

FREQUENTLY ASKED QUESTIONS

CITY OF AUSTIN'S THIRD PARTY AGREEMENTS & MBE/WBE COMPLIANCE

1) WHAT ARE THIRD PARTY AGREEMENTS?

These agreements are contracts that provide for the design and construction of public improvements or improvements to City real property by a third party, or improvements (including leasehold improvements) on private land by a third party receiving financial incentives from the City rather than a direct contract between the City of Austin and a general contractor.

2) WHAT IS THE LEGAL BASIS OF APPLYING MBE/WBE REQUIREMENTS TO THIRD PARTY AGREEMENTS?

The Austin City Council passed a resolution on January 12, 2012 that requires the language of the MBE/WBE procurement program be included as a requirement in all Eligible Third Party Agreements (commonly referred to as the “Third Party Resolution”).

3) WHICH AGREEMENTS ARE ELIGIBLE THIRD PARTY AGREEMENTS?

Based on the Third Party Resolution, Eligible Third Party Agreements include developer participation agreements, economic development incentive agreements (such as chapter 380 agreements), ground leases, and other third party agreements negotiated between the City and private entities desiring to develop City owned property or private property, and projects endorsed by the City pursuant to the Major Events Trust Fund Statute. The highlights of the resolution include the following:

- Establishes process to set MBE/WBE goals on Eligible Third Party Agreements
- Compliance with the Program by either meeting the MBE/WBE goals or providing good faith efforts
- Recruit employees from the Austin area
- Requires the Third Party to develop and utilize a Supplier Diversity Policy; and
- Specifies sanctions for failing to comply with Third Party Agreement terms to include forfeiture of funds received from the City of Austin.

4) ARE THERE ANY EXCLUSIONS TO THE RESOLUTION?

Third Party Agreements excluded from the resolution requirements include the sale of land with no continuing contractual relationship between the City of Austin and the purchaser, interlocal agreements, and privately-funded public improvements incidental to private developments.

5) WILL THE MBE/WBE PROCUREMENT PROGRAM APPLY TO PROFESSIONAL SERVICES TEAM SELECTED BY THIRD PARTY ENTITY?

Yes, the Program does apply to professional services (i.e. architectural or engineering services) retained for the project. The only exemption is if the professional services team is already under contract with the Third Party prior to the effective date of the Third Party Agreement. However, even in these occurrences, the Third Party is encouraged to evaluate all professional service opportunities for potential MBE/WBE participation by firms certified by the City.

6) ARE THE MBE/WBE GOALS PROJECT SPECIFIC OR ANNUAL GOALS?

The City has adopted by ordinance ethnic specific design and construction participation goals referred to as “Annual Goals” (see § 2-9A, B, C, D-3 (*Establishment of Program*)). The Third Party will be required to follow the process and terms in the agreement in order to meet the project specific or Annual Goals, or demonstrate Good Faith Efforts to meet the goals. Subject to the specific language in the agreement, after notification from the Third Party, SMBR may set project specific goals or sub-goals based on the breakdown of the scope of work. Only MBE/WBE firms certified by the City shall count towards the calculation of meeting the project goals. MBE/WBE participation only counts for the work completed while a firm is certified. If a firm receives their certification after performing work, only the work performed after the approval date of their certification will count towards the goals.

7) ARE OUTREACH PLANS REQUIRED OF THE THIRD PARTY?

Yes. Outreach plans are required upfront and should include any intention to hire a MBE/WBE outreach coordinator. SMBR encourages the use of a hired outreach coordinator and will provide a list of certified firms or consultants capable of performing outreach assistance. This list should be used to solicit an outreach coordinator. If a certified MBE/WBE outreach coordinator is contracted, his/her participation can count towards meeting the goals and help the Third Party comply with the City’s MBE/WBE Program.

8) WHAT ARE THE BASIC MBE/WBE PROGRAM REQUIREMENTS?

- Meet with City staff (including SMBR) *PRIOR* to design and/or construction (including leasehold improvements and supply purchases) of the project to review MBE/WBE Program requirements
- Submission and following a MBE/WBE Outreach Program Plan
- Identify subcontracting opportunities for MBE/WBE participation

- Contact SMBR for availability lists of City certified vendors
- Meet MBE/WBE goals or demonstrate Good Faith Efforts
- Submit monthly reports to SMBR (even if no activity takes place)
- Present to MBE/WBE Advisory Committee, City Council Sub-Committee or City Council upon request
- Compliance with the Third Party Agreement, MBE/WBE Ordinance and Program Rules

9) HOW IS COMPLIANCE ACHIEVED?

A third party is compliant either by meeting the goals set on the project, or performing Good Faith Efforts. The goals set on the project are not considered a ceiling, but a floor. It is possible to exceed the goals.

It is not required to perform Good Faith Efforts if goals are met. However, Third Parties are encouraged to perform Good Faith Efforts even if it is anticipated that goals will be met. If there are any errors in the goal calculation, or another error that might lead to goals not actually being met, Good Faith Efforts will have to be reviewed and if they were not performed, it will result in non-compliance. Additionally, the outreach functions of Good Faith Efforts will strengthen opportunities for MBEs/WBEs and the project (for example, contacting MBEs/WBEs on the availability list, contacting the minority and women organizations and advertising in publications).

Good Faith Effort requirements are detailed in the MBE/WBE Procurement Ordinances of the City Code Chapters 2-9A, B, C, D-21, and the Program Rules, which are available on the City's website, www.austintexas.gov.

The ability or desire of a Third Party to construct improvements or purchase supplies subject to the Third Party Agreement in-house or with its own preferred vendors does not relieve the Third Party of the responsibility to meet goals or Good Faith Efforts.

At a minimum, the following should be submitted to support Good Faith Effort documentation (documentation is not limited to this list):

- Fax logs, emails, and/or copies of documents sent to firms within the Significant Local Business Presence (SLBP) area.
- Copies of written correspondence to certified firms (include names, addresses, and other identifying information).
- Phone logs with responses (*Phone contacts, alone, will not be sufficient.*).
- Lists and copies of letters sent by mail, hand delivered, or e-mailed.
- Breakdown of negotiations made with certified firms.

- Copies of advertisements with local newspapers, trade associations, Chambers of Commerce and/or any other public media.
- Other communications regarding contacts with trade associations and Chambers of Commerce.

The following additional Good Faith Efforts factors may also be considered:

- Copies of emails or phone logs regarding assistance in bonding, lines of credit, or insurance (as required by City or Contractor).
- Copies of emails or phone logs regarding assistance in obtaining equipment, supplies, materials, or services.
- Copies of all bids received in response to Third Party contacting other firms.

WHAT IF A FIRM FAILS TO COMPLY?

- Failure to comply with the standards and principles of the MBE/WBE Ordinance and/or the Suppliers Diversity Commitment will be treated as breach of the contract, which will be subject to breach of contract remedies, including appropriate sanctions provided in the MBE/WBE Ordinance.
- Additionally, under Chapter 380 Agreements, the firm's failure to comply will require forfeiture of the City's financial investment for the applicable compliance period as defined in the agreement.

10) HOW CAN SMBR ASSIST POTENTIAL CONTRACTORS AND SUBCONTRACTORS ON THE PROJECT?

SMBR can provide assistance to any firm interested in the City of Austin's MBE/WBE certification process. It may take up to 60 days to complete the certification process after receipt of the application by SMBR. Participation of a certified firm will only count on work performed after the firm is certified.

SMBR also provides resources to firms including assistance in obtaining required bonds and a plan room at the SMBR offices to allow MBE/WBE and the public review projects plans and specifications for which the Third Party is soliciting bids.