




MEMORANDUM

TO: Mayor and Council Members

FROM: Edward Campos, Director, Small and Minority Business Resources Department 

DATE: July 14, 2023

SUBJECT: **Update regarding Minority-Owned and Women-Owned Business Enterprise Procurement Program Ordinance**

This memo serves to inform the Mayor and Council about an item for Council consideration at the July 20, 2023, meeting. Staff is requesting approval of a revised Minority-Owned Business Enterprise and Women-Owned Business Enterprise Procurement Program (MBE/WBE Program) Ordinance.

Background

The MBE/WBE Program Ordinances (City Code Chapter 2-9A-D) are scheduled to sunset on August 31, 2023. On October 27, 2022, Council approved an extension to the ordinances sunset date and concurrently approved adoption of the [2022 Disparity Study](#). In addition, on March 10, 2023, staff issued the [final report](#) from the Inclusive Procurement Working Group (IPWG), established by Resolution No. [20200326-053](#).

Ordinance Revisions

The proposed ordinance revisions include items from the disparity study consultant, Inclusive Procurement Working Group, and internal staff. Some of the highlights to the revised MBE/WBE Procurement Ordinance(s) include:

- Reducing the number of ordinances from four to two
 - Consolidating construction and professional services categories into one ordinance (Construction and Related Professional Services)
 - Combining the non-professional services and commodities categories into a separate ordinance (Goods and Services)
- Incorporating language related to the 2022 Disparity Study and the Inclusive Procurement Working Group recommendations
- Removing the reference to information related to outdated MBE/WBE estimated Availability
- Moving administrative-related items to other policies/procedures/Rules
- Increasing the certification renewal timeframe

The remaining ordinance revisions are general and heavily aimed at administrative items, such as refreshing the definitions to better reflect program administration and aligning with federal standards related to the presumed groups. It is staff's opinion that the general and substantive ordinance revisions will bring greater clarity to the program that will not only align with recommendations posed by the disparity study consultant and the IPWG but will meet the needs of the stakeholders and overall programmatic processes.

Staff reviewed the proposed revisions with the MBE/WBE and Small Business Enterprise Procurement Program Advisory Committee at its April 4th and June 6th 2023, meetings. The committee had no objections to the proposed revisions and voted unanimously to approve them.

Next Steps

The draft ordinances were posted to SMBR [website](#) on May 15, 2023 and were shared with stakeholders. A public comment period was held from May 15 through June 16, 2023. An email account (SMBROrdinance@austintexas.gov) was created to capture comments. Attached are the eight (8) public comments received and SMBR's responses to each comment.

Once the City Council has approved the draft ordinances, staff will begin the revision process of the [MBE/WBE Procurement Program Rules and related policies and procedures](#).

Should you have any questions, please contact me at Edward.Campos@austintexas.gov.

cc: Jesús Garza, Interim City Manager
 Veronica Briseño, Assistant City Manager
 Anne Morgan, City Attorney

Attachment: Public Comments and Staff Response

Public Input Process: Proposed Revisions to the City of Austin’s Minority-Business Enterprise and Women Business Enterprise (MBE/WBE) Procurement Program Ordinance (City Code Chapter 2-9A-D)

Public input Period: May 15, 2023 - June 16, 2023

#	Commenter	Comment	SMBR’s Response
1	Sallie Burchett, AICP	<p>I have reviewed the proposed changes and am in support of the modifications. I especially like the change to 4 years for recertification. This amendment makes good use of everyone's resources.</p> <p>Thank you for all you do. This program has enabled me to have financial independence and provided the ability to make great strides professionally. I am very grateful.</p>	<p>SMBR has received positive feedback and support about the revisions to the certification renewal timeframe from various stakeholders, as this change will provide additional flexibility for certified firms.</p> <p>SMBR will continue to explore opportunities that will better serve certified firms and the community.</p>
2	Ali Khataw, P.E. President & CEO, ENCOTECH	<p>I would like to submit a public comment regarding the final draft of the proposed revisions to the City of Austin’s Minority-Business Enterprise and Women Business Enterprise (MBE/WBE) Procurement Program Ordinance.</p> <p>With this comment, I would like to bring to your attention that it is a little confusing regarding the minority goals table being struck out from the ordinance. More clarifications may be needed to explain to the community.</p>	<p>The disparity study consultant recommended the City delete numerical goals cited in the ordinance to address confusion. <u>The table cited data from the 2008 Disparity Study and their inclusion caused confusion. The city will be moving towards the development of Annual Aspirational Participation Goals. These Annual Aspirational Goals are intended to replace those static goals and data in the previous ordinance(s).</u></p> <p>In response to this recommendation, the numerical goals cited under the Establishment of the Program section were removed from the ordinance.</p>
3	Eddie Hurst	<p>Drafting support should be added back to Professional Services. All prime Engineering forms have Engineers who can perform most services required to compete an assignment they just offer opportunities for local businesses. The same opportunities should be offered for CADD support, most of the time the CADD Technicians work Onsite.</p>	<p>The proposed revised ordinance for Construction and related Professional Services encompasses hundreds of scopes of work that support the design and construction of our capital improvement projects including drafting.</p> <p>The current ordinance, 2-9B Professional Services, does not identify specific scopes of work like drafting but rather provides a definition of “professional services”. The revised ordinance remains consistent with the current practice.</p>

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4	Carol Gorgan, Central Tejas Research & Title Services	<p>After reading all the information on the changes, I am glad that the certification will be every 4 years instead of 2 years, but I think it should be every 5 years just like the HUB!</p> <p>I only receive work by being the sub-contractor, I never receive work by the city as contractor. I do believe the certification should be less forms and on lay man terms to complete. If you have been certified for several years then you should only have to update certain forms to be recertified, our company had to go through a full certification during covid. Because the city said we failed to complete the forms needed, and we never received the email or by mail to complete forms to keep our certification valid. That was not fair, there should be regular mail and email sent to complete the ongoing certification.</p>	<p>It was recommended by the disparity study consultant that the City adopt the federal approach to recertification. The federal approach allows a firm to remain certified until its eligibility is removed, rather than having a firm’s certification “expire.” Staff agreed and revised this section to align with the federal approach.</p> <p>Once a firm loses their certification status, the owner will have to reapply for certification, we no longer consider the recertification process. SMBR’s Certification Division can assist firms complete certain documents, however, some information will need to be resubmitted. SMBR strives to streamline the certification process by keeping the forms as simple as possible while complying with program requirements.</p> <p>The City usually sends 60-day DBE Annual Review and Recertification Notices via email, however, firms have the opportunity to provide their preferred method of contact. In reviewing this specific issue, we found that the preferred method of communication was fax; therefore, the vendor would receive notification by fax. SMBR will reach out to the vendor to ensure they have all the necessary information needed to update their profile on Austin Finance Online.</p>
5	Jennifer Cregar, Founder & Principal, Terra Lumina Consulting	<p>In general, the revised language seems appropriate to me, and as a certified WBE, I appreciate the extended certification review period.</p> <p>I would like to offer one suggestion to explicitly include businesses that are majority-owned by individuals who identify as LGBTQIA+ in the eligibility definitions. It’s possible that businesses that are</p>	<p>Individuals who identify as LGBTQIA+ can apply to be a MBE/WBE certified firm and will be considered by SMBR’s Director to meet the individual claim requirement of Socially Disadvantaged. However, to add LGBTQIA+ individuals to the programs’ presumed Socially Disadvantaged group, would require more data collection and analysis by the City of Austin.</p>

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		majority-owned by individuals who identify as LGBTQIA+ could be included in § 24(32)(f), but I would prefer to see them explicitly included in the definition of an eligible “Minority Person.”	<p>The City’s Minority-Business Enterprise and Women Business Enterprise (MBE/WBE) Procurement Program is a race and gender-based program, which requires a disparity study for its justification and continuation. A disparity study is conducted approximately every five years to ensure that the City’s current programs remain legally defensible and administered with national best practices.</p> <p>Staff recommends that the next disparity study that the City conducts include a request to study the number of LBGTQIA+ owners in the marketplace and if there are disparities.</p>
6	Luke Ortega Luper, Owner, SWMBE Bonding Capacity Growth Program	The 2022 Disparity Study mentions Surety Bonding as a barrier to MWBE contracting about 31 times, and yet neither the COA nor SMBR has any plans for a new bonding program since they shut down the last one in 2019. The COSA SBD now has a bonding program in place; where is the COA's? A surety bonding education and technical assistance program is critical to the success of the SMBR program.	<p>The recommendations from the 2022 Disparity Study and the Inclusive Procurement Working Group outlined the need for a comprehensive supportive service program for certified firms. SMBR is continuing to explore implementing new strategies and developing a supportive services program, which may would include capacity building services such as, a resource guide for firms, business training, coaching, educational events, and technical assistance.</p> <p>In addition, in the FY 2022-2023 budget process SMBR received a Program Manager I position which its primary focus will be <u>the development and</u> implementation of these programs and services.</p>
7	Channy Soeur, CEO and Michelle Dahlstrom, Chief Administrative Officer	<p><u>Comments to Proposed SMBR Construction and Professional Services Ordinance</u></p> <ul style="list-style-type: none">Page 3 – Q1) Strike “and barriers to equal contract terms”	<ul style="list-style-type: none">Page 3 – Q1) This is a quote directly from the 2022 Disparity Study findings. The City does not feel striking this is warranted.Page 13 – 2-9-10 – 11/12) The development of the annual aspirational MBE and WBE goals will be developed on an annual basis for the fiscal year

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	CAS CONSULTING & SERVICES, INC.	<ul style="list-style-type: none">• Page 13 – 2-9-10 – 11) <i>“Establishing annual aspirational MBE and WBE goals”</i> – this should have an established calendar date (i.e. January 2 of every year, etc.) and be posted publicly• Page 13 – 2-9-10 – 12) Procurement department should produce a monthly report showing/tracking M/WBE goals• Page 15 – 2-9-12 – B) <i>“no sponsor and/or project management department shall have the authority to conduct any activities without express ordinance or rule delegation to such department.”</i> – Unclear. Revise for clarity.• Page 17 – 2-9-15 – K) <i>“The certification status of all MBEs and WBEs shall be reviewed every four years from the initial date of certification.”</i> Add “SMBR will adjust the personal net worth for every 4-year review based on market availability” This section does not address DBEs• Page 19 - 2-9-18 – A) This program needs to be reviewed every 4 years to ensure the effectiveness of annual aspirational goals, and SMBR should produce this report and make it available to the public	<p>starting Oct. 1st. This will be in conjunction with the development of the annual procurement forecast. The Oct. 1st date will be included in the MBE/WBE Procurement Program Rules. SMBR will be responsible for producing reports on an annual basis to reflect contracting activity for projects/contracts with MBE/WBE goals attached.</p> <ul style="list-style-type: none">• Page 15 – 2-9-12 – B) The MBE/WBE Procurement Program Rules and other administrative rules and policies will cover this area.• Page 17 – 2-9-15 – K) The Personal Net Worth will be adjusted annually. DBEs are governed by the Code of Federal Regulations (CFR 49 Part 26) and are governed by the local MBE/WBE Procurement Program.• Page 19 - 2-9-18 – A) The City of Austin strives to conduct a disparity study review of its contracting activities every 5 years. This timeline is adhering to best practices.

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8	Nathalia Parker, KLP Construction Supply	<p>I do not agree with the new proposed definition of WOMAN:</p> <p>47) WOMAN. A person, whether a citizen of the United States or a lawfully admitted permanent resident lawfully admitted resident alien, who is or identifies of the female gender.</p> <p>“Who is or IDENTIFIES of the female gender” - the Portion - IDENTIFIES of the female gender - must be struck out and not accepted. This is NOT the definition of Woman and should NOT be the definition of woman for the purposes of this program, nor in life.</p> <p>You cannot be a woman just because you identify as a woman. You are a woman because you are born female with 2X chromosomes - XX chromosomes.</p> <p>A non female, which would be a male, is born with XY chromosomes.</p> <p>This chromosomes difference makes it clear that women and men are not the same from the beginning and this difference needs to be honored, especially within this program.</p>	<p>The definition of “woman” outlined in the proposed ordinance, closely follows the federal definition which is, <i>a person assigned a female sex at birth, or a person who defines herself as a woman</i>. To be eligible for the Minority-Owned and Women-Owned Business Enterprise Procurement Program, the business owner would need to be a citizen of the United States or a lawfully admitted permanent resident.</p> <p>Administrative Rule 2.5, Racial and Ethnic Identity & Gender of the Minority-Owned and Women-Owned Business Enterprise Procurement Program Administrative Rules, indicates the minority/women group membership into the program is based on the individual’s claim and/or has held themselves out to be a member of that particular group over a long period of time.</p> <p>The Small and Minority Business Resource Department will continue to require applicants to provide documentation to confirm group membership.</p>