



# Application of the City's Good Faith Efforts Policy

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# Maintaining a Constitutionally Sound Program

- The City's Minority and Women Business Enterprise (MWBE) Program, a race- and gender-conscious government supplier diversity program, must be narrowly tailored to remain constitutionally sound.
- **Narrow tailoring:** City's program must be administered to specifically fulfill only its intended goal of remedying discrimination in contracting.
  - MWBE contract goals must reflect available opportunities and firms.
  - Contract goals cannot be quotas, Good Faith Efforts (GFE) is the standard of compliance. Courts have consistently looked at ***“the flexibility of the program requirements, including the provision for good faith efforts to meet goals...It is imperative that remedies not operate as fixed quotas.”***
  - Implementation of race and gender-neutral remedies.
- OBO administers the City's MWBE Program adhering to these requirements.

# Good Faith Efforts Standard



- Chapter 15-84(b)(5) provides that OBO is responsible for reviewing documentation from potential contractors and from contractors concerning Good Faith Efforts made to meet or exceed the participation goals for contracts.
- The City's written Good Faith Efforts Policy provides guidance for contractors and is referenced in solicitations and available on OBO's website ([www.houstontx.gov/obo](http://www.houstontx.gov/obo)).
- **Good Faith Efforts are steps taken to achieve the MWSBE Goal which, by their scope, intensity and usefulness, demonstrate the Prime's actions to meet or exceed the contract goal prior to award or throughout the duration of the contract.**
- A GFE analysis is conducted at bid submission and throughout the life of the project, with a final determination at the end of each project.

# Contract Goals and MWBE Plan Submission

- MWBE contract goals are established based on the divisibility of work on each project and the availability of certified MWBEs to perform the work.
  - Goals are waived when there are limited certified firms available in the market to perform the scope of work or the contract does not lend itself to divisibility.
  
- MWBE Plans must be approved prior to Council award.
  - A compliant MWSBE Plan includes subcontractors who will perform a **Commercially Useful Function (CUF)**:
    - Subcontractors must be listed to perform work included in the scope and must be certified in the NAICS Codes for that work at the time of bid submission.
    - Committed dollar value / percentages must be commensurate with the identified divisible work, as needed per the scope.



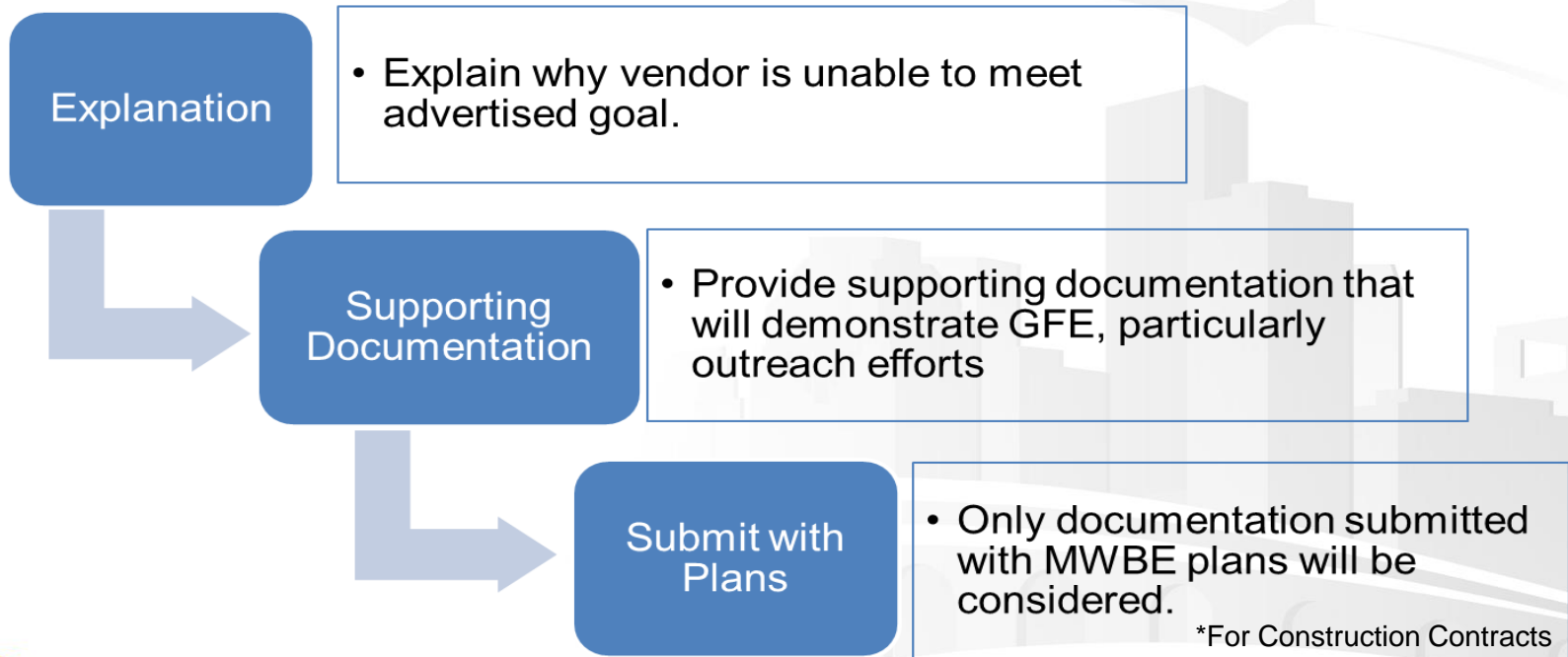
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# Good Faith Efforts: Prior to City Council Approval of Award

# Good Faith Efforts Determination: Pre-Award

- When a submitted MWBE Participation Plan is less than the **advertised contract goal(s)**, bidder **must** provide documentation illustrating their Good Faith Efforts to achieve the goal(s).
- Good Faith Efforts must be demonstrated by the vendor **PRIOR** to the contract award by Council.



# Demonstrating Good Faith Efforts Pre-Award

Elements include:

- Attendance at Pre-Bid Meeting
- Outreach and Advertisement
- Notice and Solicitation
- Access to Contract Details
- Point-of-Contact
- Work Designations and Explanations
- Make Sure MWBEs Perform CUF
- Negotiations, Contracts/LOIs
- New Efforts



This is **NOT** an exhaustive list.

***\*\*City may consider other factors or types of relevant efforts in appropriate cases, as documented by contractor.***



# Denied Good Faith Efforts



## Denied Good Faith Efforts usually consists of:

- Self-performance by the Prime
- Little or no supporting documents
- Commercially Useful Function issues
- Using non-certified firms





# OBO's GFE Appeals Process



OBO's Assistant Director renders initial GFE determination

If GFE submission is denied, Bidder may appeal to the OBO Director

If denial is upheld by Director, Bidder may appeal to the City's Legal Department





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# Good Faith Efforts: After Contract Award

# Demonstrating Good Faith Efforts Post-Award

## Compliance Management

- Designate an MWBE Liaison Officer.
- Execute and submit required subcontracting agreements outlining terms of engagement.
- When possible, provide Sub-Consultants /Subcontractors with advance notice when they will be needed for project.
- Keep a log of efforts made throughout the course of contract to meet goal.
- Contact OBO for assistance if experiencing challenges meeting the goal.

## Compliance Management

- Promptly respond to inquiries from the City regarding MWBE participation for goal credit.
- Genuinely attempt to resolve disputes with MWBEs. Leverage City's mediation process.
- Attend all meetings and mediations requested by the City.
- Provide information that is factually accurate and free of material misrepresentation.
- Provide up-to-date MWBE Utilization Schedules and promptly report payments to the B2G Now system.
- Notify OBO of the effect of scope of work changes on Participation Plan.

## Deviation Requests

- Utilize all MWBEs on the approved Participation Plan unless a deviation is approved.
- Request a deviation when needed and make Good Faith Efforts to replace MWBE firms with other MWBE firms.

***\*\*City may consider other factors or types of relevant efforts in appropriate cases, as documented by Contractor.***

# Work Order Contracts



## ➤ Challenges with MWSBE Compliance

- Work orders are issued by the contracting department as needed, and often with extremely quick turnaround times (e.g., 24-48 hours).
- Scope of work is generally pretty broad, affecting listed MWSBE subcontractors as they rarely operate in every specialization that may be needed on all work orders.
- When a listed MWSBE cannot perform the work, Prime must make GFE to find another certified firm to perform the work to meet the contract goal(s).
- The quick turnaround time to perform the work as required by the City, at times, results in the Prime self-performing the work or utilizing a non-goal credit firm who is available.

# Evaluation of MWBE Compliance



- OBO performs a final evaluation of MWSBE compliance at the end of projects.
- When a goal is not met, to determine Good Faith Efforts, OBO reviews all relevant documentation related to goal compliance:
  - Prime's Explanation and Documentation
  - Affected MWSBE Subcontractor's Response and Documentation
  - Department's Explanation/Response and Documentation
  - OBO's Project File
- After evaluating whether Primes made GFE, they are notified of their rating via letter.
- Primes who disagree with their rating have 14 days to contact the OBO Division Manager who will review all evidence and notify the Primes of the results of the review.
- Primes may seek a final review of their rating by appealing to the OBO Director.

# MWSBE Ratings



- **Outstanding:**
  - Made Good Faith Efforts to exceed contract goals
  
- **Satisfactory:**
  - Made Good Faith Efforts to meet contract goals
  
- **Satisfactory Due to Good Faith Efforts:**
  - Fell short of the goal, but made Good Faith Efforts to meet contract goals
  
- **Unsatisfactory:**
  - Fell short of the goal, and did not make Good Faith Efforts to meet contract goals



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# Case Studies



# Case Study 1: Approved Good Faith Efforts

## A Water Line Rehabilitation Project with a 18.00% Advertised MWBE Goal {11.00 % MBE & 7.00 % WBE}

- Contractor's Participation Plan: 16.00% MWBE { 11.00% MBE , 1% WBE, & 4.00% SBE }
- Contractor failed to meet the WBE goal by 6.00%.
- Contractor could use **SBE** % toward meeting the **WBE** goal up to 4%:

4.00% SBE added to the 1.00% WBE = 5.00% WBE

11.00% MBE and 5.00% WBE = **16.00% MWBE**

- **Contractor provided the following documentation for evaluation:**

- Bidder's MWSBE Participation Plan, Pre-Bid Good Faith Efforts & Bidder's MWSBE Goal Deviation Request
- Documents provided the following information:
  - MWBEs contacted and contact details.
  - Identified several work elements within the Scope of Work.
  - MWBEs' work capabilities & relevant scope of work.
  - Stated bid invitation was e-blasted to 800 construction firms which included MWSBE certified subcontractors.
  - Dates of contact for fax and email notification, and telephone call follow-ups.
  - Results of contact with MWBEs.
  - Confirmation of publication in the Houston Chronicle, Industry Publications, and Publications targeted to minority and female communities.





# Case Study 1: Approved Good Faith Efforts

**Department Services evaluated documentation and verified details.**



**Vendor demonstrated Good Faith Efforts by providing documentation, which are as follows:**

- Notified a reasonable number of certified MWSBEs.
- Followed up to determine if they were interested in submitting a bid.
- Solicited MWSBEs within a reasonable amount of time by providing written notification to MWSBEs more than 7 business days before bid submission.
- Provided documentation of advertisement.
- Attended pre-bid meeting.



# Case Study 2: Denied Post-Award Good Faith Efforts

## A Local Drainage Project Construction Work Order Contract with a 18.00% Advertised MWBE Goal of {11.00 % MBE & 7.00 % WBE}

- Contractor's Awarded Participation Plan: 18.00% MWBE { 9.00% MBE , 7.00% WBE, & 2.00% SBE}.
- Contractor Achieved Participation: 15.02 MWBE {12.07% MBE, 2.95% WBE and 0.00% SBE}.
- Contractor failed to meet the WBE goal by 4.05%. Contractor also failed to meet the SBE committed goal by 2.00 %.



# Case Study 2: Denied Post-Award Good Faith Efforts

## Contractor failed to demonstrate Good Faith Efforts:



- Contractor failed to utilize all WBE firms on the contract.
- Contractor did not utilize the SBE firm listed on the contract.
- According to the contractor, the work scheduled for the WBE was removed by the COH but contractor failed to remove WBE firm through the contractually mandated deviation process.
- The change by COH happened within reasonable amount of time to deviate.
- Contractor did not make any efforts to replace the WBE participation amount.
- OBO reviewed change order and discussed with the contracting department.
- OBO made independent decision based on all information obtained.
- Contractor received Unsatisfactory rating due to contractor's failure to make Good Faith Efforts to meet the WBE and SBE goals.





# Thank You

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