



**City of Austin  
Resolution 20120112-058**

**Third Party Agreements**

**Minority-Owned and Women-Owned Business Enterprise  
Procurement Program Requirements  
Guidebook**

**Revised May 2012**

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## 1. Overview

The City of Austin enters into multiple third party agreements, which provide for the design and construction of public improvements or improvements to City real property by a third party rather than through a direct contract between the City and a general contractor. The City desires that Eligible Third Party Agreements comply with the standards and principles of the City's [Minority-Owned and Women-Owned Business Enterprise \(MBE/WBE\) Procurement Program Ordinance](#). [The initial MBE/WBE Ordinance was adopted in 1987 and the Austin City Council and City Manager have been committed to the program since its inception. The City of Austin has conducted numerous studies including availability and disparity studies that concluded there is a disparity among MBE and WBE businesses in Austin. The MBE/WBE program is designed to redress those disparities. A detailed history of the City's program is included in the Ordinances, Chapters 2-9A-1- 2-9D-1 of the City Code \(<http://www.austintexas.gov/department/small-and-minority-business/about>\).](#)

The Austin City Council first passed a [Third Party Resolution](#) on November 8, 2007 that requires that the language of the [Minority-owned and Women-owned Business Enterprise \(MBE/WBE\) Procurement Program](#) be included as an element of all eligible Third-party Agreements. [This resolution was repealed and replaced on January 12, 2012 with an amended resolution that included additional provisions.](#) The Third Party/Private Entity must comply with the standards and principles of the MBE/WBE Procurement Program. Eligible Third-party Agreements include agreements with developer participation, economic development, ground leases, 380 Agreements, [facilities constructed following a City endorsement pursuant to the Major Events Trust Fund statute](#), and third party agreements negotiated between the City and private entities desiring to develop City-owned property. [On January 12, 2012, Austin City Council readopted the resolution to include the following: The resolution includes the following provisions:](#)

- [Sets MBE/WBE goals on eligible third party agreements](#)
- [Compliance with the agreement by either meeting the goals or providing good faith efforts](#)
- [Applies sanctions to violations of the standards and principles of the MBE/WBE Procurement Program](#)
- [Apply standards and principles to facilities constructed following a City endorsement pursuant to the Major Events Trust Fund statute;](#)
- [Recruit employees from the Austin area;](#)
- [Apply sanctions to violations of the standards and principles of the MBE/WBE Procurement Program; and,](#)
- [Forfeiture and, forfeiture](#) of funds received from the City of Austin for failure to comply with contract terms; [and,](#)

Third-party Agreements excluded from the resolution requirements include the sale of land with no continuing contractual relationship between the City and the purchaser, interlocal agreements administered by another entity, and privately-funded public improvements incidental to private development. (Resolution – Appendix A)

## 2. MBE/WBE Goals

The Successful Third Party/Private Entity will be required to meet the annual ethnic-specific design and construction goals or demonstrate a good faith effort to meet the goals. The MBE and WBE goals are contained in City Code Chapter 2-9(A) for construction projects and 2-9(B) for professional services contracts. Currently the goals are as follows:

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	Professional Services Participation Goals	Construction Participation Goals
African-American-owned Business Enterprises	1.9%	1.7%
Hispanic-owned Business Enterprises	9.0%	9.7%
Asian-American and Native American-owned Business Enterprises	4.9%	2.3%
Women-owned Business Enterprises (WBE)	15.8%	13.8%

In certain cases, SMBR may set project specific participation goals or subgoals. The City's Small and Minority Business Resources Department ("SMBR") is available to assist the Third Party/Private Entity in identifying certified minority-owned and women-owned firms to meet the participation goals. SMBR will provide a list of certified firms from which the Third Party/Private Entity can solicit participation in the design and construction of improvements. SMBR is also available to assist the Successful Third Party/Private Entity in scheduling outreach meetings with MBE and WBE firms prior to the time that the Successful Third Party/Private Entity begins the design and construction phase.

### 3. Identifying Professional Services and Construction Trades

SMBR can provide a list of certified MBE and WBE firms to the Third Party/Private Entity. The City uses the National Institute of Governmental Purchasing (NIGP) Commodity Codes to identify professional services, construction trades, supplies and equipment for all of its purchases. MBE and WBE firms are listed on the City's database, using the NIGP codes. The Third Party/Private Entity has the responsibility of identifying scopes of work required to complete the design and/or construction of a project and obtaining a list of certified MBE/WBE firms. The Third Party/Private Entity may use the trade summary sheets (Professional Services and Building Construction) to identify scopes of work required for the project (Appendix B). The trade summary sheets include NIGP codes along with a description of the code. If you require services, supplies or equipment that is not listed, a representative from SMBR Compliance Division can assist you in identifying the appropriate codes. The availability of certified firms can change from project to project. It is important that you request a current availability list for each project or consult the City's Certified Vendor Directory at [www.austintexas.gov/smbr/](http://www.austintexas.gov/smbr/).

Contact the assigned SMBR Representative for the project or SMBR Compliance Division at (512) 974-7600 for assistance with identifying codes for professional services or construction trades and to provide a list of available certified firms for the project.

### 4. Counting Participation and Certification Designations

#### Counting Participation

Only firms that are certified by the City of Austin as MBEs or WBEs may be counted toward meeting the goals established for the project. MBE and WBE firms must also be certified for the scopes of work they are listed to perform. When a MBE/WBE participates in a contract, only the value of the work actually performed by the MBE/WBE toward MBE/WBE goals shall be counted toward the overall goal. If the MBE/WBE firm ceases to be certified during the contract, participation will only be counted for the value of work that was performed while the firm was certified. The Third Party/Private Entity may count the MBE or WBE participation of every level of subcontracting toward the goals (2<sup>nd</sup>/3<sup>rd</sup> tier subcontractors).

Small minority-owned or woman-owned firms that you work with, but are not certified, may be eligible for certification with the City of Austin. Please contact SMBR Certification Division for additional information at (512) 974-7645.

**Certification Designations**

Certification applications are reviewed to determine compliance with the Ordinance requirements including, ownership, management and control of the business identified. A qualifying firm is designated as:

MBE: A firm certified as a Minority-owned Business Enterprise.

WBE: A firm certified as a Woman-owned Business Enterprise.

M/WB: A firm certified as a Minority-owned Business Enterprise and as a Woman-owned Business Enterprise.

W/MB: A firm certified as a Woman-owned Business Enterprise and a Minority Business Enterprise.

M/WDB: A firm certified as a Minority-owned Business Enterprise, a Woman-owned Business Enterprise and a Disadvantaged Business Enterprise.

W/MDB: A firm certified as a Woman-owned Business Enterprise, a Minority-owned Business Enterprise and a Disadvantaged Business Enterprise.

The following coding system is then used on the availability list provided to Third Party/Private Entytys to specify the type of certification for each firm.

Gender/Ethnicity Description	Code	Location Description	LCTN Code
Female / Asian-American	FA	Significant Local Business Presence (SLBP)	SL
Male / Asian-American	MA		
Female / African-American	FB	Outside SLBP	TX
Male / African-American	MB		
Female / Hispanic	FH		
Male / Hispanic	MH		
Female / Native American	FN		
Male / Native American	MN		
Female Caucasian	FW		

Participation of firms that are certified as both minority-owned and women-owned (M/WBE or W/MBE) may count toward either the appropriate minority goal or the woman goal, but not both and may not be changed on a single contract once the determination has been made prior to using the certified firm.

***Certification by the City neither warrants the capacity nor guarantees the performance or qualifications of any MBE/WBE firm listed on the availability list or the City's database. The Third Party/Private Entity must evaluate proposed bidders & suppliers qualifications.***

## 5. Good Faith Efforts

Third Party/Private Entities have a responsibility to make a portion of the work available to MBE/WBE subcontractors so as to facilitate meeting the goals or subgoals. If the Third Party/Private Entity cannot achieve the goals or subgoals, documentation of the Third Party/Private Entity's Good Faith Efforts to achieve the goals or subgoals must be submitted along with the required monthly report submissions. SMBR will review the documentation provided and determine if the Third Party/Private Entity made sufficient Good Faith Efforts. That there may be some additional costs involved in soliciting and using MBEs and WBEs is not a sufficient reason for a Third Party/Private Entity's failure to meet the goals and subgoals, as long as such costs are reasonable. However, a Third Party/Private Entity is not required to accept a higher quote from a subcontractor in order to meet a goal or subgoal. Bid shopping is prohibited.

### **Good Faith Efforts Review**

If goals are not met, SMBR will examine Good Faith Efforts documentation submitted with reports to ensure that the Third Party/Private Entity made Good Faith Efforts to meet the project goals or subgoals. In determining whether the Third Party/Private Entity has made Good Faith Efforts, SMBR will consider, at a minimum, the Third Party/Private Entity's efforts to do the following:

- (A) Solicit certified MBE/WBE subcontractors with a Significant Local Business Presence (SLBP) and request a response from those interested subcontractors who believe they have the capability to perform the work of the contract through at least two reasonable, available, and verifiable means. The Bidder must solicit this interest more than seven (7) business days prior to submission of the Compliance Plan to allow sufficient time for the MBEs or WBEs to respond. (The date bids/proposals are due to the City should not be included in the seven day solicitation criteria.) The Bidder must take appropriate steps to follow up with subcontractors who respond. The Bidder must state a specific and verifiable reason for not contacting each certified Firm with a significant local business presence.
- (B) Provide interested MBEs/WBEs with adequate information about the plans, specifications, and requirements of the contract, including addenda, in a timely manner, to assist them in responding and submitting a bid. (A sample letter that can be used to solicit the interest of potential subcontractors is provided for your convenience. (Appendix C))
- (C) Negotiate in good faith with interested MBEs/WBEs that have submitted bids/proposals to the Bidder. An MBE/WBE that has submitted a bid to a Bidder but has not been contacted within five (5) business days of submission of the bid may contact SMBR to request a meeting with the Bidder. Evidence of good faith negotiation includes the names, addresses, and telephone numbers of MBEs/WBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for MBEs/WBEs to perform the work. Bid shopping is prohibited.
- (D) Select portions of the work to be performed by MBEs/WBEs in order to increase the likelihood that the MBE/WBE goals or subgoals will be met. This includes, where

appropriate, breaking out contract work items into economically feasible units to facilitate MBE/WBE participation, even when the Bidder might otherwise prefer to perform these work items with its own forces.

- (E) Publish solicitation notice in a local publication (i.e. newspaper, trade association publication, or via electronic/social media).
- (F) Use the services of available community organizations; minority persons/women contractors' groups; local, state, and federal minority persons/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of MBEs/WBEs.
- (G) Seek guidance from SMBR on any questions regarding compliance with this section.

The following factors may also be considered by SMBR in determining compliance through good faith efforts; however, they are not intended to be a mandatory checklist, nor are they intended to be exclusive or exhaustive:

- (A) 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.
- (B) Whether the Bidder made efforts to assist interested MBEs/WBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

The ability or desire of a Third Party/Private Entity to perform the work of a contract with its own organization does not relieve the Bidder of the responsibility to make 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 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 Bidder contacting other Firms.

## 6. Outreach Program Plan

Prior to starting design or construction of a project and no later than 14 business days after the initial agreement is signed between the City and the Third Party/Private Entity, the Third Party/Private Entity must submit an Outreach Program Plan to SMBR for review and approval. The plan must address the following items:

- Networking events to inform minority and women community organizations and MBE/WBE firms of the projects.
- Detail how the project will be procured (i.e. number of packages that will be created or number of phases the projects will be broken down into) for both design and construction, if applicable.
- Outline plans and specifications distributions to SMBR, minority and women community organizations.
- Identify timelines for events, bid submission deadlines, and pre-bid/site visit meetings.
- Identify public outreach coordinator that will be the point of contact.

The Outreach Program Plan will be reviewed by both SMBR and the managing City Department. Once the plan is approved, the managing City Department will coordinate a meeting between SMBR and the Developer/Contractor to review plan and summarize the MBE/WBE Procurement Program requirements. A SMBR representative will be assigned to the project and will be the point of contact for questions, providing MBE/WBE availability lists, reviewing good faith efforts/summary/report submissions, assisting/attending with networking events, and pre-bid meetings.

## 7. Reporting Requirements

The Third Party/Private Entity will be required to provide monthly reports, on progress toward meeting the MBE and WBE participation goals (Reports – Appendix D). Reports will be due on the 10<sup>th</sup> of the every month. Along with the reports, the Third Party/Private Entity will be required to submit a monthly Activity Summary. If goals have not been met, good faith efforts for any activities performed for the reporting month should be attached with the summary. Reports can be emailed or faxed to the SMBR representative assigned to the project. The Third Party/Private Entity may be asked to report and appear before the City's MBE/WBE and Small Business Advisory Committee, the MBE/WBE and Small Business Council Sub-committee and/or Austin City Council regarding MBE and WBE participation, when feasible. City Staff will provide the Third Party/Private Entity at least one (1) month notice if reporting requests are made by Austin City Council or Committees. Electronic versions of the required reports can also be found at [www.austintexas.gov/SMBR](http://www.austintexas.gov/SMBR).

## 8. SMBR Resources

A SMBR Representative will be assigned to monitor and provide assistance throughout the duration of the project. The contact information will be provided to the Third Party/Private Entity prior to beginning design or construction of the project. SMBR will assist in the following areas:

- Coordinate networking events
- Provide NIGP Codes (using Third Party/Private Entity description of the work)
- Provide availability list of certified MBE/WBE firms
- Assist with meeting locations

- Assist in defining good faith effort
- Assist in developing strategies to increase participation

In the event additional services are needed, SMBR is divided into three separate divisions: Certification, Compliance, and Resource Services.

**The Certification** division verifies that the Minority, Women and/or Disadvantaged Owned Business Enterprise applicant owns, manages, and controls the day-to-day operations of the business. By reviewing completed applications and performing site audits, the division ensures that a business owner meets the qualifications of the MBE/WBE and DBE Procurement Program.

The **Compliance** division is responsible for reviewing, monitoring and tracking MBE/WBE participation on City procurements through Pre-Award and Post-Award phases of a project. At Pre-Award, the Compliance team reviews solicitations, sets project goals, collaborates with Project Managers to help identify scopes of work on projects, and verifies Compliance Plan information submitted by Bidders/Third Party/Private Entitys. At Post-Award, the Compliance team monitors and assesses compliance by conducting site audits, reviewing payment requests, facilitating performance/payment issues, and determining final compliance with the Program.

The **Resource Services** division provides information and assistance to the minority business community.

- SMBR's Plan Room provides free electronic access to the McGraw-Hill Dodge system of drawings and construction specifications for projects in 100 counties in south and central Texas. The Plan Room also has hard copy plans and specifications from local, private, and public sector jobs that can be viewed onsite or copied for a minimal fee.
- Outreach facilitates departmental communications regarding services, key initiatives, special notices; and hosts monthly workshops on topics of interest to the minority business community. Past workshop titles include: Certification 101, Meet the Prime, IT Opportunities, Big Projects with Opportunities. SMBR collaborates with local trade associations including Asian Contractors Association, Austin Area Black Contractors Association, Community Mentor Protégé Initiative, US Hispanic Contractors Association and other community organizations to increase awareness of our program and other available resources.
- In order to help our vendors overcome the challenges that can be associated with bonding, SMBR has a Bonding Financial Consultant on staff. The Bonding Consultant meets one-on-one with business owners to educate and assist them with their bonding needs.

## 9. Compliance with the MBE/WBE Procurement Program

As described in the amended Third Party Resolution 20120112-058, the obligation to comply with the standards and principles of the City's MBE/WBE Ordinance and Supplier Diversity Commitment shall be material terms of the contract. Failure to comply with the standards and principles of the MBE/WBE Procurement Program shall be treated as a breach of the contract and may be subject to the following:

- Sanctions under the MBE/WBE Ordinance;
- Forfeit the City's financial investment for the applicable compliance period as defined in the agreement; or

- Promptly return all monies or reimburse the City for any waiver or taxes or fees received from the City with interest.

#### 10. Anti-Lobbying Ordinance 20071206-045

Under the terms of the Anti-Lobbying Ordinance, there is a “no-contact” period from the date the City issues a solicitation until the contract is executed. During the “no-contact” period, the potential respondents and their subcontractors can speak only to the authorized person listed in the solicitation regarding the terms of the solicitation. The ordinance allows certain exceptions, for example, the respondent may speak to SMBR regarding the MBE/WBE requirements. The full language of the ordinance can be found at [www.austintexas.gov](http://www.austintexas.gov).

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