

RESOLUTION NO. 20160303-016

WHEREAS, since 1987, the City has operated a Minority-Owned and Women-Owned Business Enterprise (MBE/WBE) Procurement Program (MBE/WBE Program) to provide minorities and women equal opportunities to participate in all aspects of City contracting, including, but not limited to, construction, professional services, non-professional services, and commodities consistent with federal, state, and local laws; and

WHEREAS, consistent with the legal standards established by the U.S. Supreme Court in the case of *City of Richmond v. J. A. Croson*, the City has periodically updated the factual predicate for its MBE/WBE Program, and by way of its most recent disparity study completed by National Economic Research Associates, Inc. (NERA) in 2015 (Disparity Study), has once again established a strong basis in evidence to support consideration of narrowly tailored race and gender-conscious remedies for the ongoing effects of marketplace discrimination on contract participation of MBE/WBE firms on City contracts; and

WHEREAS, the Disparity Study dated December 17, 2015, was thereafter presented to the public, the MBE/WBE and Small Business Enterprise Procurement Program Advisory Committee, the City Council Economic Opportunity Committee, and the City Council, for review and consideration, and providing multiple opportunities for public input regarding soundness of methodology, accuracy of data, and reasonableness of factual findings and recommendations; and

WHEREAS, the Disparity Study recommended numerous race- and gender-neutral and race- and gender-conscious remedial policy elements to enhance the participation of small MBE/WBEs in City contracts; and

WHEREAS, while the City welcomes and encourages participation by all qualified, ready, willing, and able firms in City contracting on a non-discriminatory basis, currently the City does not have a program specifically targeted to enhancing contract opportunities for veteran-owned and service-disabled veteran-owned business firms (VOB/SDVOB);

WHEREAS, pursuant to Resolution No. 20121108-053, the Disparity Study also assessed, evaluated, and confirmed the underutilization of ready, willing, and able VOB/SDVOB firms on City Contracts as compared to their availability;

WHEREAS, the U.S. Supreme Court holding in *Croson* imposes the highest level of constitutional scrutiny, known as strict scrutiny, on government programs or policies that employ the use of racial classifications; and the U.S. Supreme Court and some federal appeals courts have applied an intermediate level of scrutiny to government programs or policies that employ the use of gender classifications; in contrast, when a race- and gender-neutral classification such as VOB/SDVOB is used in a government program or policy, the courts utilize the lowest level of constitutional scrutiny, a rational basis test, to determine its legality, meaning that the government need only demonstrate that its program or policy is “rationally related” to a legitimate government purpose;

WHEREAS, as determined by courts, the levels of constitutional scrutiny for race- and gender-conscious MBE/WBE programs are significantly higher than the level of scrutiny for VOB/SDVOB programs; and

WHEREAS, a VOB/SDVOB program is therefore more appropriately implemented separately and apart from the City’s remedial MBE/WBE Program, albeit with a similar objective of seeking to achieve greater City contract participation by VOB/SDVOB firms, and also of seeking to honor the service and

sacrifices made by veterans and service-disabled veterans on behalf of our nation and our City through the City's preferential treatment of business firms that are owned by such persons; **NOW THEREFORE,**

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

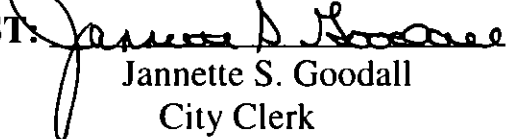
After full consideration of the Disparity Study's detailed findings and recommendations, the City Council hereby accepts the 2015 NERA Disparity Study's findings as providing a strong basis in evidence that establishes a compelling interest for action by the City to remedy the ongoing effects of marketplace discrimination adversely affecting the participation of ready, willing, and able MBE/WBEs, and that establishes a rational basis for action by the City to enhance contracting opportunities for ready, willing, and able VOB/SDVOBs in City contracts.

BE IT FURTHER RESOLVED:

The City Manager is directed to seek additional input from the public, City staff, and the City's outside counsel regarding appropriate legally defensible policy options that are narrowly tailored to address the effects of identified marketplace discrimination, including, but not limited to, the proposed policy and administrative recommendations outlined in the Disparity Study, and based upon such feedback, to draft an ordinance for City Council's consideration that appropriately amends the MBE/WBE Program to incorporate such policy options and to enhance opportunities for small MBE/WBEs in City contracts in a manner that is legally defensible, effective, and feasible.

BE IT FURTHER RESOLVED:

The City Manager is directed to seek additional input from the public, City staff, and the City's outside counsel regarding the proposed recommendations outlined in the Disparity Study, and based upon such feedback, develop recommendations for policy options to enhance participation opportunities for VOB/SDVOBs in City contracts in a manner that is legally defensible, effective, and feasible.

ADOPTED: March 3, 2016 **ATTEST:** 
Jannette S. Goodall
City Clerk