry in informing community members about the audit process and responding to questions from members of the community.

In addition to various contractors and city staff, we interviewed representatives from the U.S. Department of Housing and Urban Development pertaining to its requirements, monitoring and oversight functions. We interviewed the Director of the Apprenticeship Opportunity Pilot Program on that program's work. We interviewed community members who have worked in various ways with the City with respect to inclusion efforts. Finally, we have interviewed experts throughout the country with respect to best practices.

In addition to reviewing the documents relating to designated PED and HRA contracts and projects, we obtained and reviewed various documents and reports relating to the scope of the audit. Those documents include the following:

- Mayor Kelly's Minority Business Outreach Task Force Report (10-27-04)
- Summary of Recommendation by 2003 MBDR Partners
- Summary of 2003 Report on People With Disabilities
- Equal Access Group Recommendations, (Date)
- Brookings Institute "Close the Gap" Report (Date)
- Court Documents in Pending Cases Michael Thomas v. City of Saint Paul and Brian Conover v. City of Saint Paul
- Mind the Gap, Reducing Disparities to Improve Regional Competitiveness in the Twin Cities, Brookings Institute Report, 2000
- BBC Research & Consulting Study, September 1995
- Institute on Race and Poverty Study, February 1996
- Evaluation of the City of Minneapolis Department of Civil Rights Contract Compliance Unit, By the Roy Wilkins Center for Human Relations and Justice at the University of Minnesota, May 2007

The findings and recommendations in this report are based upon the information gathered, reviewed and analyzed pursuant to the methodology described above.

IV. COMPLIANCE REQUIREMENTS

In accordance with the scope of work set forth in the RFP and the contract for performance of audit services, the consultants investigated, reviewed and evaluated efforts of the City, PED and HRA related to the inclusiveness of economic opportunities for minorities, women and persons with disabilities pursuant to the following laws and ordinances:

1. Chapter 84 of the Saint Paul Administrative Code.
2. Chapter 183.04 of the Saint Paul Legislative Code.
3. Minnesota Statutes, Chapter §574.26-32.
4. 24 CFR Part 85 Section 36 (E) Sections 1 and 2 - Contracting with Small and Minority firms, Women Business Enterprise, and Labor Surplus area firms.
5. Title 24 Sub Part J, Section 570.506 Section g 1-7.
6. Federal Section 3
7. Minnesota Statutes, Chapter 469 (subd. 4, 4a, 6,7, 12,13).

As previously stated, the U.S. Supreme Court, in *J.A. Croson v. City of Richmond*, has articulated criteria for determining whether a contracting program such as that operated by the City is constitutional and legally defensible, stating that it must address a “compelling government interest” and it must be “narrowly tailored.”¹⁰ The factual and legal analysis of the City and HRA contracting programs pursuant to *Croson* will be included in the disparity study and are not a part of this performance audit. For purposes of the performance audit, the Consultants assumes the constitutionality of the program (VOP) and is evaluating the effectiveness of existing City and HRA practices and efforts to implement the above laws and policies.

1. Chapter 84 of the Saint Paul Administrative Code

Chapter 84 of the Saint Paul Administrative Code (the Vendor Outreach Program or “VOP”) contains the City’s policy for helping minority-owned, women-owned and small businesses (MBEs, WBEs and SBEs) participate in City contracts.¹¹ It is a comprehensive policy and includes a broad range of contracting activities associated with City development projects. Although there is not a specific HRA resolution adopting the Vendor Outreach Program or otherwise making the VOP applicable to HRA, the practice of HRA has been to apply the VOP requirements to HRA contracts as well. In accordance with Chapter 84, the City and HRA have established a VOP goal of 15% MBE, WBE and SBE utilization for all HRA contracts and for development contracts. The goal includes both hard and soft costs on business opportunities. With respect to City PED (non HRA) contracts, the goal is set on a contract by contract basis. The goal is applied to projects with sub-contracting opportunities. Pursuant to practices undertaken as a result of the Mayor’s Task Force in October 2004, HRA developers and professional service providers are to make a “good faith” effort to allocate the 15% goal as follows:

1/3 of 15% to MBEs

¹⁰*City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 504,(1980).

¹¹ Chapter 84 § 84.05 -84.11.

1/3 of 15% to WBEs
1/3 of 15% to SBEs.

Chapter 84 requires that certified MBEs, WBEs and SBEs be used to meet the goals. To be eligible for participation, businesses must demonstrate that they are owned and controlled by minorities or women, or meet certain revenue guidelines, and obtain certification as such. The City participates in a joint certification program along with the City of Minneapolis, Hennepin County and Ramsey County. The HRA has elected to use this same certification programs for WBE's, MBE's and SBE's who are used to meet goals for development projects

The range of contracting activities under Chapter 84 includes various requirements of the program manager, PED, CAS, bidders and contractors in connection with bidding, contracting, monitoring and reporting.¹² Chapter 84 specifically requires rejection of bids where there has been a material lack of compliance with the Chapter's requirements and requires that every contract without bidding includes provisions which obligate the contractor to fully comply with the applicable outreach requirements imposed in the chapter, provides that failure to comply is a breach of the contract and includes remedies for such breach.¹³ Further, it is provided that furnishing of fraudulent or false information in connection with the program shall constitute a misdemeanor.¹⁴

2. Chapter 183.04 of the Saint Paul Legislative Code

Chapter 183.04 of the Saint Paul Legislative Code pertains to the City's requirements for affirmative action in employment.¹⁵ The Department of Human Rights is responsible for the overall implementation of Chapter 183. In addition to certain affirmative action requirements applicable to all City contracts over \$50,000.00, the ordinance also prohibits discrimination in employment. The City has promulgated Affirmative Action/Equal Employment Opportunity Contract Specifications which contractors must implement themselves and must include in lower tier contracts with sub-contractors. The specifications apply to all companies receiving \$50,000.00 or more in City contracts over the preceding twelve months. Contractors are required to submit an Affirmative Action Registration certifying that the contractor has developed and is implementing an effective Affirmative Action Program, and to renew the registration after two years. The contractor is mandated to take certain specific actions to ensure equal employment opportunities, including recruitment efforts targeted at minorities, women and individuals with disabilities.

The City has promulgated Supplemental Affirmative Action/Equal Employment Opportunity Contract Specifications for Construction Contractors which contain additional requirements with respect to women and minority utilization goals and reporting. Utilization goals for construction projects receiving \$50,000.00 or more in City assistance are expressed as a percentage of hours performed by construction workers on site, as follows:

¹² Chapter 84, at § 84.04 through 84.10.

¹³ Chapter 84, at § 84.12.

¹⁴ Chapter 84, at § 84.12.

¹⁵Chapter 183.04.

6% of total hours performed by women
11% of skilled craft hours performed by minorities, and
11% of laborers hours performed by minorities.

There are also utilization goals for apprentices with respect to construction projects receiving \$50,000.00 or more in City assistance, as follows:

15% of the total hours performed by apprentices
6% of apprentices hours performed by women, and
11% of apprentice hours performed by minorities.

Additional requirements for contractors include establishing contact with the Apprentice Opportunities Pilot Project (AOPP) and attending a pre-construction conference with assigned staff from the Human Rights Department to discuss the utilization goals and how they will be met. There are affirmative reporting requirements and specific forms that are required to be submitted to the Human Rights Department during the duration of the project. The Director of the Department of Human Rights is responsible for the administration and enforcement of these requirements. The failure of a contractor to make every good faith effort to meet the participation goals for women and minorities is grounds for the Director to sanction the contractor, which sanctions may include termination or suspension, declaring the contractor ineligible for further City contracts, and other sanctions and remedies.¹⁶ The ordinance creates a Human Rights Commission with certain oversight duties with respect to the Department, including the power to adopt rules of practice and procedure.¹⁷

3. Minnesota Statutes, Chapter §574.26-32

Section 574.26 to 574.32 of the Minnesota Statutes are known as the “public contractors’ performance and payment bond act.” Except for exemptions delineated in the Act including situations where the contract amount is \$75,000 or less, a contract with a public body for the doing of any public work is not valid unless the contractor gives (1) a performance bond to the public body with whom the contractor entered into the contract and (2) a payment bond for the use and benefit of all persons furnishing labor and materials pursuant to the contract.¹⁸ A public body may also require a private bidder to provide a bid bond or other security as a guaranty that the bidder will enter into a contract if its bid is accepted. Requirements relating to performance and payment bonds, bid bonds, as well as insurance, financing and related matters have been identified as impediments to participation by minorities and women in City and HRA development projects. The discussion at section VI will address these concerns.

4. 24 CFR Part 85 Section 36 (E) Sections 1 and 2 -Contracting with Small and Minority firms, Women Business Enterprise, and Labor Surplus area firms.

¹⁶ Chapter 183.04(10); Affirmative Action/Equal Employment Opportunity Construction Specifications, (4).

¹⁷ Chapter 184.19.

¹⁸ Minnesota Statutes, Chapter § 574.26 to 574.32.

This portion of the Code of Federal Regulations (CFR) establishes required affirmative steps that grantees receiving funds from the U.S. Department of Housing and Urban Development (HUD) must take to assure that small, minority and women-owned firms are used when possible.¹⁹ It states as follows:

§ 85.36 Procurement

(e)"Contracting with small and minority firms, women's business enterprise and labor surplus area firms. (1)The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible. (2) Affirmative steps shall include:

- (i)Placing qualified small and minority business enterprises on solicitation lists;
- (ii)Assuring that small and minority businesses are solicited whenever they are potential sources;
- (iii) Dividing total requirements, when economically feasible to permit maximum participation by small and minority business and women's business enterprises;
- (iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;
- (v) Using the services of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and
- (vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e) (2)(i) through (v) of this section.

This provision is applicable to certain development activities of PED and HRA that involve the use of HUD funds and will be discussed at Section VI.

5. Title 24 Sub Part J Section 570.506 section g 1-7

Subpart J of Title 24, Chapter V, Part 570 requires recipients of HUD Community Development Block Grant funds to maintain certain records. Section 570.506 sets forth requirements for record-keeping and data collection to enable the Secretary to determine whether a recipient has met the requirements of the program. Section (g) 1 through 7 states the minimum records that a recipient must establish and maintain pertaining to fair housing and equal opportunity.²⁰ This provision is applicable to projects that utilize CDBG funds.

6. Federal Section 3

Section 3 requires that when HUD Federal assistance generates the need for the recipient of HUD funding to increase internal employment or let contracts, the recipient must give preference in hiring to low and very low income persons and must give preference in contracting to businesses

¹⁹ 24 CFR part 85, Section 36 (e) Sections 1 and 2 - contracting with Small and Minority Firms, Women's business enterprises and labor surplus area firms.

²⁰ Title 24, Sub-part J, Chapter V, Part 570.506, Section (g) 1-7.

owned by these persons or that substantially employ low and very low income persons.²¹

7. Minnesota Statutes, Chapter 469.012 (subd. 4, 4a, 6,7, 12,13)

Chapter 469 of the Minnesota Statutes sets forth the general authority for municipal bodies to engage in economic development activities. The chapter covers a wide range of activities and contains provisions relating to the authority, powers and duties of municipal bodies.²² The relationship of this section to the audit will be discussed at Section VI.

²¹ Section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. § 170 IU.

²² Minnesota Statutes, Section 469.

V. THE CONTRACTING ENVIRONMENT

The City of Saint Paul is governed by a Mayor and a seven (7) member council. The Mayor is Chris Coleman and Kathy Lantry is President of the City Council. There are thirteen (13) City departments. Planning and Economic Development (PED) is the department with responsibility for managing the economic and development activities of the City. Its staff manages the City's activities in the areas of economic development and housing and works closely with the Housing and Redevelopment Authority (HRA) in that regard. Its Director is appointed by the Mayor and the current Director is Cecile Bedor.

Most of the operations and financing for the economic development activities of PED are handled by the HRA, which is a separate legal entity created in 1947 pursuant to Chapter 469 of the Minnesota Statutes. HRA has legal authority to raise funds and to enter into development agreements and other contracts in connection with its activities. The City Council is also the Board of Commissioners of HRA. While Council actions are subject to veto by the Mayor, their actions as Commissioners of HRA are not. The Director of PED, Cecile Bedor, is also the Executive Director of HRA. PED staff is retained and paid by HRA to work on HRA projects and operations. The City Attorney's Office provides legal services to PED and HRA.

HRA is engaged in contracting with developers for commercial and residential developments in the City. It handles development loans and grants and tax increment financing. HRA administers funds from HUD, such as CDBG and HOME, funds from the City's STAR program and HRA's own funds. Contracting for PED/HRA projects is either handled in house (at PED) or through the City Department of Contract Analysis Services (CAS). The factors in the decision by PED/HRA to use the solicitation services of CAS are whether the HRA presently owns the site (e.g. a demolition project) or HRA will own the project once it is constructed (e.g. a parking ramp) or if the developer enters into the agreement with the contractors.

Contracts may generally be described as either "City" contracts (where the City executes the agreement with contractors) or development contracts (where an external party, usually known as a "developer," executes the agreements with contractors). With contracts that are not HRA projects, developers or owners provide estimates to the Vendor Outreach Coordinator at CAS relating to "business opportunities." The VOP Coordinator works with the developer and the PED project manager to set goals for the project. The "business opportunity" for purposes of establishing goals is based upon a process of identifying the "total development cost" and subtracting those items perceived as not presenting an opportunity for goal-setting (e.g. financing cost, land acquisition) and what is left is the total figure for setting the goal (the business opportunity).

From the commencement of VOP in 1997 until 2004, VOP goals for development contracts also were established on a project-by-project basis. In 2004, a 15% goal (5% WBEs, 5% MBEs, 5% SBEs) was established as the goal for HRA development projects. This change reflects one of 15 recommendations of a Task Force that was formed by then-Mayor Randy Kelly to review the implementation of VOP and the affirmative action requirements of the Human Rights ordinance. With these contracts the VOP Coordinator is involved in establishing the "business opportunity" figure with respect to which the 15% goal is applicable. The 15% goal was based on an examination of similar programs in cities of similar size and demographics and past performance of the City of

Saint Paul's programs. It was contemplated that this goal would apply until such time as any adjustment might occur, if appropriate, as a result of a future disparity study.²³

The obligations of Chapter 183 are triggered by contracts \$50,000.00 or greater. All City contracts (where the \$50,000 of City money threshold is reached) must be signed by the Director of DHR. HRA does not have that requirement, as the required signatures for its contracts (which contracts do not involve any City funds) are the Chairperson of the HRA Commission (or designee), HRA Executive Director, HRA City Attorney and Office of Financial Services. While some HRA contracts have been signed by the Director of DHR, it is unclear why this occurred. The affirmative action goals for construction projects (6% women, 11% minority skilled, 11% minority unskilled) apply to all projects and are not negotiable.

The powers, duties and limitations of a housing and redevelopment authority are set forth in Chapter 469 of the Minnesota Statutes. The Disparity Studies that established the basis for enacting the VOP did not include HRA. The position of HRA is that while the provisions of VOP do not specifically refer to or include HRA and the HRA Board of Commissioners has not enacted a resolution stating that Chapter 84 is specifically applicable to it, HRA "practice" is to apply VOP to its contracts.²⁴ Similarly, with respect to the applicability of Chapter 183 to HRA, the language of the ordinance does not specifically refer to HRA and the HRA Board of Commissioners has not adopted a resolution with respect to applicability, but the position of HRA is that it is applied as a matter of practice.²⁵ HRA has provided \$130,000 of funding to support the disparity study that is currently underway so that HRA is included in the study which is not common with respect to redevelopment authorities and reflects a recognition of the significance of the role of HRA in inclusion efforts.²⁶

Finding: The fact that HRA has not adopted resolutions specifically stating that Chapter 84 and Chapter 183 are applicable to it, contributes to confusion and uncertainty about requirements and duties pertaining to compliance with VOP and affirmative action goals.

Recommendation: The HRA Board of Commissioners should adopt resolutions specifically stating that Chapter 84 and the affirmative action requirements of Chapter 183 are applicable to HRA. The resolution should define responsibilities for HRA staff for coordinating with VOP and DHR staff with respect to implementation and monitoring of goals.

²³JHH interview with MBDR Director, 5-24-07.

²⁴ JHH & WHL interviews with PED Director, MBDR Director, PED Staff A and City Attorney Staff A, 5-24-07; JHH interview with PED Deputy Director, 8-15-07; JHH interview with City Attorney Staff A, 8-27-07.

²⁵ JHH interview with PED Deputy Director, 8-15-07; JHH interview with City Attorney Staff A, 8-27-07.

²⁶JHH interview with MBDR Director, 5-24-07.

VI. REVIEW OF INCLUSION EFFORTS AND PRACTICES

A. Department of Planning and Economic Development (PED)

(1) PED Inclusion Initiatives

PED has implemented or participated in a number of initiatives with the purpose of increasing minority and female participation in business opportunities generated by PED/HRA's housing and economic development activities. Those activities include:

- (a) Business Opportunity Matrix (Biz Matrix)
- (b) Construction Partnering Program (CPP)
- (c) Emerging Market Homeownership Initiative (EMHI)
- (d) City of Saint Paul Socially Responsible Investment Fund (SRIF)
- (e) Business First-Stop Shop site at www.stpaul.gov
- (f) Small Developer Ownership Construction Program
- (g) Developed Emerging Markets Economic Data which illustrates the changing demographics relative to ethnicity of City residents, market data and entrepreneurs.
- (h) Community Partners - Functions
- (i) PED Report Card
- (j) Minnesota Ethnic Chamber Coalition
- (k) Working Capital Fund

Also, there are other policies that, if implemented fully, encourage contracting with small, minority and women owned businesses. For example, the policy for disposition of HRA owned real estate includes, as part of the criteria for developer selection, an evaluation of the developer's demonstrated ability to meet equal opportunity/affirmative action employment and contracting goals and to provide equal opportunity to minority/women-owned businesses, as well as demonstrated past history in those areas.²⁷

PED operates the Minority Business Development and Retention Program (MBDR) which has as its primary goal to increase minority and female participation in business opportunities generated by PED/HRA's Housing and Economic Development activities. This program is implemented by PED pursuant to the provisions of Chapter 84 that direct PED to undertake "capacity building" activities aimed at SBE's, MBE's and WBE's, such as "mentoring, technical assistance programs, advocacy efforts, encouraging joint venture formation, collaboration with organized labor and providing financial assistance."²⁸ MBDR has contracted with a number of vendors for outreach, capacity building and technical assistance, including:

American Dream

²⁷ HRA Policy for Disposition of HRA-owned Real Estate, dated 5-28-03.

²⁸ Chapter 84, at 84.11.

American Multivision/Contempto, LLC
Women Venture
Selby Area Community Development Corporation
Riverview Economic Development Association
Neighborhood Development Center
Minnesota Geographic Society
Minnesota Economic Development Agency
Office for Business & Community Economic Development (University of Minnesota)
Minnesota Ethnic Chamber Coalition
Kaposia, Inc.
Saint Paul Urban League

(2) Contracting Process

PED/HRA engages in the contract bidding process but also contracts pursuant to development agreements. On occasion PED/HRA issues an RFP for a site and on other occasions an owner or developer will bring forth a proposed development project. The owner or developer in this situation usually brings 80 to 90% of the financing for a project and HRA provides the remaining 10 to 20%. The City investment with respect to these privately negotiated agreements could take many forms, including, for example, grants, loans, TIF (tax incremental financing) or other vehicles.

When an owner/developer initially proposes an “idea” for a project, PED staff provides the owner/developer a letter explaining all of the compliance requirements that may or could apply to the project, which letter is sent by the developer to PED acknowledging an understanding of said requirements (Appendix A). If the project proceeds, a determination is made concerning various specifics, including the source of funds. The proposal moves forward through the process and goes to the PED credit committee and ultimately to the HRA Board of Commissioners for approval. At that point, PED staff provides to the owner/developer information detailing the areas of compliance that will actually apply to the particular project. (Appendix B). The owner/developer must send to PED a letter acknowledging intent to comply in the various areas.. A document is prepared which describes the project, its financing, and all of the applicable terms and provisions, including compliance. Chapter 84 and Chapter 183 compliance are specifically incorporated into the agreement as exhibits.²⁹ That document usually takes the form of a development agreement, loan agreement, grant, or some similar agreement between the owner/developer and HRA.

In a situation involving “City” contracts, the “business opportunity” for purposes of the VOP goals is generally more within the control of the City. However, in the case of “development” projects which utilizes other sources of funds, such as the owner/developer’s own private funds, funding and resources are not under the control of HRA. Notwithstanding, in those instances the 15% VOP goal for HRA projects is applied to the total amount of the business opportunity, including the non-HRA portion of the project funding. There are situations where City or HRA funds are injected late in the process, resulting in limited opportunity for vendor outreach and affirmative

²⁹ JHH interview with PRD Director, MBDR Director, PED Staff A and City Attorney Staff A, 5-24-07.

action because negotiations have already occurred and the deal is far along.³⁰

When a project originates with HRA as opposed to an owner or developer, HRA staff develops an RFP which includes the compliance requirements. Proposals are submitted, analyzed and taken to the HRA Board which makes a decision on which developer is selected. In these instances, it is unclear that a developer's past performance concerning VOP and affirmative action goals is a significant consideration taken into account before selection. It should be, not only when HRA is disposing of property, but also for all HRA projects. Developers should know that their record respecting accepting and achieving goals for participation and for employment is important to getting more City/HRA business. A procedure for recording and evaluating past performance is recommended. See discussion, finding and recommendation on page 44.

Very early in the development process, a PED project manager is assigned to each project. There are 18 project managers who are assigned to one of three Project Teams that assume responsibility for projects largely on the basis of location of the project or type of project.³¹ The three teams are the Downtown Team, the East Team and the West Team. All project managers receive training on the requirements of Chapter 84 and Chapter 183. There is also a compliance manual that is provided to each project manager and all members of the economic development staff.³²

(3) Compliance Procedures for VOP and Affirmative Action

As previously stated, an HRA development project starts with an owner or developer who either has a proposal or site for development or responds to an RFP. HRA sends a "first letter" (mentioning types of compliance that might apply) which is returned by the developer with an acknowledgment of possible compliance requirements along with an application fee. There are at least seven areas of compliance, including VOP, Affirmative Action, Apprentice Opportunities Pilot Program (AOPP), Federal Davis Bacon, Little Davis Bacon (local), Business Subsidy and Living Wage. The matter works through the process and is placed on the HRA agenda, at which time HRA sends a "second letter" (stating which compliance actually applies). The second letter is signed by the developer and returned. It refers to a pre-construction conference where City staff responsible for various compliance areas meet with the developer and/or general contractor to discuss compliance requirements and the items that must be included in bid packets.³³

Generally, at pre-construction meetings, VOP is represented by the Vendor Outreach Coordinator and the representative for DHR is a Human Rights Specialist. The meetings are also attended by all the City staff persons in charge of monitoring other areas of compliance, including wage and hour requirements. The wage and hour monitoring is done by staff within PED. In

³⁰ JHH interview with PED Staff C, 8-15-07.

³¹ JHH interview with PED Staff D, 8-15-07; JHH interview with PED Staff B, 6-15-07.

³² JHH interviews with MBDR Director, PED Staff A and City Attorney Staff A, 6-14-07; JHH interview with PED Staff D, 8-15-07; Various PED updates December 16, 2005 - May 25, 2007.

³³ JHH interview with MBDR Director, 5-24-07; JHH interview with PED Staff B, 6-15-07.

addition to discussing the various compliance requirements, developers and general contractors attending the pre-construction meetings are provided the reporting forms for the VOP and the affirmative action requirements of DHR. At these meetings, the City staff explains the application of the requirements to the specific project and review the paperwork necessary with respect to the reporting forms. There is an attempt to address particular issues or challenges anticipated with respect to the project. City staff answers any questions that the developer or general contractor might have at that time. The AOPP coordinator also attends these meetings. She explains and responds to any questions relating to the apprenticeship program.³⁴

There is an opportunity for project managers to be actively involved in the pre-construction process with respect to the VOP and affirmative action goals. For instance, the project manager may be involved in the bid process. Based upon interviews conducted by the Consultants, the level or degree of involvement varies among project managers. A proactive project manager may track where the bids are sent (newspapers, chambers of commerce, community groups and other forms of outreach) to ensure that attempts are made to maximize the likelihood of reaching the project goals. Some project managers have started conducting “pre-pre-construction conferences” which occur before a developer even hires architects and obtains other professional services. There is not always an opportunity for this because it is often the case that these types of services are already contracted prior to the time that a project comes to the attention of PED/HRA. However, it is important for project managers to become involved in this manner at the earliest possible point in the development process if VOP goals are to be meaningfully applied to these pre-construction costs which are usually for professional services and sometimes referred to as “soft costs.” They include such items as architectural, legal and surveying as well as real estate services in connection with land acquisition.³⁵

Finding : VOP goals are often not applied to certain professional services which include such items as architectural, legal, surveying and real estate services which are sometimes referred to as “soft costs” or pre-construction costs. The degree of involvement of project managers with respect to efforts to include the participation of MBE’s, WBE’s and SBE’s at that stage is lacking and inconsistent at best. Proactive involvement of project managers at that stage could serve to enhance opportunities for inclusion.

Recommendation : Project managers should be required to become actively involved with efforts to identify business opportunities at the earliest possible stage in the process to maximize occasions to set VOP goals for professional service contracts. These efforts should include arranging and attending conferences with owners, developers and others for that purpose at the earliest possible stage in the process.

After the pre-construction meeting with developer, prime contractor, sub-contractors and staff from PED, VOP and DHR, the next phase in the development process is the start of actual construction. From the prospective of PED/HRA, interviews conducted by the Consultants reveal

³⁴Attendance of JHH at Pre-construction meeting on June 27, 2007 for United Family Practice Center Project; JHH interview with PED Staff B, 6-15-07.

³⁵JHH interview with PED Staff B, 6-15-07.

that PED project managers generally view the monitoring and tracking of VOP and affirmative action goals to be the primary responsibility of Vendor Outreach Manager and DHR respectively.³⁶ Because, however, HRA has not formally adopted Chapter 84 and has not arranged with the City and its CAS section for monitoring of VOP provisions of HRA's contracts, the VOP manager has not been officially given responsibility for monitoring and tracking of VOP results on HRA contracts. See the discussion of post contract formation of monitoring of compliance at p.50 below.

(4) VOP and DHR Compliance Issues

(a) Projects with Control Over Payments

With respect to the VOP goals, it is significant to note that for the purposes of considering compliance there are two types of projects: those projects where PED/HRA controls payments or "draws" and those projects where PED/HRA does not control payments or draws.

As for projects where PED/HRA controls payments or draws, which include the vast majority of development and construction projects, there is some opportunity for the project manager to take an active role in enforcing compliance. In considering whether this presents a realistic opportunity for a project manager to assume an effective role in connection with achieving compliance, it is useful to compare the monitoring and implementation of compliance for wage and hour. In this area, the PED staff responsible for monitoring compliance routinely communicate with project managers as to whether there is compliance with the requirements. If the contractor has failed to comply with the paperwork requirement or the paperwork indicates non-compliance with the underlying substantive requirements, information is regularly communicated to project managers with a request to withhold payments. Project managers respond by withholding payments/draws and insisting upon compliance prior to making payment to the contractor.³⁷ This is not the practice with respect to compliance with the VOP goals and the affirmative action goals. Several PED staff persons stated specifically that there is nothing that prevents withholding of draws by project managers for failure of developers or contractors to comply with VOP or affirmative action requirements.³⁸ However, there is a recognition of several distinctions from the perspective of PED with respect to forcing compliance with wage and hour laws as compared to compliance with the VOP and affirmative action requirements. The applicable wage and hour requirements provide specific authority for withholding payments for failure to comply with respect to both federal and local wage and hour law.³⁹ PED staff responsible for monitoring wage and hour compliance stated, "That area is not

³⁶JHH interviews with PED Director, MBDR Director and PED Staff B, 6-15-07; JHH interviews with PED Deputy Director, PED Staff C, PED Staff D, and PED Staff E, 8-15-07.

³⁷ JHH interview with PED Staff B, 6-15-07; JHH interview with PED Staff F, 7-13-07; JHH interview with PED Deputy Director, 8-15-07.

³⁸ JHH interviews with PED Deputy Director, PED Staff C, PED Staff D and PED Staff G, 8-15-07;and PED Staff H 7-13-07.

³⁹ Davis Bacon Act 40 U.S.C. 247 (Title 29 CFR Parts 1, 3, 5and 7); Saint Paul Administrative Code, Sec. 82.07.

subjective, it is cut and dried.”⁴⁰ There is a view that as a result of the applicable regulations, project managers are “required” to withhold payments for violations of those provisions and it is mandatory. On the other hand, the general view of many projects managers is that with respect to the VOP and affirmative action goals, withholding of payments is not mandated.⁴¹ Therefore, many project managers state that it is their practice to rely upon VOP and DHR staff to advise them if there are any problems with compliance. PED staff interviewed in connection with this study stated that steps are taken by project managers to address compliance problems when information is conveyed to them. In the absence of communications from staff at VOP or DHR indicating a problem or requesting help or assistance on the part of the project manager, PED project managers generally state that they assume everything is fine and make payments.⁴² In fact, a violation of VOP and/or affirmative action provisions would constitute a default under a development or loan agreement, entitling HRA to exercise its remedies, which include withholding of payments.⁴³ If HRA formally adopted Chapter 84 and applied its provisions for compliance with prime contractor bid requirements to its contracts, once a developer made contractual commitments to abide by them the VOP requirements would also be “cut and dried”. The VOP materials now given to developers at meetings with them include the specifics of Chapter 84’s two methods prime contractors can use to demonstrate compliance with Chapter 84’s vendor outreach requirements. As is discussed more fully at pp.36-37 below, one method is to “prequalify” by documenting before the contract is signed the arrangements that have been made with certified contracts and that these arrangements will meet or exceed the participation goals for the project. Sec. 84.08 (d). The other is the “good faith efforts” method of compliance where the prime contractor agrees to undertake the outreach steps specified in the ordinance and submit evidence of taking them with the aim of meeting the participation goal. For either method the contractor is either complying or not complying.

On HRA contracts sometimes the developer acts as the prime contractor and subcontracts work itself. In these cases the developer is the prime contractor. In other cases the developer selects a prime contractor who subcontracts work. HRA should make clear to developers that by obligating the developer to meet VOP requirements, HRA is requiring the developer to provide evidence that the prime contractor on the project is subcontracting in conformance with the prime contractor bid requirements of Chapter 84. It is especially important for HRA to have these requirements and enforce them when the project will receive HOME, CDBG or other federal funds that require taking affirmative steps to use small, minority-owned and women-owned businesses in federal grant funded contracts. See the discussion of these requirements below at p. 27. Consultants review of files and interviews with staff indicate that PED/HRA staff do not follow through with developers to determine which method of complying with the prime contractor bid requirements the developer meets, nor is evidence of compliance regularly collected. In some cases it appears from review of PED/HRA files that the assumption is that the “good faith efforts” method of compliance is being pursued. This is especially the case when the contract is signed before subcontracting is underway. In those cases prequalification is often not possible or appropriate. While files indicate

⁴⁰ JHH interview with PED Staff F7-13-07.

⁴¹ JHH interview with PED Deputy Director, 8-15-07.

⁴² JHH interviews with PED Deputy Director, PED Staff D, PED Staff B and PED Staff C, 8-15-07.

⁴³ JHH interview with MBDR Director, 9-27-07.

communications with prime contractors seeking updates on VOP subcontracting results, they do not include documentation of the outreach efforts required by Sec. 84.08 (b) and (c) to be documented when qualification is according to the “good faith efforts” method. The VOP program coordinator has developed a form that contractors can use to provide this evidence on a monthly basis, but they are not routinely used for that purpose.

When CAS bids PED projects as City contracts the CAS buyer routinely identifies certified businesses that are potential sources and notifies them of bidding opportunities. For example, the CAS buyer maintains and updates a list of certified vendors who do demolition work. This list is generated using the codes for the type of business a certified vendor does. These lists are updated as the certified vendor pool changes. Based on file review and interviews with PED/HRA staff this important aspect of vendor outreach is not routinely or consistently engaged in when PED/HRA makes the contracting arrangements for HRA contracts. Undertaking this activity is especially important when the PED/HRA project will receive federal HOME program, CDBG or other federal funds. Federal requirements include that certified businesses be on solicitation lists as potential sources and be solicited whenever they are potential sources. See the discussion of federal inclusion requirements at page 27 below.

Finding : Generally, many HRA/PED project managers do not assume responsibility to take affirmative steps to ensure compliance with VOP and affirmative action goals, unless information reflecting compliance problems is brought to their attention by VOP or DHR monitoring and compliance staff.

Recommendation : Procedures should be established and additional training should occur for PED/HRA staff to delineate clear lines of responsibility for monitoring and tracking compliance, set duties with regard to cross-checking and establish communication protocols to enhance the implementation, monitoring and reporting of compliance requirements. Adequate resources should be provided to support the training and implementation of the communication, monitoring and reporting protocols by PED/HRA project managers.

A review of project files confirm a dearth of communications from VOP and DHR staff concerning problems with compliance, compared to communications from staff monitoring wage and hour compliance. It is unclear why there is a general absence of communications from VOP and DHR staff concerning failure of contractors to comply with the requirements. Based upon the comments of a number of persons interviewed at PED, it appears that there is lack of clarity with respect to monitoring. While, as stated, PED staff generally views monitoring to be the responsibility of VOP and DHR staff, it is noted that one of the stated goals of the MBDR program at PED is “monitoring of goals and objectives” with respect to targeted vendors.⁴⁴ MBDR has an annual budget of \$250,000 for capacity building. The MBDR director stated that it would be useful if HRA had more resources to assist in this area to help small and start-up businesses with bidding,

⁴⁴ PED Update, May 26, 2006.

bonding and related activities.⁴⁵ Several PED project managers echoed the view that insufficient staffing and inadequacy of resources for monitoring could be part of the reason why there is not much communication from those offices to PED concerning problems. Additional possible factors included turf issues, as well as uncertainty with respect to priorities (what to concentrate on) and policies.

PED files are divided into five sections. While descriptions may vary slightly, generally, the sections are as follows:

Section I	Notes / Risks
Section II	Underwriting Documentation
Section III	Closing Documents
Section IV	Compliance Documents
Section V	Disbursements / Accounting.

These sections are sometimes referred to as file “positions.” The Consultants reviewed 13 project files at PED.⁴⁶ In selecting files for review at PED, the objective was to include a “mix” of the various types of projects handled at PED and HRA. Files reviewed included loan agreements, grants, development agreements, housing developments, business relocations and site demolition. Generally, project files all contain the applicable provisions of VOP and affirmative action requirements in the primary agreement with the developer or contractor. While there are sometimes references to goals and requirements contained in various sections of the file, the primary file position where this information is located is usually at Section IV. Examples of information gleaned from interviews with project managers and other staff and reviews of project files include the following:

- (1) As previously stated, interviews with projects managers revealed that their perspective is to primarily rely upon the Vendor Outreach Manager and HR Specialists to inform them of compliance problems. Several cited examples where they had become involved in addressing situations upon learning of concerns. A project manager stated that, typically, he would contact VOP and DHR before payments were made. He stated that if he learned of a problem, he would hold a draw until the problem was resolved. He also stated that the most common matter brought to his attention related to prevailing wages. Another project manager noted that while most of her projects involve bond deals where there is not control over draws, she attempts to address problems when there is an opportunity to do so. For instance, The Lowery project was such an opportunity because it was an HRA project. She held back some funds for compliance purposes and received feedback from the VOP coordinator and HR specialist, as well as PED compliance staff for wage and hour, prior to approving the last draw. She also recalled a situation with a compliance problem with the affirmative action goals on the Emerald Gardens

⁴⁵ JHH interview with MBDR Director, 6-14-07.

⁴⁶ PED/HRA project files reviewed: Ace Auto, Capp Road Demolition, Allina, Gander Mountain, Rock Tenn, Westminster Place, The Lowery, Hazel Park, Smile Center, Brighton Victoria Park, Regions Hospital, Bonnie Jean and Upper Landing .

project. As project manager, she went out and met with an HR specialist and the general contractor which resulted in progress toward the goals. The Civil Engineer for PED sometimes acts as project manager for demolition projects. He stated that whenever a payment request comes in from a contractor, he contacts PED compliance staff concerning wage issues and contacts staff at VOP and DHR and waits for a response before making payment. One project manager stated that there have been occasions where he used a 10% or 20% “holdback” until compliance concerns were addressed to a degree of satisfaction. Several project managers related their experience that in many instances, however, there is no response or the response is that compliance staff have not had time to review the paperwork and are not sure when they can get to it. This experience was usually cited with respect to DHR. From the project managers’ perspective, they cannot delay payment for an unreasonable amount of time while waiting to be advised of the state of compliance. A project manager recalled an occasion on which he approved a draw under such circumstances, and issues arose. The project manager continued to work on the problem with the other parties until it was ultimately resolved.⁴⁷

(2) The file reviews confirm that while evidence of communications pertaining to concerns about compliance from VOP and DHR are sparse, there is some evidence of communications regarding these matters. As stated, each file contains compliance provisions in the underlying agreement and there is a compliance section within each file. Often the compliance section has a checklist. Sometimes items are checked but in many instances no items are checked. It could either be inferred in those instances that the checklist still serves as a reminder or it could be inferred that it is ignored. As previously stated, many files contain correspondence from compliance staff relating to wage and hour concerns.⁴⁸ With respect to VOP and affirmative action compliance, the file reviews revealed “mixed” results. On the Allina project, there was a \$294,000 loan for leasehold improvements and capital costs from the Strategic Investment Fund (SIF) to Allina Health Systems to relocate its offices and 336 employees in the Westgate Business Center. There was a “public benefits” analysis for purposes of SIF. While the total project cost was \$1,591,465, the compliance goals were applicable to the \$294,000 amount. There was limited opportunity to achieve the goals in that situation due to the late point in time at which the SIF loan was awarded. In this file, there are memoranda from an HR specialist to the project manager stating that no women or minority hours were reflected on the project and that AAP registration forms had not been submitted. There is an e-mail exchange between the project manager and HR specialists, including an e-mail from an HR specialist to the project manager stating that DHR would be monitoring Allina. Although the compliance checklist in the file contains some notations, nothing is filled in. Ultimately, there is a letter from the contractor requesting disbursement and disbursement is made. On the HRA/PED Report Card as of March 31, 2007, the VOP total is reported at \$36,090, or 2.27%, with \$33,730 of that amount for WBE,

⁴⁷ JHH interviews with PED Staff C, PED Staff D, PED Staff G and PED Staff E, 8-15-07; JHH interview with PED Staff B, 6-15-07.

⁴⁸ Examples are project files for Ace Auto, Gander Mountain and The Lowery.

\$2,360 for SBE and none for MBE.. With respect to hours for purposes of Chapter 183, the numbers reflect zero.⁴⁹

(3) An example of a file that reflects documentation of several aspects of the steps to promote inclusion is the file of the White Bear Avenue/Smile Center project, which included a \$150,000 loan to a non-profit for development of an area in conjunction with HRA approval of a \$910,000 loan to Dental Facilities LLC for construction of a new dental facility. The project manager's file documents e-mail exchanges with the VOP coordinator about the pre-construction meeting and strategies for VOP outreach and with DHR staff about the pre-construction meeting. She documents attendance at the pre-construction meeting. The file does not contain any notation of compliance concerns from VOP or DHR. The March 31, 2007 PED Report Card (for projects in process) shows that when 21.85% of contracts were awarded, 11.12% were VOP awards (8.08% SBE, 3.05% WBE, 0% MBE). It indicates that Chapter 183 reporting information is "unavailable."

(4) Several of the other files that were reviewed reflect e-mail exchanges between project managers and compliance staff at VOP and/or DHR. In many instances, the file reviews leave some ambiguity with respect to the degree of progress in addressing concerns in the particular situation.⁵⁰ For example, the file for The Lowery project contains April 19, 2006 e-mails from the project manager to both the VOP coordinator and an HR specialist inquiring about the status of compliance in their respective areas before approval of the last draw. There is an April 21, 2006 communication from the VOP coordinator to the project manager stating that the VOP goal has been exceeded. While there is a May 9th response from the HR specialist, the communication is more ambiguous.⁵¹ In the VOP file for the Lowery, there is not even a copy of the project manager's e-mail of April 19th. The only post approval document is an undated form listing sub-contractors apparently supplied by the owner with amounts and designations of certification status. The file does not indicate what the VOP goal was. The On Target for March 05 lists Lowery with a 10% goal and a 12.95% of total development cost result. The PED Report Card for March 31, 2007 (for projects in process) shows 13.24% VOP participation with the entire amount consisting of WBEs. The reporting for Chapter 183 is listed as "unavailable."

The purpose of the examples cited above from interviews with project managers and from review of project files is to illustrate the types of communications that occur as well as some areas where improvements can be made with respect to the exchange of information between project managers and compliance staff and appropriate follow-up. Moreover, there have been examples where compliance staff have intervened in the process to clarify that compliance goals are applicable to a project. With the Upper Landing project, a question arose concerning the continued applicability

⁴⁹ Project file for Allina.

⁵⁰ Project files for Gander Mountain, Rock Tenn and The Lowery.

⁵¹ Project file for The Lowery.

of City compliance requirements to the second phase (selling of parcels) of a development project where compliance clearly applied to the first phase (the underlying conveyance of property to the developer). In response to the objection of the developer (Centex Multi-Family Communities, L.P) to interpreting compliance as a continuing obligation, the Director of the Department of Human Rights engaged PED staff and the City Attorney to reach a unanimous opinion that compliance was a continuing obligation throughout the project, which was conveyed to the developer.⁵²

Finding : Practices of HRA/PED project managers with respect to confirming the level of compliance with VOP and affirmative action goals prior to making payments vary to a considerable degree. There is no standard procedure, which results in a lack of consistency and does not contribute to the likelihood of maximizing compliance opportunities.

Recommendation : A uniform process should be established whereby project managers consistently check with VOP and DHR compliance staff concerning the status of compliance prior to making payment. This should include a procedure for project managers to routinely receive updates from compliance staff and status reports prior to making payments. The procedure should include guidelines for the possible actions that a project manager is expected to take in the event of non-compliance, including but not limited to, initiating steps to achieve compliance and withholding payments. Project managers should be required to complete the compliance check list form located in the compliance section of project files.

(b) Projects With No Control Over Payments

The other type of project is where PED/HRA does not control the draw. An example of this type of situation is conduit bond financing. In this type of transaction, the City (and HRA) does not provide any funds but is leveraging its tax status. With respect to projects where the City or HRA controls payment, at least, theoretically, payments could be withheld to gain compliance. That is not the case with conduit bond projects. As a means of creating some leverage for enforcement in these types of transactions, PED staff has recently developed a compliance agreement with enforcement and liquidated damages provisions for use in such situations. Appendix C. The first project where this agreement was implemented was Regions Hospital.⁵³

The Regions transaction involved two separate compliance agreements, one pertaining to \$178 million for hospital improvements with a Total Business Opportunity of \$112 million, and an \$18 million parking ramp with a Total Business Opportunity of \$959,756. Both contain a VOP goal of 15% (5, 5, and 5) and the standard affirmative action goal (6, 11 and 11) and apprentice goal (15, 11 and 6). The agreement for improvements provides that in the event of default, HRA may take whatever action is deemed appropriate, and provide for liquidated damages in the following amounts:

\$170,000 for default regarding affirmative action goals
\$ 30,000 for default regarding apprentice goals

⁵² December 4, 2003 letter from Director of DHR to Patrick Kelly, Counsel for Centex.

⁵³ JHH interviews with PED Staff H, 6-15-07 and 7-13-07.

\$100,000 for default regarding VOP goals

The compliance agreement for the parking ramp provides for liquidated damages in the following amounts:

\$136,000 for default regarding affirmative action goals

\$ 24,000 for default regarding apprentice goals

\$ 40,000 for default regarding VOP goals

The VOP files for the Regions project with respect to both the parking ramp and the hospital expansion are more extensive than most. In September of 2006 the VOP coordinator and MBDR Director met with Kraus -Anderson to discuss the minority contracting plan for the hospital expansion. They proposed diversity outreach efforts to Kraus-Anderson, the prime contractor. Apparently they proposed goals of 7%/7%/7%, rather than the usual 5%/5%/5%. Whether an overall goal greater than 15% was proposed is not disclosed in the VOP files reviewed. Regions presented a written response dated November 20, 2006 which is in the files. It rejected the 7%/7%/7%. It argued that earlier bid packages and cost estimates were on the basis of 5%/5%/5%. It took the position that recent projects of similar scope and complexity show that 7%/7%/7% is unattainable without significant financial impact. The City accepted the proposal of Regions that the goal be 5%/5%/5% of the business opportunity costs of the project at a November 27, 2006 goal setting meeting. The VOP coordinator's notes from the meeting reflect that the reasons discussed in the response memo were discussed at the meeting. The Regions Expansion is being bid in packages. This provides an opportunity for a continuing relationship with the project to assure that sound plans are made to assure that VOP goals will be met. The VOP files include detailed information about use of certified subcontractors that Kraus-Anderson proposes to use with future bid packages. There is also an exchange of e-mails in the file where the VOP coordinator provided Kraus-Anderson with lists of certified contractors sorted by particular classifications of work. If the certification list could be searched electronically, this could have been done by Kraus-Anderson. See the discussion at p.60. There is also a sheet in the file that has Diversity Outreach Efforts listed on it. It is undated. It appears to be a "template" for special outreach efforts for business goals and hiring goals. The file includes Identification of Prime Contractor and Subcontractors (including material suppliers) forms for the prime contractor and for each of the subcontractors. These disclose the use of second tier subcontractors and of suppliers. They can be used to determine the utilization of VOP certified vendors. The file also has notes of the status of VOP through 6/1/07 information. They disclose that as of the date of the information, their goals are not being met, but there is also a note that there are not dollar amounts available yet for four certified businesses that are subcontractors or second tier subcontractors. It appears that this project is being actively monitored. Regions type agreements are now being used for other bond deals.⁵⁴

In addition to developing a tool for use where there is no ability to "leverage" control of payments, a benefit of the Regions-type of agreement is to have all of the compliance provisions located in one document, which renders it easier for both compliance staff and contractors to be clear

⁵⁴ JHH interview with PED Staff E, 8-15-07.

about requirements.⁵⁵

Finding : There could be benefits from increased clarity with regard to the various compliance goals, including VOP and affirmative action goals, applicable to a specific project. Including all of the goals in one document along with responsibilities for implementation and consequences for non-compliance, could provide increased clarity to both compliance staff and contractors. Specifically, with projects where the City and HRA do not control the draw, there is no opportunity for project managers to withhold payment to “leverage” compliance.

Recommendation : Consideration should be given to expanding the use of Regions - type liquidated damages provisions to achieve compliance, particularly in contract situations where draws are not controlled by the City or HRA and possibly in other situations, where appropriate.

With respect to monitoring of compliance for VOP goals, an important question arises in terms of what, if anything, is expected to occur concerning monitoring and implementation of the goals once the construction project has commenced. It seems that from the perspective of VOP, staff may view its work as completed when the goals are inserted into the project. For development projects the goal is set at 15% and it appears that the “good-faith” method of achieving the goals applies by default in situations where the actual goals are not achieved.

(5) HUD Requirements

The City is the recipient of funding from the U.S. Department of Housing and Urban Development and administers a number of programs and projects that utilize HUD funds. The program administrator is also the head the Finance Team at PED, which consists of approximately 20 staff, some of whom are grants managers. He has been employed with PED for approximately 30 years. The lead grants manager has been employed with PED for 21 years. There is also a “Resource Team” within the Finance Department. This team assists project managers in identifying possible sources of funds for projects. In addition to HUD funds, this team administers other funds, such as the STAR program. These programs are described at the City’s web page (www.stpaul.gov/depts/ped).

HUD funds programs and projects. Both programs and projects require eligible activities and persons consistent with HUD guidelines. Examples of HUD programs are Community Development Block Grant (CDBG) funds and HOME funds.

HUD also funds certain projects. Projects pertain to particular activities. When funding a project, it is necessary to ensure that funds are used for an eligible activity. The requirements include that the program must be located in a specific “service area” and that the activity meets one of three “national” objectives which are: serving low and moderate income people, eliminating slum and blight and meeting urgent needs. Usually, PED uses the “low and moderate income” category. With respect to activities relating to businesses, there are two ways to qualify: serving low and moderate income people and job creation. The Resource Team reviews proposed activities to determine that a project involves an eligible activity and meets one of the national objectives before funding is

⁵⁵ JHH interview with PED Staff H, 7-13-07.

approved.⁵⁶ With respect to CDBG, there is a process whereby each year the City determines the projects to be funded for the following year. While CDBG funds come from the federal government, they are distributed to the grantees through the City process. HUD CDBG sub-grantee agreements must comply with the applicable HUD requirements and include attachment C which sets forth 30 compliance requirements with which subgrantees must comply, including Chapter 84 and Chapter 183.

Resource Team decisions on use of funds are made in a manner to first utilize the most restrictive funds that may apply to a particular activity. HOME funds are more restricted than CDBG funds and must be used to serve people who are at or below 80% of median income.

To keep track of HUD programs and funds, PED utilizes a HUD computer system called IDIS. The City must provide regular reporting to HUD with respect to programs and funding. Oversight for the City's HUD programs is with the Minneapolis regional office. There is an annual funding application and various documents are required by HUD programs to be submitted to the HUD office. These include a consolidated plan and an "Impediments to Fair Housing" study. We requested and received the following documents related to operation of HUD programs, which we reviewed for purposes of the audit:

- HRA review by State auditors for 2006
- Sample form of agreement with a community development Corporation (CDC)
- Grantee reimbursement request form
- Form that sub-grantee sends to City for compiling information - IDIS Report
- Form that sub-grantee uses to have its participants fill-out to provide information - Affidavit
- Internal listing of CDBG projects
- 2005, 2006 and 2007 listing of specific projects funded with CDBG dollars
- Plans that are sent to HUD regarding proposed use of funds
(5 year plans and yearly updates)
- State audits for 2003, 2004 and 2005 (2002 was not available)
- HUD integrated disbursement report regarding CDBG activities
- City 2005 CAPPER report - five year goals and objectives
- 2005 - 2006 CAPPER report
- 2005 consolidated annual performance and evaluation - citizen summary
- Metropolitan Twin Cities Fair Housing Action Guide

The HUD program is a reimbursement program. A grantee (the City) must enter information into IDIS (HUD computer system) and is subsequently reimbursed. The program administrator and grants manager explained that the HUD regional office monitors a part of the City's program each year for compliance with HUD requirements. There is usually an on-site review of some aspect of the program on an annual basis. Similarly, the City monitors sub-grantees. Previously, PED staff performed this monitoring, but more recently this has been done by contractors providing this function for the City. Usually five to seven groups (CDCs) are monitored on an annual basis. The program administrator and grants manager stated that the City's programs and HUD operations have been determined to be in compliance with HUD regulations and requirements each year and there

⁵⁶ JHH & WHL interviews with HUD Program Administrator and Grants Manager, 6-14-07.

has been no adverse determinations.⁵⁷

We discussed the City's HUD program with Maria Paulson, the HUD regional office staff person with oversight responsibility for the Saint Paul office. Ms. Paulson has been responsible for oversight of the Saint Paul office since 2005 and is involved with monitoring the programs administered by the office, including HOME, CDBG and ESG (Emergency Shelter Grants). Ms. Paulson explained that 24 CFR part 85 contains uniform requirements for government entities and addresses affirmative action relative to minorities and women. Staff from the Minneapolis regional office monitors the City's overall program. While there is an annual audit of some aspect of the program, Ms. Paulson could not recall the last time that the City's program was audited with respect to compliance with the provisions that are the subject of this study. After further searching the data base to determine if there was an indication of when that type of audit last occurred, she was unable to find anything that indicated when those aspects of the program were last monitored. The primary report submitted to the Minneapolis office on an annual basis is "Summary of CPD-PIH-HSG Minority Business Enterprise Activity, HUD Form 2516A." With respect to the question of whether the City is meeting all of the program "requirements," Ms. Paulson stated that it is a fact that the City has not been found by the HUD office to be out of compliance with any aspect of the program.

We reviewed two different sets of guidelines provided by Ms. Paulson, which apply to cities concerning outreach standards. One related to guidance on MBE/WBE outreach and the other is a guideline on Federal Section 3. These guidelines are used by HUD trainers in explaining to grantees what they should be doing. We also received from Ms. Paulson a checklist used by HUD to review the procurement component for the HOME program and a checklist used in connection with procurement for the CDBG program. These "guidance" documents are applicable to the types of outreach that the office should engage in to ensure that it is meeting HUD requirements. The guidelines prescribe procedures and actions that HUD grantees should undertake in implementing minority and women's business enterprise outreach programs and also state what is required of HUD grantees with respect to targeting low and very-low income persons for employment and business opportunities. The guidelines are set forth at Appendix E. Ms. Paulson explained that while the guidelines do not specifically refer to Part 85, in fact they apply to multiple federal programs.

The two checklists set forth the program components reviewed by HUD to determine whether procurement activities for HOME and CDBG programs are in compliance and include the following:

For CDBG programs - Is the program participant taking affirmative steps to use small, minority-owned and women-owned businesses in grant funded contracts such as:

- including such businesses on solicitation lists whenever they are potential sources
- ensure that such businesses, when identified, are solicited whenever they are potential sources
- dividing procurement requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by such businesses
- requiring prime contractors when subcontracts are let, to take affirmative

⁵⁷ JHH & WHL interviews of HUD Program Administrator and Grants Manager, 6-14-07.

steps to select small, minority-owned businesses in grant-funded contracts

For HOME programs - Is the program participant taking affirmative steps to use small, minority-owned and women-owned businesses in grant funded contract such as:

- including such businesses on solicitation lists whenever they are potential sources
- ensuring that such businesses, when identified, are solicited whenever they are potential sources
- dividing procurement requirements, when economically feasible , into smaller tasks or quantities to permit maximum participation by such businesses
- requiring prime contractors when subcontracts are let, to take affirmative steps to select small, minority-owned businesses in grant-funded contracts

Discussions with others reveal that the PED staff is aware of the guidelines and requirements of HUD and other funding programs. It is not clear that staff engages in the types of outreach activities to the extent indicated in the guidelines provided by Ms. Paulson on a project-by-project basis. We interviewed PED staff who supervises the Housing Rehabilitation Program which uses HUD funds, as well as other types of funds for home improvement. With respect to the CDBG and HOME funds, staff explained that the HUD guidelines with respect to median income are applied. The HOME funded rehabilitation programs administered by both the City and subgrantees allow homeowners to choose their own contractors. For rental and large scale development projects, VOP and affirmative action goals are required. While there is an opportunity for outreach to women and minority contractors to perform the work, contractors selected by homeowners must be certified for purposes of removal of lead paint. Staff explained that this limits the opportunity for outreach to targeted vendors.⁵⁸ In discussing how the City prepares its annual report to HUD (CAPER), housing advocate staff described the information that is compiled, which includes some of the types of reporting required pursuant to Title 24, part 570. As for Federal Section 3, staff and others expressed the view that there are limited opportunities to apply it and that there is uncertainty with respect to its application. We were told that the Rondo library project may have employed some individuals with disabilities referred by Kaposia that fit the provisions of Section 3. It is noted that the HUD 2005 CAPER describes activities of the MBDR program. The “American Dream” program is described as benefitting persons with disabilities and MBDR proposed involvement of individuals with disabilities on the Rondo Library and Housing project is described. It is unclear whether persons with disabilities were actually employed on the project. The housing impediment analysis notes, at footnote 15, that there are increasing disparities for persons with disabilities in the Saint Paul area and also includes housing information pertaining to individuals with disabilities. Overall, there does not seem to be much focus on this area.⁵⁹ HUD monitors the performance of contractors, reviews annual reports from recipients and investigates complaints pertaining to Section 3. It also examines employment and contract records for evidence that recipients are training and employing Section 3 residents and awarding contracts to Section 3 businesses. It is unclear whether the regional

⁵⁸ JHH interviews with PED Staff I and PED Staff J, 7-12-07.

⁵⁹ JHH interview with PED Staff J, 7-12-07.

HUD office has been collecting the data that would indicate efforts to direct employment and other economic activities generated by HUD funds, to the greatest extent possible, toward low-and very low income persons. Attached as Appendix D is the HUD Summary Report Form used to collect and report such data.

As previously stated, the activities of the City's HUD program have not been determined to be out of compliance with HUD requirements. A more detailed audit than that undertaken by the consultants would be required in order to fully review and evaluate compliance with each aspect of the comprehensive HUD program. The discussion at Section VI. A. 4 (a), above, includes suggestions and a recommendation that we believe is consistent with HUD requirements. In addition, we made several findings that we believe will enhance the inclusion efforts which are the subject of this audit.

Finding : It is not clear that PED/HRA staff consistently engages in the types of outreach described in the HUD guidelines for procurement activities with respect to programs, including HOME and CDBG in all cases.

Recommendation : PED/HRA staff should consistently follow the HUD guidelines for outreach to include small, minority-owned and women owned businesses in procurement activities for CDBG and HOME programs, which include:

- including such businesses on solicitation lists whenever they are potential sources
- ensuring that such businesses, when identified, are solicited whenever they are potential sources
- dividing procurement requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by such businesses
- requiring prime contractors when subcontracts are let, to take affirmative steps to select small, minority-owned businesses in grant-funded contracts

Finding : It is not clear that PED/HRA staff follows the HUD guidelines targeting low and very-low income persons for employment and business opportunities on a contract by contract basis.

Recommendation : PED/HRA staff should routinely follow the HUD guidelines for targeting low and very-low income persons for employment and business opportunities and seek to implement the guidelines, where possible, as follows:

- Recipients and their contractors and subcontractors must show preferences for giving training and employment opportunities to low-income persons, to the greatest extent feasible. They should show priority considerations for hiring low-income persons as follows:
 - 1) Low- income persons residing in the service area or neighborhood in which the project is located.
 - 2) Participants in HUD Youthbuild programs.
 - 3) If project is assisted under the McKinney Act, homeless persons in the project area of the project.

4) Other Section 3 residents.

The persons hired should be qualified to perform the work required.

- Recipients and their contractors and subcontractors must direct their efforts to award Section 3 business, to the greatest extent feasible, to Section 3 business concerns in the following preference order:
 - 1) Section 3 businesses that operate in the project area.
 - 2) Entities that carry Youthbuild programs.
 - 3) Other Section 3 business concerns.

The business must be able to demonstrate that it can successfully perform under the terms and conditions of the proposed contract. In addition, these requirements do not restrict competition to only businesses meeting one of the priorities, nor do they authorize set-asides.

- Numerical goals for meeting the greatest extent feasible requirement:
 - For training and employment opportunities resulting from Section 3-covered housing assistance, a commitment to employ 10% of the aggregate number of new hires each year over the duration of the Section 3 project.
 - For training and employment opportunities resulting from Section 3-covered community development assistance, a commitment to employ 30% of the aggregate number of new hires for a one-year period.
 - For contracts awarded in connection with Section 3-covered projects, a commitment to award at least 10% of the total dollar amount of contracts for building trades work and at least 30% of the total dollar amount of all other Section 3-covered contracts.
- All recipients of assistance must:
 - Amend their employment and procurement policies to comply with Section 3.
 - Include the Section 3 clause in covered contracts and subcontracts.
 - Document their best efforts to comply with Section 3 and their success at hiring low-income persons.
 - Monitor their own compliance and the compliance of their contractors and subcontractors.
 - Provide annual reports to the Assistant Secretary for Fair Housing and Equal Opportunity as requested.
- Recipients must maintain the following records:
 - The good faith efforts made to make low-income persons aware of the positions, and to encourage and facilitate their application.
 - The number and dollar value of all contracts awarded to businesses and, in

particular, Section 3 businesses during the fiscal year.

- A description of the best efforts made to award contracts to Section 3 businesses.
- The mechanisms by which they ensured that contractors and subcontractors complied with the Section 3 preferences for training, employment and contract awarding.

Recommendation: PED/HRA staff should be required to make available and share with the community on an annual basis the information contained in the HUD Section 3 Summary Report, found at Appendix D.

(6) Other Programs and Initiatives

We sought to ascertain what activities PED and HRA are engaged in pursuant to other applicable laws that constitute outreach to the targeted communities. Regarding the broad range of development related activities authorized by Minnesota Statutes, Chapter 469, the “American Dream” Down Payment Assistance Program (ADDI) is designed to assist low income citizens with down payments. There is also a “Houses to Homes” program that subsidizes the cost of homes for low income persons and a “City Living” program which is funded through bond proceeds. While Chapter 469 authorizes an authority to “buy down” interest rates, HRA views its activities to subsidize development costs (which theoretically reduces the price of the homes and thereby reduces mortgages) as providing assistance in that area.⁶⁰ An example of a project that illustrates the process of review and analysis involved when programs such as the STAR program or CDBG funds are used is the White Bear Avenue/Smile Center project.⁶¹

Minnesota Statutes Section 574.26 through 574.32 pertains, among other things, to performance and payment bonds. More broadly, there is the question of what steps PED and HRA might take toward “leveling the playing field” for targeted vendors with respect to bonding, insurance, financing and related matters. Conversations with staff and a review of various programs listed at section VI. A indicate a number of initiatives PED and HRA have initiated that are intended to offer support for targeted vendors. One such program is the Small Developer Ownership Construction Program. It is a PED initiative whereby lenders are urged to support small developers by lending up to 90% of construction financing (whereas usually they will lend only 80% and require a 20% equity position on the part of the developer). The City guarantees the additional 10%. The program is touted by the City as a useful tool to assist small businesses in obtaining funding. However, the program is relatively new and it has not yet yielded results. The experience of the first contractor with a project involved with this program is such that he has maintained that lenders do not embrace the program. This minority developer has provided information and testimony to the City asserting that the City does not provide a welcome environment for minority contractors and

⁶⁰ JHH interview with PED Staff K, 7-12-07.

⁶¹ White Bear Avenue/Smile Center project file involved the Neighborhood Star program and use of CDBG funds. The file documents the participation of neighborhood and community groups, projected job creation and CDBG rationale for funding. The loan agreement states that the project is undertaken pursuant to authority authorizing HRA to take such actions in certain designated and/or targeted areas pursuant to Minnesota Statutes Section 469.001 through 469.047.

developers.⁶²

The VOP ordinance provides that “..the manager shall develop and administer a program to assist certified businesses to obtain bonding and insurance.”Sec. 84.06 (13). PED operates the Working Capital Loan Fund, the purposes of which are to provide funds for activities, including payroll, gap financing, supplies, bonding and insurance and other qualified activities. The City had \$100,000 in the early 90’s and set up a bonding assistance fund. This was when bonding was required on all contracts of \$2,000 or more. The City worked to get this bonding threshold raised by the State legislature. This made the bonding fund less useful because the bond costs on larger projects used up the small fund more rapidly than when bonds on smaller projects were the focus. The VOP Manager worked it out for PED/HRA to solicit proposals to administer what became called the Working Capital Loan Fund (WCLF). The Selby Area CDC (SACDC) and Women Venture responded and now each administers ½ of the fund. PED administers the City grant to the two organizations. The organizations report to PED. Selby Area CDC administers a loan guarantee program and Women Venture does direct loans. They operate similar programs with other funds as well. PED reviews performance, receives grant reports and processes annual request to renew the grants. The VOP staff connects contractors with needs to the WCLF grantors by telling contractors about the program and giving phone numbers. The MBDR program of PED also refers contractors with needs. VOP staff does not get a lot of requests for assistance.⁶³

Consultants obtained reports from Selby Area CDC and contract documents from Women Venture and reviewed them. Review of performance on the City’s WCLF programs is beyond the scope of this audit. While the intended purpose of contracting out the effort to private organizations was to make the loans more accessible to small minority owned business and to maximize the money and resources available to serve these businesses, it appears that some of the project managers, buyers and other City staff who might be in a position to identify businesses that would benefit from the Fund and make referrals to it, may not be as aware of the Fund as they might be. This may in part be a result of contracting out the Fund. If the Fund were staffed by the City, awareness of the program might result from encountering the City employees who staff it. It appears that the full potential for the fund to accomplish its purposes is not being met.

PED operates a range of additional programs and initiatives, including Cultural Star Capital Project Programs, Neighborhood Star Loan and Grant Programs and Economic Development Loan Programs.

Findings: A number of PED initiatives, such as the Working Capital Loan Fund and the Small Business Developer Ownership Construction Program, are not operating in a manner to maximize capacity building with respect to targeted vendors. These programs could benefit by focusing on steps to make the programs more accessible to targeted businesses, additional training for staff and further promoting the programs in the community. Additional resources are needed to support these efforts.

⁶² Remarks at HRA meeting, 6-13-07, with respect to Griffin Garden Rowhouses development project.

⁶³ WHL interview with VOP coordinator ,8-3-07, WHL interview with CAS manager, 5-25-07.

Recommendation: PED initiatives to support capacity building should be reviewed in order to implement steps designed to make programs more accessible to targeted businesses, provide additional staff training and further promote the programs in the community. An emphasis should be on making the programs more focused upon eliminating barriers to inclusion identified in Chapter 84. Additional resources should be made available to support these efforts.

(7) Compliance Reporting

Chapter 84 provides that each City department shall prepare reports of the levels of participation for professional service contracts and PED shall prepare reports reflecting goals and results with respect to development and other grant projects under its jurisdiction. It further provides that CAS shall prepare reports reflecting goals and results with respect to contracts under its jurisdiction. These reports are to be filed with the CAS manager with a summary of information provided to the Mayor and Council.⁶⁴

PED prepares an Annual Production Report, which has two components pertaining to economic developments and housing. In addition, PED prepares a quarterly report reflecting project goals and results which is called the PED Report Card. At PED, the Report Card is prepared by the PED staff. It contains goals and results for projects in process and completed projects. There are forms which are provided to contractors and sub-contractors and required to be submitted with requests for payment. The numbers pertaining to specific projects are calculated and inserted into a spreadsheet. Drafts of the spreadsheet are forwarded to the project manager, Vendor Outreach Manager and Director of DHR, for review and occasionally they add comments. Only privately owned projects are included in the PED Report Card and the projects have a 15% goal. HRA owned projects, with goals set on a project-by-project basis, are bid by CAS and reflected in its reports. The PED Report Card is posted on the PED web site.⁶⁵

⁶⁴ Sec. 84.10 (c).

⁶⁵ JHH interview with PED Staff F, 7-13-07.

B. Division of Contract and Analysis Services

The City of Saint Paul Contract & Analysis Services Section (CAS) plays an important role in PED/HRA inclusion efforts. The Vendor Outreach Program (VOP) of the City is a part of the Contract & Analysis Services section.

(1) The Vendor Outreach Program (VOP)

The manager of CAS is the City employee who is designated in the VOP Ordinance to direct and administer the VOP program. Sec. 84.05 (a). The CAS manager directs and administers the establishment of desired levels of certified vendor participation and the certification of businesses. The manager directs and administers the prime contract and vendor contract requirements. The CAS manager directs monitoring and reporting on goals established and the results of efforts to meet them. The program coordinator of VOP is a CAS staff member. CAS staff provide contract formation services for PED and HRA.

(a) PED/HRA Contracts for Which CAS Provides Services

A section of the Office of Financial Services of the City, CAS provides contracting services to the departments of the City. Admin. Code, Sec. 2.02 (G) (6). CAS also issues certain contracts for the HRA. These contracts are not projects brought to the City by developers or others seeking funding. They are contracts where the City or HRA itself is initiating the project. Situations where this occurs include development and construction of city or HRA owned facilities, demolition and site preparation projects to make land available for development, and professional services contracts for studies and plans.

CAS also provides contracting services to PED/HRA for professional services contracts. The VOP Ordinance expressly applies to professional services. Sec. 84.01 Declaration of Policy and Purpose.⁶⁶ Sec. 84.06. Establishment of Desired Levels of Participation.⁶⁷ Site planning, environmental assessment, and other PED/HRA activities involve engagement of the services of engineers, planners, architects, consultants and other professionals. Professional services contracts are not subject to competitive bid requirements. CAS prepares and issues professional services solicitations for contracts over \$5,000 for the departments, including PED/HRA. Departments can do professional contracts under \$5,000 directly. A professional services contract can result from issuance of a request for proposal (RFP), or it may be a “negotiated” professional services contract, that is negotiated with a single source. When a department does not use CAS services to issue an RFP, Contract Services may not be made aware of the contract. Some professional services contracts present opportunities for certified vendors to obtain subcontracts. In such cases they are prime contracts upon which goals for VOP participation may be appropriate.⁶⁸ The Departments do not

⁶⁶ The ordinance includes: In doing so, this ordinance is intended to remedy and correct the effects of past discrimination in construction, goods, services and professional services whose effects still burden small and minority-owned and women-owned businesses in the city. (emphasis supplied).

⁶⁷(c) (7) As to professional services, the levels of participation that are established by other city departments and offices.

⁶⁸ Two examples of such contracts reviewed were the contract for site planning for the former Ford Motor Company
(continued...)

always tell Contract Services about professional contracts.⁶⁹

(i) CAS Services

CAS manages the purchasing and contracting process. According to Minnesota law, formal sealed bid procedures are required for contracts over \$50,000. Admin. Code Sec. 82.02 (a). Sealed bids are an option when the contract is between \$10,000 and \$50,000. Admin. Code Sec. 82.03 Also the practice is to competitively bid labor services.⁷⁰ Examples are tree pruning, lawn, and janitorial services. When a competitive bid process is used the standard solicitation process involves notifying possible bidders of the opportunity to bid and advertising it, providing bid specifications, receiving and processing bid responses, reviewing the bids submitted and comparing responses. The CAS buyer routinely identifies certified businesses that are potential sources and notifies them of bidding opportunities. For example, the CAS buyer maintains and updates a list of certified vendors who do demolition work. This list is generated using the codes for the type of business a certified vendor does. These lists are updated as the certified vendor pool changes. Bid specifications include details on all of the laws and ordinances with which bidders must comply. Included are the requirements for vendor outreach to MBE's, WBE's and SBE's and for affirmative action in employment. It involves working with the departments respecting bidder selection. For contracts of any amount, whether or not bid procedures are undertaken, if a contract will involve subcontracting, the buyer sets certified vendor participation goals, reviews the contractor's commitment to efforts to include WBE's, MBE's and SBE's among its subcontractors and determines whether Vendor Outreach goals will be accomplished. If a contract will not involve subcontracting, CAS undertakes outreach to certified vendors. Vendor outreach efforts are discussed in the Vendor Outreach Program (VOP) section below.

(ii) Contract Categories: Under Chapter 84

There are two categories of City contracts: prime contracts and vendor contracts. Prime contracts are for projects where it is reasonably likely that the prime contractor "will use, contract with or seek bids from, one (1) or more subcontractors." Sec. 84.03 Definitions, "Prime contract". "Vendor contract" means a contract with a vendor as to which "the vendor will not use, contract with, or seek bids from, subcontractors." Sec. 84.03 Definitions, "Vendor Contract." The Vendor Outreach Program applies to both categories of contracts. Because VOP goals are for utilization of subcontractors, the goal setting process applies only to prime contracts. In effect a 100% goal for utilization of a VOP certified vendor would be a set aside of that contract.

(iii) Prime Contracts

Nearly all City prime contracts are construction projects. The staff person assigned to

(...continued)

site and the contract for Consultants services for Central Corridor light rail transit development. In both cases inclusion of consideration of participation by certified subcontractors in evaluating responses produced significant VOP participation results.

⁶⁹ WHL interview with CAS manager, 5-25-07.

⁷⁰ WHL interview with CAS manager, 5-25-07.

administration of these contracts is a management assistant IV who has been the “construction buyer” for many years. Only occasionally does another buyer administer a construction project contract. Many professional services contracts are also prime contracts. As is discussed above only some of PED/HRA prime contracts are administered by CAS.

(iv) Goal Setting

The VOP Ordinance requires the manager to set desired levels of participation annually both for prime and for vendor contracts. Sec. 84.06 (a). For prime contracts the manager is also to adjust the goals on a contract by contract basis. Sec. 84.06 (b).⁷¹ The adjustments are designed to tailor the goals to the particular subcontracting possibilities and to reflect the availability of certified vendors for the particular work to be done. The goals then can be targeted to the classifications of work for which there is an adequate pool of certified vendors available. The VOP Ordinance also specifies the factors the manager is to apply in setting levels of participation. Sec. 84.06 (c).⁷² When

⁷¹ Sec. 84.06 (b) *Adjustments for individual prime contracts.* The manager shall also establish and/or, where appropriate, modify levels of participation by subcontractors, which may be more or less than the annual levels established in subsection (a), for individual prime contracts, taking into account the total dollars of the contract and the dollars in the contract which may reasonably be expected to be subcontracted. In setting such level of participation, the manager shall also take into account and remove from consideration those amounts and works under the contract and subcontracts which cannot be performed or supplied by subcontractors which are certified as eligible for participation in the vendor outreach program. Such levels of participation shall be established by SIC Code where appropriate, and the manager shall indicate which codes included within the definition of SIC Code are being used and for what purposes.

⁷² Sec. 84.06 (c) *Factors.* In setting levels of participation of SBEs, MBEs and WBEs, whether annually under subsection (a) above or for individual prime contracts under subsection (b) above, the manager shall endeavor to arrive at the number of such businesses (i) which are currently available in the marketplace and which are qualified to do the particular work required by the city contract, and (ii) which would reasonably be expected by normal economic and business operation and market forces to participate in such vendor contracts and prime contracts, in the absence of present discrimination or the effects of past discrimination.

The manager shall consider the following factors in establishing levels of participation:

- (1) The practical, as opposed to theoretical, availability of SBEs, MBEs and WBEs ("such businesses" in this subsection) in the marketplace;
- (2) The particular goods and services, or construction or development projects, for which such businesses are available;
- (3) The past levels of participation of such businesses in city vendor contracts or as subcontractors in city prime contracts;
- (4) The reasonably anticipated number and amount and type of city vendor contracts and subcontracting opportunities in city prime contracts for the next fiscal year;
- (5) Whether the reasonably anticipated contracts are for goods or services, or construction contracts, for which there are few or no such businesses available or qualified to do the particular work, or to do subcontracts;
- (6) Whether such businesses will be able to obtain necessary bonds, insurance policies, and equipment or personnel required to perform such city vendor contracts or subcontracting on prime contracts;
- (7) As to professional services, the levels of participation that are established by other city departments and offices;
- (8) Whether the reasonable and necessary requirements of the contract render subcontracting or other participation of business other than the bidder or proposer infeasible;
- (9) Whether a public or administrative emergency exists which requires the goods or services, or construction or development project, to be delivered or performed with unusual immediacy;

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a prime contract is administered by CAS certified vendor participation goals are set on a contract by contract basis.

CAS staff sets goals on construction contracts including PED/HRA contracts referred to CAS for administration. The management assistant IV does most of the goal setting. The VOP Program Coordinator also sets some goals. The process of setting goals includes:

(1) Obtain information on the scope of the project and the money amounts to be spent on each type of work.

(2) Review the pool of certified businesses. In some cases there few or no certified contractors. For example, one minority company maintains elevators, but none supply them. There are only 3 precast concrete companies in the Midwest., none are VOP certified.

(3) Consider past bidding activity. An example of an issue affecting availability is whether the listed contractor follows through by actually submitting bids.

(4) Consider similar past projects to determine

1. Is the project conducive to subcontracting?
2. What the level of VOP participation has been in past similar projects.

(5) Consider vendor pool changes. Special circumstances can affect the certified vendor pool's availability; e.g. a lot of projects at same time can mean fewer vendors may be available.⁷³

Another factor affecting the available vendor pool is whether the subcontractors must meet a requirement to use union labor. Many certified businesses are not union. Union labor requirements constrain the certified vendor pool for a project.⁷⁴ Although State law limits the City from requiring union labor, prime contractors may require their subcontractors to use union labor even if neither the City nor HRA imposes such a requirement. Another limitation on opportunities for certified vendor participation is the size and scale of the project. There are significant challenges when a project is very large, such as the Excel Center. Their scale makes use of small firms more difficult. Most do not have the resources or experience to manage and execute on so large a scale. Also a great deal of the money spent for the project goes for purchase of materials. An example is concrete. There is

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(10) Whether the number of certified SBEs, MBEs or WBEs providing the services required by the contract are so few as to render them unavailable in practical terms, despite attempts to locate them; and

(11) Whether the application of the provisions of this ordinance will impose an unwarranted risk on the city or unduly delay acquisition of the goods or services, or completion of the construction or development project.

(12) Availability shall be construed as broadly as is lawful and reasonably possible in order to effectuate the goals of this ordinance.

⁷³ WHL interview VOP Program Coordinator, 8-03-07.

⁷⁴ WHL interview with CAS staff A, 6-15-07.

only one supplier used by everyone in the twin cities and, it is not a certified contractor. This means that portion of the project does not present an opportunity for certified vendor participation.⁷⁵

When setting project by project goals, desire to reach a target goal is balanced with what is realistic. No formula or mathematical calculation is used to set the goals.⁷⁶ See specific discussion and findings at (c)(v). Reporting of VOP Participation on page 51.

Finding: Because setting goals on a project by project basis involves weighing of many factors and facts specific to each contract, determinations of whether or not an appropriate goal was set on any particular project is difficult. Also the factors considered and the weight given to them are not recorded in the project files. Audit of the goals figures in therefore not feasible.

Recommendation: The factors considered and the weight given them when setting a project VOP participation goal should be disclosed in the project file. The goals set and results achieved, however, should be analyzed to enhance determination of whether goals are being appropriately set. CAS should aggregate and analyze the information on the contracts for which it is responsible to improve evaluation of the setting and achievement of goals.

(v) Meeting VOP Goals

While the VOP Ordinance requires all prime contractors to submit evidence of VOP compliance in order for the bid to be awarded, the Ordinance provides two different ways for a prime contractor to do this.⁷⁷ The most common is for the low bidder to agree to the proposed VOP goal

⁷⁵ WHL interview with CAS staff A, 6-15-07.

⁷⁶ WHL interview VOP Program Coordinator, 8-03-07.

⁷⁷ Sec. 84.08. Prime contract bid requirements.

(a) *Evidence of compliance with bid documents.* Each apparent low bidder on a city prime contract is required to submit, before the bid is awarded to it, evidence of its compliance with the requirements of the vendor outreach program, on such forms as the manager may prescribe. Such forms may include a certification by the bidder that the bidder will not use any subcontracts on the particular job. Such evidence shall be submitted after the opening of the bids, and on or before a date to be established by the manager, but in no case after the tenth day following the opening of such bids.

(b) *Compliance with outreach requirements.* Such a bidder shall submit evidence (1) that it has complied with the outreach requirements of the vendor outreach program specified in subsection (c) in this section 84.08, and (2) that it sought to enter into subcontracts with certified SBEs, MBEs and/or WBEs who are willing and qualified to do the work required by the particular subcontract. Such evidence shall be submitted on such forms and meeting such requirements as the manager may determine necessary to establish that the bidder did comply fully and completely with such outreach requirements. The presence of fraud, misrepresentation, or intentional discrimination by the bidder shall negate compliance with outreach requirements hereunder.

(c) *Outreach requirements.* The following steps are required for compliance with the outreach requirements of the vendor outreach program in this section 84.08.

(1) List each possible subcontract opportunity in the prime contract, indicating where possible the SIC Code of such work, seeking the assistance of the manager in ascertaining such subcontract opportunities.

(2) Obtain a current list of certified SBEs, MBEs and WBEs from the manager, which list shall contain where available the applicable SIC Code or codes for such businesses.

(3) Attend all pre-bid conferences to obtain information about the vendor outreach program, the levels of

(continued...)

and indicate in the bid response the certified vendors the prime contractor will contract with to make the goal the City has proposed. This is referred to as the pre-commitment method of compliance with the VOP requirements. The prime contractor qualifies by meeting the alternative compliance provision of Sec.84.08 (d). It means that the contractor need not document the outreach efforts undertaken to locate and contract with subcontractors. The City does not inquire into the outreach undertaken by the contractor. It does not require documentation of the ten outreach steps listed in Sec. 84.08 (c). The buyer looks at the apparent low bidders submissions to see if the prime has agreements with subcontractors that meet the goal. If the submitter meets the requirement by meeting the goal no follow up is made to determine what the submitter in fact did to get that result.⁷⁸ The promise to contract with the certified subcontractors the prime designates becomes a binding contract term. It is no longer a participation goal. It is enforceable like all contract terms. The less common alternative occurs when the apparent low-bidder does not agree to meet the full VOP goal

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participation of certified SBEs, MBEs and WBEs, and the outreach requirements herein.

(4) Request assistance from minority and women community organizations, minority and women contractor groups, or other organizations that provide assistance in the recruitment and placement of SBEs, MBEs or WBEs.

(5) Obtain a current list of minority and women publications from the manager.

(6) Solicit bids from certified SBEs, MBEs and WBEs, which have been identified by the manager in consultation with the bidder as being available and capable of performing the necessary work, for the subcontracts within the prime contract at least ten (10) days prior to bid opening, by phone, advertisement in a local paper and the relevant minority publications on the list obtained from the manager, or other means specified by the manager, by written notice to the bidder. The bidder for the prime contract must solicit bids from a minimum of five (5) such certified businesses for each subcontract within the prime contract, by SIC Code where available and applicable. If the applicable certified list, using the SIC Code or codes where available, is five (5) or fewer, such bidder must contact the entire list.

(7) Provide plans and specifications or information regarding the location of plans and specifications to certified SBEs, MBEs or WBEs.

(8) Where applicable, advise and make efforts to assist interested SBEs, MBEs and WBEs to obtain bonds, lines of credit, or insurance required to perform the contract.

(9) Submit documentation if bids from certified SBEs, MBEs or WBEs were rejected, giving the complete basis for the rejection and evidence that the rejection was justified.

(10) Bidders on prime contracts who continuously list the same certified SBEs, MBEs and WBEs as having been contacted and listed as unavailable, when contact has previously been unsuccessful as a result of disconnected phone numbers or returned mail, will not be deemed to be in compliance with the outreach requirements.

(d) *Alternative compliance.* Notwithstanding the foregoing, a bidder on a prime contract shall be deemed to have complied with the above outreach requirements of the vendor outreach program, if such a bidder submits evidence with its prime contract bid documents that it has already entered into binding contracts with certified subcontractors whose contract dollar amounts meet the levels of participation established for that prime contract. A subcontractor is certified for the purpose of this subsection if it is certified before the award of the contract. If such bidder submits the name of a proposed subcontractor to satisfy this program, and the subcontractor is not certified before the award of the bid, the dollar amount of that subcontract will not be counted in determining the level of participation of certified SBEs, MBEs and WBEs, and the bid may be rejected as being unresponsive if the bidder has not otherwise complied with the above outreach requirements of the vendor outreach program as required by this section 84.08. Bidders shall not count toward the desired level of participation any agreements with businesses that are not located within the marketplace or otherwise do not meet the guidelines as set forth in this ordinance. The bidder may include first and second tier subcontractors and suppliers as meeting the desired levels of participation.

⁷⁸ WHL interview with CAS manager, 5-25-07.

specified in the bid documents. Then the prime contractor may qualify by documenting the outreach efforts undertaken as specified in Sec. 84.08 (b)-(c). The City then determines whether the Prime contractor has undertaken the outreach steps in good faith, but has been unsuccessful in reaching the full VOP goal nonetheless. If they were undertaken in good faith the bid is considered responsive and the contract is awarded. This is referred to as the good faith effort method of compliance. The listing of specific clearly defined outreach steps that must be undertaken to demonstrate that the prime contractor has complied with VOP in good faith is a strength of the St Paul Ordinance.⁷⁹ An additional outreach step that should be added, however, is subdividing contract work into economically and operationally feasible units that will increase opportunities for certified vendors to bid on subcontracts. See the discussion and recommendation at p. 45 below.⁸⁰

If a certified subcontractor wants to learn why the prime contractor did not accept his bid, if the prime contractor is required to document outreach efforts the subcontractor may learn the rejection reason. If a contractor seeks to qualify by documenting outreach efforts, the contractor must disclose the complete basis for rejection of the bid of a certified subcontractor and provide evidence that the rejection was justified. Sec. 84.08 (c) (9). CAS has not interpreted the Ordinance to require compliance with this requirement, however, when the contractor uses the alternative method to qualify. This means that a certified subcontractor may not be able to learn why its bid was rejected, because according to current practice CAS will not require submission of that information with the bid response. The matter of whether subcontractor rejection reasons must be submitted even when the prime qualifies by making precommitments is being litigated. In a Nov. 7, 2007 Order, a Ramsey County District Court Judge has ordered the City to obtain from contractors whose contract dollar amounts meet the levels of participation established for a particular prime contract, documentation that they have given rejected subcontract MBE, SBE, and WBE bidders the reason why their contracts were rejected. The court has also ordered that these prime contractors document that requests for bids were made to the rejected bidders in a timely manner. The City disputes the decision and it is not yet final. Sec. 84.08 (6) requires bid solicitation to be at least ten days prior to bid opening.⁸¹ One of the requirements of Sec. 84.08 (b) is that prime contractors submit evidence, “(2) that it sought to enter into subcontracts with certified SBEs, MBEs and/or WBEs who are willing and qualified to do the work required by the particular subcontract.”

The City’s vendor outreach procedures include attaching an explanation of the VOP requirements entitled VENDOR OUTREACH PROGRAM to every Request for Bid or Request for Proposal it issues.⁸² It provides that the apparent low bidder must submit a General Contractor Utilization form indicating the registered vendors that will be used on the project within ten days after a vendor notification letter is mailed. A copy of the form is included. Also the procedures provide that the apparent low bidder “is also responsible for submitting the Intent to Perform forms (copy follows) completed and signed by the registered subcontractors certifying that they are going to perform this work.”

⁷⁹ Consultants have reviewed the May 2007 “Evaluation of the City of Minneapolis Department of Civil Rights Contract Compliance Unit” by the City’s Department of Civil Rights” It recommends to Minneapolis Denver’s Ordinance provisions defining good faith steps. In our view St. Paul’s VOP Ordinance is superior to that of Denver. It is more clear and focused.

⁸⁰The Denver Ordinance discussed in the footnote next above addresses this issue but in different terms.

⁸¹ Conover vs. City of St. Paul, Court File No.: 62-C3-06-006503, Ramsey County District Court, Findings of Fact and Order for Judgment, Nov. 2, 2007.

⁸² Affidavit of CAS staff A dated April 16, 2007, Conover v. City of Saint Paul, paragraph 6

The “General Contractor Utilization Commitment Form” on which the prime is to list the name of each certified subcontractor, describe the work the subcontractor will do and the dollar amount of each subcontract, states on it in bold type, “Changes in contract amounts or subcontractors must be approved in advance by VOP staff. Questions? Call 266-8900.” Copies of this form or other documents with the names and amounts of subcontracts are generally found in the CAS files.

The “Subcontractor Intent to Perform” forms which each subcontractor is to sign acknowledging the subcontract commitment of the prime and the amount the subcontractor will be paid are supposed to be sent to the CAS buyer as part of the approval process. This form is designed to implement the requirement of the VOP Ordinance that deems qualified a bidder that “submits evidence with its prime contract bid documents that it has already entered into binding contracts with certified subcontractors whose contract dollar amounts meet the levels of participation established for that prime contract...” Sec. 84.08 (d). The bidder has 10 days from bid opening to submit its documentation of VOP compliance. Sec. 84.08 (a). These provisions are designed to prevent prime contractors from listing possible certified subcontractors to get the contract but then not following through with those subcontractors. When a prime contractor makes a binding commitment to a subcontractor for a specific contract amount the subcontractor has the knowledge and the legal standing to make sure the VOP commitment agreed to actually happens. The form includes that the subcontractor’s signature is to be secured and on the form when it is filed with the City. Almost no copies of these forms signed by subcontractors were found in the files reviewed. The Vendor Notification Letter sent to the apparent low bidder requires submission of a list of all subcontractors, but does not require submission of Subcontractor Intent to Perform forms. The files consultants reviewed did not include any other evidence documenting that the prime contractor has entered into binding contracts with certified subcontractors whose contract dollar amounts meet the levels of participation established for the prime contract.

Documentation of the prime contractor’s commitment to contract with specified certified businesses is important to enforcement of the VOP provisions of the contract. Failure to document the prime’s commitment prior to final execution of the contract leaves the particulars of the prime’s commitment ambiguous.

Unfortunately there are contractors who list certified subcontractors and subcontract amounts but do not engage the specified contractor. As the discussion of the 2286 Capp Road demolition and site clearance project that follows reveals, our audit disclosed one such situation. The prime, Veit & Company, submitted to the CAS buyer a list of three certified subcontractors and amounts in order to meet the VOP goal and therefore not have to document outreach efforts. The subcontract amounts exceeded the 5% VOP goal. Consultants inquiry of a WBE and an MBE listed by the prime determined that the prime did not contract with the specified subcontractors. Whether any City official knew about this is not clear from review of files. The PED project file did not include the list of subcontractors the prime submitted to the CAS buyer. Instead it included a different list requested by the PED engineer who was managing the project. This second subcontractor list did not indicate subcontract amounts or whether the subcontractors were certified. From the businesses names it appears that they were to do different work than was to be done by those on the list submitted to the CAS buyer. From the files reviewed by consultants actual VOP participation on the project could not be determined. By consulting the businesses, consultants determined that two of the contractors listed on the second list of subcontractors were certified, and were paid amounts that indicate that the 5 % VOP goal was exceeded. Without additional information the full total VOP

participation was not determined. The report to the public on VOP participation on the project (On Target, April 2007 and detailed report for 2006) was based on the information from the first list of subcontractors, not the actual results, and is, therefore, inaccurate.

As the 2286 Capp Road project demonstrates there are not procedures in place that will assure that significant information needed to make the VOP program effective is communicated with people who need it to be sure that contractors are following through on their inclusion commitments. There was no procedure requiring the CAS buyer to inform the PED project manager of the specifics of how the prime contractor intended to meet the VOP goal. Also, when the project manager obtained subcontracting information from the prime contractor, he did not obtain information on subcontract \$\$ amounts or certification status. With nothing to compare, the project manager was unable to identify that the prime's subcontractor list had changed. Because the later list of subcontractors was not shared with the CAS buyer, the difference in the lists was not discovered. Even when the information for On Target was obtained, the difference was not discovered. On Target based its report on the initial promises of the prime, not on what actually occurred. If signed acknowledgements of the subcontracts and their amounts had been provided before the contract was signed, the subcontractors would have had the information and an incentive to complain to the City if the prime contractor did not follow through on the subcontracts. If the project manager had learned of the need for substitution of subcontractors, and had discussed with the prime contractor the need for the change, the department, in consultation with VOP staff, could have determined whether to modify the contract to permit the substitution.

The City has a process for identifying subcontractors, their certification status, the nature of their work and the subcontract amount. Some files maintained by the VOP program coordinator include copies of forms entitled, "Identification of Prime Contractor and Subcontractors (Including Material Suppliers). The current version of the form has a place for the VOP goal, both dollar and percentage. There are columns for identifying the prime and subcontractors as W/M/S/BE, to indicate whether each is certified, for listing the nature of the work, the date work is to begin, the date work is completed and the contract amount. The form includes: "Form must be updated and submitted when you add, delete, or make other changes to the list."⁸³ The version of this form revised 10/2/2003 indicates it should be submitted to the Department of Human Rights (DHR) and/or the Dept. of PED. The version of the form revised 10/28/04 provides that the form is to be submitted to DHR and PED and CAS. Why copies are in some of the VOP Program Coordinator's files and not in others is not apparent from review of the files. An earlier version of the form, still found in a 2005 file, indicated the form was a Department Of Human Rights form and listed that department only. This form is supplied to contractors by the Department of Human Rights. DHR collects the information to be able to know who the contractors and subcontractors are to monitor their employment relative to affirmative action goals. If submission of this form was universally required and all information on it required to be completed and if staff were designated to review these forms, compare them with earlier submissions and evaluate them, enforcement of the VOP compliance requirements would be enhanced.

Finding: The City is not always obtaining from contractors, who are claiming compliance with VOP requirements by fulfilling the proposed VOP goal, signed acknowledgments by certified subcontractors of the subcontract and its amount prior to final action on a City contract.

⁸³ WHL review of Gander Mountain Headquarters VOP file.

Commitments by prime contractors to subcontract with a certified business are not regularly communicated to project managers, and changes in subcontractors are not being adequately tracked and monitored. Subcontractor changes are taking place without the knowledge of VOP staff. The consequences of subcontractor changes are not being evaluated. The result is that prime contractors can fail to abide by the subcontractor commitments made to qualify as a responsive bidder without any consequences. Failure to identify such matters contributes to a belief by contractors that reports are filed, but nothing is done with them.

Recommendation: As a precondition to signing the City's contract with the prime contractor, the City should require prime contractors who claim compliance with VOP requirements by fulfilling the VOP goal to submit acknowledgments signed by each certified subcontractor of the intent of the prime contractor to subcontract with that subcontractor. The nature of the work and the contract dollar amount should be specified. The VOP program should establish procedures for tracking and monitoring after the contract is signed to assure that subcontractor commitments and any need for changes to them are communicated to both the project manager and to VOP staff. Working together with the prime contractor, the project manager and VOP staff should assess any need for a change in certified subcontractors and act on requests for changes in a manner that advances the purposes of the VOP program.

(b) The Need for Early VOP Program Involvement

(i) Early Involvement.

For the VOP program to be effective it is important to have input early in the consideration of City projects. The presence of staff is most significant at early stages. PED/HRA characterizes projects in their early stages as conceptual and pre-development projects. VOP staff attends pre-developer meetings of the departments, including PED. These are meetings where City staff is considering a development project and has not yet selected a developer or general contractor. At these meetings the VOP Program Coordinator urges upfront consideration of the VOP goals to be required. She also helps to evaluate the success general contractors or developers who might become involved with the project have had with achieving VOP goals on other projects. In the last year or year and one half, she has had increased inquiries about companies' performance with VOP. She is not sure of the context or the reasons she was asked.⁸⁴ VOP staff is not certain that they are made aware of all such meetings. It is also at the early stages that subdividing the project into smaller parts as a means of increasing VOP participation can be considered. Early involvement of VOP staff is not always possible. In some cases the developer brings the project to PED/HRA for funding after preliminary work is complete. In those cases, however, VOP staff can assist in determining whether participation levels by certified vendors prior to submission of the project were sufficient to merit City funding if VOP staff is notified of the request before PED/HRA makes a funding commitment.

Finding: VOP staff are not always advised of PED/HRA projects in the conceptual and pre-development phases prior to making a funding commitment and offered an opportunity to have input on VOP goals, developer and contractor selection, and funding approval.

Recommendation: PED/HRA should be required to involve VOP staff at the conceptual

⁸⁴ WHL interview VOP Program Coordinator, 8-03-07.

and pre-development stages and prior to making a funding commitment on all of its projects.

(ii) Businesses Past VOP/AA Performance

As is discussed at pages 13-15 above, the policy for disposition of HRA owned real estate includes, as part of the criteria for developer selection, an evaluation of the developer's demonstrated ability to meet equal opportunity/affirmative action employment and contracting goals and to provide equal opportunity to minority/women-owned businesses, as well as demonstrated past history in those areas. The City's VOP and AA programs do not have a procedure for recording and evaluating the performance of contractors on accepting and achieving VOP/AA goals. The absence of systematic collection of information respecting past performance results in having to rely on impressions of City staff, including VOP staff. These impressions are part of the personal experience of each staff member. If the staff involved in evaluation of past VOP/AA performance are new, the ability to make sound judgments about the selection of developers and prime contractors is limited. Furthermore, impressions that are not recorded and that are not based on established performance evaluation criteria are not well documented and are difficult to defend should they be challenged by a rejected developer or prime contractor. It is particularly important to have such procedures when past performance is considered when PED/HRA selects developers or prime contractors or professional services providers.

The information of past performance should include (a) the record of goals set, goals accepted and goals achieved by the business on St. Paul/HRA contracts, both in terms of certified vendor participation and achievement of affirmative action hiring goals, (b) the record of responses by the business to recommendations by St. Paul/HRA designed to improve inclusiveness, (c) the inclusiveness record of the business on contracts with other government bodies, (d) the inclusiveness policies, practices and record of the business in its non-governmental contracts.

Vendors should know that their record respecting accepting and achieving goals for participation and for employment is important to getting more of City/HRA business. They need to know that the City/HRA is keeping track of promises they make to do better in the future. They need to know that the City/HRA is following up to see that recommendations are being acted on. Also this information should also benefit contractors. Businesses should be able to put forth their superior record on inclusiveness when seeking City/HRA funding for a project. A superior inclusiveness record should become a basis for the City/HRA to do business with a larger number of developers and prime contractors.

Finding: There is no procedure for compiling records documenting contractors and developers past performance accepting and achieving VOP and AA goals. Uniform records of past performance of developers and contractors are not regularly maintained.

Recommendation: PED and the other City departments, in conjunction with VOP staff, should establish procedures for the recording and evaluation of the performance of developers and prime contractors in accepting and fulfilling VOP goals. A system for compiling information on VOP/AA performance and documenting it should be established.

VOP staff attends meetings with developers before they are approved. At these meetings VOP staff tells of the goals being considered and offers to help find businesses or gives them a list

of certified vendors.

After agreement with the developer or prime contractor VOP staff also attends pre-construction meetings to explain the VOP compliance requirements and provide information that will assist the prime contractor and any subcontractors who attend to identify VOP certified subcontractors for work if subcontracts have not yet been let.⁸⁵

(iii) Means for Increasing Certified Vendor Participation

Two ways to lessen the impact of factors that adversely affect VOP participation are to break the project into smaller components and to encourage and work with joint ventures between large and small contractors, including small MBE's and WBE's.

(iv) Dividing Projects Into Smaller Bid Packages

An example of dividing the project into smaller bid packages is the Smith Ave. Parking Garage project. This was a PED project that was bid by CAS because the City was the owner of the garage that was to be built. The City did not select a general. It then broke out the electrical work, the plumbing, etc. into separate projects. The CAS construction projects buyer then set VOP goals for each of the separate contracts. This required the prime electrical contractor, for example, to seek out certified subcontractors to do part of the electrical work. The establishment of a VOP goal for subcontracting part of the electrical work was based on consideration of matters such as the size of the pool of certified vendors that have the capacity to do parts of the job, such as wiring the buildings offices. Many certified vendors do not presently have the capacity and experience to do the entire job. For example, they may not have the experience and capacity to do street lighting. The pool of certified vendors who can do parts of the electrical work justifies a significantly higher goal for that part of the work than the size of the certified vendor pool that could do all of the electrical work.

Audit of the CAS bid files of the Smith Avenue Parking Ramp project confirmed that significant VOP participation was achieved.

Contact with one of the MBE's who obtained subcontracts on the Smith Ave. project confirmed the benefits from subdividing the project. It meant there were separate goals for two different parts of the project for which his company could do some of the work. He ended up with subcontracts on both parts of the project. He explained that if the project had not been subdivided the prime contractor might not have sought out certified subcontractors on both of the parts of the project his company was able to do. An overall goal for the entire project might have been met in ways other than by subcontracting the work his company could perform to a certified business. He also pointed out that subdividing reduced the emphasis on material supply, increasing opportunities for his company that supplies labor. The portions of the project on which he received work involved installation of materials rather than obtaining the materials to be installed.⁸⁶

(v) Joint Ventures

Possibilities for joint ventures also increase the potential for participation by certified

⁸⁵ WHL interview VOP Program Coordinator, 8-03-07.

⁸⁶ WHL tel. interview with MBE contractor z 8-28-07.

vendors. They have the advantage of dividing the work to use the small contractor for aspects of the project it is capable of doing, but, in addition, it is a mentoring relationship respecting the management of larger more complex projects.⁸⁷

Again, review during the audit of the files of the Smith Ave. Parking Ramp project provided a positive example of how a joint venture can result in increased VOP participation. An MBE has a joint venture relationship with a majority-owned contractor. They are sharing the labor on an aspect of the project. They work together as part of the Construction Partner Program. When the program was started the MBE became involved and suggested the company he now partners with as a partner because he had done work for them. They have been working together for 5 years. They jointly bid on projects. For the Smith Ave. project this means each will get one half of the over ½ million dollar part of the project. While the two company's payroll departments make sure that the work is divided evenly, often the MBE gets more than one-half.⁸⁸

Presently the VOP Ordinance does not include among the vendor outreach requirements for prime contracts in Sec. 84.08 (c) a requirement that a prime contractor structure its subcontracting by subdividing the contract work into economically and operationally feasible units that will increase opportunities for certified vendors to bid on subcontracts.

Finding: When projects are subdivided into smaller bidding packages and VOP goals are set for each package, VOP participation can be increased. Joint ventures between certified and non certified vendors can contribute to increased availability of certified vendors.

Recommendation: When structuring projects for bidding increased use should be made of subdividing the project to improve opportunities for utilization of certified vendors. The City should continue and expand its efforts to increase opportunities for joint ventures. Subdividing work into economically and operationally feasible units that will increase opportunities for certified vendors should be added as a vendor outreach requirement of Sec. 84.08(c).

(c) Monitoring and Reporting on VOP Program Results

Administration of the VOP program does not end when the contract is signed. The City's VOP policy and the purposes of the VOP program extend beyond obtaining VOP language in contracts when they are signed. The Program includes determining its results. This means determining whether the city is achieving the purposes of the VOP program. Is the City preventing on-going underutilization of MBEs, WBEs and economically deprived SBEs? Is the city promoting increased participation by such businesses in public contracting that is comparable to their availability in the Saint Paul marketplace? The VOP ordinance provides for monitoring and reporting not only on the participation goals agreed to, but also on the results of efforts to meet them. Sec. 84.10 **Monitoring and Reporting.** Direction and administration of the VOP program includes monitoring and reporting on results achieved.

While obtaining contractual commitments to meet VOP participation goals is of primary importance to the success of the VOP program, much can happen after signing that will affect results. The project may require additional or different work to be done. There may be a need to

⁸⁷ WHL interview with CAS staff A, 6-15-07.

⁸⁸ WHL tel. interview with MBE contractor z 8-28-07.

change subcontractors. Especially when decisions on subcontracting will occur after the agreement with the developer or prime contractor is signed, it is important to take steps to assure the purposes of the VOP program are furthered through this subcontracting. Also it is important to determine whether the prime contractor complied with the VOP promises it made when signing the contract.

The project managers and engineers of PED and the personnel of other departments administer the contracts once they are signed. They are the City employees whose duties put them in contact with how the project is being implemented. They are the employees who have contact with the contractor. For this reason they are appropriate to monitor the contractors follow through on its VO commitments and to learn of changes that will affect opportunities for certified businesses. The CAS manager considers the departments as the monitor of compliance with the VOP participation goals established and agreed to by contractors. The departments are the compliance people, the monitors. As has been explained the low bidder on a contract administered by CAS may not agree to the goals for VOP participation specified in the bid documents. The low bidder may agree to a goal, but at a percentage that is less than proposed. The VOP Program Coordinator is not regularly told by the buyer that the low bidder will not commit to the full goal. She does not know what the buyer does in such circumstances.⁸⁹

(i) Changes After the Contract is Let

In some cases the work to be done on a project changes after the contract is let. The need to do different or additional work can result after the contractor has begun working at the site. While there may not be large numbers of these situations, they can present opportunities for increased participation by certified vendors. In any event, it is important to know whether VOP certified vendors are getting any of this work. An example of a project reviewed during this audit is the 2286 Capp Road industrial building demolition and site clearance project. After Veit & Company was awarded the contract, change orders resulted in \$27,340 in additional work, a 10% increase. The Department of Human Rights was not notified of the first change order for \$12,986.14 before it was approved. DHR was notified of and signed off on two subsequent change orders. The PED project file and Department of Human Rights files both include documentation that DHR was informed of a change for \$9,526 of additional work related to proper disposal of lead impacted concrete building sumps, excavation of PAH impacted site soils encountered below grade, etc. DHR also was notified of and signed off on a change order for removal of 71 tons of PAH impacted soil encountered below the warehouse slab. Consultant reviewed the CAS bid file. The VOP coordinator does not maintain separate files on projects where there is a CAS bid file.⁹⁰ None of the files indicate that VOP was informed of any changes. The narrative justification for having Veit & Company do the additional work implies that contracting with or subcontracting with another company was a possibility. If that possibility had been explored there might have been an additional opportunity for a certified vendor.

Change orders affect the determination of whether VOP goals have been met. If certified contractors do not get any of the added work, their percentage of the total project goes down. Only if certified businesses get a higher percentage of the added work than their percentage of the work initially agreed to will the VOP percentage increase. In the case of the 2286 Capp Road project described above, because all the added work was to be done by the prime who is not certified, the impact of changes reduces the VOP participation from 6.3% to 5.7%. This assumes that \$17,500

⁸⁹ WHL interview VOP Program Coordinator, 8-03-07.

⁹⁰ WHL interview VOP Program Ccoordinator, 8-03-07.

was in fact paid to certified subcontractors. As is discussed above, review of files raises questions about who in fact worked as subcontractors and what amounts they received. See the discussion of Meeting VOP Goals above at p 39.

If a project changes in its scope after the contract is let generally CAS is not involved in whether certified contractors will share in the additional work that may be required. CAS does not learn of change orders unless the result is to need a new contract to fulfill over runs, add-ons, etc.⁹¹

Finding: VOP staff is not regularly informed of change orders and additional work to be done on projects after the contract is let. VOP input could result in additional opportunities for certified vendors. Change orders are not considered when reporting on results of efforts to meet VOP participation goals. PED requests its project managers to consider change orders and to update the total development cost of projects to reflect them. When this requirement is followed the changes are reflected in the total development costs reported in the “Completed” section of the HRA/PED Compliance Report Card.

Recommendation: When PED/HRA staff determines that change orders for additional work are necessary, VOP staff should be informed and have an opportunity to participate in the discussions to advocate for meeting the need for additional work in a way that increases opportunities for certified vendors and to set an appropriate VOP goal for the additional subcontract work. Reports on the VOP program should include change orders in the calculations of percentage participation of certified businesses.

(ii) Subcontractor Performance and Replacements

The success of the VOP effort depends in part on the establishment and maintenance of positive working relationships between prime contractors and certified subcontractors. If a certified subcontractor is unable to follow through on doing the work on a subcontract, not only is that contractor not likely to get future work, but also the prime contractor’s perception of the City’s inclusion efforts is damaged. Generally VOP staff does not learn about how certified contractors worked out after bids were let. The department project manager might learn about problems. They usually only get bad reports. Occasionally, when the prime responds to the next project, the prime comments on prior work with a certified subcontractor. Department people do not report performance problems to the VOP program coordinator – they report it to buyers.⁹²

From time to time a prime contractor must replace a subcontractor, either because the subcontractor is not performing adequately or the subcontractor decides not to do or finish the work. The forms supplied to Prime contractors indicate that they are to report any changes in their list of subcontractors. See the discussion of the 2286 Capp Road Project at p. 41 above. VOP staff, however, are not involved with these changes. Primes replace subcontractors on their own.⁹³ Replacing a subcontractor is a possible opportunity for certified vendor participation. Also investigation of the reasons the certified subcontractor did not fulfill the contract may reveal needs that if met can assist the certified business to succeed in the future..

⁹¹ WHL interview with CAS manager, 5-25-07.

⁹² WHL interview VOP Program Coordinator, 8-03-07.

⁹³ WHL interview VOP Program Coordinator, 8-03-07.

Finding: The requirement that contractors notify project managers of the need to change subcontractors is not always enforced. Project managers do not always notify the VOP program coordinator of subcontractor performance problems or of the need to change subcontractors. As with other opportunities for certified vendor participation, notice as far in advance as possible of selecting a replacement increases chances of certified vendor participation. In the absence of procedures requiring vendor outreach when replacing a subcontractor, it may be that opportunities to promote increased participation by certified vendors are being missed. Also it may be that the business development needs of the certified business with performance problems or being replaced are not being addressed.

Recommendation: Project managers should regularly report to the VOP program coordinator on VOP performance matters that arise after a contract is signed and of the need to replace subcontractors. The VOP program coordinator should take steps to assure that vendor outreach policies are followed when replacing a subcontractor. The project manager, in consultation with the VOP program coordinator, should identify any business development assistance needs of the certified subcontractor with performance problems or who is being replaced and make appropriate referrals to business development resources.

(iii) Monitoring of Certification Status

The VOP program contemplates monitoring of developments after the contract is signed and while it is being performed. The goals of the VOP program extend beyond obtaining particular language in contracts before they are signed. The focus of the VOP effort is to provide opportunities to WBEs, MBEs and SBEs who are actually doing the work. The VOP Ordinance's monitoring and reporting requirements provide that the manager is authorized to verify that certified businesses "...are certified, remain eligible and certified, actually performing the work, and otherwise in compliance with the vendor outreach program." Sec. 84.10 (a). Information relevant to determining these matters can come to the attention of the City as a contract is being performed. Consultants' review of files illustrates one such instance. In the VOP file on the Gander Mountain Corporate Headquarters there is a contractor profile form where the certified WBE/SBE contractor indicates, "all work subbed out". The Identification of Prime Contractor and Subcontractors form for this WBE/SBE subcontractor indicates how the entire contract amount will be paid to subcontractors and suppliers. The form does not indicate whether any of the second tier subcontractors and suppliers is certified. This type of information would provide the basis for investigating whether the business is properly certified as an SBE. An SBE must perform a commercially useful function. According to the VOP Ordinance, "*Commercially useful function* means a function performed by a business enterprise when it 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 that industry." Sec. 84.03 Definitions. Businesses that act as conduits to transfer funds to another business are often referred to a pass-throughs. Our audit did not disclose any procedure for notifying the CERT program of such circumstances.

Finding. Procedures for alerting the CERT program of the need to review certification status have not been established nor has staff been trained to identify them.

Recommendation: The VOP program should establish procedures for identifying and taking appropriate action on information related to a business' certification and provide training to staff on them.

(iv) Responsibility for Post Contract Formation Monitoring of Compliance

No City official contacted by consultants takes responsibility for monitoring the VOP Program after contracts with prime contractors are executed. This contributes to the deficiencies of post contract signing monitoring described in this report. As is discussed at pages 17-18 above, from the perspective of PED/HRA, interviews conducted by the Consultants reveal that PED project managers generally view the monitoring and tracking of VOP and affirmative action goals to be the primary responsibility of the Vendor Outreach Manager and DHR respectively. The CAS Manager takes the position that CAS is responsible only for City contracts and only up to when the contract is awarded. She contends that CAS is responsible for compliance with VOP requirements only before the contract is awarded. It is her position that once the contract is signed basically CAS's job is done. It is her view that responsibility for monitoring goes to the Departments. CAS tracks results quantitatively, but her office does not have responsibility once the contract is executed. Her position is that her office has no legal obligation respecting VOP compliance after the contract is awarded. She views CAS and the VOP program coordinator as resources for PED/HRA, but asserts that, pursuant to Chapter 84, CAS has no obligation for VOP compliance on HRA development projects before or after the contract is awarded. She considers the VOP program coordinator to be a consultant rather than compliance staff. She does not see the VOP program coordinator's role to be like that of Department of Human Rights staff or that of the wage and hour staff. The role of the VOP program coordinator is to respond to requests for assistance, not to function as compliance staff. It is her position that the VOP Program coordinator is not required to maintain any official project files for HRA development projects. The Coordinator does, however, maintain some personal files of projects for her own reference.

Prior to the adoption of Chapter 84, there was a period of time when there were four full time staff assigned to the Vendor Outreach Program. These staff were able to do more detailed post-contract monitoring of City contracts for compliance with the ordinance that was in place at the time. Budget cuts resulted in the VOP staff being reduced to just a single position. As a result, very little of the VOP Program Coordinator's time is available for such activity now, even though Chapter 84 provides for it.

The CAS manager has brought our attention to the provisions of the City's Administrative Code that describe the duties of CAS. Under Section 2.02 G (6) of the Saint Paul Administrative Code, CAS is responsible for the contracting process up until a City contract is signed. These provisions, however, do not limit the extent of the duties and responsibilities of the CAS manager as provided for in Chapter 84. These duties and responsibilities are discussed at page 46-47 above. They extend to the contracting process after a City contract is signed.

CAS evaluations of its employees include consideration of performance of VOP responsibilities and duties as they are presently understood. Post contract formation monitoring and reporting duties should likewise be considered when making such evaluations.

Finding: Lack of clarity about responsibility for post contract formation monitoring of

compliance with VOP promises made by contractors in both City and HRA contracts contributes to the deficiencies of monitoring of VOP compliance and results identified in this report. Inadequate monitoring contributes to deficiencies in required reports. Monitoring and reporting of compliance are essential to accomplishment of the purposes of the VOP program. Coordination of DHR and VOP monitoring will increase the effectiveness of monitoring and eliminate duplication of reports contractors must supply. For these responsibilities and duties as for all VOP/AA responsibilities and duties, when considered for pay raises, promotion and related matters, evaluation of PED/HRA project managers and other staff and CAS and DHR staff should include how well they discharge responsibilities and perform VOP and AA duties.

Recommendation: The mayor and HRA should clarify who has responsibility for monitoring and reporting of compliance with the VOP program after contracts are signed, and direct that policies and procedures be established to monitor and report on VOP compliance after contracts are signed. The procedures should specify what the roles of department staff, the VOP program coordinator, and the Department of Human Rights will be in monitoring. PED/HRA project managers should have first line responsibility for monitoring. The VOP program coordinator should be designated as compliance staff to work with the project managers on monitoring and enforcement. The DHR Director with respect to affirmative action employment and the CAS manager with respect to vendor outreach should each have responsibility for monitoring and enforcement of all City and HRA contracts. The City and HRA should supply staff and budget to accomplish effective monitoring and enforcement. Staff evaluation for pay, promotion and related matters should include how well VOP/AA responsibilities and duties are discharged.

(v) Reporting of VOP Participation

Determining results of VOP outreach accurately is important to evaluation of the program and to the understanding the public and contractors and suppliers have of it. While over-reporting is obviously not desirable, neither is under-reporting.

Finding: The VOP Ordinance requires not only reports documenting goals established, but also requires reports on results of efforts to meet them. Not all the information necessary to understand the VOP and its impacts is aggregated and analyzed and reported to the public. Aggregation and analysis of additional information not now included in reports on VOP participation would advance understanding of the VOP and its impact. PED/HRA and CAS should aggregate and analyze the information on the contracts for which they are responsible. The analysis should include, (a) number and percentage of all contracts for which goals were set. (b) the dollar amount of contracts for which goals were set and the percentage that dollar amount is of the total contract dollars, (c). the number and percentage of all contracts where the actual VOP participation met or exceeded the goal set, (d) the dollar amount and the percent of the total contract dollars of contracts where the actual VOP participation met or exceeded the goal set. (e) the number and percentage of all contracts where the actual VOP participation was less than the goal set, (f) the dollar amount and percent of the total contract dollars of contracts where the actual VOP participation was less than the goal set, (g) the number and dollar amount of contracts where no goal was set because no subcontracting was anticipated, (h) the number and dollar amount of contracts where no goal was set because no subcontracting was anticipated that resulted in VOP participation, and the dollar amount of that participation, (i) the overall VOP goal percentage set weighted by contract amount, (j) the overall VOP participation percentage achieved weighted by contract amount. By undertaking

this analysis each year, comparisons will assist in evaluating whether the goals being set are increasing or decreasing, whether goals are being set more frequently or less frequently, whether goals are being met and exceeded more often or less often, and whether VOP participation in vendor contracts where no goal is set is increasing or decreasing. The overall VOP goal percentage set and achieved can be tracked over time. These figures also provide a basis for comparison with the 15 % overall goal that applies to HRA contracts where CAS is not involved in setting up the contract.

Finding: CAS's reports on VOP compliance are based on initial promises by the prime contractor, not on what the prime contractor has in fact done. Therefore, the City's understanding of the extent to which the VOP program is achieving its purposes is distorted. Inaccurate reporting contributes to public misunderstanding of the program, its operation and its value. The PED/HRA Compliance report card, however, reports both on contract awards in its "In Process" section and on amounts actually paid on its "Completed" section. CAS's reports should also include both promises made and results achieved. While CAS's reports include information on contracts separately for African-American, Hispanic, Asian and Native American businesses, the reports of PED/HRA do not. Results of outreach efforts to each of these groups is important to understanding the impact of VOP and to designing measures to increase its effectiveness.

Recommendation: The reports of both PED/HRA and CAS on the results of efforts to meet VOP goals required by the VOP Ordinance should include actual results of contracting and subcontracting, not just initial VOP participation promises from the prime contractor and results for African-American, Hispanic, Asian and Native American owned businesses, not just for minorities. Both CAS and PED/HRA should aggregate, analyze and report the additional information specified in the finding above.

(vi) Calculation of VOP Participation

Second tier subcontractors and suppliers. In order to accurately report results consideration must be given to who will actually do the work, not just the identity of subcontractors. Especially in larger and more complex projects, subcontractors in turn subcontract the work they are to do to other businesses. The businesses that are subcontractors to subcontractors are called second tier subcontractors. The VOP Ordinance permits a bidder to "include first and second tier subcontractors and suppliers as meeting the desired levels of participation." Sec. 84.08 (d). provides, however, that bidders "...shall not count toward the desired level of participation any agreements with businesses that...do not meet the guidelines as set forth in this ordinance." Sec. 84.08 (d). This means it is important to learn about the subcontracting intentions of the first tier subcontractors. If a certified subcontractor intends to subcontract work to an uncertified business, the dollar amount of that work should not be counted as VOP participation. Similarly, if a subcontractor that is not certified intends to subcontract work to a certified business, the dollar amount of that work should be counted as VOP participation.

Based on review of files, information on use of second tier subcontractors and suppliers is contained in some files, but not in all. Generally files of large projects where the prime contractor has staff devoted to compliance matters contain subcontractor utilization information that disclose second tier subcontractors and suppliers. Generally speaking other files do not. Where there is sufficient information available VOP staff appropriately take second tier subcontracting into account when calculating VOP results.

Finding: Information from subcontractors respecting use of second tier subcontractors is not obtained and analyzed in all cases to accurately report the level of VOP participation achieved.

Recommendation: Information should be collected from subcontractors respecting use of second tier subcontractors should be obtained and analyzed in all cases and reflected in reports on results of VOP efforts.

(vii) Contract Changes and Additions

When additional or different work results in change orders calculations of results of efforts to achieve participation goals should reflect the impact of these changes. This matter is discussed above at pages 48-50.

Finding: Change orders are not considered when reporting on results of efforts to meet VOP participation goals.

Recommendation: Reports on the VOP program should include change orders in the calculations of percentage participation of certified businesses.

(viii) Reporting On Results When Goals Are Set By Other Entities

On some PED projects the lead on inclusion efforts is taken by another jurisdiction. For example, the Minnesota Department of Transportation (MN/DOT) set the inclusion goals for the Smith Avenue Transit Center project under their disadvantaged business enterprise (DBE) law and regulations. While there was significant success in meeting the goals MN/DOT set, except for one small segment of the project, the painting portion, the Saint Paul's VOP reports do not account for it. The City owns the structure, the project was managed as a PED project, and the contract bidding and administration was done by CAS. The size of this project and its connections with the City makes it an important element of understanding of the City's VOP efforts. Staff explained that it was not reported on because the City was not responsible for setting the VOP goals.⁹⁴ On Target and the other reports to the community are not department performance reports. Their purpose is to give the City and its residents an accurate picture of the status of achievement of its inclusion efforts.

Finding: Reports on inclusion efforts do not include all PED/HRA projects. Projects where VOP goals are set by a jurisdiction other than Saint Paul are not accounted for. This underreporting excludes significant construction projects undertaken by PED/HRA.

Recommendation: Reports of inclusion efforts should include all PED/HRA projects, including those where VOP goals are set by another jurisdiction with appropriate notation.

Purchases under \$2,500. Departments may purchase goods, equipment and labor under \$2,500 directly. They have credit cards for these purchases.⁹⁵ CAS recommends vendors to departments who inquire and produces and supplies the departments with a "small purchase directory" of certified vendors. It appears that these contracts do not otherwise get the involvement of the Vendor Outreach Program, at least not through Contract Services. By its terms the VOP

⁹⁴ WHL interview VOP Program Coordinator, 8-03-07.

⁹⁵ WHL interview with CAS manager, 5-25-07.

Ordinance applies to all City contracts without regard to their amount. Sec. 84.04 Applicability provides:

The provisions of this ordinance shall apply to all contracts which are awarded or entered into by the city, including vendor contracts and prime contracts, except as may be hereinafter specifically exempted, and shall be liberally construed for the accomplishment of its policies and purposes.

There is no exemption for purchases of goods, equipment or labor under \$2,500. To comply with the ordinance all employees of the PED and of the other City Departments with purchasing authority should comply with the vendor outreach requirements of the VOP Ordinance discussed below. At a minimum they should be provided with access to information and with training on how they can exercise their authority to contract on the City's behalf in furtherance of the policy of the VOP Ordinance to promote increased participation by qualified, minority-owned, women-owned, and small businesses in public contracting that is comparable to their availability in the Saint Paul marketplace. They should engage in the outreach activities specified in the vendor contracts section of the VOP ordinance discussed above.

(d) Vendor Contracts

While the setting of VOP goals on a contract-by-contract basis is not appropriate for vendor contracts, Chapter 84 does require the City to set an overall goal for participation in vendor contracts. The CAS manager is to set desired levels of participation of SBEs, of MBEs and WBEs on an annual basis for vendor contracts and prime contracts. Sec. 84.06 (a),(c).

The staff of CAS who provide contracting services are commonly referred to as buyers. CAS buyers are assigned to commodity areas such as office equipment, printing, painting, athletic supplies, etc. Most, but not all, of the commodity area contracts are vendor contracts.

The Vendor Outreach program applies not only to prime contracts, but also to vendor contracts. With respect to vendor contracts emphasis is on outreach. Outreach includes affirmative steps to achieve the desired level of participation of MBE's, WBE's and SBE's. Outreach requirements include:

... (b) *Outreach requirements.* The manager shall engage in one (1) or more of the following outreach steps in order to achieve the desired level of participation for all city vendor contracts:

- (1) Solicit bids, proposals or quotations from certified SBEs, MBEs and WBEs for the vendor contracts prior to bid opening by phone, advertisement in a local paper, or other means.
- (2) Provide plans and specifications or information regarding the location of plans and specifications to certified SBEs, MBEs or WBEs.
- (3) Request assistance from minority and women community organizations, minority and women contractor groups, or other organizations that provide assistance to such minority and women contractor groups in the recruitment and placement of SBEs, MBEs or WBEs.
- (4) Where applicable, advise and make efforts to assist interested SBEs, MBEs and WBEs to obtain bonds, lines of credit, or insurance required to perform the contract.
- (5) Prepare and maintain documentation if bids from certified SBEs, MBEs or WBEs were

rejected, giving the complete basis for the rejection and evidence that the rejection was justified.

Seeking to award a portion of vendor contracts to certified SBE's, MBEs and WBEs in accordance with the annual goal for vendor contracts is mandatory. Sec.84.09 (a).provides: (a) *Manager compliance.* The manager shall, consistent with applicable laws and statutes relating to competitive bidding and awards of contracts to the lowest responsible bidder, seek where possible and lawful to award a portion of vendor contracts to certified SBEs, MBEs and WBEs, in accordance with the annual levels of participation for such businesses established pursuant to section 84.06 above.

If the desired level of participation is not achieved, the manager of CAS is to reexamine the procedures used by the City and, where appropriate, to seek changes in them by ordinance or administrative order. Sec. 84.09 (c) provides:

(c) *Unmet levels of participation.* In the event that the number and dollar amount of vendor contracts awarded to SBEs, MBEs and WBEs does not rise to the levels of participation that were established under section 84.06 of this ordinance, the manager shall reexamine the procedures used by the manager and other city officials for the processing and award of contracts. Where appropriate, the manager may seek changes in such procedures by ordinance or administrative order.

The On Target April 2006 and April 2007 summary reports to the public of the Vendor Outreach Program for 2005 and 2006 do not mention vendor contracts or participation in them by MBEs, WBEs or SBEs. According to the On Target for 2004 the City established for 2004 an overall goal of 10% for using certified vendors for purchase of goods, equipment, supplies, professional services and other services (GEPS). The report lists VOP spending and percentages for each City department and for master contracts. Master contracts are arrangements with a contractor to provide supplies or services to all of City government. An example might be copy machine and printer paper. The City wide percentage of such GEPS contract dollars that went to VOP certified contractors was 5%, one-half of the overall goal. Of \$43,381,535 in GEPS spending, the VOP total was \$2,047,662. On Target March 2005. In 2005 the VOP percentage of GEPS spending increased to 6.05% (\$3,151,551 of total City GEPS spending of \$51,820,916) according to figures found in the Saint Paul Vendor Outreach Program Detail Report for 2005. Again, in 2006 the VOP percentage of City GEPS spending increased to 8.18% (\$4,295,503 of total City GEPS spending of \$52,503,249) according to figures found in the Saint Paul VOP Detail Report for 2006. There may be included in these figures some professional services and other services contracts involving subcontracts. In none of these years was the 10% 2004 goal for GEPS VOP spending met.

Because outreach to certified vendors is to be undertaken on all City contracts, all of the buyers of the CAS department are important participants in the City's inclusion efforts, not just the buyers responsible for administration of construction and other prime contracts. To undertake vendor outreach they all must learn who the vendors are who are certified or are eligible to be certified for each of the purchases they undertake on behalf of the City. They must also determine how to best inform these possible vendors of contract opportunities. The job descriptions (performance plans) of purchasing staff include working to increase use of certified businesses and their efforts are part of their evaluation. Buyers structure purchases to improve certified contractors chances. Buyers assist

potential certified bidders with complying with the procedures for obtaining a City contract.⁹⁶

By conducting vendor outreach buyers gain valuable knowledge about the pool of certified vendors.

Like the City, both private contractors and subcontractors are purchasers of goods, equipment, supplies, professional services and other services. When private contractors who perform work on a contract with the City make GEPS purchases from VOP certified companies, those purchases contribute to achieving the VOP goals for the contract. Increased capability to effectively reach certified vendors will contribute toward meeting VOP participation goals. Both achieving the City's goal for VOP participation in Vendor contracts and achieving the goals for certified vendor participation in private company's contracts with the City can be enhanced. The City and its departments, including PED/HRA, and private companies have a mutual stake in increased effectiveness of vendor outreach efforts.

Finding: The City's inclusion efforts would be enhanced if the City and private GEPS purchasers increased sharing of their experiences with vendor outreach and with each other.

Recommendation: The City should encourage, sponsor and initiate means for City buyers and private GEPS purchasers to share their experiences with vendor outreach, including e-mail, periodic meetings and other means.

(e) VOP Staffing

Consultants reviewed the amount of VOP staff necessary to meet the requirements of the VOP program. Presently there is only one 80% staff position specifically devoted to VOP program coordination and implementation. It is our view that this level of staffing is inadequate to accomplish all the tasks described in this report. The recommendations in this report will increase the expectations of VOP staff.

Finding: Current staffing levels are inadequate to meet the needs of the VOP program. Presently there is only one staff person devoting 80% of her time to the VOP program. Implementation of the recommendations of this report will increase the need for VOP staff.

Recommendation: VOP staff should be increased by at least ½ time.

(2) Certification

The vendor pool available for achieving PED/HRA's VOP inclusion goals is companies that are certified as MBE's, WBEs and SBEs. An effective program for certifying vendors is essential. It defines the vendor pool. Increases in the certified vendor pool increase the potential for PED/HRA to meet its inclusion goals. The certification of vendors also affects the credibility of inclusion efforts. The program must certify those businesses that are intended to participate. It should be appropriately thorough, but not unduly burdensome on businesses seeking to participate. At the same time, businesses that are not the intended participants in inclusion efforts should not be certified.

⁹⁶ WHL interview VOP Program Coordinator, 8-03-07.

Certification of businesses that are not in fact small, or are not owned, managed and operated by minority persons or women negatively impacts public support for a vendor outreach program.

St Paul's Vendor Outreach Program Ordinance includes certification as a component. The Ordinance provides for certification of eligible businesses for two years. Certification is renewable for two-year periods by recertification. Generally the CAS manager, the person designated to direct and administer the Vendor Outreach Program, is the person with the duty to make decisions about the certification program. The manager of CAS is designated as the person to whom applications for certification are submitted. The CAS manager is authorized to cooperate with any other governmental entity having a program materially similar to the vendor outreach program in providing for a joint or mutually acceptable application process. Certification of a business by another program materially similar to the vendor outreach program can be accepted.

The CAS manager has discretion to waive all or part of the application process, and waive the submission of information required by the other certification program which has certified the business. The VOP ordinance provides for appeals by businesses whose application for certification has not been granted or has been terminated by the manager. The CAS manager may review a business periodically to determine that it continues to be eligible for certification and meets the definitions of an SBE, MBE or WBE. Such review shall take place at least every two years after initial certification.

(a) Qualifications for Certification

The purpose of the certification requirement is to assure that the businesses who participate in the Vendor Outreach Program are those that the VOP Ordinance intends to benefit. To participate MBEs, WBEs and SBEs must be located in or doing business in the City of Saint Paul's marketplace. The marketplace is defined as 13 Minnesota Counties and two Wisconsin counties.⁹⁷

The Saint Paul VOP ordinance targets all businesses owned by minorities or women. Minority-owned and women-owned business enterprises (MBEs and WBEs) are defined in the VOP Ordinance.⁹⁸ *Minority* means a citizen of the United States or lawfully admitted permanent resident who is Asian-American, Native American, African-American, or Hispanic.

The VOP Ordinance also defines a small business enterprise (SBE)⁹⁹ In order to qualify as

⁹⁷ *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

⁹⁸ *MBE, or minority-owned business enterprise* means a qualified business located in the marketplace or doing business in the marketplace at the time of bid opening or solicitation (a) which is at least fifty-one (51) percent owned by one (1) or more minority persons, or, in the case of any publicly owned business, at least fifty-one (51) percent of the stock is owned by one (1) or more minority persons; and, (b) whose management and daily business operations are controlled by one (1) or more minority persons who own it.

WBE, or women-owned business enterprise means a qualified business concern located in the marketplace or doing business in the marketplace at the time of bid opening or solicitation (a) which is at least fifty-one (51) percent owned by one (1) or more women, or, in the case of any publicly owned business, at least fifty-one (51) percent of the stock is owned by one (1) or more women; and, (b) whose management and daily business operations are controlled by one (1) or more women who own it.

⁹⁹ *Small business enterprise (SBE)* means a business entity whose principal place of business is in the marketplace

(continued...)

small, the gross revenues of the business must not exceed the gross revenues specified for that type of business by the Minnesota Department of Administration.

(b) The CERT Program

The VOP Ordinance authorizes the CAS manager to designate by contract, persons or entities to carry out one (1) or more functions under the ordinance to the extent provided in the contract. Accordingly, the CAS manager has designated the CERT program to carry out certification functions described in the VOP Ordinance.

The joint certification program of the cities of Saint Paul and Minneapolis, and Ramsey and Hennepin Counties, Central Certification, CERT, is a joint powers entity created in 1999. The entity was later restructured in 2003. In accordance with the revised Joint Powers Agreement in January 2004, the four members designated the City of Saint Paul as the lead agency. The lead agency is responsible for housing the Program and serves as the CERT Program's fiscal agent. Before the CERT program was restructured the CERT program was outsourced to private entities. CERT maintains its own web site - www.govcontracts.org. Lists of certified vendors and certification application forms may be downloaded from this site.

The CERT Program is governed by an Executive Committee consisting of one representative of each of the participating jurisdictions. Saint Paul's Vendor Outreach Program Coordinator serves as the City's representative on this Committee. The Program is staffed by a half-time Business Assistance Specialist. As part of its lead agency responsibilities, Saint Paul has assigned its VOP Program Coordinator responsibility for supervising the Business Assistance Specialist and clerical staff who handle applications and update the CERT database. The VOP Program Coordinator devotes 20% of her time to CERT program duties. Occasionally her work includes processing CERT applications. The CERT program reimburses Saint Paul for these services.

In addition to overseeing the overall operations of the CERT Program, the CERT Executive Committee also serves as the Appeals Board in the event that a vendor wishes to challenge a certification decision by the CERT staff.

(...continued)

that:

- (a) Is not a business dominant in its field of operation, nor an affiliate or subsidiary thereof; and
- (b) Is not a broker, or a manufacturer's representative, does not operate as a franchise or under a franchise agreement, and is not a business in which the owner is also owner or part owner of one (1) or more businesses that is dominant in the same field of operation; and
- (c) Is not a business whose gross revenues exceed those established for its Standard Industrial Classification (SIC) code, as adjusted by the department of administration of the state pursuant to statute; and
- (d) Performs a commercially useful function; and
- (e) If it has been in operation for less than one (1) year, must be able to provide reasonable evidence in form satisfactory to the manager, showing that it has an established record of generating revenue while performing the business function represented in its application for certification or, if a professional service, showing that it possesses applicable licenses or professional certifications or credentials.

Like all certification programs, the CERT program maintains and updates a data base of certified businesses. Goals of such a database include accuracy, currency, flexibility and accessibility. Access to this data is especially important to the work of PED/HRA staff who work on a frequent basis with prime contractors on their subcontracting efforts. The prime contractor bids out parts of the work on large scale projects over a considerable period. Each bidding package becomes an opportunity to increase VOP participation and better achieve the goals set for the project. If PED staff have easy access to the data on certified vendors able to do a particular type of work they can assist the prime contractor in identifying certified businesses from whom to solicit bids.

At the time the CERT Program was launched in 1999, the participating jurisdictions jointly funded a consultant to custom-write a certification database application that allows for tracking certification applications, recording data about certified businesses and how to contact them, classifying the types of business conducted by each business and recording the history of the business's certification. This software allows for searches and for reordering of and selection of data to create lists of businesses with specified characteristics. This software is available on five CAS workstations including those of the VOP Program Coordinator and the CERT program business assistance specialist. The other jurisdictions in CERT also have access to the software. Except for the five CAS and CERT staff, CAS buyers, PED/HRA project managers and engineers, minority business retention staff and prime and other contractors do not have access to the capabilities of this software to search the database and generate lists of contractors with specified characteristics. There is limited capacity to transfer data from the city's certification database to other databases.

When a prime contractor is seeking certified subcontractors or a purchaser is attempting to identify certified suppliers they are interested only in certified businesses that can fulfill a particular need. Classification of the business the certified vendor does is very important. The easier it is to identify the certified vendors who can meet a particular need, the more likely it is that certified vendors will obtain contracts.

In order to make certification data more widely available the certifications of businesses as MBE, WBE or SBE are added to the data in the City's database for tracking financial transactions. That system assigns NIGP codes to businesses and is more widely available to City employees than the CERT database. It does not, however, contain the detail of the CERT database, only the certifications of the businesses.

The classification code systems include sub-classifications for highly specific descriptions of work. If the number of classifications is too great because classifications are too specific, businesses must be assigned numerous codes. Also, locating the type of business needed as a supplier or subcontractor can become too complex. The City only uses certain codes – if it uses too many, it gets complicated. Activities described are frequently very similar. The City uses only one of the codes for the same type activity. The City prefers using code numbers for generic descriptions of activities – rather than the codes for more specific work.¹⁰⁰

From the point of view of certified businesses accurate and complete listing of the work they do by classification code is key to learning about contracting opportunities. If not properly classified, a business may not be contacted by the City or by private contractors about possibilities for doing work.

¹⁰⁰ WHL interview of VOP Program Coordinator, 8-03-07.

Inability to search the vendor data base electronically and to reorganize the data in it is a concern of contractors who are seeking certified subcontractors and suppliers. Staff of a prime contractor reported that they use central CERT, but the CERT directory of certified contractors is not as accessible as it should be. We learned that the Hispanic American Construction Industry Association (HACIA) in Chicago has an excellent directory that we have reviewed. It lists HACIA's members by CSI divisions. It repeats the information in more than one Division if the member has that capacity. It also lists categories of "Supplier", "Consultants", and "Legal/Financial Services." It includes an alphabetical listing of companies that brings together the contact information, a description of work done and the CSI divisions where it is listed. HACIA's website also has this information (<http://www.haciaworks.org/freedomweb/>) and can be searched by numerous variables. Click on the Member Matching Service. The suggestion was made that the printed directory should be reformatted to be most useful. We heard that contractors need an electronic directory and to be able to do their own searches. The opinion that the databases are not user friendly was expressed. The company for which this person works has its own subcontractor database. This indicates that software is available that permits electronic searches and creation of appropriate lists of possible certified vendors.¹⁰¹

Consultants own review of the lists of vendors on the CERT program website confirms that much could be done to make the data more useful and understandable.

Other certification programs have vendor lists that can be searched electronically. See for example the website of the Bureau of Minority and Women Business Opportunities of the Pennsylvania Department of General Services at: www.dgsweb.state.pa.us/imaginepa/bcabd/vendor_search.asp. While this site could be improved it demonstrates that such sites can be constructed.

CERT Executive Committee members have determined that one of the key benefits of membership in CERT is having direct access to the full functionality of its vendor database. Thus, as a matter of policy, the Executive Committee has decided to make available the CERT vendor lists only in printed form or as a PDF file on the www.govcontracts.org web site to non-CERT members. Executive Committee members are aware that it would be advantageous to have a single database of certified vendors that is readily accessible by all interested parties in the Twin Cities metro area. To that end, since 1999 CERT members have made numerous attempts to further consolidate the local certification programs and/or to get other jurisdictions to join CERT. For various reasons, a single certification function has not materialized.

Finding: While the list of vendors certified by the CERT program is available on CERT's website, www.govcontracts.org, the list cannot be searched nor can the viewer of it reorder the information to create lists of contractors with specific characteristics. The VOP program coordinator spends time developing lists of specific certified businesses and supplies them to contractors that request them. This reduces the time available for performing the other aspects of VOP program coordination and for supervision of the CERT program. With better software the contractors could generate these lists themselves. Use of the information is difficult if the viewer is not already familiar with the business classification system used in the list. The directory is not as user friendly as it could be. The need for such a system outweighs concerns respecting its use by other jurisdictions that do not contribute to its "cost."

¹⁰¹ WHL and RS interview of prime contractor X staff, 8-16-07.

Recommendation: The City should obtain an electronic certification data system that is more effective. All users should have access to the data on certified companies including private companies and staff of other government jurisdictions. The system should be compatible with commonly used computer systems and software or be able to be converted for use by such systems. A goal should be elimination of the need to input data more than once. In designing the system current government and private users should be consulted. The system should be designed to assure that only authorized persons involved with certification and updating data on certification can generate or change the data on certified businesses. If possible these changes should be undertaken with the other jurisdictions that participate in CERT and the costs shared by the jurisdictions. If not possible, Saint Paul should obtain such a system. Users of the system should be able to conduct electronic searches of the data and produce lists of certified vendors meeting specified characteristics. A means for searching for classification codes by commonly used descriptions of businesses should be included. The City alone or in conjunction with other jurisdictions should review directories produced by other programs and revise its printed directory to make it easier to use.

(c) Joint Certification

While participation in a joint certification program involves sharing control of the program, on balance the advantages of the joint certification program outweigh the disadvantages. Currently four jurisdictions participate in the CERT program. Other government and private bodies also conduct certification programs. While the CERT program and Saint Paul have established procedures for submission of certification by other jurisdictions as a basis for being certified by CERT and Saint Paul, contractors still must supply supplementary information to have another certification accepted. Businesses in this marketplace must apply for and obtain certification from other governments to participate in their inclusiveness programs. Saint Paul certifies some businesses that CERT does not. Saint Paul's certification is not limited to small businesses. It includes MBEs and WBEs that are not small.

Working together with other jurisdictions on certification has many advantages. Businesses interested in obtaining contracts with the other jurisdictions in the joint program seek certification. These businesses then become known to and available to PED/HRA and the City of Saint Paul as businesses that can help meet inclusion goals. Multiple jurisdiction certification also reduces the need for businesses to file paper work and participate in the certification process. This is of especial significance to new and small businesses. They often lack staff to undertake administrative tasks. Seeking certification becomes one more matter on an already crowded agenda for the owners of the business. Also pooling of the resources of several jurisdictions, especially ones that are in the same labor market, can increase the capability to adequately staff the certification effort. From the point of view of prime contractors seeking possible subcontractors fewer lists of certified vendors to check makes the task of identification easier. Again, smaller and newer prime contractors often lack staff to do these tasks.

On the other hand, joint certification programs also face significant challenges. The participants each face the challenge of convincing their jurisdiction that they should contribute funds to an effort that benefits other jurisdictions. Allocation of funding among the jurisdictions can be difficult. Agreement must be reached on the details of the program and its staffing. Oversight and accountability must be addressed. Because joint programs are designed to increase participation,

matters of timely processing of certification requests, renewals of certification and reviews of certified vendors must be addressed.

The other certifications that CERT accepts include the Minnesota Unified Certification Program. It is the joint certification program of the Metropolitan Council, the Metropolitan Airports Commission and the Minnesota Department of Transportation (MN/DOT). This is a disadvantaged business enterprises (DBE) certification program. Other certifications accepted are the Minnesota Department of Administration and two private certifiers, the Minnesota Minority Supplier Development Council and the Women's Business Enterprise National Council. Certification by the Small Business Administration as an 8(a) certified disadvantaged business is also accepted. To be accepted the business must meet the geographic and other CERT criteria.

Applications to qualify for CERT include information for the CERT program to use to establish minority, women, and small status.

While this system reduces what a business must do to obtain certification the burden on businesses, especially new, small businesses remains significant. Having several certifiers in the same labor market also results in different vendor databases to be searched when seeking certified vendors. Representatives of larger and more established businesses, both a prime contractor and a MBE, expressed that the system of having to certify with several programs was not a significant problem for them. They recognized, however, that they have skilled and experienced administrative staff to assist them with meeting the requirements of the various certifiers. A minority contractor recalled that it was not always the case for him when his business was smaller and new and he had to do everything.¹⁰²

The undesirability of having several certification programs in the same marketplace has long been recognized. In a 1996 report the Institute on Race and Poverty included in its recommendations that certification should occur either by the Disparity Study Joint Powers Board or a larger multi-jurisdictional body that could encompass the entire Twin Cities market. The study found, "Duplicative and sometimes conflicting procedures result from the unnecessary overlap in the current administration and enforcement of programs. Many minorities have reported dissatisfaction, frustration, and confusion, regarding varying certification programs within the same marketplace."¹⁰³ While the CERT program is a step in the right direction, the inclusion efforts of PED/HRA and of the City would be enhanced if more jurisdictions in the Twin Cities marketplace would join together their certification programs. As has been noted the City's efforts at inclusion of other jurisdictions have not yet born fruit.

Finding: The continuation of several separate certification programs in the Twin Cities marketplace limits the effectiveness of the inclusiveness efforts of PED/HRA and the City of Saint Paul.

Recommendation: The City should continue to play a leadership role in efforts to consolidate government certification programs that include the Twin Cities marketplace. Steps should be taken to broaden participation of jurisdictions in the certification program. Any expanded

¹⁰² WL and RS interview of prime contractor X staff, 8-16-07; WHL tel. interview of minority contractor Y, 8-28-07

¹⁰³ "Final Report of the Disparity Study Public Hearings" by the Institute on Race and Poverty submitted to the Disparity Study Joint Powers Board, Feb. 8, 1996, p.42-43.

certification program should comply with the requirements of Chapter 84 of the Saint Paul Administrative Code and have sufficient staff and resources to accomplish its tasks in a timely and efficient manner.

(d) Processing of Certification Requests

CERT is a popular certification. The backlog in processing certifications is approximately 2 months.¹⁰⁴ This means that the VOP Program Coordinator processes some requests herself, because volume is too great for the CERT Program Business Assistance Specialist, a ½ time employee, to do them all. Because there is such a backlog, priorities for consideration have been developed. They try to act quickly when the applicant is bidding on a job or is being considered for a contract or subcontract of any of the four participating jurisdictions. Vendor inquiries also get a quicker response. These requests are taken out of the order of when they were received.¹⁰⁵ They also process re-certifications.

Appeals: The VOP Ordinance requires that there be a process for appealing when certification is denied or terminated. Sec. 84.07 (h). Appeals of certification denials are to the CERT Collaborative Executive Committee described above.

Certified contractors are concerned that they not have to compete with improperly certified businesses for the opportunities to be a VOP contractor on a project. One MBE reported when asked about experience with the CERT program that he believes certification is too easy, although he said it is getting a bit tougher. He gave as an example a contractor who claimed Native American ownership but was not required to produce Indian identification documents as proof of tribal membership. He also said a competitor transferred 51% of his company to his daughter and was certified as a WBE in a couple of weeks. He lost out on a job that went to that contractor. He indicated that transfer of ownership to women is a common way for majority males to become a certified vendor. He says MN/DOT is the most thorough on certification. Now that he has good staff it is not particularly a problem that there are several certifiers, but it was more of a problem when he was starting out and is for other companies getting started. He suggested that companies get the hardest to get, most thorough certification first, and then that could be accepted by the other jurisdictions. He also mentioned that he knows that the CERT program is backlogged on certifying businesses and that they need more staff to certify.¹⁰⁶ The certification database includes several WBE certified vendors in the same business as this MBE.

Increasingly businesses appealing from denial of certification are claiming that the definitions of the requirements of proof to support certification are not sufficiently clear. Review of appeals of denial of certification files confirms this. This concern may be affecting the results of appeals. New definitions should be prepared.

Finding: Lack of clarity of definitions and requirements of proof are negatively affecting the decision of appeals from denials of certification.

Recommendation: The City's representative to CERT should participate in and support

¹⁰⁴ WHL interview with VOP Program Coordinator, 8-03-07.

¹⁰⁵ WHL interview with VOP Program Coordinator, 8-03-07.

¹⁰⁶ WHL tel. interview with MBE contractor z 8-28-07.

development of CERT program rules or guidelines that will more clearly define certification eligibility.

(3) Outreach to Businesses Owned by Persons With Disabilities.

The Vendor Outreach Program does not include provisions for identifying businesses owned by persons with disabilities. Because businesses owned by persons with disabilities are not a VOP category identified in Chapter 84 this audit did not examine the City's performance in undertaking outreach to such businesses. If such businesses qualify as small businesses they can benefit in the same way that all small businesses benefit if they participate in the VOP. They can be certified as small in the VOP program. Chapter 84, however, does not now require outreach to businesses owned by persons with disabilities. There are no requirements to identify such businesses, to publicize their availability, to notify them of contracting opportunities or to otherwise engage in vendor outreach to them. There is no separate goal for participation by businesses owned by persons with disabilities. A separate goal for businesses owned by persons with disabilities would be an incentive for prime contractors to seek to subcontract with such businesses

(a) Saint Paul's experience with targeting "handicapped-owned" businesses.

Before the Vendor Outreach Program (VOP) was adopted in 1997 Saint Paul's Targeted Vendor Development Program (TVDP) included businesses owned by "handicapped" individuals.¹⁰⁷ Annual reports from those years reflect this.

The highest number of vendors certified as handicapped was 9. To set goals, one needs to identify a pool of vendors. The City never set a handicapped goal on a contract when handicapped-owned businesses were being certified because there was too small a vendor pool for any particular type of work needed on a contract. CAS generally considers 3 vendors to be a minimum to be a pool upon which a goal can be based. Among the 9 vendors certified as handicapped, no three did the same work. If there is only one vendor who does work, a goal for that type of work becomes a requirement that the particular vendor obtain the subcontract.

When Saint Paul was certifying businesses owned by handicapped persons, some of the vendors who City staff believed would qualify did not apply, even when encouraged to do so. They said they did not want the stigma.¹⁰⁸

The disparity study done in 1997 did not include businesses owned by handicapped persons. There were not enough to justify including them. The study did not obtain data that could be used to support the need for setting goals for participation of handicapped-owned businesses.

(b) Increasing opportunities for participation of businesses owned by persons with disabilities.

Chapter 84 describes vendor outreach practices that could be applied to businesses owned by persons with disabilities even if there are not sufficient numbers certified for a type of work to

¹⁰⁷ The term "handicapped" is now seldom used and has generally been replaced by "persons with disabilities" or similar terms.

¹⁰⁸ WHL interview with CAS manager 8-14-07.

justify a goal for such businesses. As is discussed in the section of this report on vendor contracts, significant outreach can be engaged in even when there are no opportunities for subcontracting. The outreach requirements of Sec. 84.09 (b) could be applied to businesses owned by persons with disabilities as they are for MBEs, WBEs and SBEs. Both City staff and prime contractors could (1) solicit bids and proposals from such businesses, (2) provide them with information regarding specific contracting opportunities, (3) request assistance with outreach efforts from contractor groups of persons with disabilities and organizations that provide assistance to them, (4) advise and make efforts to assist businesses owned by persons with disabilities to obtain bonds, lines of credit, or insurance, and (5) document when bids by such businesses are rejected, including the basis for the rejection and evidence relating to its justification. Certainly an over-all goal for participation of businesses owned by persons with disabilities both as subcontractors and as vendors could be set and reviewed annually and revised accordingly as Sec. 84.06 now provides for SBEs, MBEs and WBEs for vendor and prime contracts. Adding vendor outreach to businesses owned by persons with disabilities will require adequate staff and an adequate budget to develop and provide materials, train staff, monitor and report on progress toward reaching participation goals and otherwise implement this aspect of vendor outreach.

Recommendation: St Paul should amend Chapter 84 to provide for outreach to businesses owned by persons with disabilities and provide the necessary staff and budget to fully implement this outreach effort.

(c) Certification of businesses owned by persons with disabilities.

The CERT joint certification program in which Saint Paul participates does not certify vendors owned by persons with disabilities . In order to institute an outreach program for such businesses Saint Paul would need to institute a certification program for businesses owned by persons with disabilities. This program should have all the characteristics of an effective certification program discussed at pp.56-57. Application materials, guidelines on documentation of qualification for certification and other documents that adapt the certification process to businesses owned by persons with disabilities should be developed and staff designated to implement the certification program. Certification staff will need to be trained.

Anticipated volume of applications for certification should be considered when determining the staff and resources needed to institute certification of vendors owned by persons with disabilities. Saint Paul's prior experience and the experience of the State of Maryland indicates that the volume of applications for certification of such businesses is likely to be small compared with those for SBE, WBE and MBE certification. The State of Maryland's Department of Transportation has 13 certified vendors owned by persons with disabilities, compared with 1,682 African-American owned vendors, 1,472 female owned vendors and 304 Hispanic owned vendors. In accordance with State law, Maryland has designated its Department of Transportation as the State's certification program.¹⁰⁹

(d) Defining businesses owned by persons with disabilities.

Instituting a vendor outreach program applicable to businesses owned by persons with disabilities will require Saint Paul to define such a vendor. The matter of definition of disability is

¹⁰⁹ Maryland Department of Transportation website and directory of certified businesses.

discussed in the context of Saint Paul's employment of disabled person's ordinance at p.80. Consultants know of no legal requirement that the City define disability as the Congress defines that term in the Americans with Disabilities Act (ADA). For, example, the State of Wisconsin Fair Employment Law defines handicap differently from the ADA definition of disability. Court interpretation of ADA has caused that law to be less effective at promoting inclusion of persons with disabilities in employment than many of its sponsors intended. As the American Association of People with Disabilities (AAPD) has recognized, through a series of decisions interpreting the definition of "disability" narrowly, the Supreme Court has inappropriately shifted the focus away from an employer's alleged misconduct and onto whether an individual can first meet a "demanding standard for qualifying as disabled."¹¹⁰ This has created an absurd and unintended Catch-22: people with serious health conditions like epilepsy or diabetes who are fortunate to find treatment that makes them more capable and independent – and more able to work – may find they are not protected by the ADA at all because limitations from their impairments are not considered substantial enough. Either, the courts say the person is impaired but not impaired *enough* to *substantially* limit a major life activity (like walking or working), *or* they say the impairment substantially limits something—like liver function—that does not qualify as a "major life activity." Courts even deny ADA protection when the employer freely admits that it terminated the individuals because of their disabilities. This is not what Congress intended.¹¹¹

Congress is considering bills to change the definition of disability in the ADA. The ADA Restoration Act of 2007 (H.R. 3195) has been introduced and hearings have been held. The bill has 225 House cosponsors, including four from Minnesota. A companion Senate Bill, S. 1881, has bipartisan sponsorship.

Defining disability differently from the ADA definition may have consequences that should be considered. The difference in definition may mean that EEOC would not consider Saint Paul to be a substantially equivalent agency for enforcement of the ADA. Also use of a different definition means that the differences must be explained to Saint Paul staff and to contractors and the public. This adds some complexity to the task of contractor and public education.

At the same time the ADA Restoration Act definition of disability should be easier to administer because the issues it presents are fewer. For example, the impact of mitigating measures need not be considered when determining whether a person is disabled.

Achievement of a goal of inclusiveness of disabled-owned businesses will be better accomplished if Saint Paul adopts the a definition of disability other than the ADA definition. Consideration should be given to adopting a more inclusive definition as found in other states, such as Wisconsin. Consideration may also be given to the definition under the ADA Restoration Act, depending on the ultimate result of that legislation. Other definitions that are better than the provisions of the ADA Restoration Act of 2007 are being developed and should be considered.

Recommendation: The task force on inclusion of persons with disabilities recommended

¹¹⁰ AAPD website, ADA Restoration Keeping the Promise to End Unfair Employment Discrimination.

¹¹¹ AAPD website, ADA Restoration Keeping the Promise to End Unfair Employment Discrimination.

at p.82 should study the provisions of the ADA Restoration Act, the definitions used by other states and programs and other proposals for more inclusive definitions of disability and person with disability and affirmatively endorse and lobby for changes to definitions that would more effectively accomplish inclusion of persons with disabilities, including changes in the federal ADA.

Procedures for processing certification requests and any appeals from them must take into consideration laws designed to protect the privacy of personal medical records and the laws respecting sharing of personal medical information and records. Legal restrictions that limit inquiry about disability must also be complied with.

(e) Non-profits that employ persons with disabilities.

An additional option to consider is to include non-profits that employ persons with disabilities among the businesses targeted to promote inclusion of such persons. In such cases the key characteristic is not ownership and control, it is the vendor's employment of persons with disabilities. Montgomery County, Maryland, for example, includes such non-profits in its definition of minority businesses. Its ordinance provides that a not for profit entity organized to promote the interests of persons with a disability is a minority owned business only if at least 51 percent of the individuals used by the nonprofit entity to perform the services or manufacture the goods contracted for by the County are persons with a disability. This supplements the businesses owned by persons with disabilities covered by its vendor outreach ordinance.¹¹² The Maryland Department of Transportation directory lists 48 such not for profit entities. A listing of these groups is a resource for contractors to use as suppliers. Because of their employment of persons with disabilities consideration should be given crediting obtaining supplies or services from such entities toward the accomplishment of business goals pertaining to persons with disabilities.

Recommendation: Saint Paul should identify businesses that employ persons with disabilities to provide services and supply goods and provide the information obtained to its buyers and to contractors. Saint Paul should encourage purchases of goods and services provided by persons with disabilities or manufactured by them and recognize such purchases as contributing to the City's goals for inclusion of persons with disabilities as vendors and contractors. The City should collect data on utilization of such businesses and report on it publicly.

(f) Goal setting for businesses owned by persons with disabilities.

As the discussion above indicates, significant effort may be required to identify sufficient numbers of businesses owned by persons with disabilities in a particular business to merit establishment of a goal for participation in subcontracting. In cases where there are enough certified businesses identified an appropriate goal can be set.

Recommendation: The task force on inclusion of persons with disabilities recommended at p.82 should develop a program for providing vendor outreach to businesses owned by persons with disabilities, for certifying such businesses and for establishing vendor subcontracting goals for such businesses. The task force should consider the matters discussed in this report and endeavor

¹¹² Montgomery County Maryland Article XIV. Purchases from Minority Owned Businesses, Sec. 11 B-58 (a).

to identify other concerns that might impact on achieving the goal of increased participation of vendors who are disabled. Saint Paul should implement the resulting program and provide it with the necessary staff and resources identified by the task force. The task force membership should be supplemented to include City employees with responsibilities for vendor outreach and City/HRA contracting, contractors who are disabled and other individuals who advocate on behalf of persons with disabilities and who have appropriate expertise.

C. Department of Human Rights

(1) Description of Department of Human Rights Activities

The Department of Human Rights (DHR) has two primary areas of responsibility. First, the DHR is responsible compliance, which includes (1) ensuring that all contractors with cumulative contracts over \$50,000 with the City of Saint Paul have an affirmative action plan, (2) monitoring the contractor's progress with that affirmative action plan, and (3) monitoring the inclusiveness efforts on construction projects. Second, the DHR is charged with investigating claims of discrimination in employment and in housing and public accommodation.

(a) Affirmative Action Plan

A major part of the Human Rights Specialist job is to ensure that each contractor with the City of Saint Paul, which has either a single contract of over \$50,000 or has cumulative contracts totaling over \$50,000 within the prior 12 month period, has an affirmative action plan registered with the City. The affirmative action plan shall comply with the provisions of § 183.04 of the Saint Paul City Code. Once the contractor has an affirmative action plan registered, it is valid for two years.

With the affirmative action registration, the contractor is agreeing to disseminate an AA/EEO policy statement; to actively recruit for persons with disabilities, women and minority employees; to conduct an analysis of the workforce to determine any areas of underutilization of minorities, women or persons with disabilities; to work towards a ten percent goal for persons with disabilities; and to supply the DHR with such information as is required. The DHR supplies the contractor with the necessary forms and a separately drafted affirmative action plan is not necessary.

When a new contract comes into the DHR for signature, a Human Rights Specialist (HRS) is responsible for ensuring that the contractor is up to date on its affirmative action registration. If it is a contractor who has previously done business with the City, then the HRS who is responsible for that contractor will review that contractor file, determine if the affirmative action plan and all other paperwork is up to date, and review the contractor's past performance. Based upon this review, the HRS makes a recommendation to the Director on whether he should sign the contract. If, however, the contractor is a new contractor with the City, an HRS is assigned to be responsible for that contractor. The HRS must then provide the new contractor with the relevant paperwork to complete an affirmative action plan. Often with new contractors, the contractor will contact the HRS for assistance in completing the affirmative action plan. On a very few occasions, contractors have chosen not to do business with the City, because the contractor did not want to submit an affirmative action plan. Once the HRS has received and reviewed the completed affirmative action plan, he or she will then make a recommendation to the Director for signature.

(b) Contractor Audits

In addition to ensuring that each contractor has a current affirmative action plan registration, each HRS is responsible for monitoring the contractors for efforts at inclusion of women, minorities and persons with disabilities. This includes reviewing semi-annual reports submitted by the contractors and conducting regular audits of contractors. Each audit consists of an entrance conference, the actual audit and an exit conference.

In the course of the audit, the HRS identifies all areas of non-compliance. What constitutes non-compliance is not specifically identified in the ordinance, the implementing rules, or the instructions provided to contractors. If the HRS does identify areas of non-compliance, the DHR has the authority to terminate or suspend any contract in whole or in part, declare a contractor ineligible for further city projects, and “other sanctions may be imposed and remedies invoked as provided by [§183] of the Saint Paul Legislative Code, or by rule, regulation or order of the human rights commission, or as otherwise provided by law.” §183.04 (6). The Director views contract compliance as perhaps the most important tool of the DHR in its overall goal to “foster equal opportunity for all to obtain employment,” as it allows for proactive steps to be taken to improve the employment opportunities of women and minorities, rather than the more reactive response of enforcement investigation.¹¹³ §183.01.

(c) Monitoring Construction Projects

HRS staff are responsible for monitoring the progress toward the inclusion of minorities, women, and apprentices on all construction projects over \$50,000. These construction projects have, as a minimum goal, the inclusion of six percent total hours performed by women, eleven percent of skilled craft hours performed by minorities, and eleven percent unskilled or laborer hours performed by minorities. There is a further goal of fifteen percent of total hours performed by apprentices, with six percent of total apprentice hours performed by women and eleven percent of total apprentice hours performed by minorities. The contractors are required to make good faith efforts toward these goals. The good faith effort criteria are identified in a handout provided to the contractors (appendix G).

This monitoring includes attending pre-construction meetings in which the general contractor and any sub-contractors in attendance are informed of their obligations under section 183. At this meeting, the general contractors are given Projected Employment Utilization forms (PEU’s), which the contractor is to use to identify the projected utilization of minorities, women and apprentices on the project. The PEU should at least reflect a projected utilization of six percent women, eleven percent minority skilled and unskilled, and fifteen percent apprentices. The DHR also provides contractors with Good Faith Effort Criteria (Appendix G), which explains sixteen factors necessary for a contractor to establish its good faith efforts.

Once work on the project starts, the general contractor is then required to submit Monthly Employment Utilization forms (MEU’s), which record the actual utilization of minorities, women and apprentices in that month. For contracts of \$500,000, the DHR submits a monthly report to the Mayor and the City Counsel on the progress in these projects toward the utilization of minorities, women and apprentices.

The HRS’s are responsible for reviewing these MEU’s to ensure that the project is fulfilling its commitment as identified in its PEU. The HRS is also responsible for conducting regular on-site inspections of the construction site, to ensure the presence of women and minorities on the job site. If the HRS determines that the contractor is not making a good faith effort to achieve the goals, then it is the HRS’s responsibility to follow-up with the general contractor or the sub-contractors. How this follow-up should occur is not specified, but is generally done through e-mails, phone calls,

¹¹³ RLS interview with DHR director, 9-6-07.

letters and occasionally meeting with contractors.

(d) Investigation of Discrimination Claims

The DHR investigates approximately 100 complaints of employment discrimination and 30 complaints of housing and public accommodation discrimination per year. As the result of a work sharing agreement with the Equal Employment Opportunity Commission (EEOC), the DHR is compensated for employment discrimination files under that work sharing agreement, which are closed in the fiscal year. The EEOC fiscal year ends on September 30. It has been estimated that the funds received by the EEOC pay for the equivalent of 0.8 FTE HRS. In an office with only five and one-half HRSs, one Support Staff person and one Director, this is a substantial portion of its budget.¹¹⁴ Therefore, there is a priority placed on the fulfillment of this contract.

(2) Issues which impact the effectiveness of the DHR.

(a) Budget

Between 2002 and 2005, the budget for the DHR was cut by approximately 40 percent. It has since remained at this level, with only minor increases, for a 2007 adopted budget of \$532,865.¹¹⁵ These budget cuts have resulted in drastic staff cuts. In 2002, the DHR staff consisted of 11.5 FTEs. The current budget allocation is for 7.5 FTEs. This reduction in staff came with no equivalent reduction in responsibilities. Approximately 0.8 FTE is paid for by the contract the DHR has with the EEOC. Personnel cost make up 94 percent of the budget.

A comparison of the accomplishments of the Saint Paul DHR to the Minneapolis Department of Civil Rights provides some indication of how successful this Department has been with a limited budget.¹¹⁶ In 2005, the DHR had 135 EEOC cases filed and closed 128. It also had 95 non-EEOC cases filed and closed 87. It had 412 affirmative action plans on file and completed 210 registrations. In that same year, the Minneapolis Department of Civil Rights, with a budget of \$2,600,000, and a staff of 24 had 68 EEOC cases filed and closed 59. It had 47 non-EEOC cases filed and closed 66. It had 482 affirmative action plans on file.¹¹⁷

Within the DHR, there is a conflict between competing interests of what tasks are given priority, due to the limitations of available staff. With so much of the budget being dependant on the completion of EEOC investigative files, these budget cuts exacerbate this already existing tension.

Finding: The Department of Human Rights is not adequately funded to accomplish the

¹¹⁴ Personnel costs make up 94% of the Human Rights Department Annual Budget according to the City's budget projections.

¹¹⁵ There is only one other department that has a lower budget than the DHR, the City Clerk's office at \$302,402. The Mayor's office has the next lowest budget, which is still approximately 2.7 times the size of the DHR at \$1,456,446.

¹¹⁶ This is not an exact comparison, as the Minneapolis Department of Civil Rights also has responsibility of prevailing wage policy, federal Davis-Bacon Act, Equal Benefits Ordinance, and the Small and Underutilized business function. Affirmative action registrations are only done by the City of Saint Paul.

¹¹⁷ City of Saint Paul Department of Human Rights 2005 Comparison with the Minneapolis Department of Civil Rights. (appendix H).

responsibilities it has for compliance monitoring and investigation.

Recommendation: The City should provide adequate resources to support the Department of Human Rights.

(b) Staff Changes

This summer has seen significant changes in the staff at DHR. In July, one HRS of eleven years resigned his employment to take a job in the private sector. Another HRS of over twenty years is on an extended leave. Prior to this summer, these two DHR employees were responsible for virtually all of the monitoring of the major construction projects. Of the remaining four HRS's, none have more than approximately two years of experience.

Experience in monitoring, auditing, and the construction industry as a whole is a tremendous asset as an HRS. Knowledge of which unions or types of work provide the most opportunities for women, minorities and persons with disabilities allows the HRS to best assess the utilization by contractors. Experience in the specific means by which contractors may fulfill the responsibilities under the Good Faith Criteria is important for the City in assessing the contractor's compliance and for the contractor when it seeks advice on how to comply. One example of this is when a contractor seeks advice from the HRS as to the best resources for recruiting women, minorities or persons with disabilities for the specific type of work conducted by the contractor. In light of the importance of this knowledge gained through experience, the loss of these two staff members has been a devastating blow to the Department and to the City.

In our comments about the relative inexperience of the Department staff, we would like to make clear that we are in no way commenting on the talent or potential abilities of the current DHR staff. In fact, considering the relative inexperience, we have been impressed with the work produced. The Director has also praised his staff and noted that many have been very quick to learn the many aspects of the job. The Department is also impressive for its racial and ethnic diversity, embodying the spirit of §183.

Finding: The loss of two experienced HRS staff members has resulted in an inexperienced DHR staff, lacking the knowledge gained through experience in auditing and monitoring contracts.

Recommendation: Processes should be put into place to better document and maintain the knowledge gained through experience of HRS staff in order to make the Department less dependant on individual knowledge and experience.

(c) Structure of office

Prior to 2000, DHR employees were divided between compliance (affirmative action plans, contractor audits, and monitoring construction projects) and enforcement (investigation of discrimination complaints). This changed in 2000, and now all HRS employees are responsible for compliance and enforcement. This change was prompted in part due to the desire of HRS staff to

have more diversity in their job function.¹¹⁸ These changes have impacted how the work in the Department is accomplished.

As in any job, the Human Rights Specialists make choices about how to prioritize the work between the enforcement and compliance duties. Because the Director's signature on a contract is a necessary part of any contract with the City, priority is placed on the approval of affirmative action plans. The HRS employees understand the importance of moving the contract along as quickly as possible, and will put off other work to complete an affirmative action plan registration.

There is also a strong push in the Department to fulfill the contract with the EEOC for investigation of employment discrimination complaints. The fiscal year for the EEOC ends on September 30 of each year. In order for the Human Rights Specialist to complete the investigation file and allow for any appeal, there is often a push to complete investigative files in the month of August. Therefore, at this time of year -- in the middle of the construction season -- there is little to no work being done on the monitoring of construction projects or contractor audits.¹¹⁹

Even throughout the year, the registration of affirmative action plans and the enforcement work take priority over responsibilities of auditing current contractors or monitoring construction projects. In speaking with the HRS staff, it was clear that they saw the registration of affirmative action plans and the investigation of files as their primary responsibility.¹²⁰ DHR is judged by other Departments by how quickly they are able to move a contract through the office. DHR funding is dependant upon how many investigative files are closed in a fiscal year. In reviewing the files of contractors and in speaking with the HRS employees, it was clear that the current HRS employees are doing very few audits. More than one employee stated to us that he or she had never completed an audit.¹²¹ As for the work of monitoring major construction projects, the only person currently in the office responsible for monitoring construction projects, stated that the only thing she is currently doing to monitor these projects is to enter the MEU figures into a table.¹²²

Finding: The compliance and investigation functions of the Department of Human Rights are in conflict for limited resources.

Recommendation: The Director of DHR should consider restructuring the Department into two sections: HRS employees responsible only for enforcement and HRS employees responsible only for compliance.

(d) Lack of experience and training

The HRS staff currently working in the DHR are inexperienced. The most experienced HRS employee has been with DHR for approximately two years, while one HRS was hired this summer.¹²³ The HRS staff has generally not had any prior relevant experience in investigation, monitoring and

¹¹⁸RLS interview with HRD Director, September 6, 2007.

¹¹⁹ RLS interview with HRS A,B,C and D on June 4-5 and August 14, 16, 2007.

¹²⁰ RLS interview with HRS A,B,C and D on June 4-5 and August 14, 16, 2007.

¹²¹RLS interview with HRS C and D on August 14, 16, 2007.

¹²²RLS interview with HRS C, August 14, 16, 2007.

¹²³RLS interview with HRS A and B, June 4-5, 2007.

auditing prior to joining the DHR.¹²⁴ Considering the inexperience of this staff, little training is provided to them. Formalized training for HRS staff includes:

- 1) The EEOC provides a training session on how to investigate employment discrimination complaints to new hires;
- 2) New hires are provided a workbook in which they learn the statistical aspects of the position; and
- 3) In 2006, the State of Minnesota provided the HRS staff with training on how to conduct an audit.¹²⁵

While this training has been good, according to HRS staff it did not provide them with the knowledge of what it actually is like to do an audit or to monitor a project.¹²⁶ The type of training that is needed for this, formalized on the job training or a formal mentoring program, are not available. Some HRS staff have asked more senior staff members to accompany him or her on an audit or on-site visit. However, this is left to the individual HRS staff member to seek out.¹²⁷ With the staff changes that occurred this summer, this is even less available now that there are no experienced HRS employees working in the office. The Director has stated that he is not currently planning any additional formalized training for his staff, other than refresher courses.¹²⁸

Until this summer, there were primarily two HRS staff responsible for monitoring all major construction projects. Neither of these two HRS staff are currently working in the Department. Therefore, there is no HRS staff member with experience in monitoring major construction projects. Experience, particularly experience in monitoring construction projects, can make a critical difference in the ability of the DHR to effectively evaluate the project's progress. Review of the work of the experienced HRS staff, who had been monitoring the projects, made this clear. These staff members were able to easily identify areas of opportunity for women and minorities in a construction project, which may not otherwise have been apparent to a less experienced HRS. For example, on one project in which female utilization of women in the dry-walling work, as he knew that there would be women available to work in taping and mudding. The experienced HRS staff were also able to identify those unions in which there are very few minority members.¹²⁹ With this knowledge base, the HRS is able to best identify those opportunities for the utilization of women and minorities and therefore understand if a particular utilization demonstrates good faith efforts being made.

Current HRS staff have had training on the technical aspects of monitoring of projects. They are knowledgeable on how to calculate the utilization of women or minorities. However, there has been little to no effort at providing the staff with on-the-job training or training on the construction industry itself. When asked what plans he had to provide his current staff with training and support to monitor major construction projects, the Director responded that he has no such plans.¹³⁰ The Director stated that it is his view that his staff knows how to monitor major construction projects,

¹²⁴ RLS interview with HRS A and B, June 4-5, 2007.

¹²⁵ RLS interview with the DHR Director, September 6, 2007.

¹²⁶ RLS interview with HRS A and B, June 4-5, 2007.

¹²⁷ RLS interview with HRS B and C, August 14, 16, 2007.

¹²⁸ RLS interview with the DHR Director, September 6, 2007.

¹²⁹ RLS interview with HRS A and B, June 4-5, 2007.

¹³⁰ RLS interview with DHR Director, September 6, 2007.

and no further training is needed.¹³¹

Finding: In light of the relative inexperience of the DHR staff, little training has been provided. This is particularly true with respect to on-the-job training, formalized mentoring, and training on the construction industry.

Recommendation: The DHR Director should ensure that all HRS staff receive adequate training on compliance, including conducting audits, monitoring construction projects, good faith effort criteria, and the construction industry. The training should include both written or classroom training and formalized mentoring and on-the-job training.

(e) No monitoring of contracts adding up to \$50,000 over twelve months

Section 183 applies not only to contracts that are worth \$50,000, but also to contractors with contracts that add up to \$50,000 over a twelve-month period. The DHR becomes aware that a contractor needs to register an affirmative action plan, once it has been informed by either HRA/PED or CAS that the contractor will be subject to the requirements of § 183.

Currently, there is no process in place in either HRA/PED or in CAS to track those contractors who have numerous small contracts that add up to \$50,000 over a twelve-month period. Therefore, the contractors do not have the required affirmative action plans and are not complying with the provisions of § 183. In January 2006, the Director of DHR requested an analysis of how many contractors had contracts that added to more than \$50,000 through CAS, but did not have a registered affirmative action plan. A checks written report was requested from the Office of Financial Services and an HRS staff member reviewed the report to identify those contractors who did not have a current registered affirmative action plan. Her analysis identified 187 contractors who should have had a registered affirmative action plan, but did not.¹³² Since January 2006, there have been no steps taken in an attempt to correct this problem.

Finding: Contractors with accumulated contracts of greater than \$50,000 are not registering an affirmative action plan with the City.

Recommendation: HRA/PED and CAS should implement a process to identify those contractors who have accumulated contracts, which add up to \$50,000 per year. Once such a contractor is identified, the contractor should be referred to DHR for an affirmative action plan registration.

(f) Current Implementing Rules of Section 183

The implementing Rules for § 183 of the Legislative Code, originally written in 1977, have not been updated since 1982. This is despite the fact that the ordinance was re-written in 1988. The practices in the DHR have, however, been updated over the past 25 years. The result is that the

¹³¹ The Director also stated, however, that it can take up to three years, depending on prior educational background and experience, for an HRS employee to be fully competent in the job, due to the large learning curve and the benefits that come with experience. RLS interview with DHR Director September 6, 2007.

¹³² Affirmative Action Plan Compliance for City of Saint Paul Vendors Receiving Checks over \$50,000 During Calendar Year 2005.

implementing rules are no longer the best or most accurate description of how § 183 is implemented. When contractors contract with the City, they agree to abide by the provisions of § 183. Section 183, in turn, specifically requires contractors to abide by the implementing rules to that section. However, some of the requirements placed upon contractors are either not spelled out in the implementing rules or are currently implemented in a different way than is identified in the rules, for example, the implementing rules do not define good faith effort. This puts the contractor and the DHR in a difficult position.

The power to “adopt reasonable rules of practice and procedure, and to advise the director on policies of the department” lies with the Human Rights Commission. §183.19(7). In recent years, however, the Commission has not devoted any time to addressing the issues of rules, practice, procedure, or policy with respect to the compliance functions of the Department.

What the DHR has done to unofficially replace the implementing rules, is to provide contractors with handouts, which are given to all new contractors at the pre-construction meeting. One handout (attached as Appendix F) outlines all of the duties and responsibilities of the contractor. A second handout, entitled Good Faith Effort Criteria (attached as Appendix G) provides very detailed instructions to the contractor on what is required to demonstrate a good faith effort. At least one HRS stated that when contractors called and asked for a copy of the implementing rules, she was simply embarrassed to provide it to them, as she felt it was so outdated.¹³³

Finding: The implementing rules for section 183 are out of date and do not accurately reflect the current work being done by the DHR.

Recommendation: The DHR Director and the Human Rights Commission need to work to update and enact current implementing rules. These rules should include a definition of Good Faith Efforts as defined in the DHR handout, Good Faith Efforts Criteria (attached as Appendix G).

(g) Utilizing the Enforcement Tools

This past winter, the DHR Director enacted a new policy requiring each HRS to complete three contractor audits per month. Based upon a random review of the files and interviews with HRS staff, this goal is currently not being achieved.¹³⁴ While there are some audits being conducted, there is no HRS staff person achieving the goal of three audits per month. Some HRS staff admit to never having conducted an audit of assigned contractors, despite being employed by DHR for more than one year. Some HRS staff have also reported that they are even unclear about how to conduct an audit, despite having received training.¹³⁵

When an audit is conducted, and the HRS does identify areas of non-compliance, the response of the DHR is to enter into a conciliation agreement to address those areas. This is regardless of the severity of the non-compliance. In interviews, HRS staff stated that they did not believe the DHR had the authority or support to terminate or suspend contracts or to declare

¹³³ RLS interview with HRS B, June 4-5, 2007.

¹³⁴ RLS interview with HRS A,B,C and D, June 4-5, 2007 and August 14, 16, 2007.

¹³⁵ RLS interview with HRS A,B,C and D, June 4-5, 2007 and August 14, 16, 2007.

contractors ineligible for further City contracts, despite having the authority to do so under § 183.¹³⁶ However, the implementing rules at Article IV provide that evidence of non-compliance may be grounds for any of the following actions:

- (a) Termination of the contract;
- (b) Suspension of the contract until corrective steps are taken;
- (c) Continuation of the contract subject to the imposition of the conditions to correct the discrimination;
- (d) Declaration that the contractor shall be ineligible to bid on future contracts either permanently or for a stated time; or
- (e) A combination of the above.

DHR staff is not taking full advantage of these options it has for compliance.

Similarly, HRS staff are required to review the MEU's submitted by contractors in construction contracts and evaluate whether the project is on target for reaching its utilization goals. If it appears that the project is under utilizing minorities, women and apprentices, the HRS has an obligation to contact the contractor to determine if it is making good faith efforts to achieve goals. The HRS assigned to the project is also responsible for conducting on-site visits to the projects to verify the reported people are actually employed by the project.

Since July when the two HRS staff members left, there has been virtually no monitoring of construction projects. Numbers from the MEU's have been inserted into the monthly reports, but no analysis is being conducted with respect to whether contractors are making good faith efforts.¹³⁷ There were no on-site visits being conducted. In discussions with the current HRS staff, there did not appear to be a plan for who would now be monitoring these contracts or ensuring the HRS had the knowledge or experience to do so.¹³⁸

Finding: DHR is not currently conducting regular audits of contractors, is not consistently monitoring construction projects, and is not using the full range of corrective actions for increasing compliance with the good faith efforts criteria.

Recommendation: Processes should be put into place to ensure that all contractors are audited on a regular basis and all construction projects are monitored on a regular basis. Consequences of the failure to comply with the good faith criteria must be made clear to all contractors. HRS staff should be trained on the enforcement tools available under the implementing rules. Policies should be put in place to clarify under what circumstances a particular action might be taken and the process whereby the DHR initiates that process.

(h) Communication with other Departments

There is very little consistent cross department communication, resulting in limited understanding by the DHR staff of the work being done in PED/HRA and in Contract & Analysis Services Division (CAS). For example, the HRS employees did not know under what circumstances

¹³⁶ RLS interview with HRS A and B, June 4-5, 2007.

¹³⁷ RLS interview with HRS C and D, August 14, 16, 2007.

¹³⁸ RLS interview with HRS C and D, August 14, 16, 2007.

a PED or HRA contract would be referred to DHR for signature. HRS staff reported that they felt that the interests of their Department were, at times not heard or taken into consideration by the other Departments.¹³⁹ HRS staff also identified specific instances in the recent past when they felt that staff from CAS had assisted contractors in circumventing the requirements of the DHR.¹⁴⁰ HRS staff also reported that occasionally in pre-construction conferences, project managers have minimized the importance of the DHR requirements to the contractor in the presence of the HRS. HRS staff reported that communication with the project manager during the project varied depending on the project manager involved.¹⁴¹ Overall there was a general impression that project managers were improving in their support for DHR work, there was still much work to be done. Project managers, by contrast, have reported that they are willing to support compliance efforts, but rarely hear from DHR regarding problems. This improved communication and support is primarily on an ad hoc basis, however, and there is no systemic or regular communication between the departments regarding their shared interests.

Finding: Communication and support between the Departments is often limited or ineffectual.

Recommendation: Processes should be put in place, which encourage regular communication between HRS staff and HRA/PED project managers and with CAS staff regarding specific problems with contractors or projects.

(i) Delays in Signing Contracts with the DHR

Other Departments have complained that contracts are delayed in the DHR and blame the DHR employees for this delay. Based upon our random review of the contractor files, this has not been the case. The HRS takes action on the contractor file usually on the same day it enters the office or within a day or two of receiving it. When delays have occurred, it was because the contractor was slow in getting the affirmative action plan to the HRS. A good example of this is the contract with Historic Saint Paul, Inc. from 2006. DHR received the contract on September 12, 2006. On that same day, the HRS called the contractor regarding its' affirmative action registration. The following day, the HRS faxed the information to the contractor. On September 21, 2006, the HRS called to follow-up on the affirmative action plan registration. The contractor called on October 4, 2006 to advise that the registration form would be signed on October 6th. On October 6th, the HRS also sent over a sample affirmative action plan. On October 10th, the HRS called the contractor to follow-up. DHR received the affirmative action registration form on October 16, 2006. DHR signed it that same day. The signing of a new contract is an important opportunity for the HRS to ensure that the contractor is up to date with the affirmative action plan and all prior paperwork, as the contract will not be signed until this paperwork is received. In other words, it is an easy stick for the HRS to use to obtain compliance by a contractor.

¹³⁹ RLS interview with HRS A and B, June 4-5, 2007.

¹⁴⁰ One example of this was a contract with the Friends of the Mississippi that was originally bid for \$52,000. Because it is over the \$50,000 threshold, the Friends of the Mississippi needed an affirmative action plan. The HRS person responsible went to the Friends of the Mississippi office and sat down with them to assist them in completing the plan. The next thing she heard was that the project had been re-bid as a \$47,000 project with Friends of the Mississippi and \$5,000 with another organization, thus obviating the need for an affirmative action plan.

¹⁴¹ RLS interview with HRS A and B, June 4-5, 2007.

The signing of the contract is also an opportunity for the HRS to use to obtain an agreement by the new contractor to take additional steps toward inclusion of women, minorities and persons with disabilities. The file review evidenced times in the past when, prior to signature, the HRS would closely review existing contractor files for evidence of inclusion efforts. If the HRS saw areas in which he or she believed the contractor could improve, an agreement was reached with the contractor for improvement, before the new contract was signed. This did not result in any delay in the signing of the contract, and worked like a mini-audit on the contractor. When asked why this process was not still used, we were informed that it was due to a change in the software that made it more cumbersome to put the letter outlining the areas of concern together.¹⁴² It was admitted, however, that it was a good practice that achieved positive results with a minimum of effort.

Finding: The DHR works diligently to sign contracts in a timely manner. However, because DHR requires all of the affirmative action registration paper work before it can sign a contract, there can be a delay in the ability of the DHR to sign a contract.

Recommendation: (a) DHR should continue to monitor the time it takes to sign a contract once it is in the Department. (b) A procedure should be put into place to notify DHR earlier in the process to allow time for the Department to obtain the necessary affirmative action registration from the contractor prior to signing the contract. (c) DHR should reinstitute the process of obtaining specific agreements from contractors on the contractor's implementation of the good faith criteria at the time of the affirmative action plan registration.

(j) Management Structure

In the current structure of the DHR, the Director is the only person with any management authority. The Director, however, spends a significant amount of his time out of the office working on outreach efforts, an important aspect of his job. It is through community outreach that the Department is able to educate and interact with the community on issues of discrimination and contract compliance.

With no other manager or team leader in the office, the result is that some of the more experienced HRS staff have taken on this role without the corresponding pay, title, or authority to do so. This has, at times, resulted in hard feelings between HRS employees, who resent being "managed" by a co-worker. At the same time, there is no one else in the office responsible for the day-to-day management of the Department, including workload assignments, ensuring that regular contractor audits are being conducted, ensuring that construction project monitoring is being done on a regular basis or as a resource for technical assistance for the rest of the staff.

Finding: Due to the DHR Director's many responsibilities, he is not available for day-to-day management of the Department.

Recommendation: The DHR needs intermediate level supervision with the responsibility for:

- (a) day-to-day work distribution;
- (b) ensuring that regular audits are being completed;

¹⁴²RLS interview with HRS A, June 18-19, 2007.

- (c) ensuring that construction projects are being monitored; and
- (d) serving as a resource for technical assistance for the staff.

(3) New areas of responsibility

In addition to the many responsibilities of the DHR, in 2006 it has assumed two new areas of necessary monitoring. The City of Saint Paul enacted a 10 percent disability employment goal for all businesses contracting with the City. Also, by City of Saint Paul Council Resolution 06-304, construction projects are required to use apprentices for a certain percentage of the total work hours. Each of these new requirements has added to the workload and responsibilities of the DHR. Neither of these new requirements provided any additional funding or staff to the DHR for this work.

(a) Disability Employment Goals

The new disability employment goals require “service providers, material suppliers and construction contractors [to] establish a 10% goal for employing people who have disabilities in their non construction job groups.”¹⁴³ This means that when a contractor registers its affirmative action plan with the City, in addition to making an analysis of its utilization of minorities and women in its work force, it must also make an analysis of its utilization of persons with disabilities in its work force. If the contractor’s current utilization of persons with disabilities is below 10 %, then it must set a numerical goal for hiring people with disabilities until the contractor reaches 10 % of its non-construction workforce.

While affirmative action hiring goals for women and minorities have been in existence nationally for many years, affirmative action hiring goals for persons with disabilities have not. In so enacting this new hiring goal, the City of Saint Paul has demonstrated considerable leadership. However, the goal has been enacted without providing the DHR with any additional resources to promote and educate the public about the new goal. Also there are many questions about its implementation, which have not been answered. As a result, the goal in its current state it is a relatively meaningless goal.

One very key issue that must be more clearly conveyed to all contractors is the question of who is disabled. The Affirmative Action Program Registration form requires contractors to agree to “set an employment goal of 10% of people with disabilities for our non-construction workforce, and [to] maintain a statement of the goal and timetable to remedy any underutilization of people with disabilities.” What it does not say in the Affirmative Action Program Registration or in the instruction sheet that is given to contractors, is what is the definition of who is disabled.¹⁴⁴ Is the definition a contractor is to use the definition in sec. 183, the definition under Minnesota State Law, the definition under the ADA, or a completely different definition? It also does not state who decides if a person is disabled or not. Does the City certify that identified persons are disabled or is it left to the discretion of the contractor? Will medical documentation be required to establish the disability,

¹⁴³Handout from DHR entitled New 10% Disability Employment Goal for Businesses Contracting with the City of Saint Paul.

¹⁴⁴As stated in more detail under “Defining businesses owned by persons with disabilities” the auditors do not support the use of the definition as it now stands under the ADA. Consideration should be given to adopting a more inclusive definition as found in other states, such as Wisconsin. Consideration may also be given to the definition under the ADA Restoration Act, depending on the ultimate result of that legislation.

or will the individual's statement that he or she is disabled be sufficient. It is also not clear for contractors whether identifying a person as disabled under this affirmative action plan is the same as admitting the person is disabled in the context of any potential discrimination complaint or lawsuit.¹⁴⁵

As noted above, the hiring goal does not include construction job groups. The Auditors have identified no clear reason why these jobs groups are not included in the hiring goal. Depending on how disability is ultimately defined under this hiring goal, it is likely that vast a number of persons with disabilities will be qualified to perform the construction work with reasonable accommodations.

Since its implementation, there has been no training provided to the HRS staff on the new disability employment goals. The staff has been provided no guidance or training on monitoring the compliance of contractors to make good faith efforts to achieve a 10% goal of employing people with disabilities. The staff also has not been provided guidance or training on the goal so as to answer questions of contractors.

In addition, there has been very little effort put into publicizing the new goal or educating the public about the new employment goal. This publication and notification component is necessary to educate contractors about their obligations to set employment goals for persons with disabilities. In our interviews with contractors, none of the contractors questioned about the disability goals, understood what the responsibilities were for employing persons with disabilities.¹⁴⁶ It is also necessary to notify potential employees that employers contracting with the City of Saint Paul are under an affirmative duty to work toward the 10 % employment goal. Much like they are given with respect to minority and women employees, contractors need to be given the information about resources they can go to in order to recruit persons with disabilities. Persons with disabilities need to be aware that it will be necessary for them to disclose if they have a disability, in order to be considered under the new hiring goals. Potential employees and contractors must understand who is and who is not disabled.¹⁴⁶

As stated above, there are currently very few audits being conducted of contractors with the City. As a result of the very few number of audits conducted since the implementation of the new employment goal, it was not possible to assess how the audit process is working to enforce it. Based upon the files reviewed, we found that of the employers who have reported a current utilization of persons with disabilities, not one comes even close to the 10 percent requirement. Furthermore, of the audits that have been conducted since the enactment of the 10 percent goal, emphasis remains on the utilization of women and minorities.

¹⁴⁵While equal employment litigation is not a subject of this report, this may very well be a serious concern for contractors. A significant issue in disability discrimination litigation is the question of whether the complainant or plaintiff is actually disabled. Contractors may be unwilling to identify persons as disabled if that would later be equated as an admission of this issue in any litigation.

¹⁴⁶This may be skewed by the fact that our interviews focused on construction contractors. However, these contractors are under the obligations of this hiring goal for their non-construction workforce.

¹⁴⁶In interviews with contractors, City staff and community members it was clear that the definition of "person with disability" that is being understood is very narrow. A person with a disability is equated with a person with a developmental disability or a person in a wheelchair. Persons with disabilities such as diabetes, chronic depression, or ADHD, for example were not being thought of as being included. These less visible disabilities are more difficult to quantify in an affirmative action/goal setting context.

Finally, one inherent difficulty of any affirmative action program with respect to persons with disabilities, is the fact that so many disabilities are not obvious to the employer. Therefore, an employer must rely upon individuals self-disclosing his or her disability. The Catch-22, however, is that because of the stigma and the discrimination against persons with disabilities, many people are very reluctant to disclose the fact that they do have a disability. In interviews we conducted with experts around the country on disability discrimination law and policy, reluctance to self-disclose a disability and the question of how would the decision be made to determine if a person is disabled, were universally cited as the two most significant hurdles to overcome in the application of any hiring goals for persons with disabilities.

Other municipalities, which have made efforts to increase the employment opportunities for persons with disabilities, have recognized the many complex issues that must be addressed in developing a comprehensive program. For example, in an interview with a participant in the City of Chicago's efforts to expand their initiatives for persons with disabilities, she advised that a Mayor's Task Force on Persons with Disabilities was convened for this task. The task force met for three years and addressed a wide range of issues that affect persons with disabilities. While a long process, the result has been supported by a wide group of interested parties and has produced a variety of well developed programs to increase the employment and other opportunities of persons with disabilities.¹⁴⁷ In interviews with disability advocates, including legal experts, members of advocacy organizations, and employees of other municipalities, there has been general agreement that a similar process necessarily needs to be implemented in Saint Paul if there is to be any meaningful effort made toward increasing the opportunities for persons with disabilities.

We applaud the City of Saint Paul for implementing this important step to increasing the workforce participation of persons with disabilities. However, significant work must still be done to make these hiring goals meaningful. Many questions need to be worked out as to how this will best be implemented and assessed. A public relations campaign is needed to educate contractors and potential employees about this new effort. Without these efforts, the 10 percent hiring goal will remain a meaningless goal.

Finding: The City of Saint Paul has demonstrated great leadership in implementing a 10 percent hiring goal for persons with disabilities. However, little follow-up work has been done to implement the goal.

Recommendation: A task force should be set-up to study and make recommendations about the best way in which the 10 percent hiring goal for persons with disabilities should be implemented. Issues addressed by this task force should include how the person with a disability is identified, sources for recruitment and outreach, training for City staff and contractors, and how the goal should be publicized within the community. Members of the task force should include the Director of Human Rights, members in the community who advocate on behalf of persons with disabilities, and lawyers and/or legal scholars with expertise in the ADA. The task force should also address other barriers to employment for persons with disabilities, such as a vendor outreach program for persons with disabilities, accommodations and accessibility issues for persons with

¹⁴⁷The report can be found at

http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/DisabilityWorksFinalReport.pdf

disabilities, and a hiring goal for persons with disabilities in the construction trades.

(b) Apprenticeship Opportunities Pilot Project

Every person we talked to on the subject, from City staff to contractors to interested community members, agreed that there will be a significant shortage of experienced construction workers in the very near future. According to the Brookings Institute Report, *Mind the Gap, Reducing Disparities to Improve Regional Competitiveness in the Twin Cities*, in the year 2000, the baby boom generation represented 44 percent of the region's total labor force. People in the construction industry state that the average skilled trade worker or laborer is over 50 years old. For these reasons, there is concern about the impending shortage of employees in the construction industry.

In an effort to address this, the Saint Paul City Council passed Resolution 06-304 in April 2006, which established the Apprenticeship Opportunities Pilot Project (AOPP). The Resolution established that on construction projects receiving \$50,000 or more, there will be a 15 percent apprentice utilization goal and a goal of six percent of those hours to go to women and eleven percent of the hours to go to minorities. According to the Rules Governing the AOPP, "this goal is based on the total work hours performed by construction trade workers on the project site. The apprentices must be enrolled in training programs approved by the Minnesota Department of Labor & Industry."

The Rules Governing the AOPP further state,

"AOPP facilitates the hire of apprentices by working as a liaison between government, construction developers, contractors, unions, and community-based organizations with pre-apprenticeship programs or construction placement services." Contractors are required to "establish contact with [the] AOPP staff members prior to the start of a monitored project in order to discuss union apprenticeship opportunities in the contractor's workforce."

The Rules also require the DHR to:

1. Be responsible for the implementation and administration of the requirements of the resolution;
2. The Human Rights Director is responsible for developing the contract specification language and developing a system for monitoring the actual use of apprentices on construction projects;
3. The Human Rights Department will determine on a project by project basis the appropriateness of requiring the use of apprentices for 15 % of the total work hours.
4. The Human Rights Director is also responsible for reporting on a quarterly basis on the impact of the program and for making recommendations for continuation of the program and for mechanisms to create budget sustainability for the AOP beyond the pilot stage.

With these new responsibilities, the DHR has been provided with no additional funding with

which to accomplish all of this work. The HRS staff have also not been provided with any additional training or direction on how to implement or monitor the AOPP requirements. It is unclear, therefore, to what extent DHR is fulfilling these obligations under the Resolution.

The AOPP program currently has a budget for two years. It was intended to have three funded staff positions, but after less than one year, two of the staff people have been let go, due to a shortage of funds.

The AOPP has run into other difficulties as well. It took until the Fall of 2006 to be up and running, after the summer construction period had begun to wind down. The construction season of 2007 has been unusually slow. As a result, there is little hiring occurring, beyond hiring back the usual crew. Therefore, while the AOPP has identified qualified candidates for placement, it has been unable to find a contractor who is currently hiring.¹⁴⁸

The construction industry has also not been receptive to the work of the AOPP. Mary Dahlquist, the Director of AOPP, stated that when she has spoken to employers, she often gets feedback that they are only looking to hire experienced employees and do not want to take the time to train or work with apprentices. She reflected that this is related to the current slump in the construction industry, as there are currently experienced workers available.¹⁴⁹

In the current market, it is not possible to tell what kind of an impact the AOPP is having. The problem is that the funding for the pilot project ends next year. Even if the funding is extended for one more year, it is not clear whether next year's construction season will be busier, thus allowing for a better assessment of the project. The only way the project can be adequately assessed is with funding for a longer period of time, which will allow the program to get the word out to enough contractors and potential apprentices and to work during a more robust construction season.

Finding: In the near future a shortage of qualified workers in the construction industry can be expected. However, due to the current downturn in the construction industry, resulting in a shortage of available construction work and the short time the AOPP program has been in place, it is difficult to assess the program's effectiveness.

Recommendation: The City must continue to be aware of and prepared to address the impending shortage of qualified employees in the construction industry. Therefore, the City should continue to fund and actively support the work of the AOPP in order to fairly assess the effectiveness of the program in light of the current labor market conditions.

Finding: The DHR staff has not been trained or provided direction on the Department's responsibilities under the AOPP. Therefore, it is unclear to what extent DHR is fulfilling its obligations under the Resolution.

¹⁴⁸ The AOPP Director gave us the example of a very qualified woman, who is seeking work as a cement finisher. As of August, the cement contractor had not yet called back the core group, so they had no room for an apprentice. As it is such a seasonal occupation this woman will now have to wait until next year to get her chance.

¹⁴⁹ RLS interview with AOPP Director, August 15, 2007.

Recommendation: DHR staff should be trained on the obligations under the Resolution with respect to AOPP. Processes should be put into place to ensure that DHR is fulfilling its obligations under the AOPP.

VII. FINDINGS AND RECOMMENDATIONS

Our findings and recommendations are arranged in accordance with eight categories listed A through H. While many of the findings and recommendations listed at A through G relate to more than one area, for convenience we have listed each only once in the category that we believe to be most applicable. We have included at “H” additional recommendations that we believe will lead to overall improvement. Appendix I is a chart that lists each finding and recommendation, references where it is located in the report and identifies which City department or unit of government would have primary responsibility for implementation.

A. Increasing Effectiveness and Enforcement

The City/HRA can better achieve inclusiveness goals by considering findings and recommendations that will enhance the effectiveness of VOP/AA programs and increase enforcement of vendor outreach and affirmative action employment requirements. A key to doing so is more clearly defining roles and responsibilities for achieving goals and strengthening enforcement.

1. **Finding:** Lack of clarity about responsibility for post contract formation monitoring of compliance with VOP promises made by contractors in both City and HRA contracts contributes to the deficiencies of monitoring of VOP compliance and results identified in this report.. Inadequate monitoring contributes to deficiencies in required reports. Monitoring and reporting of compliance are essential to accomplishment of the purposes of the VOP program. Coordination of DHR and VOP monitoring will increase the effectiveness of monitoring and eliminate duplication of reports contractors must supply. For these responsibilities and duties as for all VOP/AA responsibilities and duties, when considered for pay raises, promotion and related matters, evaluation of PED/HRA project managers and other staff and CAS and DHR staff should include how well they discharge responsibilities and perform VOP and AA duties.

Recommendation: The mayor and HRA should clarify who has responsibility for monitoring and reporting of compliance with the VOP program after contracts are signed, and direct that policies and procedures be established to monitor and report on VOP compliance after contracts are signed. The procedures should specify what the roles of department staff, the VOP program coordinator, and the Department of Human Rights will be in monitoring. PED/HRA project managers should have first line responsibility for monitoring. The VOP program coordinator should be designated as compliance staff to work with the project managers on monitoring and enforcement. The DHR director with respect to affirmative action employment and the CAS manager with respect to vendor outreach should each have responsibility for monitoring and enforcement of all City and HRA contracts. The City and HRA should supply staff and budget to accomplish effective monitoring and enforcement. Staff evaluation for pay, promotion and related matters should include how well VOP/AA responsibilities and duties are discharged.

2. **Finding:** The compliance and investigation functions of the Department of Human

Rights are in conflict for limited resources.

Recommendation: The Director of DHR should consider restructuring the Department into two sections: HRS employees responsible only for enforcement and HRS employees responsible only for compliance.

3. **Finding:** Contractors with accumulated contracts of greater than \$50,000 are not registering an affirmative action plan with the City.

Recommendation: HRA/PED and CAS should implement a process to identify those contractors who have accumulated contracts, which add up to \$50,000 per year. Once such a contractor is identified, the contractor should be referred to DHR for an affirmative action plan registration.

4. **Finding:** When projects are subdivided into smaller bidding packages and VOP goals are set for each package, VOP participation can be increased. Joint ventures between certified and non certified vendors can contribute to increased availability of certified vendors.

Recommendation: When structuring projects for bidding increased use should be made of subdividing the project to improve opportunities for utilization of certified vendors. The City should continue and expand its efforts to increase opportunities for joint ventures. Subdividing work into economically and operationally feasible units that will increase opportunities for certified vendors should be added as a vendor outreach requirement of Sec. 84.08(c).

5. **Finding:** VOP staff is not regularly informed of change orders and additional work to be done on projects after the contract is let. VOP input could result in additional opportunities for certified vendors. Change orders are not considered when reporting on results of efforts to meet VOP participation goals. PED requests its project managers to consider change orders and to update the total development cost of projects to reflect them. When this requirement is followed the changes are reflected in the total development costs reported in the "Completed" section of the HRA/PED Compliance Report Card.

Recommendation: When PED/HRA staff determines that change orders for additional work are necessary, VOP staff should be informed and have an opportunity to participate in the discussions to advocate for meeting the need for additional work in a way that increases opportunities for certified vendors and to set an appropriate VOP goal for the additional subcontract work. Reports on the VOP program should include change orders in the calculations of percentage participation of certified businesses.

6. **Finding:** The requirement that contractors notify project managers of the need to change subcontractors is not always enforced. Project managers do not always notify the VOP program coordinator of subcontractor performance problems or of the need to change subcontractors. As with other opportunities for certified vendor participation, notice as far in advance as possible of selecting a replacement increases

chances of certified vendor participation. In the absence of procedures requiring vendor outreach when replacing a subcontractor, it may be that opportunities to promote increased participation by certified vendors are being missed. Also it may be that the business development needs of the certified business with performance problems or being replaced are not being addressed.

Recommendation: Project managers should regularly report to the VOP program coordinator on VOP performance matters that arise after a contract is signed and of the need to replace subcontractors. The VOP program coordinator should take steps to assure that vendor outreach policies are followed when replacing a subcontractor. The project manager, in consultation with the VOP program coordinator, should identify any business development assistance needs of the certified subcontractor with performance problems or who is being replaced and make appropriate referrals to business development resources.

7. **Finding:** VOP goals are often not applied to certain professional services which include such items as architectural, legal, surveying and real estate services which are sometimes referred to as “soft costs” or pre-construction costs. The degree of involvement of project managers with respect to efforts to include the participation of MBE’s, WBE’s and SBE’s at that stage is lacking and inconsistent at best. Proactive involvement of project managers at that stage could serve to enhance opportunities for inclusion.

Recommendation : Project managers should be encouraged to become actively involved with efforts to identify business opportunities at the earliest possible stage in the process to maximize occasions to set VOP goals for professional service contracts. These efforts should include arranging and attending conferences with owners, developers and others for that purpose at the earliest possible stage in the process.

8. **Finding :** There could be benefits from increased clarity with regard to the various compliance goals, including VOP and affirmative action goals, applicable to a specific project. Including all of the goals in one document along with responsibilities for implementation and consequences for non-compliance, could provide increased clarity to both compliance staff and contractors. Specifically, with projects where the City and HRA do not control the draw, there is no opportunity for project managers to withhold payment to “leverage” compliance.

Recommendation : Consideration should be given to expanding the use of Regions - type liquidated damages provisions to achieve compliance, particularly in contract situations where draws are not controlled by the City or HRA and possibly in other situations, where appropriate.

9. **Finding:** It is not clear that PED/HRA staff consistently engages in the types of outreach activities described in the HUD guidelines for procurement activities with respect to programs, including HOME and CDBG, in all cases.

Recommendation : PED/HRA staff should consistently follow the HUD guidelines for outreach to include small, minority-owned and women owned businesses in procurement activities for CDBG and HOME programs, which include:

- including such businesses on solicitation lists whenever they are potential sources
- ensuring that such businesses, when identified, are solicited whenever they are potential sources
- dividing procurement requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by such businesses
- requiring prime contractors when subcontracts are let, to take affirmative steps to select small, minority-owned businesses in grant-funded contracts

10. **Finding :** It is not clear that PED/HRA staff follows the HUD guidelines targeting low and very-low income persons for employment and business opportunities on a contract by contract basis.

Recommendation : PED/HRA staff should routinely follow the HUD guidelines for targeting low and very-low income persons for employment and business opportunities, and seek to implement the guidelines, as follows:

- Recipients and their contractors and subcontractors must show preferences for giving training and employment opportunities to low-income persons, to the greatest extent feasible. They should show priority considerations for hiring low-income persons as follows:
 - 1) Low- income persons residing in the service area or neighborhood in which the project is located.
 - 2) Participants in HUD Youthbuild programs.
 - 3) If project is assisted under the McKinney Act, homeless persons in the project area of the project.
 - 4) Other Section 3 residents.

The persons hired should be qualified to perform the work required.

- Recipients and their contractors and subcontractors must direct their efforts to award Section 3 business concerns, to the greatest extent feasible, to Section 3 business concerns in the following preference order:
 - 1) Section 3 business that operate in the project area.
 - 2) Entities that carry Youthbuild programs.
 - 3) Other Section 3 business concerns.

The business must be able to demonstrate that it can successfully perform under the terms and conditions of the proposed contract. In addition, these requirements do not

restrict competition to only businesses meeting one of the priorities, nor do they authorize set-asides.

- Numerical goals for meeting the greatest extent feasible requirement:
 - For training and employment opportunities resulting from Section 3-covered housing assistance, a commitment to employ 10% of the aggregate number of new hires each year over the duration of the Section 3 project.
 - For training and employment opportunities resulting from Section 3-covered community development assistance, a commitment to employ 30% of the aggregate number of new hires for a one-year period.
 - For contracts awarded in connection with Section 3-covered projects, a commitment to award at least 10% of the total dollar amount of contracts for building trades work and at least 30% of the total dollar amount of all other Section 3-covered contracts.
 - All recipients of assistance must:
 - Amend their employment and procurement policies to comply with Section 3.
 - Include the Section 3 clause in covered contracts and subcontracts.
 - Document their best efforts to comply with Section 3 and their success at hiring low-income persons.
 - Monitor their own compliance and the compliance of the contractors and subcontractors.
 - Provide annual reports to the Assistant Secretary for Fair Housing and Equal Opportunity as required.
 - Recipients must maintain the following records:
 - The good faith efforts made to make low-income persons aware of the positions, and to encourage and facilitate their application.
 - The number and dollar value of all contracts awarded to businesses and, in particular, Section 3 businesses during the fiscal year.
 - A description of the best efforts made to award contracts to Section 3 businesses.
 - The mechanisms by which they ensured that contractors and subcontractors complied with the Section 3 preferences for training, employment and contract awarding.
11. **Recommendation:** PED/HRA staff should be required to make available and share with the community on an annual basis the information contained in the HUD Section 3 Summary Report, found at Appendix D.

12. **Finding:** A number of PED initiatives, such as the Working Capital Loan Fund and the Small Business Developer Ownership Construction Program, are not operating in a manner to maximize capacity building with respect to targeted vendors. These programs could benefit by focusing on steps to make the programs more accessible to targeted businesses, additional training for staff and further promoting the programs in the community. Additional resources are needed to support these efforts.

Recommendation: PED initiatives to support capacity building should be reviewed in order to implement steps designed to make programs more accessible to targeted businesses, provide additional staff training and promote the programs in the community. An emphasis should be on making the programs more focused upon eliminating barriers to inclusion identified in Chapter 84. Additional resources should be made available to support these efforts.

13. **Finding:** DHR is not currently conducting regular audits of contractors, is not consistently monitoring construction projects, and is not using the full range of corrective actions for increasing compliance with the good faith efforts criteria.

Recommendation: Processes should be put into place to ensure that all contractors are audited on a regular basis and all construction projects are monitored on a regular basis. Consequences of the failure to comply with the good faith criteria must be made clear to all contractors. HRS staff should be trained on the enforcement tools available under the implementing rules. Policies should be put in place to clarify under what circumstances a particular action might be taken and the process whereby the HRD initiates that process.

14. **Finding:** In the near future a shortage of qualified workers in the construction industry can be expected. However, due to the current downturn in the construction industry, resulting in a shortage of available construction work and the short time the AOPP program has been in place, it is difficult to assess the program's effectiveness.

Recommendation: The City must continue to be aware of and prepared to address the impending shortage of qualified employees in the construction industry. Therefore, the City should continue to fund and actively support the work of the AOPP in order to fairly assess the effectiveness of the program in light of the current labor market conditions.

B. Resolutions and Rule Changes

To better achieve inclusion goals, resolutions and rule changes should be made to make clear HRA's commitment to implementation of the procedures and requirements of the vendor outreach program ordinance and the affirmative action in employment program. Rules implementing Chapter 183 need updating. The City/HRA should take steps necessary to develop expanded outreach to businesses owned by persons with disabilities. Steps should also be taken to improve the effectiveness of vendor certification.

1. **Finding:** The fact that HRA has not adopted resolutions specifically stating the Chapter 84 and Chapter 183 are applicable to it, contributes to confusion and uncertainty about requirements and duties pertaining to compliance with VOP and affirmative action goals.

Recommendation: The HRA Board of Commissioners should adopt resolutions specifically stating that Chapter 84 and the affirmative action requirements of Chapter 183 are applicable to HRA. The resolution should define responsibilities for HRA staff for coordinating with VOP and DHR staff with respect to implementation and monitoring of goals.

2. **Finding:** The implementing rules for section 183 are out of date and do not accurately reflect the current work being done by the DHR.

Recommendation: The DHR Director and the Human Rights Commission need to work to update and enact current implementing rules. These rules should include a definition of Good Faith Efforts as defined in the DHR handout, Good Faith Efforts Criteria (attached as Appendix G).

3. **Finding:** Lack of clarity of definitions and requirements of proof are negatively affecting the decision of appeals from denials of certification.

Recommendation: The City's representative to CERT should participate in and support development of CERT program rules or guidelines that will more clearly define certification eligibility.

4. **Finding:** The continuation of several separate certification programs in the Twin Cities marketplace limits the effectiveness of the inclusiveness efforts of PED/HRA and the City of Saint Paul.

Recommendation: The City should play a leadership role in the consolidation of government certification programs that include the Twin Cities marketplace. Steps should be taken to broaden participation of jurisdictions in the certification program. Any expanded certification program should comply with the requirements of Chapter 84 of the Saint Paul Administrative Code and have sufficient staff and resources to accomplish its tasks in a timely and efficient manner.

5. **Recommendation:** Saint Paul should amend Chapter 84 to provide for outreach to businesses owned by persons with disabilities and provide the necessary staff and budget to fully implement this outreach effort.
6. **Recommendation:** The task force on inclusion of persons with disabilities recommended at p.83 should study the provisions of the ADA Restoration Act, the definitions used by other states and programs, and other proposals for more inclusive definitions of disability and person with a disability and affirmatively endorse and lobby for changes to definitions that would more effectively accomplish inclusion of persons with disabilities, including changes in the federal ADA.

7. **Recommendation:** The task force on inclusion of persons with disabilities recommended at p.82 should develop a program for providing vendor outreach to businesses owned by persons with disabilities, for certifying such businesses and for establishing vendor subcontracting goals for such businesses. The task force should consider the matters discussed in this report and endeavor to identify other concerns that might impact on achieving the goal of increased participation of vendors who are disabled. Saint Paul should implement the resulting program and provide it with the necessary staff and resources identified by the task force. The task force membership should be supplemented to include City employees with responsibilities for vendor outreach and City/HRA contracting, contractors who are disabled and other individuals who advocate on behalf of persons with disabilities and who have appropriate expertise.
8. **Recommendation:** Saint Paul should identify businesses that employ persons with disabilities to provide services and supply goods and provide the information obtained to its buyers and to contractors. Saint Paul should encourage purchases of goods and services provided by persons with disabilities or manufactured by them and recognize such purchases as contributing to the City's goals for inclusion of persons with disabilities as vendors and contractors. The City should collect data on utilization of such businesses and report on it publicly.
9. **Finding:** The City of Saint Paul has demonstrated great leadership in implementing a 10 percent hiring goal for persons with disabilities. However, little follow-up work has been done to implement the goal.

Recommendation: A task force should be set-up to study and make recommendations about the best way in which the 10 percent hiring goal for persons with disabilities should be implemented. Issues addressed by this task force should include how the person with a disability is identified, sources for recruitment and outreach, training for City staff and contractors, and how the goal should be publicized within the community. Members of the task force should include the Director of Human Rights, members in the community who advocate on behalf of persons with disabilities, and lawyers and/or legal scholars with expertise in the ADA.

C. Process Clarification and Communication

Our interviews with staff from each of the three areas of the City government made clear that there are many processes that are not clearly defined and are being conducted on an ad hoc basis. Clarifying the task that needs to be done and the person or department responsible for the work would enhance the effectiveness of these programs. Improved communication will contribute to improved inclusiveness results.

1. **Finding:** Practices of HRA/PED project managers with respect to confirming the level of compliance with VOP and affirmative action goals prior to making payments

vary to a considerable degree. There is no standard procedure, which results in a lack of consistency and does not contribute to the likelihood of maximizing compliance opportunities.

Recommendation : A uniform process should be established whereby project managers consistently check with VOP and DHR compliance staff concerning the status of compliance prior to making payment. This should include a procedure for project managers to routinely receive updates from compliance staff and status reports prior to making payments. The procedure should include guidelines for the possible actions that a project manager is expected to take in the event of non-compliance, including but not limited to, initiating steps to achieve compliance and withholding payments. Project managers should be required to complete the compliance check list form located in the compliance section of project files.

2. **Finding:** VOP staff are not always advised of PED/HRA projects in the conceptual and pre-development phases prior to making a funding commitment and offered an opportunity to have input on VOP goals, developer and contractor selection, and funding approval.

Recommendation: PED/HRA should be required to involve VOP staff at the conceptual and pre-development stages and prior to making a funding commitment on all of its projects.

3. **Finding:** The City is not always obtaining from contractors, who are claiming compliance with VOP requirements by fulfilling the proposed VOP goal, signed acknowledgments by certified subcontractors of the subcontract and its amount prior to final action on a City contract. Commitments by prime contractors to subcontract with a certified business are not regularly communicated to project managers, and changes in subcontractors are not being adequately tracked and monitored. Subcontractor changes are taking place without the knowledge of VOP staff. The consequences of subcontractor changes are not being evaluated. The result is that prime contractors can fail to abide by the subcontractor commitments made to qualify as a responsive bidder without any consequences. Failure to identify such matters contributes to a belief by contractors that reports are filed, but nothing is done with them.

Recommendation: As a precondition to signing the City's contract with the prime contractor, the City should require prime contractors who claim compliance with VOP requirements by fulfilling the VOP goal to submit acknowledgments signed by each certified subcontractor of the intent of the prime contractor to subcontract with that subcontractor. The nature of the work and the contract dollar amount should be specified. The VOP program should establish procedures for tracking and monitoring after the contract is signed to assure that subcontractor commitments and any need for changes to them are communicated to both the project manager and to VOP staff. Working together with the prime contractor, the project manager and VOP staff should assess any need for a change in certified subcontractors and act on requests for changes in a manner that advances the purposes of the VOP program.

4. **Finding:** The DHR works diligently to sign contracts in a timely manner. However, because DHR requires all of the affirmative action registration paper work before it can sign a contract, there can be a delay in the ability of the DHR to sign a contract.

Recommendation: (a) DHR should continue to monitor the time it takes to sign a contract once it is in the Department. (b) A procedure should be put into place to notify DHR earlier in the process to allow time for the Department to obtain the necessary affirmative action registration from the contractor prior to signing the contract. (c) DHR should reinstitute the process of obtaining specific agreements from contractors on the contractor's implementation of the good faith criteria at the time of the affirmative action plan registration.

5. **Finding:** Procedures for alerting the CERT program of the need to review certification status have not been established nor has staff been trained to identify them.

Recommendation: The VOP program should establish procedures for identifying and taking appropriate action on information related to a business' certification and provide training to staff on them.

6. **Finding:** Communication between the Departments is often limited or ineffectual.

Recommendation: Processes should be put in place, which encourage regular communication between HRS staff and HRA/PED project managers regarding specific problems with contractors or projects.

7. **Finding:** The City's inclusion efforts would be enhanced if the City and private GEPS purchasers increased sharing of their experiences with vendor outreach and with each other.

Recommendation: The City should encourage, sponsor and initiate means for City buyers and private GEPS purchasers to share their experiences with vendor outreach, including e-mail, periodic meetings and other means.

D. Documentation

Documentation is an important part of the City's compliance and inclusion efforts. Proper documentation allows the City to assess how it is doing in the accomplishment of its goals. This information can be used for purposes such as analyzing the effectiveness of a program or providing evidence to the community that the City is serious about achieving these inclusion goals. Proper documentation is also critical for the sharing of knowledge and experience, making the City less dependant on particular employees personal knowledge or experiences.

1. **Finding:** While the list of vendors certified by the CERT program is available on CERT's website, www.govcontracts.org, the list cannot be searched nor can the

viewer of it reorder the information to create lists of contractors with specific characteristics. The VOP program coordinator spends time developing lists of specific certified businesses and supplies them to contractors that request them. This reduces the time available for performing the other aspects of VOP program coordination and for supervision of the CERT program. With better software the contractors could generate these lists themselves. Use of the information is difficult if the viewer is not already familiar with the business classification system used in the list. The directory is not as user friendly as it could be.

Recommendation: The City should obtain an electronic certification data system that is more effective. All users should have access to the data on certified companies including private companies and staff of other government jurisdictions. The system should be compatible with commonly used computer systems and software or be able to be converted for use by such systems. A goal should be elimination of the need to input data more than once. In designing the system current government and private users should be consulted. The system should be designed to assure that only authorized persons involved with certification and updating data on certification can generate or change the data on certified businesses. If possible these changes should be undertaken with the other jurisdictions that participate in CERT and the costs shared by the jurisdictions. If not possible, Saint Paul should obtain such a system. Users of the system should be able to conduct electronic searches of the data and produce lists of certified vendors meeting specified characteristics. A means for searching for classification codes by commonly used descriptions of businesses should be included. The City alone or in conjunction with other jurisdictions should review directories produced by other programs and revise its printed directory to make it easier to use.

2. **Finding:** The loss of two experienced HRS staff members has resulted in a inexperienced DHR staff, lacking the knowledge gained through experience in auditing and monitoring contracts.

Recommendation: Processes should be put into place to better document and maintain the knowledge gained through experience of HRS staff in order to make the Department less dependant on individual knowledge and experience.

3. **Finding:** There is no procedure for compiling records documenting contractors and developers past performance accepting and achieving VOP and AA goals. Uniform records of past performance of developers and contractors are not regularly maintained.

Recommendation: PED and the other City departments, in conjunction with VOP staff, should establish procedures for the recording and evaluation of the performance of developers and prime contractors in accepting and fulfilling VOP goals. A system for compiling information on VOP/AA performance and documenting it should be established.

4. **Finding:** Because setting goals on a project by project basis involves weighing of

many factors and facts specific to each contract, determinations of whether or not an appropriate goal was set on any particular project is difficult. Also the factors considered and the weight given to them are not recorded in the project files. Audit of the goals figures in therefore not feasible.

Recommendation: The factors considered and the weight given them when setting a project VOP participation goal should be disclosed in the project file. The goals set and results achieved, however, should be analyzed to enhance determination of whether goals are being appropriately set. CAS should aggregate and analyze the information on the contracts for which it is responsible to improve evaluation of the setting and achievement of goals.

E. Budget and Staffing

Improvement in achieving inclusiveness goals means increasing staff and budgets. The commitment of the City/HRA to inclusion is reflected by its willingness to devote staff and dollars necessary to do so.

1. **Finding:** The Department of Human Rights is not adequately funded to accomplish the responsibilities it has for compliance monitoring and investigation.

Recommendation: The City should provide adequate resources to support the Department of Human Rights.

2. **Finding:** Current staffing levels are inadequate to meet the needs of the VOP program. Presently there is only one staff person devoting 80% of her time to the VOP program. Implementation of the recommendations of this report will increase the need for VOP staff.

Recommendation: VOP staff should be increased by at least ½ time.

3. **Finding:** Due to the DHR Director's many responsibilities, he is not available for day-to-day management of the Department.

Recommendation: The DHR needs intermediate level supervision with the responsibility for:

- (a) day-to-day work distribution;
- (b) ensuring that regular audits are being completed;
- (c) ensuring that construction projects are being monitored; and
- (d) serving as a resource for technical assistance for the staff.

F. Training

We identified a need for additional training in several areas. This, of course, is closely related to all of the other areas, including the recommendations pertaining to budget and staffing.

1. **Finding:** In light of the relative inexperience of the DHR staff, little training has been provided. This is particularly true with respect to on-the-job training, formalized mentoring, and training on the construction industry.

Recommendation: The DHR Director should ensure that all HRS staff receives adequate training on compliance, including conducting audits, monitoring construction projects, good faith effort criteria, and the construction industry. The training should include both written or classroom training and formalized mentoring and on-the-job training.

2. **Finding:** Generally, many HRA/PED project managers do not assume responsibility to take affirmative steps to ensure compliance with VOP and affirmative action goals, unless information reflecting compliance problems is brought to their attention by VOP or DHR monitoring and compliance staff.

Recommendation : Procedures should be established and training should occur for project managers to delineate clear lines of responsibility for monitoring and tracking compliance, set duties with regard to cross-checking and establish communication protocols to enhance the implementation, monitoring and reporting of compliance requirements. Adequate resources should be provided to support the training and implementation of the communication, monitoring and reporting protocols by PED/HRA project managers.

3. **Finding:** The DHR staff has not been trained or provided direction on the Department's responsibilities under the AOPP. Therefore, it is unclear to what extent DHR is fulfilling its obligations under the Resolution.

Recommendation: DHR staff should be trained on the obligations under the Resolution with respect to AOPP. Processes should be put into place to ensure that DHR is fulfilling its obligations under the AOPP

G. Reporting

We make recommendations intended to improve reporting and to enhance the public's understanding of the City and HRA's inclusion efforts.

1. **Finding:** Reports on inclusion efforts do not include all PED/HRA projects. Projects where VOP goals are set by a jurisdiction other than Saint Paul are not accounted for. This underreporting excludes significant construction projects undertaken by PED/HRA.

Recommendation: Reports of inclusion efforts should include all PED/HRA projects, including those where VOP goals are set by another jurisdiction with appropriate notation.

2. **Finding:** Change orders are not considered when reporting on results of efforts to meet VOP participation goals.

Recommendation: Reports on the VOP program should include change orders in the calculations

of percentage participation of certified businesses.

3. **Finding:** The VOP Ordinance requires not only reports documenting goals established, but also requires reports on results of efforts to meet them. Not all the information necessary to understand the VOP and its impacts is aggregated and analyzed and reported to the public. Aggregation and analysis of additional information not now included in reports on VOP participation would advance understanding of the VOP and its impact. PED/HRA and CAS should aggregate and analyze the information on the contracts for which they are responsible. The analysis should include, (a) number and percentage of all contracts for which goals were set, (b) the dollar amount of contracts for which goals were set and the percentage that dollar amount is of the total contract dollars, (c) the number and percentage of all contracts where the actual VOP participation met or exceeded the goal set, (d) the dollar amount and the percent of the total contract dollars of contracts where the actual VOP participation met or exceeded the goal set, (e) the number and percentage of all contracts where the actual VOP participation was less than the goal set, (f) the dollar amount and percent of the total contract dollars of contracts where the actual VOP participation was less than the goal set, (g) the number and dollar amount of contracts where no goal was set because no subcontracting was anticipated, (h) the number and dollar amount of contracts where no goal was set because no subcontracting was anticipated that resulted in VOP participation, and the dollar amount of that participation, (i) the overall VOP goal percentage set weighted by contract amount, (j) the overall VOP participation percentage achieved weighted by contract amount. By undertaking this analysis each year comparisons will assist in evaluating whether the goals being set are increasing or decreasing, whether goals are being set more frequently or less frequently, whether goals are being met and exceeded more often or less often, and whether VOP participation in vendor contracts where no goal is set is increasing or decreasing. The overall VOP goal percentage set and achieved can be tracked over time. These figures also provide a basis for comparison with the 15 % overall goal that applies to HRA contracts where CAS is not involved in setting up the contract.

Finding: CAS's reports on VOP compliance are based on initial promises by the prime contractor, not on what the prime contractor has in fact done. Therefore, the City's understanding of the extent to which the VOP program is achieving its purposes is distorted. Inaccurate reporting contributes to public misunderstanding of the program, its operation and its value. The PED/HRA Compliance report card, however, reports both on contract awards in its "In Process" section and on amounts actually paid on its "Completed" section. CAS's reports should also include both promises made and results achieved. While CAS's reports include information on contracts separately for African-American, Hispanic, Asian and Native American businesses, the reports of PED/HRA do not. Results of outreach efforts to each of these groups is important to understanding the impact of VOP and to designing measures to increase its effectiveness.

Recommendation: The reports of both PED/HRA and CAS on the results of efforts to meet VOP

goals required by the VOP Ordinance should include actual results of contracting and subcontracting, not just initial VOP participation promises from the prime contractor and results for African-American, Hispanic, Asian and Native American owned businesses, not just for minorities. Both CAS and PED/HRA should aggregate, analyze and report the additional information specified in the finding above.

4. **Finding:** Information from subcontractors respecting use of second tier subcontractors is not obtained and analyzed in all cases to accurately report the level of VOP participation achieved.

Recommendation: Information should be collected from subcontractors respecting use of second tier subcontractors. Such information should be obtained and analyzed in all cases and reflected in reports on results of VOP efforts.

H. Additional Recommendations and Proposed “Best Practices”

Because inclusiveness efforts involve staff and programs in numerous departments and many actors both in and outside of government, it is very important to be able to continually coordinate efforts to maximize their impact. Responsibility for oversight and coordination needs to be clearly identified and adequately staffed. Means for assuring that the participants in inclusion efforts will share their experiences with each other and with the community should be fostered. Exceptional performance and improvement should be honored and recognized. Periodically, the inclusiveness efforts of the City/HRA will benefit from outside review and audit.

1. Oversight Function

Under the current administrative structure, the duties and responsibilities for implementing, monitoring and reporting on the City and HRA’s inclusion efforts are reposed with staff in three City departments and HRA. In addition to the needs for clarification discussed in the findings and addressed in the recommendations, the audit reveals a particular challenge in coordinating the efforts of various staff. We recommend that the City and HRA consider authorizing the Mayor to designate a staff person to provide oversight and coordination with respect to the inclusion efforts and activities occurring at CAS, DHR, PED and the HRA. In order for this position to be meaningful, the HRA Board of Commissioners should take appropriate action to sanction the position. The designated oversight person should receive, review and evaluate reports on inclusion activities. Appropriate staff support and resources should be provided in connection with this function.

2. Annual Meeting

The desire to maximize inclusive participation of women, minorities and persons with disabilities in the economic development opportunities of PED and HRA is shared by the City, HRA developers, contractors, and the broader community. The City and PED, and the MBDR program in particular, provide considerable information to the community pertaining to the activities of PED and HRA. We believe that those efforts could be enhanced through establishing an annual meeting at which City and HRA staff would share with the community information relating to inclusion efforts and activities during the prior year. Ideally, the meeting would include City and HRA staff,

representatives from interested parties (contractors, MBEs, WBEs, disability community, labor unions and others) and representatives from the broader community. In addition to providing a forum for the City/HRA to share information and thereby promote its efforts, the meeting would present an opportunity for the City/HRA to receive feedback and input from interested parties.

3. Recognition

The establishment of some type of recognition or acknowledgment for contractors who perform exceptionally well or projects that achieve or exceed goals could serve as a useful tool to promote the City and HRA's compliance efforts. Many programs, initiatives and campaigns utilize such a recognition to show appreciation for good performers and to provide motivation or incentive to others. This would involve establishing criteria for such recognition and determining the best method and occasion for presentation.

4. Future Audit

We recommend that the City and HRA conduct an audit of inclusion efforts and practices at a future date to assess the participation levels of women, minorities and persons with disabilities and to determine the impact of the implementation of recommendations from this audit toward achieving improved outcomes. We believe three years is a reasonable time period to allow for implementation of recommendations, to receive the benefit of the work of any task forces and to respond to any findings from the current disparity study.