Minority, Women, and Small Business Enterprise Program Policies

EDUCATE. CONNECT. **GROW.**

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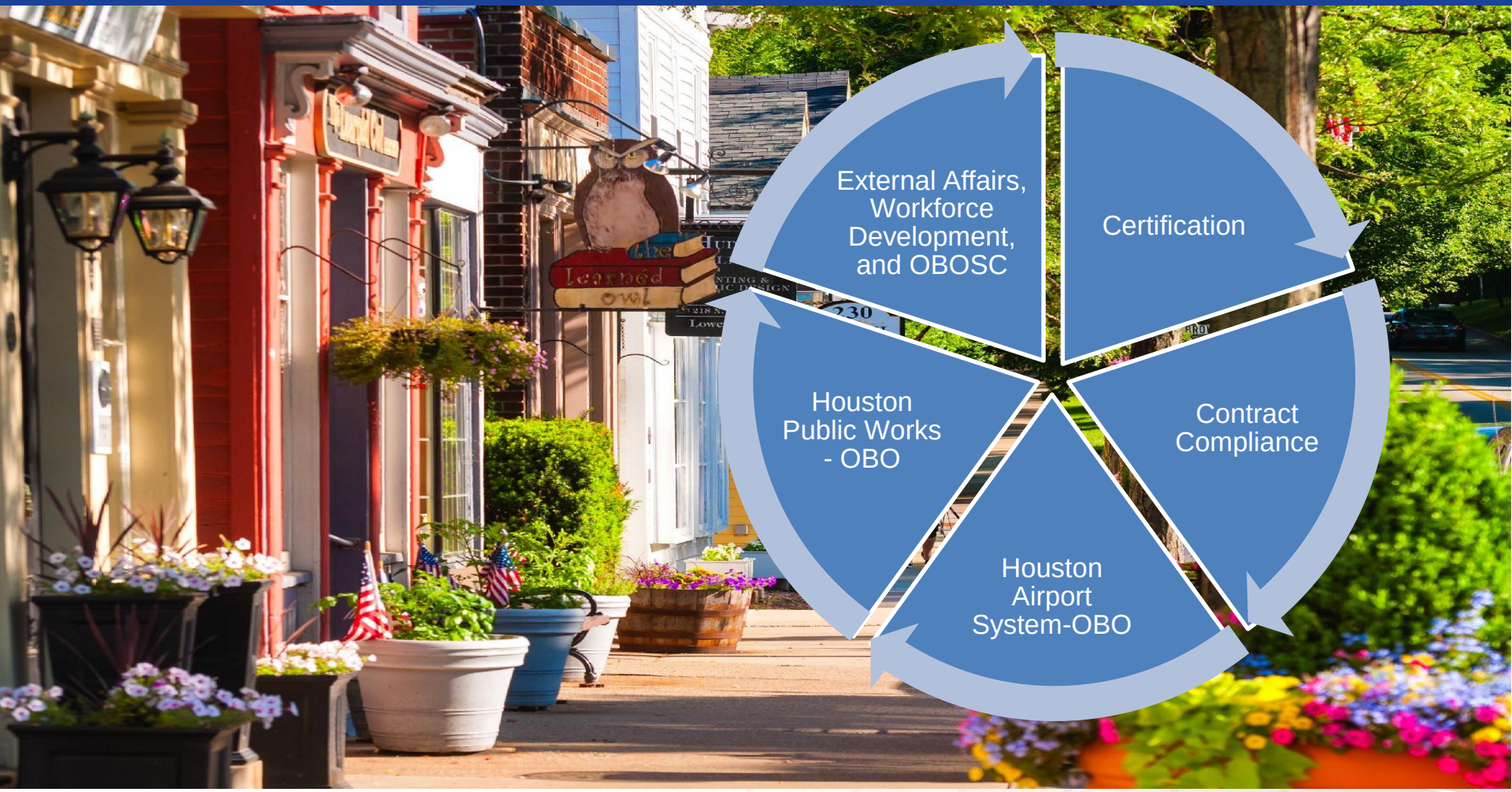
Mission

The Office of Business Opportunity is committed to cultivating a competitive and diverse economic environment in the City of Houston by promoting the success of small businesses and developing Houston's workforce, with a special emphasis on historically underutilized businesses and disenfranchised individuals.

Key Objectives: ***Educate, Connect & Grow Businesses***

OBO Department Structure



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Certification: City's Supplier Diversity Pipeline

Certification: Building the City's Supplier Diversity Pipeline

MBE

COH Projects

COH Funding

COH Requirement

WBE

COH Projects

COH Funding

COH Requirement

SBE

COH Construction Projects (≤4%)

COH Funding

COH Requirement

PDBE

COH Projects

COH Funding

COH Requirement

DBE

Federally Funded Projects

Federal Requirement

ACDBE

On and Off Airport Concession Operations (no funding source)

Federal Requirement

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Doing Business with the City and Regionally

- Our MWSBE/PDBE and DBE Directory is utilized as a pipeline for Prime contractors for the City of Houston and other entities.
- Only firms listed in our directory may be utilized on local contracts for MWSBE utilization credit.
- Approximately 25% of COH certified firms use their certification for COH contracting

New METRO Going Places

Texas Department of Transportation

PORT HOUSTON THE INTERNATIONAL PORT OF TEXAS

FBISD INSPIRE • EQUIP • IMAGINE

EPA United States Environmental Protection Agency

Houston Independent School District

HCC HOUSTON COMMUNITY COLLEGE

KBR

HOUSTON First CORPORATION

HOUSTON HOUSING AUTHORITY

HUB Statewide Historically Underutilized Business Program

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Current Pool of Certified Companies

Industry	Number of Certified Businesses
Architectural & Engineering Products and Services	298
Automotive & Transportation	179
Business Services & Support/Creative Products & Services	734
Concessions & Food Products Service	118
Construction Services & Equipment	1,288
Energy & Utilities/Environmental Services & Equipment	145
Facilities & Security Products & Services (Janitorial/Security/HVAC)	385
Health Care & Pharmaceutical Products & Services	118
Industrial Manufacturing & Equipment	66
Legal, Financial & Insurance & Real Estate Services	215
Other Services	173
Retail, Wholesale & Warehousing	177
Technology & Telecommunications	241
Grand Total	**4,137**

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Creating Opportunities through MWSBE Goals

Annual Citywide Aspirational Goals

- To promote the growth and success of MWBEs and address marketplace barriers, the City periodically sets aspirational Citywide contracting goals to ensure MWSBE participation on City projects.

Professional Services	Goods and Services	Construction
MWBE – 24%	MWBE – 11%	MWSBE – 34%

- Progress made towards meeting **Citywide** goals annually is measured by counting the participation of MWSBEs as prime contractors, subcontractors, and joint venture partners.

Goal-Oriented Contracts

- Goals are applied to:
  - Goods & Services Contracts valued **over $100,000.**
  - City funded contracts for construction work **over $ 1 million.**
  - Professional Services Contracts **(no $ threshold).**
- Contracting departments and OBO set goals taking into consideration local availability of certified MWSBEs and divisibility.

Maintaining a Constitutionally Sound Program

- The City's program must be constitutionally sound
  - **Narrowly-tailored** to achieve our objective of remedying discrimination
  - Goals must reflect available opportunities and firms

- Contract-Specific Goals: 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.

- **Contract Goals are not Quotas** –the standard for meeting goals is good faith efforts (GFE). Policy can be found on the OBO website at GFE Policy.

GFE Determination Pre-Award

- Bidders/Proposers must have compliant MWBE plans prior to Council award
- **Construction Projects**: To be responsive, with bids, Bidders must submit compliant plan or establish they have made GFE to be responsive
- A compliant MWSBE Plan includes subcontractors who will perform a commercially useful function:
  - Subcontractors must be listed to perform work included in the scope of work and must be certified in the NAICS codes for that work at the time of bid submission
  - Committed percentages must be commensurate with the identified divisible work, as per the scope

GFE Determination Pre-Award

When Contracting Department determines a plan is non-compliant, the plan is sent to OBO for a GFE assessment:

- OBO's Assistant Director reviews apparent non-compliant plans to determine whether bidder has made GFE.
- If a determination is made that Bidder has not made GFE, Bidder has an opportunity to appeal a denial decision to the OBO Director.
- If the decision to deny is upheld, Bidder will have an opportunity to appeal to the City's Legal Department as a final layer of administrative review.

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Ensuring Compliance with MWSBE Goals

Contract Compliance Division

- OBO's Contract Compliance Division monitors most City contracts to ensure compliance with laws and regulations mandated by city, state, and federal guidelines and ordinances.

- The Compliance team performs the following:

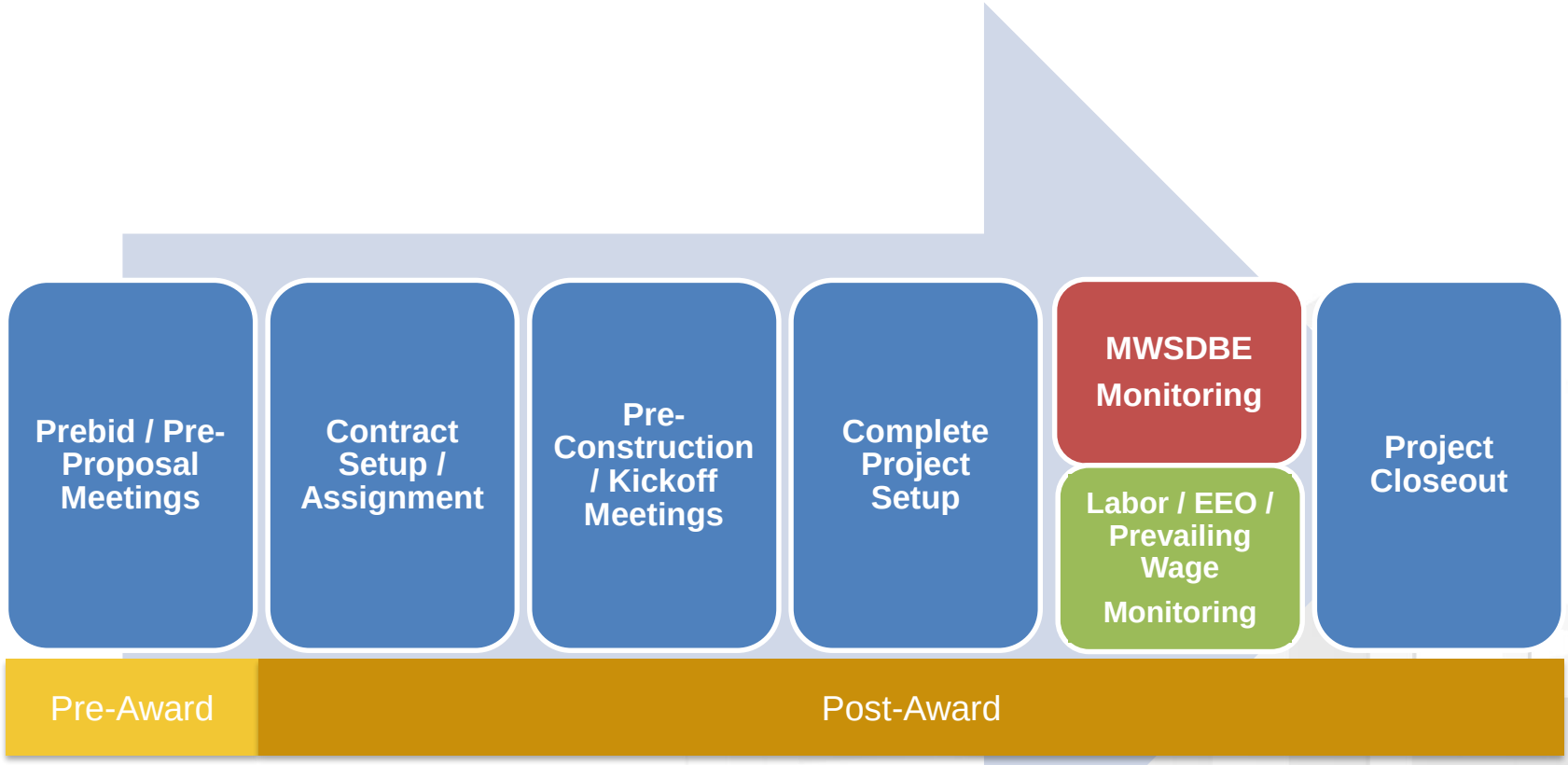
  - Monitors utilization and payments to MWSBEs and DBEs on goal-oriented and regulated construction, professional services and goods & services contracts.

  - Monitors prevailing wage and fair labor standards laws.

  - Monitors construction contracts to ensure full compliance with equal employment opportunity laws.

  - Monitors approximately 1,300 City contracts valued at approximately $8.7B.

Contract Compliance Lifecycle



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Assessing Commercially Useful Function

- A core element of MWSBE compliance is determining whether a MWSBE listed for credit is performing a Commercially Useful Function (CUF)
- Prime Contractors only get MWSBE goal credit towards contract goals when:
  - The MWSBE performs work germane to the contract's scope of work using its own forces **AND**
  - The MWBE is certified in the NAICS code in which they are performing
- A CUF analysis is performed pre-award and throughout the life of the project

Deviation from MWSBE Plans

- After contract execution, a Prime must comply with Council-approved MWSBE participation plans, unless it has received approval from OBO to deviate from the plan.

- Work designated in an approved plan cannot be completed by any other subcontractor, supplier or the Prime without OBO's approval.

Deviation from MWSBE Plans

- The Prime must give notice to the affected MWSBE of its request to **remove** or **substantially reduce** (more than 50%) their participation, stating the specific reason(s) for the request.

- The Prime must demonstrate a good cause to justify the removal or reduction.

- The Prime must also seek OBO approval to **add** an MWSBE for goal credit to the approved MWSBE participation plan.

- **Mediation Services** – offered for disputes between certified firms and Primes.

Deviation Guidelines

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Good Faith Efforts

- The standard for meeting MWSBE participation goals is the demonstration of good faith efforts.

- The City's written Good Faith Efforts Policy is referenced in solicitations and is also available on OBO's website.

- Good Faith Efforts are **steps taken to achieve the MWSBE Goal which, by their scope, intensity and usefulness, demonstrates the Primes' actions to meet or exceed the Contract Goal throughout the duration of the contract**.

Good Faith Efforts

- Race-Conscious government supplier diversity programs are required to be ***narrowly tailored***.

- One of the factors that the courts have repeatedly examined in determining whether race-based remedies are narrowly tailored to achieve their purpose in contracting is ***"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***."

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 **r**eviews all relevant documentation related to goal compliance:
  - Prime's Explanation and Documentation
  - Affected 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.

Work Order Contracts

- Challenges with MWSBE Compliance on Work Order Projects

  - Work orders are issued by the contracting department as needed, and often with extremely quick turnaround times (e.g. 28-48 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

Changes in Contract Scope

- Challenges with Change Orders
  - Change orders issued by departments affect participation plans, particularly when work assigned to listed MWSBEs is removed or reduced
  - GFE evaluation considers how change orders affected Prime's compliance, including considering the contractor's efforts to timely and efficiently deliver the project.

MWSBE Ratings

Outstanding

- Prime exceeds contract goal(s) by at least 1% and made GFE to utilize all approved MWSBEs.
- Prime exceeded advertised goal(s) but fell short of contract goal(s) and made GFE to use all approved MWSBEs.

Satisfactory

- Prime meets contract goal(s).
- Prime exceeded contract goal(s) but failed to make GFE to utilize all approved MWSBEs.
- Prime exceeded advertised goal(s) but fell short of contract goal(s) and failed to make GFE to use all approved MWSBEs

Satisfactory Due to Good Faith Efforts

- Prime failed to meet contract goal(s) but made GFE to utilize all approved MWSBEs.

Unsatisfactory

- Prime failed to make GFE to utilize all approved MWSBEs and fell short of the goal(s) by more than 1%.

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Addressing a Pattern of Non-Compliance

Suspending Contractors for MWBE Non-Compliance

- Per City Ordinance, OBO may suspend contractors who fail to make good faith efforts for up to 5 years.

- OBO establishes procedures for the implementation of sanctions

  - Suspension is pursued when the contractor exhibits a pattern of non-compliance

  - Considerations for recommended length of suspension include:

    - Whether the conduct was intentional
    - Number of instances of failure to comply
    - Whether contractor had previously been suspended
    - Whether contractor misrepresented facts
    - Contractor's actions taken to cure deficiencies

Sanctioning Process

- City Ordinance outlines the sanctioning process for determining whether a contractor should be suspended
  - Notice to contractor and opportunity to be heard in a conciliation conference with OBO
  - If not resolved at conciliation conference, a recommendation to sanction sent to the contractor and Contract Compliance Commission.
  - Once OBO recommends sanctioning a contractor, the Commission conducts a hearing
    - If a violation is found, the Commission makes a recommendation to the Mayor and City Council
  - Mayor and Council may:
    - Adopt recommendation with or without modifications;
    - Remand to CCC for further action; or
    - Reject recommendation and take no action against the contractor

Contract Compliance Commission

Commission's Purview

- Sanctions
  - OBO matters involving noncompliance of contractors under Chapter 15, Article V, including MWSBE non-compliance.
- Debarment
  - CPO-initiated action to exclude a person from acting as a contractor for a specified period of time.
  - Grounds are enumerated in Chapter 15, Section103

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Key Points about the MWSBE Program

Points of Note

Graduation vs. Prime Level Participation

- As long as a MWBE does not exceed their industry-specific size standard established by the U.S. Small Business Administration (SBA), they can maintain their certification and can participate in the MWBE program as subcontractors, otherwise, they graduate from the program .

- While in the Program, certified firms may function as prime or subcontractors on City contracts.

Points of Note

- **Promoting and Supporting MWSBE Prime Level Participation**
  - OBO Capacity Building Programs
  - I'm Certified, What's Next
  - Procurement Assistance Portal
  - One-on-One Business Development Counseling

- **OBO's Role in the Procurement Process**
  - Assist with setting goals and determining MWSBE compliance, <u>not</u> making recommendations about awards.

Thank You & Questions

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