



MEMORANDUM

To: Mayor and City Council

From: Veronica Briseño Lara, Director, Small and Minority Business Resources (SMBR) Department

Date: November 13, 2015

Subject: MBE/WBE Ordinances Extension Request and Disparity Study Update

There is an item scheduled for the November 19th Council meeting to extend the sunset date of the Minority Business Enterprise and Women Business Enterprise (MBE/WBE) Ordinances. This memo will provide background information on the need for the extension of the sunset date.

In 1989, in the case *City of Richmond v. J.A. Croson Co.*, the United States Supreme Court held that municipal race-based affirmative action programs for contracting must survive strict scrutiny in order to be permissible under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.¹ Strict scrutiny has two main components: (1) a municipality must present a “strong basis in evidence” to support an identified compelling interest in support of the race-based affirmative action program, and (2) any race-conscious remedy instituted by the municipality must be narrowly tailored to achieve that compelling government interest. Where there is strong evidence of 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 city or the city’s prime contractors, an inference of discriminatory exclusion could arise.

As a result of this requirement for strong evidence of a statistical disparity to justify race-based contracting preferences, the City has conducted periodic studies to identify the disparity and provide the legal justification for the City’s MBE/WBE program. The current ordinances (Chapters 2-9A Construction, 2-9B Professional Services, 2-9C Nonprofessional Services, and 2-9D Commodities of the City Code) are a result of these studies and case law which provide the governance for the current MBE/WBE Program. The most recent study was

¹ A gender-based procurement program is held to a somewhat lesser standard, known as intermediate scrutiny.

conducted in 2008

(http://www.austintexas.gov/sites/default/files/files/Small_Minority_Business/Report-neracoa_may2008.pdf).

A narrowly tailored program is meant to be remedial in nature, in other words to last only as long as there is discrimination. To be remedial, it is considered a best practice to include a sunset date for the program to ensure that the Council reviews the program and bases it on current statistical and anecdotal evidence of disparities in the marketplace. The City of Austin's MBE/WBE Procurement Program historically has included a sunset date, which has been extended when a disparity study has been adopted. The ordinances currently state that the program will sunset on December 31, 2015. This date was previously set based on an estimated timeline for the completion of the disparity study.

As you are aware, the City has contracted with National Economic Research Associates, Inc. (NERA) to conduct the most recent disparity study. SMBR anticipates that the study will be complete and released in December of this year. The delay in the completion is due to the additional time that was needed for NERA to negotiate contracts with three governmental entities (the City, Travis County, and AISD) and coordinate efforts among the entities, the large number of contracts and data for a five-year period that were evaluated, and strong efforts made to have complete data from stakeholders for analysis. As a result, the disparity study will include a complete and comprehensive analysis.

Following the release of the disparity study, there will be considerable outreach efforts to communicate the results and receive input from the community. Therefore, SMBR is recommending that City Council approve an extension of ordinances to December 31, 2016 to allow for the completion of the study and ample time for outreach and incorporation of the recommendations into the ordinances for Council's consideration.

The proposed timeline is:

Draft Disparity Study Timeline	
December 2015	Disparity Study is published and presented to the Council Economic Opportunity Committee.
January 2016	Disparity Study is presented to the MBE/WBE Advisory Committee. SMBR hosts a stakeholder meeting to present Disparity Study.
January-May 2016	Community feedback is collected through community meetings, online and at SMBR offices. Proposed ordinance revisions are drafted.
May 2016	MBE/WBE Advisory Committee and Council Economic Opportunity Committee consider proposed ordinance revisions for recommendation to City Council.
June 2016	City Council considers proposed ordinance revisions for adoption.

While SMBR is proposing that the revisions to the ordinances be adopted in June of 2016, we are recommending the sunset date for December 2016 to ensure adequate time once the outreach process is finalized.

If you have any questions, contact me at 512.974.2156 or veronica.lara@austintexas.gov.

cc: Marc Ott, City Manager
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