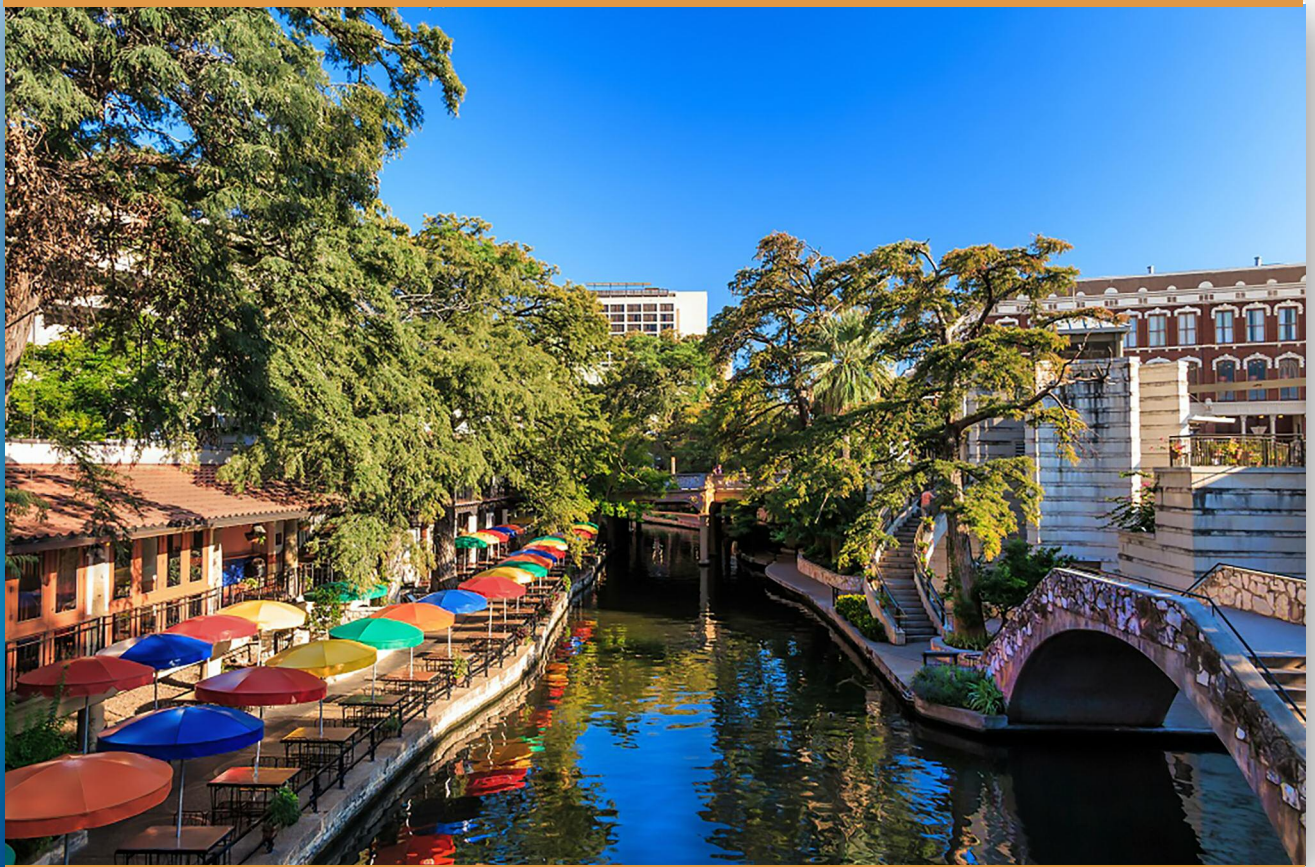


Recommendations for San Antonio Water System's Small Minority Woman Veteran Business Enterprise Program



RECOMMENDATIONS FOR SAN ANTONIO WATER SYSTEM'S SMALL MINORITY WOMAN VETERAN BUSINESS PROGRAM

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I. RECOMMENDATIONS FOR SAN ANTONIO WATER SYSTEM'S SMALL MINORITY WOMAN VETERAN BUSINESS PROGRAM

The quantitative and qualitative data in this Study provide a thorough examination of the evidence regarding the experiences of and Minority- and Woman-owned Business Enterprises (“M/WBEs”) in San Antonio Water System’s (“SAWS”) geographic and industry markets. As required by strict constitutional scrutiny, we analyzed evidence of SAWS’ utilization of M/WBEs as a percentage of all firms as measured by dollars spent, as well as M/WBEs’ experiences in obtaining contracts in the public and private sectors. We gathered statistical and anecdotal data to provide the agency 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 Small Minority Women Veteran Business program, and if so, how to narrowly tailor its Program.

SAWS has implemented an aggressive and successful program for several years. Utilization of M/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 agency’s achievements strongly suggests that these results reflect the effect of the Program. Outside of SAWS and local government contracts, M/WBEs face large disparities in opportunities for public sector and private sector work in the San Antonio 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 obtaining SAWS 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.

We recognize that many of our recommendations, both race- and gender-neutral as well as race- and gender-conscious, will require more staff and technical resources to be devoted to the Program. For an agency of its size, and a Program of this reach, a staff of only two is inadequate to achieve all of the agency’s objectives.

Based upon the Study findings, we make the following recommendations.

A. 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 a Program, so that the burden on non-M/WBEs is no more than necessary to achieve the agency's remedial purposes. Increased participation by M/WBEs through race-neutral measures will also reduce the need to set M/WBE contract goals. We therefore suggest the following enhancements of SAWS' current efforts, based on the business owner interviews and survey responses, input of department staff, and national best practices for contracting affirmative action programs.

1. Develop an Annual Procurement Forecast

We recommend that SAWS 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 opportunities¹ is one race- and gender-neutral measure that will assist all firms to access information.

2. Increase Access to Information

Many small firms requested more, and easier access to, information about working with SAWS, including how to determine which firms won bids and at what price. The agency does post information on what firm was awarded contracts, including the contract amount.² However, many business owners interested in work with SAWS were unaware of these resources. We therefore suggest greater efforts to publicize this information

Developing training videos for all aspects of the program would assist small firms and possibly reduce staff time to answer inquiries about the Program. Topics should include certification criteria and referrals to certifying agencies, contract goal setting, good faith efforts ("GFEs") criteria and documentation and other bid submission requirements, compliance monitoring, substitution requests and how to contact the fraud hotline.

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].

2. Contracting (https://apps.saws.org/Business_Center/Contractsol/archive.cfm); Purchasing (<https://sawsbid.ionwave.net/AwardedSourcingEvents.aspx>); Board Meeting Agenda Archive (https://apps.saws.org/who_we_are/board/agenda/).

3. Conduct Targeted Outreach

We suggest SAWS increase targeted outreach. This includes sessions devoted to single industries as well as a focus on the specific minority groups and women for which disparities continue to exist despite the administration of the Program. There is currently no staff person solely responsible for outreach, so additional personnel resources will be necessary.

4. Review Experience and Insurance Requirements

Several M/WBEs felt that SAWS' requirements were often greater than necessary to be considered an eligible proposer. For example, insisting that a proposer must have done a specific type of project for SAWS within a fixed number of years could be replaced with consideration of equivalent experience with another entity.

B. Continue to Implement Narrowly Tailored Race- and Gender-Conscious Measures

SAWS' 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 for Hispanic- and Asian-owned businesses. 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 M/WBEs compared to non-M/WBEs.

Further, as documented in Chapter V, when examining outcomes in the wider economy, it is clear that M/WBEs do not yet enjoy full and fair access to opportunities to compete for contracts. Data from the Census Bureau's *Survey of Business Owners* indicate very large disparities between M/WBE firms and non-M/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 M/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 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 gender 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, SAWS' high utilization of Hispanic- and Asian-owned firms 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, SAWS may become a "passive participant" in the market failure of discrimination. We therefore recommend that SAWS continue to use narrowly tailored race- and gender-based measures.

1. Use the Study to Set the Overall, Annual Aspirational M/WBE Goal

SAWS should use the Study's overall M/WBE weighted availability result to set an annual, overall, aspirational target for M/WBE utilization in agency contracts (prime contracts and subcontracts combined). We found the weighted availability of M/WBEs to be 20.4 percent. This can be the agency's goal (or a figure rounded to a whole number) for its overall spending with certified firms across all industry categories. This will require amending the current Program definition to remove the reference to annual goal setting³ and replace it with a reference to the Study, since a new study will not be conducted every year.

2. Use the Study to Set Narrowly Tailored M/WBE Contract Goals

In addition to setting the overall, aspirational annual target, SAWS 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. Broad classifications such as "construction" or "professional services" are unlikely to pass the test of strict constitutional scrutiny.

This methodology involves four steps:

1. 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.
2. Determine the unweighted availability of MBEs and WBEs in those scopes, as estimated in the Disparity Study.

3. Exhibit A, Small, Minority, Woman, and Veteran-owned Business (SMWVB) Enterprise Policy, § 5, DEFINITIONS.

3. Calculate a weighted goal based upon the scopes and the availability of at least three available firms in each scope.
4. Adjust the resulting percentage based on current market conditions and progress towards the annual goals.⁴

Written procedures spelling out the steps should be drafted.⁵

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 or an insufficient number of available firms.

Utilization should be reported and collected at the six-digit NAICS code level into the SPURS system. This will permit reporting to be congruent with the Study data and the categories in which M/WBEs are certified.

We urge SAWS 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 Hispanic- and Asian-owned firms 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 all minorities and women.

3. Narrowly Tailor and Simplify Program Administration Policies and Procedures

While the current Program has produced admirable results, there are some revisions that can strengthen SAWS’ efforts and reduce its legal risks.

- Ensure the Program is flexible. Giving points for M/WBE participation is unlikely to pass the judicial test that race- and gender-conscious measures cannot be rigid. A system whereby the only way to be awarded points is to utilize M/WBEs, and the more participation proposed, the higher the points awarded, means that a proposer who has made GFEs is not on the same footing as one who utilizes certified firms. This is not sufficiently flexible. Preferring more participation is unlikely to survive a legal challenge and is needlessly complex. Whether the goal was met or GFEs established should be a “yes or no” standard. If yes, then firms go on for consideration of award on an equal basis.
- Revise some program compliance policies.

4. See www.contrctgoalsetting.com for how to set legally defensible goals.

5. There is a goal setting module that can be added to the SPURS system that is designed to integrate disparity study data into contract goal setting.

- Some documents do not reflect current practices and/or are confusing (for example, the use of SBE goals).
- If the goal is met, then documentation of GFEs should not be required. Demonstrating that the bidder achieved the goal by definition means it made GFEs to meet the goal.
- Further, we suggest dropping Veteran-owned Business Enterprises (“VBEs”) from the title of the Program, as there are very few element’s that are specifically directed towards those firms. Small VBEs would benefit from the race- and gender-neutral measures.

C. Develop Performance Measures for Program Success

SAWS should develop quantitative performance measures for M/WBEs and the overall success of the Program to evaluate its effectiveness in reducing the systemic barriers identified in this Report. In addition to meeting the overall, annual goal, possible benchmarks might be:

1. 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 GFEs to do so.
2. 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.
3. The number, industry and dollar amount of MBE and WBE substitutions during contract performance.
4. Increased bidding by certified firms as prime vendors.
5. Increased prime contract awards to certified firms.
6. Increased M/WBE bonding limits, size of jobs, profitability, complexity of work, etc.
7. Increased variety in the industries in which minority- and woman-owned firms are awarded prime contracts and subcontracts.

D. Continue to Conduct Regular Program Reviews

SAWS has adopted a sunset date for the current Program, 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 agency must ensure that they remain narrowly tailored.