



**Greater Austin Contractors
and Engineers Association**

**2010 Central Texas Infrastructure
Design and Construction
Symposium**

**City of Austin
Minority and Women Owned
Business Enterprise Program**

Introductions

- *Moderator* – **Mike Trimble**, Director, Contract and Land Management Department
- **Veronica Briseño Lara**, Director, Small and Minority Business Resources Department
- **Rosie Truelove**, Manager, Contract Procurement Division, Contract & Land Management Dept.
- **Keri B. Juarez**, Manager, Project Management Division, Public Works Department
- **Lino Mendiola**, Outside Counsel, Andrews and Kurth, LLP
- **J. Edward Lowenberg**, Solis Constructors, Inc.



The Legal Context of the MBE/WBE Program

Lino Mendiola

Andrews Kurth LLP

Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides:

"no state shall... deny to any person within its jurisdiction the equal protection of the laws."

The claim that is sometimes made is that affirmative action is an *unequal* application of the law

More Difficult

Strict Scrutiny



Intermediate Scrutiny



Rational Basis

Less Difficult

Supreme Court Lessons

- Quotas Are Clearly Unconstitutional
- “Strict Scrutiny” Applies
- Meeting Goals or making GFE Should Be Considered the Same to Meet Narrow Tailoring and “Flexibility” Standards

How To Craft A Program

- M/WBE programs must be designed to satisfy constitutional “strict scrutiny”
 - “Compelling interest” in remedying identified discrimination established by “strong basis in evidence”
 - Remedies must be “narrowly tailored” to that evidence

Concrete Works v. City of Denver **(10th Cir. 2003)**

- Current standard for legal defensibility
- “Strong evidence” need not be based upon “irrefutable or definitive” proof
- Statistical evidence creating inferences of discriminatory motivations is sufficient
- Local government need not *prove* it discriminated

The Challenge:

- Develop evidence to meet legal standards to show a compelling governmental interest. (Why is the program needed?)
- Develop strategies to narrowly tailor program elements (Is the program too heavy handed?)
- All while attempting to increase opportunities to minorities and women (Is the program effective?)

Narrow Tailoring Factors

- Need for the program, and efficacy of alternative remedies
- Flexibility of the program
- Duration of the program
- Relationship of the numerical goals to the relevant labor market
- Impact on the rights of third parties

Model Ordinance

- Robust “Findings” Based on Credible Study
- Description of Race Neutral Measures
- Reasonably Calculated Goals
- Flexibility In Contract-specific Goals
- Waiver Provision
- Sunset Date
- Consider Segmenting Ordinance by Procurement Category

Model Ordinance

- Bidder submits “compliance plan” showing either (1) met goals, or (2) made GFE
- If no compliance plan, then bidder is not eligible for award (Non Responsive)
- If bidder failed to meet goals and failed to make GFE, then bidder is non-compliant and non-responsive
- Once the compliance plan is accepted, bidder cannot make changes (no augmentation)



City of Austin
MBE/WBE Program Overview

Veronica Briseño Lara
Director, Small & Minority Business
Resources Department

SMBR Responsibilities

- Certification
- Contract Compliance
- Outreach
- Service Provider Contract Administration
 - Austin Area Black Contractors Association
 - US Hispanic Contractors Association
 - Asian Contractors Association
 - Community Mentor Protégé Initiative
- Plan Room

Certification

- Reviews eligibility of small, minority- and women-owned firms to participate in program
- Certify business owners as:
 - Minority-Owned Business Enterprises (MBEs),
 - Women-Owned Business Enterprise (WBEs),
 - Disadvantaged Business Enterprises (DBEs)
- Makes recommendations to the State of Texas for Historically Underutilized Business (HUB) certification

Certification Types

Types of Certification offered by the City of Austin	Certification	Projects/ Funding Source	Maximum Net Worth	Site Visit
Minority-Owned Business Enterprise (MBE)	COA Certifies	City of Austin projects & funding	\$1,326,000	COA discretion
Women-Owned Business Enterprise (WBE)	COA Certifies	City of Austin projects & funding	\$1,326,000	COA discretion
Dual Certification – minority female (MBE/WBE)	COA Certifies	City of Austin projects & funding	\$1,326,000	COA discretion
Disadvantaged Business Enterprise (DBE)	COA Certifies	Federal funding	\$750,000	Federal Requirement

MBE/WBE and HUB Program

- *Historically Underutilized Business (HUB) is a certification program offered by the State of Texas.*
- *The State of Texas accepts City of Austin certified vendors as candidates for HUB certification for qualified applicants.*
- *HUB certification does not count towards City MBE/WBE Certification*

Certification Requirements

- At least 51% owned, managed, *and* controlled by a minority or a woman
- Owner(s) must be “socially and economically disadvantaged”
- The following minority groups are included:
 - African American - Native American
 - Asian - Hispanic
- Personal Net Worth (PNW) test is applied
 - Less than \$1,326,000 indexed to inflation
- Small Business Administration size standards apply
 - Varies by the type of industry

Compliance

- Pre-Award Analysis
 - Establish goals and provide MBE/WBE availability
 - Compliance plan review
 - Either goals met or Good Faith Efforts made
- Post-Award Analysis
 - Preconstruction and progress meetings
 - Requests for Change to Compliance Plan
 - Compliance audits
- Contract Closeout
 - Payments made compared to awards
 - Reports generated (Purchasing Office)

Pre-Award Compliance

Compliance is determined by one of the following (City Code 2-9(A-D)-21):

- Meeting Goals set for the project
 - MBE/WBE Participation/Project Specific Goals
 - Ethnic Participation/Project Specific Subgoals
- Meeting Good Faith Effort Requirements
 - Minimum Requirements
 - Additional Requirements

Goal Setting

- All solicitations over \$50,000 include goals
- Goals are based on
 - MBE/WBE availability
 - Estimated Budget
 - Scopes of Work or Services
- Final determination
 - \$500K or less MBE and WBE goals
 - \$500K or above ethnic sub-goals

Annual Goals

Ownership	Construction	Professional
African American	1.7%	1.9%
Hispanic American	9.7%	9.0%
Asian/Native American	2.3%	4.9%
MBE	13.7%	15.8%
WBE	13.8 %	15.8%

How to Meet the Goals Checklist

- Vendors must be
 - ✓ City of Austin Certified MBE/WBE Firms
 - ✓ Certified for listed scopes of work
 - ✓ Percentages meet or exceed solicitation goals
 - ✓ Dollar amounts consistent with bids received
 - ✓ Goals are calculated using base bid amount for construction projects

As per City Code Chapter 2-9(A-D)-22,

“Upon award of a Contract by Austin City Council that includes Goals or Subgoals that are met, the Goals and Subgoals become covenants of performance by the Contractor....”

Good Faith Efforts

- Good Faith Efforts Include:
 - Bidder/proposer maintaining a level playing field among subcontractors
 - Ensuring that all subcontractors have the same information concerning bidding opportunities
 - Giving certified subcontractors the information needed to submit a conforming and timely bid, including information regarding scope and term
- The purpose of good faith negotiation is to open a dialogue between bidders/proposers and certified subcontractors regarding subcontracting opportunities.
- Bid shopping is prohibited.

Minimum GFE Requirements

- Sending written notices to MBE/WBE firms **in the Significant Local Business Presence (SLBP)** identified on the availability list not less than **5 business days** prior to bid date.
- Providing adequate information about plans and specifications, requirements of the contract, including addendas, contact information, and due date for responding.
- Taking appropriate steps to follow up the initial solicitation with interested MBEs or WBEs.
- Stating a specific and verifiable reason for not contacting each certified firm.

Minimum GFE Requirements Cont'd

- Selecting portions of the work consistent with MBE/WBE availability.
- Negotiating in good faith with interested MBEs and WBEs.
- Contacting SMBR for an availability list, if additional scopes of work or services are identified.
- Rejecting MBEs or WBEs as being unqualified without sound reasons.


Additional Considerations

If the Bidder/Proposer meets less than half of any goal, SMBR may also consider the following additional factors in determining whether a Bidder/Proposer has made Good Faith Efforts:

- Sending written notices to MBE/WBE firms outside the SLBP (Travis, Williamson, Hays, Bastrop & Caldwell counties) on the availability list not less than 5 business days prior to bid date.
- Selecting portions of the work that will increase the likelihood that the MBE/WBE goals will be met.

Additional GFE Requirements

- Efforts to assist MBE/WBEs in bonding requirements, lines of credit, and insurance where appropriate.
- Seeking the assistance of SMBR if the goals are not met.
- Seeking the services of available minority and women community organizations



MBE/WBE Program and the Procurement Process

Rosie Truelove

Division Manager, Contract Procurement
Contract & Land Management Dept.

Contract Procurement's Role

- Partner with SMBR, Project Manager, and contractor to facilitate effective solicitation process
- All solicitations are done in accordance with state statutes and City ordinances
 - MBE/WBE Procurement Program is one of the cornerstones of the City's procurement policies

Solicitation Process Considerations

- All solicitations over \$50,000 evaluated for goals
- Goal information included in solicitation documents
- Projects are widely advertised to promote opportunities
- MBE/WBE Procurement Program reviewed at pre-bid/pre-proposal conferences
- Complete Compliance Plan is required for a submittal to be responsive and to be considered
- Contractor/Consultant must be deemed compliant by meeting the goals or conducting Good Faith Effort to be awarded a contract

Evaluated Solicitations

- Compliance with the MBE/WBE Program is a “gatekeeper” consideration item in evaluated proposals (Professional Services / Alternative Delivery)
 - Professional Services Procurements
 - Scope Specific
 - Rotation List
 - Alternative Delivery
 - Construction Manager at Risk
 - Design/Build
 - Competitive Sealed Proposal
 - Job Order Contracting

Alternative Delivery Solicitations

- Alternative Delivery Evaluation Criteria take the Offeror's past relationship with the City into account as part of the "best value" evaluation criteria
- MBE/WBE Procurement Program Compliance is a key factor

EXAMPLE:

- **Criteria:** *Offeror's Past Relationship with the City*
 - Compliance with City ordinances on substitution/addition/deletion of subconsultants, subcontractors and suppliers
 - Evidence of providing contracting opportunities for small businesses and DBEs or MBE/WBEs
 - Compliance with the City's MBE/WBE Ordinance

Alternative Delivery Solicitations

- Alternative Delivery Evaluation Criteria evaluate the Offeror's Small Business Outreach Approach
- Requires submittal of information documenting the Offeror's philosophy and approach to the outreach and inclusion of local small businesses in execution of the Work

EXAMPLE:

- **Criteria:** *Outreach Approach*

Include discussion of how the Offeror has been successful on the following factors:

- Potential contracting opportunities for MBE/WBEs and small businesses
- Compliance with minority and women owned/historically underutilized/small business programs, requirements and processes
- Strategy and approach for MBE/WBE and small business outreach and inclusion



Role of the Project Manager in the MBE/WBE Program

Keri B. Juarez, P.E., PMP

Division Manager, Project Management
Public Works Department

Project Management Division

- Part of the Mission of the Project Management Division (PMD) is to deliver Capital Improvement Projects in compliance with the M/WBE Ordinance.
- PMD partners with SMBR, CLMD and the Law Department to implement the M/WBE Program appropriately and effectively.
- Project Managers (PMs) receive regular training on the processes involved in implementation of the M/WBE Program.
- Project Managers participate in implementation of the M/WBE Program both prior to and following award of a construction contract.

Pre-Award Activities

Trade Summaries:

- Before a construction project is advertised, Project Managers develop the list of trades, or Commodity Codes, that will be included in the project.
- Each commodity code is assigned a percentage based on the construction cost for that scope of work.
- PM's work with SMBR staff to ensure that Trade Summaries are complete and correct.
- SMBR staff use Trade Summaries to develop project participation goals and availability lists.

Pre-Award Activities

Pre-Bid Conference:

- PMs invite SMBR staff to explain the M/WBE Program and discuss the project goals.
- PMs emphasize the importance of the M/WBE Program and discuss how the program will be implemented and enforced.

Post-Award Activity

Compliance Monitoring:

- Project Managers monitor the participation of subcontractors during construction to ensure that the Compliance Plan is followed.
- Project Managers review the Subcontractor Participation Form that contractors submit with each monthly pay application.
- Project Managers work with Inspectors and Consultant Owner Representatives to monitor the use of subcontractors on the project site.

Post-Award Activity

Additions, Deletions and Substitutions:

- If changes to the project team are needed during construction, the Request for Change (RFC) process is followed.
- Contractors submit RFCs to the PM for review and approval.
- RFCs are then reviewed by Public Works Management prior to submittal to SMBR for final review.
- If a Change Order affects subcontractor participation, PMs ensure that the Request for Change process is followed.



MBE/WBE Program – A Prime Contractor's Perspective

J. Edward Lowenberg

President, Solis Constructors, Inc.