MINORITY AND WOMEN-OWNED BUSINESS (MBE/WBE) PROCUREMENT PROGRAMS

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CHAPTER 11

The contents of this paper are provided for informational and educational purposes only and are not intended to provide or be a substitution for legal advice. Please consult your legal advisor for guidance and advice specific to your particular fact situation. Thank you.

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BIOLGRAPHICAL INFORMATION

My legal career has focused on various municipal issues representing clients from both the public and private sectors. After graduating from Texas Tech School of Law, I joined the El Paso City Attorney's office. Later I worked for Bickerstaff, Heath, Delgado, Acosta and am currently an Assistant City Attorney for the City of Austin, Texas.

Land use issues, including annexation, development agreements, vested rights, transportation, drafting of subdivision and zoning regulations, charter amendments, election law, redistricting, purchasing, open government and social media issues are just a few of the many experiences I have enjoyed across the state.

In addition, I have served as City Attorney for Wimberley, Texas, and successfully defended the City of El Paso's Zoning Board of Adjustment in district court when sued by a neighbor unhappy with a building official's decision (Cause No. 2007-4401, 346th District Court El Paso County).

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MINORITY AND WOMEN-OWNED BUSINESS (MBE/WBE) PROCUREMENT PROGRAMS

I. INTRODUCTION

The competition for government contracts can be fierce. On the federal, state and local level a contractor can start or further their business with a steady government income. To be a prime contractor it takes a great deal of money and capital to support your payroll and the payroll of your subcontractors. Many small subcontractors may stay small unless they can get jobs from a prime contractor performing work for a governmental entity.

At each level of government, policymakers will have constituent business owners, small and large, primes and subs that will plead their business case for more work. These policymakers may then enact programs to either help small businesses, local and/or minority or women owned businesses. This paper will focus on the minority and women owned business enterprise programs (referred to as MBEs and WBEs), and discuss the critical aspects of the City of Austin's MBE/WBE program; however, the particular facts of any case before the City will be subject to the applicable law and its interpretation in effect at the time. Please check the City's website or with City staff for the most up to date information.

For a more in-depth analysis of MBE/WBE law and issues, the Transportation Research Board of the National Academies produced, *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, by Dr. Jon Wainwright of NERA Economic Consulting and Colette Holt of Colette Holt & Associates, and can be found online at: http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_644.pdf. While the *Guidelines* address the federal disadvantaged business enterprise program, the same constitutional analysis applies to race or gender based programs at the local level.

II. TERMINOLOGY

Various government programs will focus on all or some of the following types of businesses, and these acronyms may be used throughout the paper:

- MBE – Minority-owned business enterprise;
- WBE – Women-owned business enterprise;
- DBE – Disadvantaged business enterprise (federal programs or federally funded);
- SBE – Small business enterprise; and
- HUB – Historically underutilized business.

Veteran-owned or service disabled veteran-owned business enterprise is another possible category of businesses which may be part of an MBE/WBE program.

III. *RICHMOND V. J. A. CROSON CO.*[1]

When it comes to understanding MBE programs, *Richmond v. J.A. Croson CO.*, 488 U.S. 469, 477, 109 S.Ct. 706 (1989), is the definitive case. *Croson* analyzes the Fourteenth Amendment to the U.S. Constitution and describes the strict scrutiny analysis applied to race-based programs. A gender conscious WBE program would be subject to an intermediate scrutiny analysis; however, as the two are often combined into one program only the higher strict scrutiny standard will be discussed below.

Facts. On April 11, 1983, the Richmond City Council adopted a Minority Business Utilization Plan ("Plan") requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" ("MBEs"). The Plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." "Minority group members" were defined as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." The Plan declared that it was "remedial" in nature, and enacted "for the purpose of promoting wider participating by minority business enterprises in the construction of public projects."

At the Council public hearing adopting the Plan, proponents of the Plan relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978-1983. Plus the city's counsel concluded that the Plan was constitutional. There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors.

On September 6, 1983, the city issued an invitation to bid on a project for the provision and installation of certain plumbing fixtures at the city jail. The J.A. Croson Company ("Croson"), a mechanical plumbing and heating contractor, obtained the bid forms, and determined that in order to meet the 30% set-aside requirement, a minority contractor would have to supply the fixtures, which amounted to 75% of the total contract price.

Croson reached out to MBEs that were potential suppliers and found one, but Croson did not receive a bid from the subcontractor, the company then

[1] Special thanks to Eric Cuellar, attorney in the City of Austin Law Department, for his very helpful and timely contribution of this section to the paper.

submitted a waiver request of the 30% set-aside. Croson indicated that the subcontractor was "unqualified" and that the other MBEs contacted had been unresponsive or unable to quote. The subcontractor subsequently submitted a bid that was $6,183.29 higher than the price Croson had included in their bid, and was a 7% increase over the market price.

The city denied Croson's request for a waiver and decided to rebid the project. Croson brought action under 42 U.S.C. § 1983 in federal district court, arguing that the Richmond ordinance was unconstitutional under the Fourteenth Amendment's Equal Protection Clause on its face and as applied in this case.

Procedural history. The district court upheld the Plan in all respects and the court of appeals affirmed. On appellee's petition for certiorari the Supreme Court vacated and remanded for further consideration in light of its intervening decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), in which the plurality applied a strict scrutiny standard in holding that a race-based layoff program agreed to by a school board and the local teachers' union violated the Fourteenth Amendment's Equal Protection Clause. On remand, the court of appeals held that the city's Plan violated both prongs of strict scrutiny, in that (1) the Plan was not justified by a compelling government interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.

Supreme Court's Decision. In its decision, the *Croson* court held that strict scrutiny is the standard for Equal Protection Clause review of race-based measures. The city failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race and the 30% quota could not be said to be narrowly tailored to any goal.

In its opinion, the Court disagreed with the main arguments from both sides. Appellant city relied heavily on *Fullilove v. Klutznick*, 448 U.S. 448 (1980), while appellee construction company relied on *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Appellant city relied on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief. Appellee argued that *Wygant* held that a city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination.

The Court held that a city does not have sweeping legislative power to define and attack the effects of prior discrimination. Nevertheless, a city may make race-based remedial efforts and they do not have to limit those efforts to the effects of its own prior discrimination. In other words, if a state or local government has been an active participant and even merely a "passive participant" in local discriminatory practices it may take remedial measures.

However, generalized claims of nation-wide or societal discrimination do not justify a local entity taking remedial measures to correct possible racial discriminatory practices in the locality. Also, neither labeling a program "remedial" nor basing a set-aside on a few conclusory statements by interested individuals that discriminatory practices exist in a local industry could justify a local set-aside. Finally, low minority membership in a local industry association also fails to justify local set-asides. Without some basis for believing that a constitutional or statutory violation has occurred, the Court reasoned that there could be limitless justifications for race-based decision making.

Must Provide Evidence of Past Discrimination. The Court held that the Richmond Plan suffered from the same two defects identified as fatal in *Wygant.* First, like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope for the injury it seeks to remedy. Second, it "has no logical stopping point." "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBEs in Richmond mirrored the percentage of minorities in the population as a whole. The Court noted that there is no doubt that the "sorry history" of both private and public discrimination in the country contributed to a lack of opportunities for black entrepreneurs, but this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia.

Similar to the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, "an amorphous claim that there has been past discrimination in a particular industry could not justify the use of an unyielding racial quota." It was sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at the University of California at Davis absent past discrimination in educational opportunities, *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978).

Evidence that minority membership in local contractors' associations was low could not "establish a prima facie case of discrimination." For low minority membership in these associations to be relevant, the city would have to link it to the number of local MBEs eligible for membership. If the statistical disparity between eligible MBEs and MBE membership were great enough, an inference of discriminatory exclusion

could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market.

The majority held that Congress' findings of nation-wide construction industry discrimination also could not justify the thirty percent quota. While the states and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.

In sum, none of the evidence presented by the city pointed to any identified discrimination in the Richmond construction industry. The Court held that the city had failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. To actually create a state or local constitutionally sound set-aside, a locality should first have a "strong basis in evidence ... that remedial action [is] necessary." In collecting this evidence localities should remember that the relevant statistical pool to find discriminatory exclusion is the number of minorities qualified to work or perform contracts in a particular industry and not the percentage of the minority in the population at large.

Plan Must be Narrowly Tailored. After deciding that the City showed no compelling interest for apportioning public contracts on the basis of race, the Court made two additional observations of the Plan.

First, there did not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. If MBEs disproportionally lack capital or could not meet code requirements, a race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation. The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. Before establishing a racial set-aside program, local governments should consider race-neutral methods of remedying the discrimination. Experimentation with race-neutral methods may be the best way to convince courts that race-neutral methods have actually been considered.

Second, the 30% quota could not be said to be narrowly tailored to any goal, except perhaps outright racial balancing. The Court stated that the congressional scheme in *Fullilove* allowed for a waiver of the set-aside provision where a MBE's price was not attributable to the effects of past discrimination. Unlike *Fullilove*, the Richmond Plan makes no inquiry into whether the MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors. Given the existence of an individualized procedure, the Court found that the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases was simple administrative convenience. The Court held that the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination could not justify a rigid line drawn on the basis of a suspect classification.

Local Entities Not Precluded from Taking Action to Resolve the Effects of Identified Discrimination Within its Jurisdiction. The Court emphasized that "nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." In the case of Richmond, the Court stated that if the city had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. The Court concluded its opinion by giving guidance on the measures a city could take to end discriminatory exclusion and implement racial preferences.

The Court stated that where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contracts, an inference of discriminatory exclusion could arise. Evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion. Local governments are not powerless to deal with individual instances of racially motivated refusals to employ minority contractors.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect.

In its conclusion, the Court stated that Richmond did not ascertain how many minority enterprises are present in the local construction market or the level of

their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it was simply impossible to say that the city has demonstrated "a strong basis for its conclusion that remedial action was necessary."

Because the city of Richmond failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violated the dictates of the Equal Protection Clause.

Fifth Circuit. In addition to *Croson,* a case from the Fifth Circuit Court of Appeals of value is *W.H. Scott Const. Co., Inc. v. City of Jackson, Miss.*, 199 F.3d 206 (5th Cir. 1999). In the case, a non-minority general contractor brought action against city and city officials alleging that city policy for minority participation in construction contracts violated the Equal Protection Clause. The court cited *Croson* and held that city failed to establish a compelling interest, as required by Equal Protection Clause, justifying city's policy that required 15% minority participation; city did not adopt any particularized findings of discrimination in construction industry, the disparity study commissioned by city was not adopted by city and did not analyze availability and utilization of qualified minority subcontractors.

IV. ELEMENTS OF A DISPARITY STUDY

In order to meet the rigors of strict scrutiny and to provide the evidence described in *Croson,* generally entities will hire a consultant to conduct and provide a legally defensible disparity study that complies with the current governing law for race and gender based procurement programs. Hiring a consultant allows the entity to continue to focus on their current workload, while the consultant gathers the entity's spending data, makes the statistical analysis, gathers anecdotal evidence, and make recommendations to the entity. The entity anticipating it will have a study to start a MBE/WBE program or continue its program must keep accurate records. The consultant will require the entity's contracts, invoices, and spending records for nearly all its procurements for the past five to seven fiscal years.

The analysis by the consultant will include both quantitative and qualitative research. After receipt of the entity's information the consultant will reach out to business owners that have had contracts with the entity, subcontractors, and use business lists such as Dun & Bradstreet to perform extensive statistical analysis in order to answer the following questions regarding markets, availability, utilization and disparity:

- What is the entity's relevant geographic and product market;
- An estimate of the fraction of businesses in the markets owned by M/W/DBEs – "availability;"
- An estimate of the percentage of prime and subcontract dollars earned by M/W/DBEs;
- Comparison to utilization by the public sector;
- Analysis of M/W/DBEs success, and access to capital and credit;
- Anecdotal evidence from both M/W/DBEs and non-M/W/DBEs regarding experiences doing business or attempts to do business in the relevant market area and experienced discrimination. Surveys, focus groups, public meetings and personal interviews are key to gather this information; and
- Effectiveness of race-neutral measures.

The disparity study will or will not provide the evidence necessary to justify implementation or continuation of a program and is critical to defending a race or gender conscious procurement program.

V. MBE/WBE PROGRAMS

A. Federal Law - DBE

The federal DBE program applies to local governments when the entity receives federal funding assistance, and generally applies in highway and transit construction and for airport concessions. The controlling regulations related to transportation can be found in Title 49 Code of Federal Regulations part 26 (49 CFR 26). Regulations related to selection of airport concession DBEs ("ACDBE") is mandated by 49 U.S.C. 47107(e), and the program requirements are described in 49 CFR 23.[2]

In Texas, to become certified as a DBE or ACDBE, the company must complete and submit an application through the Texas Unified Certification Program ("TUCP") to the appropriate certifying agency in Texas. A map of the different certifying agencies can be found at: http://ftp.dot.state.tx.us/pub/txdot-info/ocr/tucp/tucp-region-map.pdf. The business' location will determine which certifying agency it should apply to as the business does not apply to the U.S. Department of Transportation or the Federal Aviation Administration. For example, if the business is located in Travis, Williamson, Hays, Caldwell or Bastrop counties it would apply for certification at the City of Austin.

[2] http://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/

B. State Law - HUB

Since MBE/WBE programs are applied at the procurement stage there is an overlap with purchasing requirements. Governmental entities are subject to strict parameters in state law on how it may spend money. For cities, the provisions in chapter 252 of the Texas Local Government Code and various chapters of the Texas Government Code are applicable depending on the type of purchase it is making. Section 252.021 of the Texas Local Government Code requires award to the lowest responsible and responsive bidder for purchase of commodities more than $50,000 from one or more municipal funds, while various chapters in the Government Code allow public entities some flexibility when spending money for construction projects.

Cities have struggled for years to award contracts to their local vendors versus out of town vendors, even if the local vendor was not the lowest price. Section 271.905 of the Texas Local Government Code allows cities to give a local preference when the price from the lowest bidder is within three percent. While this is not a preference for MBEs or WBEs, having authority to award to a local business is usually part of a city's overall procurement policy to stimulate the local economy and can promote MBEs and WBEs.

What state law does require as it relates to MBEs and WBEs is found in subsection 252.0215 of the Texas Local Government Code. If a city spends more than $3,000 but less than $50,000 (usually the threshold between administrative authority and council authority), it must contact at least two historically underutilized businesses on a rotating basis. The HUB list is maintained by the state comptroller.

A HUB is defined as a for-profit entity that does not exceed the size standards in 34 Texas Administrative Code § 20.23, has its principal place of business in Texas, and is at least 51% owned by an Asian Pacific American, Black American, Hispanic American, Native American, American woman and/or Service Disabled Veteran, who reside in Texas and actively participate in the control, operations and management of the entity's affairs.

A business can become HUB certified by applying directly to the state, or by applying to one of the entities the state has certification agreements with, like the cities of Austin or Houston. Being a HUB does not automatically mean the business is a certified MBE or WBE for purposes of the City of Austin's Program. A business could be a HUB but not city certified or vice versa. Generally a business may decide to apply for both certifications at the same time, as there is no cost to apply and the general certification requirements are the same. A city is exempt from the HUB requirement if there are no HUBs in the county in which the municipality is situated. Unless the entity has adopted requirements, there are no HUB requirements for contracts above $50,000. It is also important to note, state law does not require utilization of HUBs, just contact.

C. Overview - Local Programs

Travis County and Austin Independent School District. The City of Austin has dedicated staff, time and resources to the creation and maintenance of its mandatory MBE/WBE Program since 1987. Other entities in the area are also conscious of MBE/WBE concerns and utilization. Travis County also has an MBE/WBE component when it spends money; however, due to the lack of a disparity study their program is voluntary (https://www.traviscountytx.gov/purchasing/hub). Austin Independent School District ("AISD") will have bond projects equal to $349 million dollars https://www.austinisd.org/bond/hub-program). Anticipating the future expenditures, AISD joined the City and County in hiring the same consultant to conduct a disparity study in 2013. By having the same consultant, meetings, interviews and advertisements could be consolidated for all three entities. Once the results of the disparity study are provided to the respective entities, the governing body of each entity will have the option to continue the program, as is the case for Austin, or implement a mandatory program.

D. City of Austin.

The City of Austin's annual budget for fiscal year 2014-2015 is 3.5 billion dollars.[3] Included in the City's budget are expenses to keep this large corporation operating as well as funds needed to build or make improvements to the City's roads, parks, utilities and airport. Just a small glimpse into the City's budget demonstrates what a large impact the City can have on the local economy.

For example, Austin Energy's capital budget includes $254.1 million in planned spending for infrastructure additions and improvements. The City's Public Works department is responsible for street and bridge maintenance, design and delivery of capital improvement projects, as well as managing projects for other city departments. Public Works' operating budget is $85.8 million and their capital budget includes $67.3 million in planned spending for streets, bridge, and pedestrian infrastructure improvements. Austin Water Utility's capital budget includes $182 million in planned spending for rehabilitation or replacement of aging water and wastewater lines and growth of reclaimed water assets.

In 1987, the Austin City Council made the decision to implement a procurement policy which encourages equal opportunity for everyone in the

[3] https://assets.austintexas.gov/budget/14-15/downloads/FY15BudgetHighlightsAustin.pdf

community to do work for the City. Council adopted its first minority and women owned business procurement program by ordinance and over the years it has been amended in response to caselaw and new evidence in the marketplace.[4] The MBE/WBE Program (referred to as the "Program") is not a quota system, and does not mandate the use of MBEs or WBEs.

The City has conducted several disparity and availability studies to document the past discrimination and determine the availability of firms in the marketplace. The last study was conducted in 2008.[5] There have been revisions to the Program throughout the years and it is now codified as chapters 2-9A-D in the City Code, which can be found at municode.com. Each chapter focuses on separate categories of goods or services that are procured by the City to include construction, professional services, non-professional services and commodities, respectively. Citations in this paper will only refer to chapter A; and while the chapters are nearly identical, the specific chapter should be consulted. Exceptions to the Program can be found in the definition of contract in section 2-9A-4(16), and the Program does not apply to contracts such as sole source or interlocal governmental agreements.

The Small and Minority Business Resource Department ("SMBR") administers the Program.[6] In addition to the full City Council, SMBR presents to the City Council Committee on Economic Development and the Minority-Owned and Women-Owned Business Enterprise and Small Business Enterprise Procurement Advisory Committee. Section 2-1-163 of the City Code created the advisory committee, and it is composed of members appointed by City Council. The Code provides that the membership may include a MBE/WBE certified business owner, representatives of the minority and women's chambers of commerce, a non-certified contractor, and representatives of trade associations and professional organizations.

The Program is also subject to administrative rules adopted by SMBR.[7] Chapter 1-2 of the City Code allows departments to adopt rules regarding the administration of the ordinance after notice and opportunity for public comment on the rules is provided.

In addition to the City Code and Program Rules, the City Council has also adopted resolutions regarding the Program. In the appendix are two such resolutions which provide policy direction and requirements to staff. Resolution No. 20120112-058 requires the City Manager to insert MBE/WBE requirements in "third party contracts." These are agreements in which the City does not have a direct contractual relationship with the prime contractor. The primary example is a chapter 380 economic development incentive agreement. The City provides incentives to a company, and the company may hire contractors to build a new space. With the guidance of City staff, the company must adhere to the same MBE/WBE requirements as if it were a City solicitation. Resolution No. 201021216-068 applies the Program to City purchases from cooperative purchasing programs.

Two separate departments administer procurement for the City, Purchasing (commodity and non-construction related purchases) and the Contract Management Department (construction). The Public Works Department manages City projects. SMBR works closely with each department as well as the other user departments such as Parks and Recreation. SMBR has two primary functions, certification and compliance. In addition, SMBR offers monthly workshops, construction plans, surety bonding counseling, and access and assistance to trade association membership so that small businesses are better prepared to bid on contracting opportunities.

The Program also provides for race and gender neutral measures to ensure all contractors have an equal opportunity to the City's contracting activities. There are issues in the market that may have an impact on any business regardless of the race or gender of the owner such as bonding, insurance or capital. Section 2-9A-5 provides the City will take steps to help with information, prompt payment and eliminating unnecessary barriers.

It is an opportunity program intended to redress past discrimination in the marketplace either by the private or public sector in the award of public contracts. The requirements of the Program are not only on the City staff but also apply to the firms that want to be certified as a MBE or WBE and the firms that are responding to a specific bid or solicitation issued by the City. As further explained below, the Program includes the following major components: (1) certification of minority- and women-owned firms; (2) actions which must be taken *prior* to submission of a bid or proposal to the City – pre-award requirements; and (3) actions which must be taken after a bid is awarded – post-award contract compliance.

Big Picture. How does the Program work and what are the steps that occur in the process?

[4] Ordinance No. 870219-Q.

[5] http://www.austintexas.gov/sites/default/files/files/Small_Minority_Business/Report-neracoa_may2008.pdf

[6] Austin City Code § 2-9A-6.

[7] http://www.austintexas.gov/sites/default/files/files/Small_Minority_Business/mbe_wbe_rules.pdf

1. The City decides it needs to build something, a library, animal kennel etc. The project is added to the City's capital improvements program and the budget is hammered out. Chapter 2-9B of the Code dictates the MBE/WBE process to select design professionals such as architects and engineers. For this example assume design is complete and we are ready to start construction.
2. Using the engineer and architect design plans, a project manager ("PM") will draft the scope of work for services such as foundation, landscape, electrical, mechanical, plumbing, etc. Everything that goes into construction of a building.
3. The City has software to help determine the scopes of work and each scope of work is matched to a 5-digit National Institute of Government Purchasing Code ("NIGCP"), also referred to as commodity codes. The PM coordinates with the Small and Minority Business Resource Department ("SMBR") to ensure all possible sub-contracting opportunities are taken into consideration.
4. Goals. SMBR determines whether or not there should be MBE/WBE goals on the project, whether there should be subgoals, and whether they should be annual or project specific goals. Most construction projects have goals, and the goals on a project can be the Annual Participation Goals specified in City Code, or the goals can be specific to the project. The Annual Participation Goals are produced as a result of the disparity study. Each chapter in the Code for the Program has annual goals.

For construction, in section 2-9A-3 of the Code, the Annual Participation Goals are as follows:

African-American Owned Business Enterprises	1.7%
Hispanic-Owned Business Enterprises	9.7%
Asian-American and Native American Owned Business Enterprises	2.3%
Minority-Owned Business Enterprises	13.7%
Women-Owned Business Enterprises	13.8%

The availability of MBEs and WBEs may not be uniformly present across all areas of contracting and rather than using the annual goals in the table above, section 2-9A-19 of the City Code allows the SMBR director to establish project participation goals and/or subgoals for individual contracts, based on:

a. normal industry practice with respect to construction, as determined in consultation with the city department requesting the work;
b. the availability of at least three certified MBEs or WBEs to perform the functions of those individual contracts;
c. the City's utilization of MBEs and WBEs to date, so as to achieve the Annual Participation Goals and subgoals, if any; and
d. any additional relevant factors.

5. The Contract Management Department ("CMD") puts the bid package together and includes the scope of work and the MBE/WBE Program requirements and advertises the bid. The Program requirements are compiled in a Compliance Plan,[8] and will include a print out of an availability list. The list will include all the firms certified by the City in each scope of work described in the bid.
6. The bidder must fill out and sign the Compliance Plan and include it with their bid submission to the City.
7. Since the Program is not a quota system, the bidder can meet the goals by agreeing to utilize the percentage of MBE and/or WBE firms specified in the solicitation or the bidder has to document good faith efforts ("GFE").
8. Section 2-9A-20 of the City Code provides guidance to staff on how to calculate achievement of MBE/WBE goals. Calculation of the goals is important at both the solicitation stage and throughout the life of the contract to the successful bidder. The Code provides further clarification on how to calculate goals in the purchase of supplies or when a joint venture is performing the services, but generally when a MBE/WBE participates in a contract, only the value of the work actually performed by the MBE/WBE

[8] http://www.austintexas.gov/page/smbr-forms-and-applications

shall be counted towards the overall goal.

a. The entire amount of that portion of a contract that is performed by the MBE's/WBE's own forces shall be counted, including the cost of supplies and materials obtained by the MBE/WBE for the work of the contract, and supplies purchased or equipment leased by the MBE/WBE (except supplies and equipment the MBE/WBE subcontractor purchases or leases from the prime contractor or its affiliate).

Notwithstanding subsection a. above, on a single contract, a MBE that is also a WBE may only be counted once (i.e., toward the MBE goal or toward the WBE goal, but not both).

b. The entire amount of fees or commissions charged by a MBE/WBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, toward MBE/WBE goals, provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services shall be counted.

c. When a MBE/WBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward goals only if the MBE/WBE subcontractor is itself a MBE/WBE. Work that a MBE/WBE subcontracts to a non-MBE/non-WBE firm does not count toward MBE/WBE goals.

d. If a firm ceases to be a certified MBE/WBE during a contract, the dollar value of work performed under a contract with that firm after it has ceased to be certified shall not be counted.

e. In determining achievement of MBE/WBE goals, the participation of a MBE/WBE subcontractor shall not be counted until the amount being counted toward the goal has been paid to the MBE/WBE.

9. In order to fill out the Compliance Plan and document GFE, the City Code and bid instructions require the bidder to follow these steps:

a. Solicit certified MBE/WBE subcontractors with a Significant Local Business Presence ("SLBP"), defined in the Code, and request a response from those interested subcontractors who believe they have the capability to perform the work of the contract through at least two reasonable, available, and verifiable means. The bidder must solicit this interest more than seven (7) business days prior to submission of the Compliance Plan to allow sufficient time for the MBEs or WBEs to respond. (The date bids/proposals are due to the City should not be included in the seven day solicitation criteria.) The bidder must take appropriate steps to follow up with subcontractors who respond. The bidder must state a specific and verifiable reason for not contacting each certified firm with a significant local business presence.

b. Provide interested MBEs/WBEs with adequate information about the plans, specifications, and requirements of the contract, including addenda, in a timely manner, to assist them in responding and submitting a bid.

c. Negotiate in good faith with interested MBEs/WBEs that have submitted bids/proposals to the bidder. An MBE/WBE that has submitted a bid to a bidder but has not been contacted within five (5) business days of submission of the bid may contact SMBR to request a meeting with the bidder. Evidence of good faith negotiation includes the names, addresses, and telephone numbers of MBEs/WBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for MBEs/WBEs to perform the work. Bid shopping is prohibited.

d. Select portions of the work to be performed by MBEs/WBEs in order to increase the likelihood that the MBE/WBE goals or subgoals will be met. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MBE/WBE participation, even when the bidder might otherwise prefer to perform these work items with its own forces.

e. Publish solicitation notice in a local publication (i.e. newspaper, trade association publication, or via electronic/social media).

f. Use the services of available community organizations; minority persons/women contractors' groups; local, state, and federal minority persons/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of MBEs/WBEs.

g. Seek guidance from SMBR on any questions regarding compliance with this section.

In addition, SMBR may consider if the bidder performed the following actions in order to demonstrate GFE:

- Whether the bidder made efforts to assist interested MBEs/WBEs in obtaining bonding, lines of credit, or insurance as required by the City or contractor.
- Whether the bidder made efforts to assist interested MBEs/WBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

10. CMD determines whether the bidder's response complies with all bid requirements and SMBR will determine if the bidder complies with the MBE/WBE requirements. A bidder will be deemed to be non-responsive if an incomplete or inaccurate Compliance Plan is submitted.
11. The bidder can protest the City's decision that it is non-responsive. The protest will be heard by the SMBR director and/or a third party hearing officer.
12. Practical pointer – a bidder can submit a Compliance Plan that meets the goals and all its GFE documentation. The City does not accept GFE documentation after the bid deadline. If the bidder claims to meet the goals but did a mathematical error and does not in fact meet the goals, the bid will be rejected. So submitting documentation regarding achievement of goals and GFE may help a bidder avoid rejection later on.
13. The item goes to Council to award the contract.
14. Change Orders. It is common in a construction project for there to be changes orders. Changes may be necessitated due to unforeseen conditions or a desire by the City to change or add to the design of a project. Section 2-9A-24 of the City Code anticipates there may be change orders and requires the contractor to fulfill the goals or to make good faith efforts to fulfill the goals for that change order. Change orders that do not alter the type of trades originally required to accomplish the project may be undertaken using the subcontractors and suppliers already under contract to the contractor.

1. Certification – Doing business with the City

While a subcontractor may be a HUB certified, in order to participate in the City's Program the vendor has to be certified by the City. Also, simply being a business owner that is a minority or woman will not count towards compliance with the Program. SMBR's Certification Division verifies that the minority, woman and/or disadvantaged owned business applicant owns, manages, and controls the day-to-day operations of the for-profit business in compliance with the City's Code. A business' eligibility as a certified MBE/WBE or DBE firm is determined by reviewing the certification application and backup documentation for ownership, management, and control by socially and economically disadvantaged business owners.

As a race and gender neutral component of the Program the City has implemented the Small Business Construction Program ("SBCP"). This program is designed for construction projects with an estimated budget of less than $50,000. These projects are reserved for initial solicitation for certified SBEs.

MBE/WBE General Eligibility Requirements:

- City Code section 2-9A-15;
- The applicant has the burden of production and persuasion by a preponderance of the evidence;
- Fifty-one percent owned, managed, and controlled by an economically and socially disadvantaged individual;
- A person is a minority person, and is rebuttably presumed to be Socially Disadvantaged, if he or she is a citizen of the United States or a lawfully admitted resident alien and a member of one of the following groups: Asian-American, African-American, Native American, Hispanic, or a Woman;
- Ownership must be "real, substantial, and continuing, going beyond pro forma ownership;"[9]
- Contributions of capital or expertise must be real and substantial;
- The owner must have an overall understanding of, and managerial and technical competence, experience and expertise directly related to the firm's operation and work;
- The owner cannot have outside employment or other businesses interests that conflict with the management of the firm;
- The firm must be independent – its viability does not depend on the relationship with another firm;
- Small business as defined by Small Business Administration (SBA); businesses "graduate" from the Program when they grow bigger than the SBA limits;
- Personal Net Worth Limit of no more than $1,454,000.00;

[9] Austin City Code § 2-9A-15(D)(1).

- Must have a facility located in the State of Texas;
- Must perform a commercially useful function as defined by the Code; and
- Must be in operation at least sixty days prior to the application date.

Demonstrating ownership can be easy as a sole proprietor, but can become more difficult when it is a corporate organization with general partners or stock ownership. Control by the minority or woman must be shown and cannot be limited by corporate resolutions requiring minimum votes of non-disadvantaged members. The intent of requiring this information is to prevent a pass-through firm, in other words a firm which is owned on paper by a minority or woman but is in fact controlled by a non-disadvantaged person. This does not preclude the firm from hiring people or delegating tasks, but the disadvantaged owner must have the ability and expertise to direct their employees and have the ability to make independent final decisions.

The firm applying for certification must also specify what work they are qualified to perform. Every possible scope of work is identified by a commodity code. A firm can list as many codes as it is qualified in and a list of firms can be searched on the City's website by code or firm name. For example, an engineering firm may list different engineering codes it can provide services in such as civil or mechanical. The Compliance Plan submitted by a bidder must correctly list the firms certified in the commodity codes specified in the bid. If a firm is certified but not in a particular commodity code, it's percentage of proposed work will not be counted towards meeting the goals. Being certified is not a guarantee or warranty by the City that the company is qualified or able to complete certain projects.

So long as a firm meets the Program requirements the firm may remain certified. A firm's certification is reviewed annually by the City and may provide a sworn affidavit to the City affirming it meets the Program's requirements. A firm must seek recertification every three years. The City may conduct an audit or site-visit of the firm on or before its certification anniversary. Also a third party can challenge a company's certification and submit a request for review to the City.[10]

2. Compliance

SMBR's Compliance Division is responsible for compliance with the Program at the bid stage, pre-award of a contract, and after a contract has been executed, post-award. After the solicitation is awarded SMBR continues to monitor and assess compliance by conducting site audits, reviewing payment requests, facilitating performance/payment issues, and determine compliance at contract close-out. The company that has a contract with the City must continue to adhere to the Compliance Plan it submitted with its bid. If the Plan listed, for example five MBE/WBE subcontractors, the prime cannot add, delete or substitute the listed subcontractors without prior approval of SMBR. The City understands the importance of time and deadlines on a project, and the ordinance requires City review and decision within seven days of a "request for change" to a Compliance Plan. Failure to comply with the Program can subject the prime contractor to progressive sanctions which can result in denial of future city contracts.

VI. Texas Public Information Act

Governmental entities are subject to chapter 552 of the Texas Government Code, the Public Information Act. With some exceptions the City is required to release public information. There are two exceptions to disclosure that may be familiar to many government attorneys, sections 552.104 (Information Related to Competition or Bidding), and section 552.110 (Confidentiality of Trade Secrets; Confidentiality of Certain Commercial or Financial Information). As the Compliance Plan is part of a bid response, until a contract is executed, it may be withheld. When the contract is executed with the successful bidder and governmental entity, there may be information that is a trade secret and also withheld, subject to the requirements of the Act.

A certification application can contain highly sensitive information such as financial records and records documenting race, like a birth certificate. Section 552.128 (Confidentiality of Certain Information Submitted by Potential Vendor or Contractor), protects "information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program."

The information may be disclosed only to a state or local governmental entity in this state, and the entity may use the information only for verifying the applicant's certification status, for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses, or express written permission of the applicant or their agent. Bidding information from a potential contractor or vendor is not necessarily made confidential and is subject to disclosure, unless confidential by other law. The Texas Attorney General's handbook states there are no formal opinions or cases interpreting this section, only two informal rulings. The rulings provide

[10] Austin City Code § 2-9A-17.

that information submitted orally by an applicant may be covered by this exception,[11] and the exception may not apply to documents created by the governmental body rather than submitted by the potential vendor or contractor.[12]

VII. CONCLUSION

Spending by governmental entities can have an enormous impact on the local economy and individual businesses. A constitutional race or gender based program is not a quota system but is intended to right past wrongs. Equal opportunity and treatment of businesses to earn such tax dollars are the hallmarks of a successful MBE/WBE procurement program.

[11] Open Records Letter Nos. 99-0979 (1999), 99-0922 (1999).

[12] Open Records Letter Nos. 99-0565 (1999), 98-0782 (1998).

APPENDIX A

RESOLUTION NO. 20120112-058

The City Council repeals and replaces Resolution No. 20071108-127 with the following:

WHEREAS, each year, the City of Austin enters into multiple third-party agreements, which provide for the construction of public improvements or improvements to City real property by a third party rather than through a direct contract between the City and a general contractor; and

WHEREAS, the City may enter into agreements with private entities requesting City investment for private improvements to private land; and

WHEREAS, such third-party agreements include developer participation agreements, economic development agreements under Chapter 380 of the Texas Local Government Code ("Chapter 380 Agreements"), ground lease agreements, all third-party agreements negotiated between the City and private entities desiring to develop City-owned property; and any agreements pertaining to facilities constructed by private entities in conjunction with reliance on the City's endorsement pursuant to the Texas Major Events Trust Fund Act ("Eligible Third-party Agreements"); and

WHEREAS, the City values ensuring certified minority-owned and women-owned businesses are provided an equal opportunity to participate as

suppliers of material and services on projects resulting from Eligible Third-party Agreements;

WHEREAS, the City desires that the City's Eligible Third-party Agreements comply with the standards and principles of Chapters 2-9A through 2-9D of the City Code regarding minority-owned and women-owned business enterprises (the "City's M/WBE Ordinance");

WHEREAS, the City desires that the City's Eligible Third-party Agreements require efforts be made to provide minority-owned, women-owned, and local small businesses an equal opportunity to participate as suppliers of material and services for the subject project;

WHEREAS, the City desires to redress the unemployment and under-employment in the Austin area by expecting efforts be made to recruit local candidates for employment at the subject project;

WHEREAS, the City desires such efforts will increase the availability of new full-time jobs for local residents; **NOW, THEREFORE,**

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

1. It is the policy of the City that Eligible Third Party Agreements comply with the standards and principles of the City's M/WBE Ordinance.

2. Eligible Third-party Agreements are to contain contract terms requiring the third party or private entity entering into the contract (the "Third Party") to comply with the standards and principles of the City's M/WBE Ordinance.

3. Consistent with the standards and principles of the M/WBE Ordinance, Eligible Third-party Agreements will include the establishment of ethnic specific M/WBE utilization goals, and a requirement that contractors and consultants on the subject project either meet the ethnic specific M/WBE utilization goals or demonstrate a good faith effort to meet the goals with respect to any design or construction projects including, but not limited to, construction of any leasehold improvements for the subject project. In the event the subject project is assisted by the City's financial investment (either the payment of dollars or waiver of taxes or fees), the goals shall be applied to the value of the entire subject project (as that term is defined in the agreement)—not limited to the value of financial investment provided by the City. In the event the Third Party enters into a build-to-suit lease or turn-key tenant improvement lease for the subject project, it is the Third Party's responsibility to

ensure the landlord complies with this provision for all construction and design relating to the Third Party's move-in.

4. When the Eligible Third-party Agreement is a developer participation agreement, the obligations of the City and the private entity are governed solely by the requirements contained in this paragraph. First, the City shall encourage the private entity to comply with the standards and principles of the M/WBE Ordinance on (a) the design of the water and wastewater infrastructure and related facilities; and (b) the design and construction of the subject project. Second, the City shall inform in writing all applicants for a service extension request that they are encouraged to comply with the standards and principles of the M/WBE Ordinance in the design of the water and wastewater infrastructure and related facilities. Nothing in this resolution modifies the continued applicability of the full M/WBE Ordinance to the procurement and construction of the subject infrastructure resulting from a service extension request under Chapter § 25-9 of the City Code.

5. When a request is made for the extension of electrical facilities, the City's full M/WBE Ordinance shall apply to the procurement, design, and construction of the electrical facilities.

6. When applicable, Eligible Third-party Agreements shall include the requirement of an outreach program designed to solicit participation of minority-owned businesses, women-owned businesses and small businesses.

7. The Third Party shall apprise the City's Department of Small Business and Minority Business Resources ("SMBR") when the Third Party desires assistance from SMBR in its efforts to meet the ethnic specific M/WBE utilization goals. This assistance may include identifying potential scopes of work (including, but not limited to, design, construction, and supply services), providing availability lists, establishing the bid packages available, scheduling and hosting outreach meetings, and otherwise assisting in soliciting bids from M/WBEs.

8. When applicable, the Eligible Third-party Agreement shall include a requirement that the Third Party use commercially reasonable efforts to provide minority-owned, women-owned, and local small businesses an equal opportunity to participate as suppliers of materials and services for the subject project (the "Suppliers Diversity Commitment").

9. The requirement to comply with the standards and principles of the M/WBE Ordinance and the Suppliers Diversity Commitment shall be included in the City's solicitation documents, if any, for the subject project.

10. The obligation to comply with the standards and principles of the City's M/WBE Ordinance and the Suppliers Diversity Commitment shall be material terms of the contract. Failure to comply with the standards and principles of the M/WBE Ordinance and/or the Suppliers Diversity Commitment shall be treated as breach of the contract, which will be subject to breach of contract remedies. The breach of contract remedies shall include the appropriate sanctions provided in the M/WBE Ordinance. Additionally, under Chapter 380 Agreements, if the Third Party (or landlord) fails to comply with the standards and principles of the M/WBE Ordinance, it shall be required to forfeit the City's financial investment (either the payment of dollars or waiver of taxes or fees) for the applicable compliance period as defined in the agreement. In the event the Third Party has received an up-front monetary contribution from the City or a waiver of taxes or fees on the front-end of the compliance period and the Third Party (or landlord) fails to comply with the standards and

principles of the M/WBE Ordinance, it shall be required to promptly return all monies or reimburse the City for any waiver of taxes or fees received from the City with interest.

11. The requirement to comply with the standards and principles of the M/WBE Ordinance shall be addressed and negotiated at the earliest stages of negotiation of Eligible Third-party Agreements so as to allow ample opportunity for the standards and principles of the M/WBE Ordinance to be fully incorporated into the agreement and other contract documents.

12. The City employees who negotiate Eligible Third-party Agreements will be trained in the standards and principles of the M/WBE Ordinance in order to carry out the directives of this resolution.

13. Eligible Third-party Agreements will include monthly reporting requirements to allow SMBR to track compliance with the requirements contained herein.

14. Eligible Third-party Agreements shall include the requirement that the Third Party make commercially reasonable efforts to recruit residents of the Austin area for available employment opportunities.

15. SMBR shall report its determinations of compliance or noncompliance with the negotiated standards and principles of the

M/WBE Ordinance to the SMBR Advisory Committee and the MBE/WBE & Small Business Council Subcommittee.

16. Eligible Third Party Agreements do not include (1) agreements for the sale of land in which no continuing contractual relationship will exist between the purchaser and the City, (2) interlocal agreements administered by another governmental entity, and (3) agreements for privately-funded public improvements incidental to private development.

17. Any provisions of this Resolution that are inconsistent with its predecessor, Resolution No. 20071108-127, are inapplicable to Third-party Agreements executed prior to the effective date of this Resolution.

ADOPTED: January 12, 2012 **ATTEST:** Shirley A. Gentry

Shirley A. Gentry
City Clerk

APPENDIX B

RESOLUTION NO. 20101216-068

WHEREAS, each year, the City of Austin enters into interlocal contracts with other governmental entities, as described in the Interlocal Cooperation Act, Texas Government Code Chapter 791; and

WHEREAS, interlocal contracts include contracts between the City and another governmental entity for cooperative purchases of services or commodities (Cooperative Purchases); and

WHEREAS, in the case of Cooperative Purchases, the contract between the City and other governmental entity is followed by a contract between the City and a vendor for delivery of the service or commodity; and

WHEREAS, in the case of Cooperative Purchases, the City desires to make compliance with the standards and principles of the City's Minority-Owned and Women-Owned Business Enterprise Procurement Program (M/WBE Program) a supplementary term in the City's contract with the service or commodity vendor; **NOW, THEREFORE**

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

1. It is the City's policy that Cooperative Purchases with subcontracting opportunities comply with the standards and principles of the City's M/WBE program.
2. Standards and principles of the City's M/WBE program include the Small and Minority Business Resources Department (SMBR) providing the vendor with contact information for subcontractors certified by the City of Austin; SMBR encouraging the vendor to meet the City's annual M/WBE goals in any subcontracting

opportunities; the vendor meeting the goals established by SMBR or demonstrating a good faith effort to meet the goals; and the vendor submitting monthly reports to SMBR regarding subcontracting activity.

3. The City may, on a case by case basis, propose project specific goals for a Cooperative Purchase if all scopes of work are known at time of contracting.
4. The supplemental terms regarding M/WBE standards and principles shall be included in the City's contract documents, if any, and in the contract between the City and the vendor to the extent such terms are not inconsistent with the master contract between the vendor and the cooperative agency.
5. Failure to comply with supplemental terms regarding M/WBE standards and principles shall be addressed according to the terms of the contract.
6. The City employees who negotiate Cooperative Purchase contracts will be trained in the standards and principles of the City's M/WBE Program in order to carry out the directives of this resolution.
7. Eligible Cooperative Purchase contracts are limited to the City's end user contracts with the vendor.

ADOPTED: December 16 , 2010 **ATTEST:** Shirley A. Gentry

Shirley A. Gentry
City Clerk