On June 15, 2011, the IGO issued a report detailing that the PBC significantly over-reported Minority and Women-Owned Business Enterprise (MWBE) program participation on the public building projects it manages, including City building projects as well as building projects involving the use of City money. The PBC provided a written response to the IGO report dated June 20, 2011. That response does not dispute the IGO's calculations detailing significant over-reporting of participation. The response only notes that PBC policy is more generous than the City's policy in counting MWBE participation. This is an incorrect interpretation of the PBC's policy, reflects that the PBC likely is not following its own policy and, if PBC truly operates as represented, is an indication that the PBC runs a likely unconstitutional program. Moreover, the PBC's response generally reinforces the need for the Mayor to exercise his authority and position to bring the PBC's MWBE program policies and practices into conformity with those of the City, as well as to require the PBC to fully cooperate with the IGO in any audit, review, or investigation into PBC activities involving any City funds.

> ***PBC Point #1:*** *"The method of calculation you apparently used is wrong. You calculated the percentages of MBE/WBE participation in projects using the City of Chicago's rules for such calculation. The PBC is a separate and independent body from the City and the PBC rules and regulations for making these calculations are different in an important respect. The PBC calculations take into account full participation of MBE/WBE's as primes or joint venture partners in a project, for the reasons described in the Special Conditions Regarding Remedial Program for Utilization of Minority Business Enterprise ("MBE"), Women Business Enterprise ("WBE") and Economically Disadvantaged Firms adopted by the Board on October I, 2004 and attached hereto. The City does not recognize full participation of MBW/WBE as primes or in joint venture partnerships.*
>
> *Additionally, joint venture partners have no lien rights on projects. Therefore, relying on lien waivers alone to calculate participation would inaccurately exclude MBE/WBE participants who act as joint venture partners."*[1]

IGO Response: The PBC regulations state that "[a] Contractor may count toward its MBE or WBE goal the portion of the total dollar value of a contract with an eligible joint venture equal to the percentage of the ownership and control of the MBE or WBE partner in the joint venture." However, the MBE or WBE participant in the joint venture must be "responsible for a clearly defined portion of work to be performed in proportion to the MBE or WBE percentage."[2] The prime documentation that an MWBE would submit to demonstrate that they fulfill the latter condition is lien waivers.

The PBC's position appears to be that regardless of what lien waivers show an MWBE joint venture partner should be credited with participation equal to their percentage ownership in the

[1] Public Building Commission. "Response to Report of the Inspector General of the City of Chicago, dated June 15, 2011." June 20, 2011.

[2] Public Building Commission. "Standard Terms and Conditions for Construction Contracts." Section 23.01(4)(c) http://www.pbcchicago.com/pdf/forms/Book_2_March_2011_Standard_Terms_and_Conditions_for_Construction_Contracts.pdf

project. In the case of the Westinghouse High School Project, the lien waiver shows that 88 percent of the amount that was credited as MBE participation to a joint venture partner went to other firms, including over 60 percent going to one non-MWBE firm.

This position appears to violate PBC regulations that require MWBEs to perform a commercially useful function. From the PBC regulations:

> A Contractor may count toward its MBE and WBE goals only expenditures to firms that perform a commercially-useful function in the work of a contract. A firm is considered to perform a commercially-useful function when it is responsible for execution of a distinct element of the work of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved."[3]
>
> "Consistent with normal industry practices, a MBE or WBE firm may enter into subcontracts. If a MBE or WBE contractor subcontracts a significantly greater portion of the work of a contract than would be expected on the basis of normal industry practices, the MBE or WBE will be rebuttably presumed not to be performing a commercially useful function."[4]

When an MWBE joint venture partner subcontracts out distinct elements of a project to non-MWBE firms, it is not performing a commercially useful function on those elements of the work. On the Jorge Prieto (also known as the Belmont Cragin Area), Langston Hughes, and Westinghouse school projects, the MBE joint venture partners subcontracted distinct elements of the projects to non-MWBE firms. Consistent with the PBC's regulations, the IGO did not credit these subcontracts as MWBE participation.

Additionally, it is incorrect that joint venture (JV) partners have no lien rights and therefore relying on lien waivers to calculate participation would be inaccurate. We were provided lien waivers by the PBC that include JV partners and subcontractors. The lien waivers are necessary to show how much of the work the joint venture partner performed on its own and how much it actually was paid, which is what the PBC's regulations require.

In its own calculations of MWBE participation on these projects, the PBC does not fully credit JV partners. On both the Jorge Prieto and Langston Hughes School Projects, the PBC reduced the credited participation of the MBE JV partners because the MBE JV partners subcontracted to other MWBEs. This contradicts the PBC's statement that they take into account full participation of MBE/WBE's as primes or JV partners in a project and do not rely on lien waivers.

Finally, the PBC's interpretation of its regulations appears to be that "calculations take into account full participation of MBE/WBE's as primes or joint venture partners in a project", regardless of subcontracts. This likely violates the narrow tailoring requirement that all affirmative action government contracting programs must meet. Supreme Court decisions

[3] Public Building Commission. "Standard Terms and Conditions for Construction Contracts." Section 23.01(4)(d)
[4] *Id.,* Section 23.01(4)(e)

require that an affirmative action government program must be narrowly tailored, "meaning that it did not unduly burden those who do not benefit from the program."[5] From the United States Department of Transportation, as it revised the federal Disadvantaged Business Enterprise (DBE) program to comport with the currently controlling Supreme Court decisions:

> "In a narrowly tailored program, it is important that DBE credit be awarded only for work actually being performed by DBEs themselves. The necessary implication of this principle is that when a DBE prime contractor or subcontractor subcontracts work to another firm, the work counts toward DBE goals only if the other firm is itself a DBE."[6]

Thus, the PBC's response is either ignoring its own rules or, if PBC truly operates this way, PBC runs a likely unconstitutional program.

Lastly, the PBC statement seems to absolve itself of meeting the City's program standards on City projects. The IGO regards the existence of multiple MWBE program standards for City or City-funded projects to be poor policy that leads to a lack of accountability, may foster confusion, and makes the MWBE program vulnerable to possible fraud and abuse. The IGO encourages the Mayor, who appoints the majority of the PBC Board of Commissioners and presides as Chair, to encourage the PBC to bring the MWBE program standards and policies of the City and the PBC into conformity or, minimally, to require that the PBC meet City program standards and policies on all projects involving any City funds.

> ***PBC Point #2:*** *"Additionally, you came to conclusions on the basis of documents for projects for which financial closeout had not been completed, which means that all waivers of lien had not been collected and final payments had not been made."*[7]

IGO Response: Our conclusions were based on final (or nearly final) lien waivers for the MWBEs on the projects, even if the PBC hadn't officially closed-out the project. Our conclusions also take into consideration partially documented projects, in which we based the calculations on the final (or nearly final) waivers we obtained, and gave the PBC the benefit of the doubt regarding payments to MWBEs for which we were not provided lien waivers. Were the incidence of over-reported MWBE participation revealed by our analysis of lien waivers applied to portions of projects for which we did not receive complete documentation, PBC's over-reporting would have been even greater.

> ***PBC Point #3:*** *"The PBC continues to disagree with the IGO's interpretation of the limitations of the scope of the IGO's authority. We suggest that an open and frank*

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[5] Shefsky and Froelich. "Chicago's Minority and Women Business Enterprise Program in Construction: A Constitutional Challenge: A Report to the City Council Budget Committee on the *BAGC v. City of Chicago* Trial. April 2004. pg. 5.

[6] United States Department of Transportation. "DBE Program: DBE Final Rule Rule [sic]." 1999. http://www.osdbu.dot.gov/DBEProgram/alldbe.cfm

[7] Public Building Commission. "Response to Report of the Inspector General of the City of Chicago, dated June 15, 2011." June 20, 2011.

> *conversation take place between the IGO and the PBC to resolve any legal impediments to insure an open and cooperative relationship going forward."*[8]

IGO Response: We agree that the PBC and IGO continue to disagree over the scope of the IGO's authority. However, having engaged this issue with the PBC it appears unlikely that this will be resolved by further discussion with the PBC, but rather should be resolved by the Mayor of the City of Chicago, who should direct the PBC to cooperate with the IGO in any audit, review, or investigation into PBC activities involving any City funds.

[8] Public Building Commission. "Response to Report of the Inspector General of the City of Chicago, dated June 15, 2011." June 20, 2011.