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

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BIOGRAPHICAL INFORMATION

My legal career has spanned a variety of municipal issues representing clients from both the public and private sectors across the state. 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 a Division Chief for the City of Austin, Texas.

Throughout my career I have advised on land use issues, including annexation, development agreements, vested rights, transportation, drafting of subdivision and zoning regulations, economic development agreements, charter amendments, election law, redistricting, purchasing, and open government and social media issues. As Division Chief I work with a great team of attorneys. We serve the City of Austin by advising many of the City's departments on their daily legal issues and long term projects like the Waller Creek Tunnel, the new Central Library and upgrades at Austin-Bergstrom International Airport.

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In March 2019, Marsha joined the City of Houston Legal Department as its Chief Administrative Officer after having served as Deputy Director for the City of Houston's Office of Business Opportunity for seven years. While at the Office of Business Opportunity, Marsha was integral to the department's growth and evolution having led comprehensive operational changes and policy updates to the various programs in the department. Recognizing a need in Houston's small business community, Marsha spearheaded expansion of the Office of Business Opportunity's services to include facilitating the provision of free legal assistance to businesses and providing guidance on doing business globally.

Marsha's commitment to public service spans almost two decades. Prior to joining the City of Houston, Marsha served as legal counsel to New York City government for 10 years. During that time, she worked to ensure that the most vulnerable New Yorkers had access to social services and led programs that served to maximize housing options for citizens in a perennially challenging housing market.

Marsha has a Bachelor of Arts degree in Political Science and Spanish from Colgate University and a Law degree from Villanova University School of Law. Marsha holds a designation as a Certified Global Business Professional.

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

I. INTRODUCTION[1]

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 and more government dollars. These policymakers may then enact programs to either help small businesses, local companies 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 and the administration of the City of Houston's Minority, Women, and Small Business Enterprises (MWSBE) Program; however, the particular facts of any case before each city will be subject to the applicable law and its interpretation in effect at the time. Please check each city's respective 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.[2] 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.

A. 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;
- HUB – Historically underutilized business; and
- PDBE – Persons with disabilities business enterprise.

Veteran-owned or service disabled veteran-owned business enterprise is another possible category of businesses which may be part of or complimentary to a MBE/WBE program. For example, the State's HUB program provides for a certification category of Service Disabled Veteran as defined by 38 U.S.C. Sections 101(2) and 101(16). While not part of the City's M/WBE Program, Austin currently has a Service Disabled Veteran Business Enterprise Program pilot. Service disabled veterans certified in the State's HUB program can receive three percent preference points on their submission to a request for proposal solicitation.[3]

B. *Richmond v. J. A. Croson CO.*

When it comes to understanding MBE programs, *Richmond v. J.A. Croson CO.*, 488 U.S. 469(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

[1] Special thanks to Eric Cuellar and Matthew Popkin, former law clerks with the City of Austin Law Department, for their helpful and timely contributions to this paper.
[2] Accessed June 8, 2019.
[3] https://mailchi.mp/austintexas/city-launches-pilot-service-disabled-veteran-business-enterprise-program?e=[UNIQID].

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 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 (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.

C. 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, just as the city of Houston did in *Kossman* described in further detail below. 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 makes recommendations to the entity. The entity anticipating it will 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.

D. MBE/WBE Programs

1. 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.[4]

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 agencies themselves. 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.

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

2. 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.

II. CITY OF AUSTIN

The City of Austin's annual budget for fiscal year 2018-2019 is 4.1 billion dollars.[5] 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 $195.6 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 $120.6 million and their capital budget includes $37 million in planned spending for streets, bridge, and pedestrian infrastructure improvements. Austin Water Utility's capital budget includes $194.9 million in planned spending for rehabilitation or replacement of aging water and wastewater lines and growth of reclaimed water assets.

A. History

In 1987, the Austin City Council made the decision to implement a procurement policy which encourages equal opportunity for everyone in the 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 case law and new evidence in the marketplace.[6] The MBE/WBE Program (referred to as the "Program") is not a quota system, and does not mandate the use of MBEs or WBEs, but works to ensure minority and women owned businesses can get notification of open bids and the opportunity to participate on those bids.

The City has conducted several disparity and availability studies to document past discrimination and determine the availability of firms in the marketplace. The last study was conducted in 2016.[7] 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

[5] https://assets.austintexas.gov/budget/18-19/downloads/FY19_Approved_FINAL.pdf
[6] Ordinance No. 870219-Q
[7] http://www.austintexas.gov/sites/default/files/files/Small_Minority_Business/disparity/NERA_COA_Disparity_FINAL_151217.pdf

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. The Program does not apply to contracts such as sole source or interlocal governmental agreements and the list of exceptions can be found in section 2-9A-4(16).

B. Administration

Austin's Small and Minority Business Resource Department ("SMBR") administers the Program.[8] In addition to the full City Council, SMBR presents regular reports of its activities to the City Council's Audit and Finance Committee 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.[9] 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 individual resolutions regarding the Program. Resolution No. 20120112-058 requires the City Manager to insert MBE/WBE requirements in "third party contracts."[10] These are agreements in which the City does not have a direct contractual relationship with the prime contractor but the party to the contractor is receiving city dollars or other assistance. 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 or improve a new space. With the guidance of City staff, the company must adhere to the same MBE/WBE requirements as if it were making purchases like a city would solicit goods or services. Resolution No. 20101216-068 applies the Program to City purchases from cooperative purchasing programs.[11]

Two separate departments administer procurement for the City, Purchasing (commodity and non-construction related purchases) and the Capital Contracting Office (CCO) (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 bond 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 access to 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. 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.

C. Big Picture

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

1. The City decides it needs to build something, a library, animal center 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's and architect's 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 the construction of the building and site.

[8] Austin City Code § 2-9A-10.
[9] http://www.austintexas.gov/sites/default/files/files/Small_Minority_Business/mbe_wbe_rules.pdf
[10] http://www.austintexas.gov/edims/document.cfm?id=163011
[11] http://austintexas.gov/edims/document.cfm?id=146690

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 SMBR to ensure all possible sub-contracting opportunities are taken into consideration and broken down if necessary to allow smaller subcontractors the possible opportunity to participate in the project.
4. Goals. SMBR determines whether or not there should be MBE/WBE goals on the project, whether there should be subgoals, and whether those goals should be annual or project specific goals. Most construction projects goals are set specific to that particular project's scope of work. The Code does provide for Annual Participation Goals which are produced as a result of the disparity study. Each chapter in the Code for the Program has annual goals.

For construction, in City Code Section 2-9A-3, 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%

Because 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 specific participation goals and/or subgoals for individual contracts, based on:

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

5. The Capital Contracting Office 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,[12] and will include a print out of an availability list. The availability 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"). GFE is described further below.
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 is counted towards the overall goal.

- 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).
- 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.

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

- 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.
- 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 is not counted.
- 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:

    - 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.
    - 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.
    - 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.
    - 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.
    - Publish solicitation notice in a local publication (i.e. newspaper, trade association publication, or via electronic/social media).
    - 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.
    - 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. CCO 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. The item goes to Council to award the contract.
13. 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 just as it did at the initial bid stage.

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.

D. Certification – Doing business with the City

While a subcontractor may be 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 City Code. A business' eligibility as a certified MBE/WBE or DBE firm is determined by reviewing the certification application and backup documentation, site visits and interviews 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.

1. 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;"[13]
- 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 $1,540,000.00;
- 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 actual 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 for 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. The

[13] Austin City Code § 2-9A-15(D)(1).

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.[14]

2. Challenges to Certification

Who should be eligible to be certified as a MBE/WBE? If a municipality's statute is not properly crafted, this question may be complicated by the rise of genetic ancestry tests. In *Orion Insurance Group v. Washington's Office of Minority & Women's Business Enterprises*, 754 F.App'x 556 (9th Cir. 2018), Ralph Taylor, the owner of Orion Insurance Group in Lynnwood, Washington, sued over being denied certification as a minority-owned business under the federal DBE program. Taylor had taken genetic ancestry test result and found he was 90% Caucasian, 6% indigenous American, and 4% sub-Saharan African. He then applied to Washington's Office of Minority & Women's Business Enterprises ("OMWBE") for Washington State certification that Orion Insurance Group was a minority-owned business. The OMWBE approved Orion Insurance because the Washington law did not allow for the rebuttal of the presumption that women and the statute's listed racial minorities, which included African-Americans and Native Americans, were socially and economically disadvantaged.[15] Under the law, there was no way to challenge Taylor's claim of being African-American.

Taylor then applied to the OMWBE to be certified as a DBE under the federal program, which does allow for a claim of being disadvantaged to be rebutted.[16] After first asking Taylor to provide additional narrative and further documentation of him being either African-American or Native American, the OMWBE denied Taylor's certification as a minority-owned business.

The Ninth Circuit affirmed the district court's decision to dismiss or grant summary judgment against all of Taylor's claims. The court concluded that the OMWBE did not discriminate against Taylor, did not intend to discriminate against Taylor, and did not treat Taylor differently from others in his situation.

Taylor has filed a petition for a writ of certiorari with the Supreme Court.

E. 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 a contract 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 throughout the life of the contract. 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 pressure 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.

Challenges from a losing bidder. A MBE/WBE who loses out on a contract may claim that their constitutional rights have been violated. In *Exigis, LLC v. City of Dallas*, No. 3:15-CV-01372-N, 2016 WL 3360570 (N.D. Tex. March 22, 2016), Exigis, LLC ("Exigis") sued over its unsuccessful bid for a city services contract, attempting to assert claims against city officials in their individual capacities under 42 U.SC. § 1983. Exigis claimed its due process and equal protection rights under the Fourteenth Amendment were violated by the city of Dallas awarding the contract to the other bidder. However, because Texas Local Government Code Section 252.043(f) allows the city the absolute right to reject any and all bids on a contract, Exigis's due process claim failed because it did not have a legitimate claim of entitlement to the award of the contract.[17] Exigis's equal protection rights claim failed because while Exigis was eligible to receive a bonus to its bid's evaluation point total because of its MBE/WBE status, the bid not receiving that bonus did not mean it had been treated differently than other bids. In fact, not receiving the bonus meant the city of Dallas applied the same race neutral criteria to both Exigis's bid and the winning bid. The court dismissed Exigis's section 1983 claims.

III. CITY OF HOUSTON

In 1984, the City of Houston, with the passage of Ordinance 84-1309, became the first city in the State of Texas to establish parameters for including minorities and women in City-funded contracts. While diversity federal programs are not addressed at length in this article, as a recipient of funds from the United States Department of Transportation,

[14] Austin City Code § 2-9A-17.
[15] https://apps.leg.wa.gov/wac/default.aspx?cite=326-20-048.
[16] https://www.govinfo.gov/content/pkg/CFR-2018-title49-vol1/xml/CFR-2018-title49-vol1-part26.xml#seqnum26.67.
[17] https://statutes.capitol.texas.gov/SOTWDocs/LG/htm/LG.252.htm.

the City of Houston also administers Disadvantaged Business Enterprise and Airport Concessionaire Disadvantaged Business Enterprise Programs. [18]

A. Program History

The City of Houston's (COH) Minority, Women, Small Business Enterprise (MWSBE) Program[19] has faced its share of legal challenges. The Program faced its first legal challenge in 1996[20], which led to a 20-year period litigation. In 1996, a white male-owned small contracting company, Kossman Contracting, Co., sought to invalidate COH's M/WBE program as unconstitutional under 42 U.S.C. §§ 1981, 1983, 1988 and the Fourteenth Amendment, on the grounds that the Program unconstitutionally denied Kossman Contracting, Co., equal protection of the laws. *See generally Kossman v. City of Houston*, Civil Action No. 4:96-cv-03100, (S.D. Tex., 1996). After years of litigation, in 2009, the plaintiff and COH reached a settlement agreement in which the plaintiff agreed to release its claims and to dismiss them with prejudice. The settlement agreement required that COH commission a new disparity study to ascertain whether and to what extent COH needed an affirmative action program to redress current discrimination or the effects of past discrimination. Additionally, the settlement agreement required that, until a new disparity study was performed to determine whether there were disparities regarding women-owned businesses, COH would make changes to its WBE construction contracting goals. In lieu of establishing both MBE and WBE goals on COH construction contracts, MBE and Small Business Enterprise (SBE) goals were established; WBE goals were eliminated from construction contracts and replaced with SBE goals. Certified WBEs could only be used in the Program for SBE goals unless they also were certified as MBEs. The participation of WBEs in non-construction related contracts was not affected by this settlement agreement.

In 2009, COH commissioned a new disparity study focused on construction contracts covering Fiscal Years 2005 to 2009 and the first half of Fiscal Year 2010. The study[21], which was published in 2012, found that disparities for MBEs[22] and WBEs were significant. The study found that non-minority female utilization on locally-funded construction projects fell substantially, by more than 50 percent, during the study period while WBE goals were removed from COH's construction program. By contrast, MBE utilization on locally-funded construction projects, during that same period, did not decrease. Similarly, the participation of non-minority women on federally-assisted construction contracts, which were not affected by the settlement agreement, saw no decrease during that same period. Since the 2012 study found both statistical and anecdotal evidence of discrimination, the study recommended the inclusion of non-minority females in COH's MWSBE construction program again. Over the course of several months, COH held external stakeholder meetings and convened an internal working group to discuss the study's recommendations and solicit comments. In 2013, these combined discussions resulted in the passage of a new MWSBE Ordinance, Ordinance 2013-428, and the implementation of policies and procedures to ensure narrow tailoring of the COH Program and enhance its overall administration. Amongst the many enhancements to the Program, WBEs were reinstated to the construction part of the Program and COH adopted new MBE and WBE construction contracting goals to address the effects of discrimination in its market.

Despite this enhanced Program, in 2014, Kossman Contracting, Co., again sought to invalidate COH's MWSBE program as unconstitutional. After having been engaged in an almost two-decade long legal battle with this plaintiff, COH vigorously defended it Program. In this case, the United States District Court of Southern District, Texas found that COH's Program in construction, in large part, was constitutional as it is narrowly tailored to achieve its objectives to remedy discrimination.[23] Specifically, the court found that COH satisfied the narrow tailoring requirement by using goals instead of quotas, setting goals on a contract-by-contract basis, and creating a process for contractors to apply for waivers from those goals. The court highlighted COH's due process procedure for decisions about whether to suspend contractors who did not make good-faith efforts to meet contract goals, that the city had committed to review the program at least every five years, and its numerous the numerous race- and gender-neutral programs.

The court, however, did find that COH's program was not narrowly tailored regarding goals set for participation by Native-American owned businesses because COH's disparity study indicated that these businesses were utilized to a higher percentage than their availability in the study's geographical area; resulting in a determination that there was no statistical evidence of discrimination against these businesses. As a result, the court permanently enjoined COH from enforcing its MWSBE construction program with respect to Native-Americans certified as MBEs until COH

[18] 49 C.F.R. § 26.21 (2014).
[19] Over its 35-year existence, COH Program M/WBE goals have expanded to include SBEs.
[20] *Kossman Contracting Co., Inc. v. City of Houston*, Civil Action No. H-96-3100 (S.D. Tex., 1996).
[21] "The State of Minority- and Women-Owned Business Enterprise in Construction: Evidence from Houston" April 2012, NERA Economic Consulting, in conjunction with Colette Holt & Associates.
[22] As a group, disparities were significant for MBEs, however, disaggregated results were varied.
[23] *Kossman Contracting, Co. v. City of Houston*, No. H-14-1203, WL 11473826 (S.D. Tex. Feb. 17, 2016).

establishes sufficient evidence of discrimination against those businesses in construction contracts. Consequently, since 2016, Native-American owned businesses that are certified as MBEs cannot be used to fulfill MBE goals of city-funded contracts. Native-American owned businesses certified as SBEs can, however, be used to fulfill goals, with certain limits[24], on construction contracts.

As per its MWSBE Ordinance, COH has committed to making best efforts to initiate a review of its MWSBE Program every five years to determine whether there is a strong statistical and anecdotal evidence of discrimination against these groups in city contracting[25]. This commitment, along with its need to address the removal of Native-American owned businesses from its construction program, served as the impetus for COH commissioning a new study. In 2017, COH commissioned a new disparity study covering Fiscal Years 2012-2016 analyzing its three categories of procurement: construction, professional services, and goods and non-professional services. The study is currently being performed and has not been published as of the date of this article.

B. Program Administration

The City of Houston's MWSBE Program has been revised and expanded over the years to include programs for Small Business Enterprises and Persons with Disabilities Business Enterprises, race and gender-neutral programs. Chapter 15 of the City of Houston's Code of Ordinances, Article V, Minority, Women and Small Business Enterprises ("the Ordinance") governs the administration of the MWSBE program. The Ordinance provides that the COH's policy is to stimulate the growth of local minority, women and small business enterprises by encouraging the full participation of these business enterprises in various phases of city contracting by:

1. Promoting equal opportunity for participation for MWSBE in all phases of city contracting;
2. Increasing the utilization of such local firms in providing certain goods and services;
3. Providing opportunities to broaden and enhance local firms' ranges of capacities; and
4. Increasing opportunities for such local firms to serve as contractors, in addition to serving as subcontractors.[26]

The COH Program is administered by its Office of Business Opportunity (OBO). COH has 22 departments that are responsible for the management and execution of city services. Each department reports directly to the COH Mayor's Office. Prior to 2011, COH's MWSBE program was administered by the Affirmative Action and Contract Compliance Division, a division of the Mayor's Office. In 2011, in recognition of the impact the Program has on local businesses, the office was rebranded and renamed the Office of Business Opportunity and eventually became an independent city department with expanded services. OBO's stated mission is to "cultivate a competitive and diverse economic environment in the City of Houston by promoting the success of small businesses and developing Houston's workforce, with special emphasis on historically underutilized businesses and disenfranchised individuals." OBO is responsible for establishing procedures for the implementation the MWSBE Program and enforcing the rules of the Program, in addition to other responsibilities set forth in the Ordinance.[27]

COH contracting departments play an integral role in the success of the COH's Program. As per the Ordinance, each COH contracting department director is accountable for the oversight and implementation of the following activities related to the MWSBE Program:

1. Informing MWSBE organizations or associations of the department's procurement procedures and future procurement opportunities;
2. Ensuring that department bid solicitations and requests for proposals are sent to MWSBEs in a timely manner;
3. Referring MWSBEs to technical assistance services available from the office of business opportunity and other organizations that provide such services;
4. Reviewing each request for waiver or modification of participation goals prior to its submission to the office of business opportunity for approval;
5. Monitoring the department's procurement activities to ensure compliance with and progress towards the city-wide participation goals; and
6. Providing the OBO director with the required departmental MWSBE utilization plan. [28]

[24] A 4% cap is applied which is discussed later in this article.
[25] Hous., Tex., Code of Ordinances, art. V, § 15-81(a) (1985 Supp. 2013).
[26] *Id.*
[27] *Id.* at § 15-84.
[28] *Id.* at § 15-84.1.

The impact of the COH MWSBE Program in contributing to the growth of MWSBE and the local economy overall is significant. Over the past four years, more than $1 billion dollars have been awarded to certified MWSBE firms on COH contracts. The charts below illustrate the financial impact of the Program for each of COH's three contract types: Annual MWSBE Goal; Total COH Awards; Total Awards to MWSBEs; Percentage of Awards to MWSBEs; and Awards to MWSBEs on contracts without goals.

Contract Awards – FY2015-2016

Contract Type	Goal	Fiscal Year 2015			Fiscal Year 2016		
		Total	MWSBE	%	Total	MWSBE	%
Construction	34%	$ 554,176,220	$ 152,372,786	27.5%	$ 523,571,849	$ 116,203,755	22.2%
Professional Services	24%	$ 420,229,277	$ 89,559,833	21.3%	$ 149,691,265	$ 62,591,886	41.8%
Goods & Services	11%	$ 247,572,992	$ 33,119,062	13.4%	$ 402,941,315	$ 61,021,377	15.1%
Subtotal		**$ 1,221,978,489**	**$ 275,051,681**	**22.5%**	**$ 1,076,204,429**	**$ 239,817,019**	**22.3%**
Exempt/Waiver Contracts	n/a	$ 279,310,662	$ 8,719,274	3.1%	$ 318,225,159	$ 11,139,337	3.5%
Non-Goal Oriented Contracts	n/a	$ 18,344,948	$ 4,265,472	23.3%	$ 25,304,067	$ 8,672,648	34.3%
Total		**$ 1,519,634,099**	**$ 288,036,427**	**19.0%**	**$ 1,419,733,655**	**$ 259,629,004**	**18.3%**

Contract Awards – FY2017-2018

Contract Type	Goal	Fiscal Year 2017			Fiscal Year 2018		
		Total	MWSBE	%	Total	MWSBE	%
Construction	34%	$ 396,293,167	$ 120,819,447	30.5%	$ 621,644,519	$ 182,351,603	29.3%
Professional Services	24%	$ 194,668,887	$ 62,586,848	32.2%	$ 233,603,262	$ 114,078,855	48.8%
Goods & Services	11%	$ 209,342,983	$ 34,174,863	16.3%	$ 378,705,583	$ 64,466,127	17.0%
Subtotal		**$ 800,305,038**	**$ 217,581,158**	**27.2%**	**$1,233,953,364**	**$360,896,585**	**29.2%**
Exempt/Waiver Contracts	n/a	$ 304,176,577	$ 6,855,149	2.3%	$ 100,871,724	$ 5,868,670	5.8%
Non-Goal Oriented Contracts	n/a	$ 15,692,641	$ 6,174,782	39.3%	$ 287,218,122	$ 22,066,735	7.7%
Total		**$1,120,174,256**	**$ 230,611,089**	**20.6%**	**$1,622,043,211**	**$388,831,990**	**24.0%**

C. Certification

A strong certification process is critical to administering an effective MWSBE program. A certification process with stringent criteria ensures that only those business owners that are disadvantaged by their race or gender are able to receive the benefit of contractual preferences. It is important to note that these certifications are not required for companies to compete for COH contracts, instead certification serves to increase a company's opportunity to participate on COH contracts with MWSBE and PDBE goals.

In addition to administering certification for the federal DBE Program and State of Texas HUB Program, OBO administers the following certifications for its Program using the criteria below[29]:

Race and Gender-Conscious Certifications:

- Minority Business Enterprise (MBE) – the entity must be at least 51 percent owned, managed and controlled by a U.S. citizen or legal permanent resident who is a member of the following: Black Americans, Hispanic Americans, Asian-Pacific Americans, Native American or Subcontinent Asian Americans.
- Women Business Enterprise (WBE) – the entity must be at least 51 percent owned, managed and controlled by a U.S. citizen or legal permanent resident who is female.

Race and Gender- Neutral Certifications:

- Small Business Enterprise (SBE) – the entity must be functioning as a construction or construction-related entity.
- Person with Disabilities Business Enterprise (PDBE) – the entity must be owned, managed and controlled by a U.S. citizen or legal permanent resident with a disability.[30]

All certification types also require that each entity:

[29] *Id.* at §15-82.
[30] *Id.* at §15-90.

- Is for profit, independent and currently functioning with a significant local presence in the geographical area or region identified as the metropolitan statistical area that includes the City of Houston, as defined by the United States Office of Management and Budget within the Executive Office of the President of the United States, as amended (MSA);
- Meet the U.S. Small Business Administration which requires that the entity's gross revenues or number of employees, averaged over the past three years, inclusive of any affiliates as defined by 13 CFR Section 121.103, does not exceed the size standards, for their specific industry code(s), defined in Section 3 of the Federal Small Business Act and applicable Small Business Administration regulations related to the size standards found in 13 CFR Part 121; and
- Owner must possess the requisite training and expertise to perform the type of the business for which the entity is seeking certification and, where required, the owner must have a license or certification issued in his or her name.

If the entity meets the criteria stated above, it will receive its COH certification in the appropriate North American Industry Classification System (NAICS) code(s) for its work type or industry. The entity may request certification in additional NAICS codes as their capabilities expand. Once certified, each entity is listed in the COH online MWSBE/PDBE and DBE Directory accessible via OBO's website: https://houston.mwdbe.com/. OBO offers weekly pre-certification in-person and web-based workshops for applicants on certification requirements and the application process. COH provides a fully online certification application process. To date, COH has over 3,500 certified companies in its database.

D. Establishing MWSBE Goals

One of the most impactful tools for tackling local market disparities for minority and women-owned businesses is placing and enforcing MWSBE goals on contracts. COH requires that prime contractors who do business with COH make good faith efforts to utilize MWSBEs on city-funded contracts. COH establishes citywide aspirational goals, contract-specific goals and categorical goals. To ensure narrow-tailoring of COH's Program, each eligible city-funded contract is assigned MWSBE goals. COH construction contracts have separate MBE and WBE goals, while all other contract types have a combined MWBE goal.[31] On construction contracts, SBEs may be used to meet the MBE and/or WBE goals up to a 4% combined total. SBEs cannot be used on non-construction related projects. Further, COH contract goals are subcontracting goals, meaning that goals can only be achieved by using MBE, WBE and SBEs in a subcontracting capacity on city-funded projects. Unlike the federal DBE Program, COH contract goals cannot be met by MBE, WBE or SBE prime level participation.

Each of the 22 COH departments, when procuring goods and services, determines whether a procurement requires MWSBE goals. COH's governing ordinance specifies the types of contracts that requires require subcontracting goal(s): [32]

- Goal-Oriented contract- means any contract, agreement or other undertaking anticipated for construction work in excess of $1,000,000.00 and for the supply of goods or nonpersonal or nonprofessional services in excess of $100,000.00:

    a. For which competitive bids are required by law;
    b. Which is not within the scope of the disadvantaged business enterprise programs of the United States Environmental Protection Agency or the United States Department of Transportation or any other federal or state agency having jurisdiction; and
    c. That the initiating city department, in consultation with the OBO director, determines has significant subcontracting potential in fields in which there are adequate numbers of known MWSBEs to compete for and perform the subcontract service(s).

- Regulated Contract – means any contract, agreement or other undertaking:

    a. For which competitive bids are not required by law;
    b. That is not covered by the MBE/WBE programs of the United States Environmental Protection Agency or the United States Department of Transportation or any other federal or state agency having jurisdiction; and

[31] In this article, both individual and combined goals, regardless of the contract type to which they are applied, are referenced collectively as MWSBE goals.
[32] Hous., Tex., Code of Ordinances, Ch. 15, art. V, § 15-82 (1985 Supp. 2013).

c. That the recommending city department has determined, in consultation with the director of the office of business opportunity either:

1. Has significant subcontracting potential in fields in which there are sufficient known MWSBEs to perform the particular subcontract service(s); or
2. Is of a type for which there are sufficient known MWSBEs which have represented their ability to perform the prime contract service to afford effective competition for the prime contract.

The Ordinance also carves out exceptions for applying MWSBE requirements to goal-oriented or regulated contracts[33]. If the circumstances below exist, each COH contracting department must certify that determination in writing and submit to OBO for review and approval. OBO provides guidance and forms for contracting departments to request waivers. If a departmental request is approved, the contracting department is allowed to waive the goal on the contract. Those circumstances include when the following occurs:

a. A public or administrative emergency exists which requires the goods or services to be provided with unusual immediacy;
b. The service or goods requested are of such a specialized, technical or unique nature as to require the city department to be able to select its contractor without application of MWSBE provisions (such as contracts for expert witnesses, certain financial advisors or technical consultants);
c. If application of MWSBE provisions would impose an unwarranted economic burden or risk on the city or unduly delay acquisition of the goods or services, or would otherwise not be in the best interest of the city; or
d. If the possible MWSBE participation level based on MWSBE availability would produce negligible MWSBE participation.

Once the COH department makes the determination that a contract is goal-oriented or regulated and goal(s) should be applied, OBO determines if adequate MBEs and WBEs exist to compete for and perform the prime or subcontracts being solicited. This determination is made by performing a contract-specific goal setting exercise for each contract.

1. Citywide Annual Goals

COH establishes annual "aspirational" goals to include MWSBEs in city contracting based on the availability of MBEs and WBEs established by previous disparity studies.[34] COH's objective is to award a certain percentage of its annual procurement spend, by contract type, to MWSBEs. COH's current citywide "aspirational" goals are the following:

- Construction: 34%
- Professional Services: 24%
- Goods and Non-Professional Services: 11%

COH tracks achievement of these "aspirational goals" goals through quarterly reports published by OBO showing the awards made by each of the COH's 22 departments by contract type. This serves as a report card to show how much progress is being made towards achieving these goals. The awards reports are published on OBO's website: http://www.houstontx.gov/obo/reports.html. While the above listed goals may serve as goals on specific, individual contracts, COH contracting departments are encouraged to perform a contract-specific goal setting methodology for each project.

2. Contract-Specific Goals

OBO has dedicated staff who assist COH contracting departments with setting goals on a contract-by-contract basis. These contract-specific goals are based on the divisibility of the project and the availability of MWBEs for each NAICS code/work element in the project. COH contracting departments are provided with written guidance and worksheets to facilitate the goal setting process. COH's goal setting process includes the following steps:

- Step I: Determine if the contract has divisibility, identify each work element in the scope or work or scope of services and assign a NAICS code for each major work element

[33] *Id.* at § 15-83(c).
[34] *Id.* at § 15-83(b).

- Step II: Determine the percentage each work element represents of the total contract value (professional services) or the total anticipated dollar amount for each work element (construction)
- Step III: Determine the availability of the certified firms for each work element by dividing the number of COH certified firms for each NAICS code by the total firms in the MSA (using census date, disparity study or bidder's list) for each NAICS code.
- Step IV: Multiply the relative availability from Step III by the percentage/dollar value for each work element and add the resulting weighted availability numbers to arrive at the contract specific goal.
- Step V: Goal Adjustment – refine the goal based on knowledge of project and historical participation, subcontracting opportunities, and the current market. Document any refinement of the goal.

3. Categorical Goals

When COH contracting departments have a high volume of repetitive contract types, goals are set for categories of contract types. This is commonly the case for COH's Public Works Department and its General Services Department. These departments let numerous projects addressing the needs of COH's infrastructure and building portfolio. OBO works with these departments to apply the goal setting process outlined above to categories of contracts (e.g. Lift Stations, Water Treatment, Plant Projects, Sidewalks, and Building Renovations, etc.).

E. MWSBE Goal Compliance

COH solicitation documents provide guidance to contractors on how to comply with its MWSBE Program. The standard for MWSBE goal compliance on COH contracts is good faith efforts.[35] COH's written Good Faith Efforts Policy is a part of its solicitations, referenced in its contract documents and found on OBO's website at https://www.houstontx.gov/obo/documents_and_forms.html. COH's Policy describes good faith efforts as

> "…*steps taken to achieve an Contract Goal or other requirements which, by their scope, intensity and usefulness demonstrates the bidder's responsiveness to fulfill the business opportunity objective prior to the award of a contract, as well as the contractor's responsibility to put forth measures to meet or exceed the Contract Goal(s) throughout the duration of the contract*.

Good faith efforts must be demonstrated on all contract types, professional services, construction and goods and non-professional services contracts. COH's Good Faith Efforts Policy provides a list of factors COH will consider in determining whether vendors made good faith efforts before and after contract award.

1. Pre-Contract Award Compliance

In response to COH contracts with advertised MWSBE subcontracting goals, each responding vendor must submit an MWSBE participation plan describing how it plans to meet the goals. If the vendor, when submitting a MWSBE participation plan at the time of bid or proposal submission, anticipates it cannot or will not meet the advertised MWSBE goals, it must demonstrate to OBO that it has made good faith efforts to meet those goals to be eligible for the contract award. COH requires that good faith efforts are demonstrated by an apparent successful bidder on goal-oriented contracts or proposer on a regulated contract prior to award of a contract. OBO reviews each responding vendor's efforts in accordance with COH's Good Faith Efforts Policy which outlines a list of efforts that may be taken by vendors to meet the advertised MWSBE goals.

OBO provides COH contracting departments with a compliance checklist to assist them in determining whether a vendor has submitted a compliant MWSBE plan. If the participation plan meets the numerical contract goal, the compliance checklist prompts the contracting department to confirm that the listed MWSBE firms are certified and will perform a commercially useful function on the project. Each MWSBE listed on the participation plan must be certified by OBO at the time of submission in order to be counted towards goal compliance. The COH has two distinct processes for assessing whether vendors have made good faith efforts on construction vs. non-construction contracts. While vendors on professional services, goods and non-professional services contracts may cure a non-compliant MWBE plan, construction vendors who submit a non-compliant MWSBE participation plan and fail to establish that they made good faith efforts to meet the advertised MBE and WBE goals will generally not be provided with an opportunity to cure.

[35] *Id.* at § 15-85.

2. Professional Services and Goods and Non-professional Services Contracts

Once the contracting department confirms that the responding vendor has not submitted a plan that meets the advertised goal, the department forwards the plan to OBO for a good faith efforts review. In order to complete a review, OBO requires that vendors provide their requests for a good faith efforts review on company letterhead with the following information:

i. An MWBE participation plan outlining the portion of the advertised contact goal that will be met and the MWBE certified businesses that will be used;
ii. Reason(s) why the proposer has failed to meet the advertised contract goal; and
iii. Supporting documentation detailing the steps the proposer has taken to meet the advertised contract goal.

OBO reviews the vendor's request for a good faith efforts review then notifies the vendor, via e-mail, of its determination to approve or deny the request. If the request is denied, the vendor must submit an MWBE plan meeting the advertised goal or a revised good faith efforts review request until approved by OBO.

3. Construction Contracts

In 2013, COH implemented a requirement that MWSBE participation plans or documentation of good faith efforts be submitted with construction bids in order for bidders to be responsive.[36] This new requirement served to address bid shopping of subcontractors by prime contractors which is more likely when bidders are allowed to delay submitting MWSBE plans until the apparent low bidder is identified. To facilitate the submission of required documentation at bid time, COH created the following forms for bidders to complete: *Bidder's MWSBE Participation Plan (Document 00470), Pre-Bid Good Faith Efforts (Document 00471),* and *Bidder's MWSBE Goal Deviation (Document 00472).* These forms are included as part of COH solicitation documents and are accessible on OBO's website at https://www.houstontx.gov/obo/documents_and_forms.html.

If the *Bidder's MWSBE Participation Plan* does not meet or exceed the advertised MBE and/or WBE goals, the contractor's bid submission must include the completed *Pre-Bid Good Faith Efforts* and *Bidder's MWSBE Goal Deviation* along with any supporting documents in order to be responsive on City of Houston construction contracts. OBO evaluates these documents and any supporting documentation submitted for compliance with the COH's Good Faith Efforts Policy. If OBO approves the bidder's good faith efforts, the contracting department may move forward with the process for contract award. As per the Ordinance, "[t]he final recommendation to city council for [contract] award shall be the city department's…"[37] As a result, if OBO makes a determination that the bidder has not made good faith efforts, contracting departments are given the opportunity take exception to OBO's determination and move forward to award the contract to that bidder. If the contracting department does not take exception to the good faith efforts denial, OBO notifies the bidder of the denial and timeline for an appeal. The bidder may appeal the denial to the OBO Director in writing or via email. If the OBO Director upholds the denial, the bidder may request, in writing or via email, a final administrative review of the denial by COH Legal Department. After the final level of administrative review, the contracting department may move to the next lowest responsible bidder.

4. Post-Contract Award Compliance

OBO is responsible for addressing MWSBE goal compliance on all contracts post-award. OBO, in accordance with city, state, and federal rules and regulations, monitors MWSBE goal, prevailing wage requirements, and Equal Employment Opportunity law compliance on all COH contracts, with the exception of airport and housing contracts.[38]

OBO monitors COH contracts with goals to make sure certified MWSBE subcontractors are being used as committed by prime contractors, and that the MWSBEs on each project are performing a commercially useful function in order for the prime contractor to receive full MWSBE goal credit. As per the Ordinance, an MWSBE performs a commercially useful function when is it is responsible for performing:

> …a discrete task or group of tasks, the responsibility for performance of which shall be discharged by the MWSBE by using its own forces or by actively supervising on-site the execution of the tasks by another entity for whose work the MWSBE is responsible. In determining whether a MWSBE is performing a commercially useful function, factors including but not limited to the following shall be considered: (1) whether it has the skill and expertise to perform the work for which it is being utilized and possesses all the

[36] *Id.* at § 15-85.
[37] *Id.* at §15-84(b)(5).
[38] COH Houston Airport System and Housing and Community Development Department have their own compliance division which performs similar functions as OBO's compliance team.

> necessary licenses; (2) whether it is in the business of performing, managing or supervising the work for which it has been certified and is being utilized; and (3) whether it is performing a real and actual service that is a distinct and verifiable element of the work called for in a contract…[39]

In order to determine if an MWSBE is performing a commercially useful function and to determine the appropriate credit for the work performed, OBO performs random desk and/or on-site audits. These audits serve to ensure Program integrity and prevent fraud. The work that an MWSBE subcontracts to a non-certified firm does not count for MWSBE goal credit. Prime contractors must provide subcontracting agreements with goal credit subcontractors to OBO prior to work starting on city projects. In addition to outlining the terms of engagement with the certified subcontractors, subcontracting agreements must include mediation[40] and prompt payment clauses[41].

Throughout the course of the contract, the prime contractor must make good faith efforts to comply with their submitted MWSBE participation plan, unless the contractor has received approval from OBO to deviate[42] from submitted plan. In order to request a deviation, prime contractors must complete a *Post-Award Deviation Request* form for review and approval by OBO. A *Post-Award Deviation Request* form must be submitted to add, remove or substantially reduce by more than 50% the participation of any of the listed certified firms on the prime contractor's approved MWSBE participation plan. Removal for the purposes of the deviation process includes the active termination of a goal credit MWSBE, the non-use of the goal credit MWSBE and the substantial reduction of participation of the goal credit MWSBE by more than 50%. Deviation requests do not apply to requests to add, remove or reduce the use of a company not being used toward MWSBE participation goal. However, the work performed by companies not being used for MWSBE goal credit should not limit the opportunities available to the MWSBE firms listed for goal credit. The *Post Award-Deviation Request* form can be found on OBO's website at https://www.houstontx.gov/obo/documents_and_forms.html.

F. Contract Ratings and Sanctions

At the end of each project, OBO evaluates the prime contractor's compliance with the MWSBE Program and rates the contractor's compliance efforts. If the contractor fails to achieve the MWSBE percentages to which they contractually committed, including any changes made by deviation approved by OBO, the contractor must demonstrate to OBO its efforts to meet the goal(s) and that its inability to do so was based on circumstances beyond its control. The ratings assigned to MWBE goal compliance are Outstanding[43], Satisfactory[44] or Unsatisfactory[45].

The Ordinance authorizes OBO to suspend any contractor who fails to make good faith efforts to meet MWSBE goals for a period up to, but not to exceed, five years.[46] OBO is also authorized to establish procedures for the imposition of sanctions ensuring that notice and an opportunity for a hearing is given to the contractor.[47] OBO recommends suspensions of contractors who exhibit patterns of non-compliance with MWSBE goals on several projects over the course of three years. The imposition of sanctions against a city contractor is done in accordance with various sections of the City Code.[48] The following factors are considered to determine the length of a contractor's suspension:

- Whether the failure to comply with applicable requirements involved intentional conduct;
- The number of incidences of noncompliance by the contractor;
- Whether the contractor has been suspended in the last five years;
- Whether the contractor has failed or refused to provide OBO with any requested information;
- Whether the contractor has materially misrepresented any applicable facts in any filing or communication to the City of Houston; and
- Whether any subsequent restructuring of the subject business or other action has been undertaken to cure the deficiencies in meeting applicable requirements.

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[39] Hous., Tex., Code of Ordinances, Ch. 15, art. V, §15-82 (1985 Supp. 2013).
[40] OBO provides mediation services in an attempt to resolve contract disputes between the Prime and certified firm(s) listed for MWSBE goal credit. OBO provides a trained mediator to conduct the mediation. The Prime, certified subcontractor or COH may request mediation.
[41] Tx Gov't Code, Ch. 2251.
[42] Hous., Tex., Code of Ordinances, Ch. 15, art. V, § 15-85 (1985 Supp. 2013).
[43] Generally, contractor exceeds MWSBE goal(s).
[44] Generally, contractor meets goal(s) or makes sufficient good faith efforts.
[45] Generally, contractor fails to make good faith efforts to meet goal.
[46] Hous., Tex., Code of Ordinances, Ch. 15, art. V, § 15-86 (1985 Supp. 2013).
[47] *Id.*
[48] Sections 15-22, 15-23, 15-24 and 15-84 of the City of Houston Code of Ordinances.

G. Program Education

To maximize MWSBE Program compliance and foster transparency, OBO hosts periodic training and informational sessions about the Program for COH contracting departments, the contracting community and other stakeholders. For COH contracting departments, OBO offers quarterly citywide trainings on the rules of the Programs; and when requested, customized training for individual contracting departments. In addition to reviewing the rules for MWSBE compliance at each pre-bid and pre-proposal meeting for COH contracts with MWSBE goals, OBO hosts annual informational sessions for the contracting community. At these sessions, OBO discusses how contractors can maximize compliance. Topics covered at each session include the following: what constitutes pre-award and post-award good faith efforts and how to document those efforts; how OBO assesses compliance; what constitutes a commercially useful function; and how different types of subcontracting work is counted for MWSBE participation. Informational sessions are video-taped and are available, along with PowerPoint presentation, on OBO's website.

H. City of Houston Race and Gender-Neutral Measures

Beyond the preferential MWSBE participation percentages on COH contracts, COH has implemented several race and gender-neural programs to assist local firms grow and expand their abilities to do City work. These business development programs not only serve to build the capacity of local firms to increase their competitiveness but they also serve as a measure of narrowly tailoring COH's MWSBE Program. COH programs include:

- Build Up Houston – an OBO administered seven-month program designed to increase the capacity and success of certified small businesses in the construction industry. Construction industry experts, business peers, and instructors provide business strategies including a focus on strategic planning, estimating and bidding, bonding an insurance, marketing and sales, accessing capital, government contracts and project management.
- Liftoff Houston!- for the past seven years, the COH's annual business plan competition has provided local entrepreneurs with business workshops and mentoring to create business plans, start-ups and an opportunity to win seed money totaling $30,000 in the categories of innovation, product and service.
- Small Contractor Rotation Program- a two-year COH race and gender-neutral initiative designed to provide capacity building and assistance to small certified businesses to help them transition into prime contractors by creating cash flow, assigning smaller work orders and improving bonding capabilities. Participants are eligible to bid for small contracts valued at less than $50,000 in the program.
- Interagency Mentor Protégé Program- In partnership with local governmental entities, COH provides this program in order to enhance the business skills and broaden the base of certified small businesses by connecting them to the knowledge and experience of established firms.
- Virtual Legal Lab - in partnership with the law firm, Vinson & Elkins, LLP, OBO administers this program that affords small businesses the opportunity to have one-on-one skype sessions with licensed attorneys to answer their business-related legal questions.
- Export Resources Forum – a joint initiative between OBO and COH Mayor's Office of Trade and International Affairs to promote exporting by Houston-based small businesses. The main objective is to connect small businesses to local and national resources to help them grow by expanding into overseas markets.
- Turner School of Construction Management Program – COH partners with the Turner Construction Company to offer this eight-session program designed to enhance the technical and managerial skills of small contractors and entrepreneurs in the construction industry.
- Hire Houston First Program – OBO administers this race and gender-neural procurement program which provides a preference in awarding prime-level contracts to local businesses as long as their pricing is competitive. The program is designed to ensure economic opportunity for Houston-based businesses and support local job creation.
- Kauffman Fasttrac New Venture Program- a ten-week program, facilitated by OBO, designed for entrepreneurs in the early stages of business development.

VI. TEXAS PUBLIC INFORMATION ACT

Governmental entities are subject to chapter 552 of the Texas Government Code, the Public Information Act ("Act"). With some exceptions, cities are generally required to release public information. 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 in a certification application 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. The Texas Attorney General's handbook states there are no formal opinions or cases interpreting this section, only two informal rulings. The rulings provide that information submitted orally by an applicant may be covered by this exception,[49] and the exception may not apply to documents created by the governmental body rather than submitted by the potential vendor or contractor.[50] Bidding information from a potential contractor or vendor is not necessarily made confidential and is subject to disclosure, unless confidential by other law.

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). In response to the *Boeing Co. v. Paxton*, 466 S.W.3d 831, (Tex. 2015) and *Greater Houston Partnership v. Paxton*, 468 S.W.3d 51, (Tex. 2015) cases, the legislature passed S.B. 943 as a sweeping reform to these two sections of the Act. These cases basically allowed private companies like Boeing and quasi-governmental entities like the Greater Houston Partnership doing business with governmental entities to withhold information from public release. While Senator Kirk Watson's (D-Austin) attempts to reform the Public Information Act have failed in the past, this bill is sitting on Governor Abbott's desk awaiting signature or veto. As of the submission of this paper on June 10th, the Governor had not taken action.

The bill adds to the definition of governmental body and creates a new definition of contracting information. Contracting information must be released unless exempted from disclosure. Contracting information includes information maintained by a governmental body or sent between a governmental body and a vendor, contractor, potential vendor, or potential contractor: (a) information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body; (b) solicitation or bid documents relating to a contract with a governmental body; (c) communications sent between a governmental body and a vendor, contractor, potential vendor, or potential contractor during the solicitation, evaluation, or negotiation of a contract; (d) documents, including bid tabulations, showing the criteria by which a governmental body evaluates each vendor, contractor, potential vendor, or potential contractor responding to a solicitation and, if applicable, an explanation of why the vendor or contractor was selected; and (e) communications and other information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body; includes communications between a vendor and governmental body, solicitation or bid documents and bid tabulation information.

The bill provides a list of categories to which the exceptions to disclosure under the trade secrets and commercial and financial information and proprietary sections of the Act do not apply. Information is excepted from disclosure if the governmental body can demonstrate that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.

A full analysis of the changes to the statute can be found in the Texas Municipal League's legislative update dated June 7, 2019, Number 23: https://tx-texasmunicipalleague.civicplus.com/601/June-7-2019-Number-23#bills.

V. CONCLUSION

Spending by governmental entities can have an enormous impact on the local economy and individual businesses. Governmental entities as passive participants in discrimination in the marketplace can create constitutionally defendable programs that will help to reduce discrimination and enlarge a more diverse contracting community. 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.

[49] Open Records Letter Nos. 99-0979 (1999), 99-0922 (1999).
[50] Open Records Letter Nos. 99-0565 (1999), 98-0782 (1998).