

# Recommendations for the City of Austin's Minority- and Woman-Owned Business Enterprise Program 2022





**RECOMMENDATIONS FOR  
THE CITY OF AUSTIN'S  
MINORITY- AND WOMAN-OWNED  
BUSINESS ENTERPRISE PROGRAM**

**2022**

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## About the Study Team

**Colette Holt & Associates** (“CHA”) is a national law and consulting firm specializing in issues related to Minority, Women and Disadvantaged Business Enterprise programs, business diversity initiatives, and affirmative action issues. The firm has conducted court-approved disparity studies and designed court-approved programs for over 30 years, including for numerous governments. CHA also provides training, monitoring and investigative services across the country to agencies and businesses. CHA is led by Colette Holt, J.D., the founding principal of Colette Holt & Associates and a nationally recognized attorney and expert. Ms. Holt is also a frequent expert witness, and a media author, on these issues. In addition to Ms. Holt, the firm consists of Steven C. Pitts, Ph. D., who serves as the team’s economist and statistician; Ilene Grossman, B.S., Project Administrator; Glenn Sullivan, B.S., Director of Technology; Victoria Farrell, MBA, Director Qualitative Data Collection; and Joanne Lubart, J.D., Associate Counsel.

**Adisa Communications**, founded in 1995 by its president and CEO, Shuronda Robinson, is a City of Austin MWBE certified public involvement and communications firm. The firm provides a full spectrum of public involvement and communications services. Adisa has led public sector, nonprofit, and private sector communications and outreach campaigns to successful completion through creative public involvement facilitation service.

**Cultural Strategies, Inc.** (“CS”) headed by President Sebastian Puente, is an Austin certified MBE focusing on important civic projects and education campaigns for local institutions or private enterprises. Founded in 2009, CS provides effective community engagement strategies for an ever more multicultural Central Texas. With rich experience in multicultural and multilingual marketing, advertising, outreach, and communications, CS helps build effective communications and outreach strategies for respected institutions in a variety of industries such as local government, public services, health care, education, nonprofits and private businesses.

**Pink Consulting**, a City of Austin certified MWBE, provides communications services on public and private projects. Founded in 1997, the firm focuses on the development and implementation of community outreach initiatives for governments, private firms, and community based and neighborhood organizations, with emphasis in minority communities. Principal Bobbie Garza-Hernandez possesses over 30 years of experience with public participation processes, strategic planning, marketing, fundraising and event/conference planning and coordination in the Austin and Central Texas communities

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# Table of Contents

<b>Recommendations for the City of Austin’s Minority- and Woman-Owned Business Enterprise Program . . . . .</b>	<b>1</b>
<b>I. Augment Race- and Gender-Neutral Measures . . . . .</b>	<b>2</b>
A. Develop an Annual Procurement Forecast . . . . .	2
B. Centralize the Program’s Data Collection and Reporting . . . . .	2
C. Increase Inter-departmental Communication . . . . .	3
D. Develop Virtual Training Tools for City Staff and Vendors . . . . .	3
E. Increase Awareness of Existing City Programs and Resources . . . . .	4
F. Conduct Targeted Outreach . . . . .	4
G. Enhance Opportunities on Professional Services Projects . . . . .	5
<b>II. Continue to Implement Narrowly Tailored Race- and Gender-Conscious Measures . . . . .</b>	<b>6</b>
A. Use the Study to Set the Overall, Annual Aspirational MBE and WBE Goals . . . . .	6
B. Use the Study to Set MBE and WBE Contract Goals . . . . .	7
C. Update Program Administration Policies and Procedures . . . . .	8
D. Implement a Comprehensive Supportive Services Program . . . . .	10
E. Adopt a Mentor-Protégé Program . . . . .	10
<b>III. Develop Additional Performance Measures for Program Success . . . . .</b>	<b>13</b>
<b>IV. Continue to Conduct Regular Program Reviews . . . . .</b>	<b>14</b>





# RECOMMENDATIONS FOR THE CITY OF AUSTIN'S MINORITY- AND WOMAN-OWNED BUSINESS ENTERPRISE PROGRAM

The quantitative and qualitative data in this Study provide a thorough examination of the evidence regarding the experiences of Minority- and Woman-owned Business Enterprises (“MBE/WBEs”) in the City of Austin’s geographic and industry markets. As required by strict constitutional scrutiny, we analyzed evidence of the City’s utilization of MBE/WBEs as a percentage of all firms as measured by dollars spent, as well as MBE/WBEs’ experiences in obtaining contracts in the public and private sectors. We gathered statistical and anecdotal data to provide the City with the evidence necessary to determine whether there is a strong basis in evidence for the continued use of race- and gender-conscious goals for its MBE/WBE program (program) for locally funded contracts, and if so, how to narrowly tailor its Program.

The City has implemented an aggressive and successful program for many years. Utilization of MBE/WBEs has exceeded availability for most groups. This is the outcome of setting goals, conducting outreach, and enforcing requirements. The results have been exemplary.

However, evidence beyond the City’s achievements strongly suggests these results reflect the success of the Program countering the discrimination in the contracting markets. Outside of City and other local government contracts, MBE/WBEs face large disparities in opportunities for public sector and private sector work in the Austin area markets. Our Disparity Studies for Travis County, the Texas Department of Transportation and other Texas governments support the conclusion that the current effects of past discrimination and ongoing bias would be barriers to City work in the absence of affirmative action remedies. Texas business owners reported instances of bias and discrimination, and that they receive little work without the use of contract goals.

Based upon these results, we make the following recommendations for the City’s M/WBE Program. We recognize that many of our recommendations, both race- and gender-neutral and race- and gender-conscious will require more staff and technical resources to be devoted to the Program.

# I. AUGMENT RACE- AND GENDER-NEUTRAL MEASURES

The courts require that governments use race- and gender-neutral approaches to the maximum feasible extent to address identified discrimination. This is a critical element of narrowly tailoring the Program, so that the burden on non-MBE/WBEs is no more than necessary to achieve the City's remedial purposes. Increased participation by MBE/WBEs through race-neutral measures will also reduce the need to set MBE/WBE contract goals. We therefore suggest the following enhancements of Austin's current efforts, based on the business owner interviews and survey responses, input of department staff, and national best practices for contracting affirmative action programs.

## A. Develop an Annual Procurement Forecast

We recommend that the City develop an annual procurement forecast for its website. While not a quick or easy feature to implement, a page that provides information on upcoming bid opportunities<sup>1</sup> is one race- and gender-neutral measure that will assist all firms to access information. This is especially important since many business owners expressed frustration with the difficulties in accessing information about upcoming City opportunities.

## B. Centralize the Program's Data Collection and Reporting

We suggest that all MBE/WBE and DBE Program reporting functions be centralized in the SMBR Department. While departments such as Finance will contribute to reports, such as overall spending reports, the disjunct between Program administration and Program reporting, whatever its utility in the past, is now a disservice to the Program and the business community. The somewhat parallel system of e-Capri seems to create confusion and duplication of efforts, as well as inconsistent reporting protocols and outcomes that undermine public confidence in the Program. SMBR is the Program expert, and it should be responsible for all aspects of administration, including reporting on MBE/WBE participation, to date, for contracts which contain MBE/WBE goals.

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1. See, for example, the City of Chicago's Buying Opportunities page. <https://www.chicago.gov/city/en/depts/dps/provdrs/contract/svcs/city-of-chicago-consolidated-buying-plan.html> [chicago.gov].

Further, while the City has had the B2Gnow system for some years, it is not being used to its greatest functionality to support Program administration. While the City, to our understanding, has purchased the most important modules, including contract goal setting and compliance, all aspects of contracting and procurement relevant to the MBE/WBE programs should be captured and managed in this system, including detailed industry codes, which is designed specifically to implement contracting affirmative action programs. Full implementation of this system will also create efficiencies with a reduction in current paper driven processes.

### **C. Increase Inter-departmental Communication**

SMBR can better assist certified firms and small vendors if it is made aware of upcoming opportunities in a timely and organized fashion. The City should develop a consistent protocol for user departments to communicate with SMBR about upcoming solicitations. Perhaps an inter-department checklist that would be entered into B2Gnow so that SMBR knows in a timely manner about upcoming opportunities for which to conduct outreach to certified firms; set contract goals in a timely fashion; and support transparency where a solicitation stands in the timeline and workflow.

### **D. Develop Virtual Training Tools for City Staff and Vendors**

Create training videos for all aspects of the program. These should include certification criteria and processes, contract goal setting, good faith efforts and other bid submission documents, compliance monitoring, substitution requests and working with SMBR. Particular emphasis should be placed on how to complete forms, as this was reported by vendors and City staff that create issues and lead to unnecessary rejection of bids or proposals, as well as delays in awarding projects and processing payments. Videos should be directed to specific audiences such as prime vendors, subcontractors, and particular City departments.

Conduct refresher training for City user departments once any amendments to the ordinance have been adopted. Our extensive interviews with City staff suggested that there was often confusion about how the program functions, inconsistent application of program standards and how best to work with vendors to achieve its objectives. A review of the Program pursuant to this Report is an opportune moment to review the Program's objectives, components and processes and get additional feedback on how its operations may be improved.

## **E. Increase Awareness of Existing City Programs and Resources**

Our anecdotal information revealed that better coordination between SMBR and the Economic Development Department (“EDD”) would be helpful. EDD provides services to non-construction firms, but it is unclear how widely known this is among certified firms. Also, EDD’s services are geared towards startups, not relatively mature firms that need specific help with City contracting requirements. The comprehensive supportive services approach, described below, could be the next step after firms utilize EDD’s offerings.

We suggest increased awareness of the Small Business Program throughout City departments. It appears that few user departments other than Austin Energy and the DBE program for federally assisted contracts utilize this procurement method or conduct outreach to make small firms aware of possible opportunities. These informal contracts often result from relationships, so more should be done to foster connections between certified firms and City department staff. While it is more burdensome for department staff to unbundle contracts, this can be a way to increase opportunities and introduce firms to doing business with the City. Staff in the Small Business Division of EDD can interface with SMBR to ensure that certified firms know about available resources.

We urge the City to better publicize the Quick Pay Program and other contract enhancements adopted previously. This approach can be very helpful to smoothing out cash flow for small firms, thereby supporting their ability to work on City projects. We found in our interviews that few firms were aware of these benefits. Perhaps a virtual workshop could be conducted, with the presentation available online for later access.

## **F. Conduct Targeted Outreach**

We suggest the City increase targeted outreach. This includes sessions devoted to single industries as well as a focus on specific minority groups and women. Many business owners and City staff noted that different communities have different needs and barriers, and there is little focus on woman entrepreneurs. There is currently only one SMBR staff person solely responsible for outreach, so additional personnel resources will be necessary.

## G. Enhance Opportunities on Professional Services Projects

Many professional services firms expressed frustration at the difficulties in obtaining contracts. One common issue was overly restrictive specifications that require a proposer to have a certain number of years of experience with that specific firm. This barrier gives a big leg up to large firms that have many employees and undercuts small firms that are formed by those former employees, especially those owned by minorities or women. People do not lose skills or experience because they start their own businesses. We agree that previous experience with other firms should count.

Another common request was to revise the system for setting rates for design contracts. Firm owners and representatives, both from MBE/WBEs and larger consulting firms, mentioned the complexity, burdensomeness and unfairness of the current approach, which requires firms to justify their overhead, salaries and other costs. While many agencies mandate this type of justification from engineers and other design professionals, Austin's approach was reported to be especially problematic for small firms and unfairly advantageous to large, national players in competing for prime contracts. We suggest the City review and revise these standards. A task force of industry leaders and associations, such as the American Council of Engineering Companies and MBE/WBE organizations focused on these industries, could be appointed to make specific recommendations for improvements.

The City should consider providing additional points in best value or negotiated contracts for a prime proposer using a firm that is new to City work. We heard from many firm owners and some City staff that more needs to be done to diversify the subcontractor pool. This is one approach that will incentivize proposers to seek out new partners and open up City opportunities to a wider base of businesses.

## II. CONTINUE TO IMPLEMENT NARROWLY TAILORED RACE- AND GENDER-CONSCIOUS MEASURES

### A. Use the Study to Set the Overall, Annual Aspirational MBE and WBE Goals

The City's program has been very successful in opening up opportunities for minority and woman firms on its contracts. As reported in Chapter IV, utilization has been significantly higher than availability. When we examined whether firms were concentrated within an industry or between industries on the basis of race or gender, however, a picture emerged of unequal outcomes for MBE/WBEs compared to non-MBE/WBEs.

Further, as documented in Chapter V, when examining outcomes in the wider economy, it is clear that MBE/WBEs do not yet enjoy full and fair access to opportunities to compete for construction and construction-related services contracts. Data from the Census Bureau's *Survey of Business Owners* indicate very large disparities between MBE/WBE firms and non-MBE/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), or the payroll of employer firms. Similarly, data from the Census Bureau's *American Community Survey* ("ACS") indicate that Blacks, Hispanics and White women were underutilized relative to White men. Controlling for other factors relevant to business outcomes, wages and business earnings were lower for these groups compared to White men. Data from the ACS further indicate that non-Whites and White women are less likely to form businesses compared to similarly situated White men. The results of numerous small business credit surveys reveal that MBE/WBEs, especially Black-owned firms, suffer significant barriers to business financing. There are also race-based barriers to the development of the human capital necessary for entrepreneurial success.

Our interviews with individual business owners and stakeholders and the results of our survey further buttress the conclusion that race and sex discrimination remain persistent barriers to equal contracting opportunities. Many minority and female owners reported that they still encounter barriers based on their race and/or gen-

der and that without affirmative intervention to increase opportunities through contract goals, they will continue to be denied full and fair chances to compete.

In our judgment, the City's utilization of MBE/WBEs is primarily the result of the operations of its program, not the cessation of discrimination outside of contracting affirmative action programs. Without the use of goals, Austin may become a "passive participant" in the market failure of discrimination.

We therefore recommend that the City continue to use narrowly tailored race- and gender-based measures. These should include using the weighted availability estimates to set its overall, annual aspirational MBE and WBE goals.

## **B. Use the Study to Set MBE and WBE Contract Goals**

In addition to setting overall, annual targets, the City should use the Study's detailed unweighted availability estimates as the starting point for contract specific goals. As discussed in Chapter II of this Report, an agency's constitutional responsibility is to ensure that goals are narrowly tailored to the specifics of the project. This methodology involves four steps:

- Weight the estimated dollar value of the scopes of the contract by six-digit North American Industry Classification System ("NAICS") codes, as determined during the process of creating the solicitation.
- Determine the unweighted availability of MBEs and WBEs in those scopes, as estimated in the Disparity Study.
- Calculate a weighted goal based upon the scopes and the availability of at least three available firms in each scope.
- Adjust the resulting percentage based on current market conditions and progress towards the annual goals.

Written procedures spelling out the steps should be drafted.

This constitutionally mandated approach may result in goals that are higher or lower than the annual goals, including no goals where there are insufficient subcontracting opportunities (as is often the case with supply contracts) or an insufficient number of available firms.

We recommend that the City more narrowly tailor the use of the racial and ethnic subgroup goals. Many projects do not have the variety of scopes of work to support imposing subgroup goals, leading to burdensome good faith efforts compliance activities by bidders and reviews by SMBR staff. Further, it can be the case that the goals are so small as to not lead to meaningful work, whereas a combined goal could provide significant opportunities for a certified firm. This is especially true on smaller contracts or professional services contracts with limited scopes.

The City will need to develop written criteria to determine when to set ethnic specific goals, perhaps using a checklist or menu approach.

We further urge the City to bid some contracts without goals that it determines have significant opportunities for MBE or WBE participation, especially in light of the high participation of MBE/WBEs during the study period. These control contracts can illuminate whether certified firms are used or even solicited in the absence of goals. The development of some “unremediated markets” data, as held by the courts, will be probative of whether the Program remains needed to level the playing field for minorities and women. The legal standard is that an agency must use race-neutral methods to the “maximum feasible extent” and the outcomes of “no goals” contracts will illuminate how effective race-neutral measures are in achieving non-discriminatory outcomes.

## **C. Update Program Administration Policies and Procedures**

While the current Program has produced admirable results, there are some possible revisions that can strengthen the City’s efforts.

Revise some certification policies. These include:

- Certify firms in the local program using NAICS codes, not National Institute of Government Purchasing (“NIGP”) codes. NIGP codes are extremely granular, which makes the process of using the lists attached to solicitations very burdensome to prime bidders. This high level of subdivision does not help to facilitate outreach. Allowing prime vendors to more easily search for firms and reducing the certification burden on both applicants and the City. Switching to NAICS codes (developed by the Census Bureau) will align the City’s processes and lists with the other codes used for certification in the DBE program, and the data in this Report.
- Implement a more extensive and detailed industry code review process when it is time for a firm to seek recertification. SMBR currently requests contracts or invoices during the recertification to confirm that the certified firm continues to work in the firm’s certified scopes. Additional resources are required to assist with gathering and reviewing more information, such as site visits and reference checks.
- Adopt the federal approach<sup>2</sup> to revise the policy so that a firm remains certified until its eligibility is removed, rather than having a firm’s certification

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2. 49 C.F.R. §26.83 (h)(1) (“Once you have certified a DBE, it shall remain certified until and unless you have removed its certification”).

“expire.” This is the approach in the DBE program for USDOT funded contracts, and it has worked well since its adoption in 1999. This approach reduces the burden on firms and the City and ensures that bureaucratic delays do not unfairly impede opportunities for a certified firm while its status is in review.

- Revise and clarify some program compliance policies.
- Reduce the required methods of MBE/WBE solicitation to one, rather the current test of at least two (email, fax, physical mail or telephone). Few businesses use a fax anymore and U.S. Postal Service is expensive and increasingly unreliable. We do urge the City, however, to maintain the requirement for two attempts.
- Drop the requirement that bidders must place advertisements in newspapers. The decline in the reach of newspapers makes this requirement obsolete.
- Ensure that the list of firms appended to a specific solicitation reflects industry codes that are actually relevant to the project. Since the City requires a bidder to contact all of the firms on the list to establish its GFEs should it fail to reach the goal(s), this should only include scopes of work directly relevant to the contract. Moving from NIGP to NAICS codes will help to alleviate this burden.
- Clarify that GFEs documentation is not required on contracts for which no goal was set. While a general statement encouraging the use of MBE/WBEs is useful, it is important that contract goals remain narrowly tailored. Bidders are required only to ensure that they do not discriminate; there can be no “stealth” goals.
- Clarify the standards for counting the participation of certified firms in joint venture agreements. The current language in the Construction and Professional Services MBE-WBE Compliance Plan Packets is as follows: "When an MBE/WBE performs as a participant in a certified Joint Venture, only the portion of the contract value that is the result of the distinct, clearly defined portion of the work that the MBE/WBE performs with its own forces and for which it is at risk shall be counted towards the project goals." While this mirrors the language in the DBE regulations,<sup>3</sup> it needs to be fleshed out because there is often confusion about whether the certified firm can be a subcontractor to the joint venture, or what portion of the joint venture’s dollars provided by the certified firm acting as the prime vendor may be counted towards the goal. For example, some of the interview participants thought that only a joint venture that is itself certified as an MBE or WBE can

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3. 49 C.F.R. §26.55 (b).

count towards meeting a contract goal. A training video or virtual session could help to reduce this confusion.

## **D. Implement a Comprehensive Supportive Services Program**

We recommend that the City implement a full-service supportive services program to provide wide ranging support to certified firms. While the City does provide financial support to three construction advocacy organizations, this is not a substitute for a comprehensive technical assistance and supportive services initiative. Much more needs to be done. Firms, regardless of industry, requested more support for business development and access to sources of working and long-term capital.<sup>4</sup> Other needed support includes marketing, legal services, accounting services, regulatory compliance and any other aspect of managing a business needed to work on City projects. Prime vendors and City staff also repeatedly pointed to the small number of MBE/WBEs in many subindustries that can perform on City projects. Services should target assistance by industry. For example, construction firms need support for estimating, invoicing, submitting certified payrolls, safety compliance, scheduling and other aspects of their work, as well as a bonding and working capital element that includes a surety and a lender that agree to bond and finance graduates of the training program. Engineering firms could benefit from assistance with setting overhead rates and submitting winning proposals. Technology firms might need help with creating networks and hiring staff. While there are services available in the overall Austin community, the City's program should be focused on what it takes to be a successful vendor or subcontractor on City projects.

## **E. Adopt a Mentor-Protégé Program**

There was broad support among MBE/WBEs, large prime vendors and City staff for a mentor-protégé program to increase MBE/WBEs' capabilities and foster relationships. While many mentor-protégé programs across the country focus on construction (perhaps in part because of the longer history of programs in this sector), special emphasis should be placed on technology sectors and professional services.

We suggest modeling a new initiative after the successful programs approved by the U.S. Department of Transportation. These programs provide support for MBE/WBEs while incentivizing the mentor to provide the types of assistance targeted to

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4. An example of a successful supportive services program is that of the Illinois Tollway. <https://www.illinoistollway.com/technicalassistance>.

the protégé to produce identified and achievable goals.<sup>5</sup> Program elements must be clearly spelled out so as not to impinge on the independence of the certified firm or raise concerns about whether it is performing a commercially useful function.

A program should include:

- A description of the qualifications of the mentor, including the firm's number of years of experience as a contractor or consultant; the agreement to devote a specified number of hours per month to working with the protégé; and the qualifications of the lead individual responsible for implementing the development plan.
- A description of the qualifications of the protégé, including the firm's number of years of experience as a contractor or consultant; the agreement to devote a specified number of hours per month to working with the mentor; and the qualifications of the MBE/WBE owner(s).
- A written City-approved development plan, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement, a schedule for meetings and development of action plans, and the services and resources to be provided by the mentor to the protégé. The assistance provided by the mentor must be detailed and directly relevant to City work. The development targets should be quantifiable and verifiable—such as increased bonding capacity, increased sales, increased areas of work specialty or prequalification—and reflect objectives that increase the protégé's capacities and expand its business areas and expertise.
- A long term and specific commitment between the parties, *e.g.*, 12 to 36 months.
- A provision for the use of any equipment or equipment rental.
- Extra credit for the mentor's use of the protégé to meet a contract goal (*e.g.*, 1.25% for each dollar spent), with a limit on the total percentage that could be credited on a specific contract and on total credits available under the Plan.
- Any financial assistance by the mentor to the protégé must be subject to prior written approval by the City and must not permit the mentor to assume control of the protégé or otherwise impinge on the protégé's continued program eligibility.
- A fee schedule to cover the direct and indirect cost for services provided by the mentor for specific training and assistance to the protégé.

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5. See 49 C.F.R. Part 26, Appendix D, "Mentor-Protégé Guidelines".

- A provision that the Plan may be terminated by mutual consent or by the City if the protégé no longer meets the eligibility standards for MBE/WBE certification; either party desires to be removed from the relationship; either party has failed or is unable to meet its obligations under the plan; the protégé is not progressing or is not likely to progress in accordance with the plan; the protégé has reached a satisfactory level of self-sufficiency to compete without the plan; or the plan or its provisions are contrary to legal requirements.
- Submission of quarterly reports by the parties indicating their progress toward each of the Plan's goals.
- Regular review by the City of the parties' compliance with the Plan and progress towards meeting its objectives. Failure to adhere to the terms of the Plan or to make satisfactory progress would be grounds for termination from the Program.

We recognize that this level of direction and oversight will require resources. Close monitoring of the program will also be critical.

### III. DEVELOP ADDITIONAL PERFORMANCE MEASURES FOR PROGRAM SUCCESS

The City should develop quantitative performance measures for MBE/WBEs and the overall success of the Program to evaluate its effectiveness in reducing the systemic barriers identified in this Report. Possible benchmarks might be:

- The number of bids or proposals, the industry and the dollar amount of the awards and the goal shortfall, where the bidder was unable to meet the goals and submitted good faith efforts to do so.
- The number, dollar amount and the industry code of bids or proposals rejected as non-responsive for failure to make GFEs to meet the goal.
- The number, industry and dollar amount of MBE and WBE substitutions during contract performance.
- Increased bidding by certified firms as prime vendors.
- Increased prime contract awards to certified firms.
- Increased MBE/WBE bonding limits, size of jobs, profitability, complexity of work, etc.
- Increased variety in the industries in which minority- and woman-owned firms are awarded prime contracts and subcontracts.
- Percentage of prime contractors that meet solicitation goals (at time of award) through the utilization of certified minority-owned, women-owned, and disadvantaged businesses on applicable City of Austin contracts set by the Small and Minority Business Resources (SMBR) Department.
- Percentage of MBE/WBE spend as a share of City of Austin total procurement spend.
- Percentage of MBE/WBE certified firms awarded a City of Austin contract.

## **IV. CONTINUE TO CONDUCT REGULAR PROGRAM REVIEWS**

The City adopted a sunset date for the current Program, which expires on Dec. 31, 2022, and we suggest this approach be continued. Data should be reviewed approximately every five to six years, to evaluate whether race- and gender-based barriers have been reduced such that affirmative efforts are no longer needed. If such measures are necessary, the City must ensure that they remain narrowly tailored.