

9.0 FINDINGS AND RECOMMENDATIONS

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In November 2006, MGT of America, Inc., was retained to conduct a minority and women business enterprise disparity study for the City of San Antonio (COSA) to determine whether there was a compelling interest to establish narrowly-tailored minority- and women-owned business enterprise (M/WBE) program for COSA.¹ The study consisted of fact-finding to examine the extent to which race- and gender-conscious and neutral remedial COSA efforts had effectively eliminated ongoing effects of any past discrimination affecting COSA's relevant marketplace; to analyze COSA procurement trends and practices for the study period from September 2004 through December 2007 and to evaluate various options for future program development.

The purpose of this study was to determine if there were disparities in procurement related to the race, ethnicity, or gender of business owners awarded contracts by COSA—and if any disparities were found, to present evidence on various factors that might account for them.

The results of this study and conclusions drawn are presented in detail in **Chapters 2.0** through **8.0** of this report. The following sections summarize each of the study's findings, which are followed by related major recommendations. Commendations are also noted in those instances in which the COSA already has procedures, programs, and policies in place that respond to findings. Selected best practices are described in **Chapter 8.0** of this report. These best practices expand on the findings and recommendations that are marked with an asterisk (*).

9.1 Findings for M/WBE Utilization and Availability

Findings for Prime Contracting

FINDING 9-1: Historical M/WBE Prime Utilization

A 1987 study found that less than 2 percent of COSA contracts were awarded to S/M/WBEs. **Exhibit 9-1** below shows M/WBE utilization in the 1992 San Antonio Consortium disparity study. M/WBE percentage utilization was as high as 41.5 percent in purchasing in the 1980s.

¹ MGT was hired by the City of San Antonio to conduct the study for a consortium of San Antonio agencies that includes the City.

**EXHIBIT 9-1
M/WBE PRIME UTILIZATION
CITY OF SAN ANTONIO
FY1986-87; 1989-90**

	1986-87		1989-90	
	Dollars	Percent	Dollars	Percent
Construction	\$5,497,528	7.73	\$11,927,681	5.24
Services	\$5,117,365	31.39	\$5,537,560	17.07
Purchasing	\$17,205,518	41.5	\$17,722,683	25.71

Source: NERA, *The Utilization of Minority and Woman-Owned Business Enterprises in Bexar County*, 1992

FINDING 9-2: M/WBE Prime Utilization, Availability and Disparity

The dollar value of M/WBE prime utilization by COSA over the study period is shown in **Exhibit 9-2**:

- M/WBEs won prime construction contracts for \$123.4 million (25.95 percent of the total). There was substantial disparity for all M/WBE groups, except Hispanic owned firms for which the disparity was not substantial.
- M/WBEs won architecture and engineering contracts for \$29.2 million (48.08 percent of the total). There was substantial disparity for firms owned by African Americans, Hispanic Americans and Asian Americans.
- M/WBEs won professional services contracts for \$40.3 million (12.2 percent of the total). There was substantial disparity for all M/WBE groups, except in the case of Native American for which there were no available firms.
- M/WBEs won other services contracts for \$5.0 million (29.8 percent of the total). There was substantial disparity for firms owned by African American, Asian Americans and Native Americans.
- M/WBEs won goods contracts for \$81.1 million (23.18 percent of the total). There was substantial disparity for firms owned by Hispanic Americans and Native Americans. Disparity for firms owned by nonminority females was not substantial.

**EXHIBIT 9-2
M/WBE PRIME UTILIZATION, AVAILABILITY AND DISPARITY
CITY OF SAN ANTONIO
SEPTEMBER 2004 THROUGH DECEMBER 2007**

Business Category	African American	Hispanic American	Asian American	Native American	Nonminority Women	Total M/WBE
Construction Contract Dollars	\$3,275	\$106,698,047	\$932,942	\$21,215	\$15,748,815	\$123,404,295
Construction Utilization Percent	0.01%	22.44%	0.20%	0.01%	3.31%	25.95%
Construction Availability Percent	0.48%	25.04%	0.32%	0.16%	10.37%	36.37%
Construction Disparity	Yes*	Yes	Yes*	Yes*	Yes*	N/A
Architecture/ Engineering Contract Dollars	\$5,350	\$5,011,896	\$1,353,667	\$0.00	\$22,859,992	\$29,230,905
Architecture/ Engineering Utilization Percent	0.01%	8.24%	2.23%	0.00%	37.60%	48.08%
Architecture/ Engineering Availability Percent	1.16%	18.02%	3.49%	0.00%	12.21%	34.88%
Architecture/ Engineering Disparity	Yes*	Yes*	Yes*	N/A	No	N/A
Professional Services Contract Dollars	\$3,615,804	\$33,848,203	\$152,687	\$0.00	\$2,761,624	\$40,378,320
Professional Services Utilization Percent	1.09%	10.24%	0.05%	0.00%	0.84%	12.22%
Professional Services Availability Percent	3.50%	15.73%	0.35%	0.00%	8.87%	28.45%
Professional Services Disparity	Yes*	Yes*	Yes*	N/A	Yes*	N/A
Other Services Contract Dollars	\$99,539	\$2,825,211	\$2,100	\$257	\$2,075,000	\$5,002,109
Other Services Utilization Percent	0.59%	16.88%	0.01%	0.00%	12.40%	29.88%
Other Services Availability Percent	0.88%	13.70%	0.44%	0.18%	5.79%	20.99%
Other Services Disparity	Yes*	No	Yes*	Yes*	No	N/A
Goods and Services Contract Dollars	\$19,272,363	\$33,115,563	\$5,482,812	\$45,966	\$23,100,105	\$81,016,811
Goods and Services Utilization Percent	5.51%	9.48%	1.57%	0.01%	6.61%	23.18%
Goods and Services Availability Percent	1.29%	17.68%	0.12%	0.29%	8.02%	27.40%
Goods and Services Disparity	No	Yes*	No	Yes*	Yes	N/A

Source: Utilization findings are taken from the exhibit previously shown in **Chapter 3.0 and Chapter 4.0**. Availability is based on bidder/vendors.

N/A-not applicable.

*substantial disparity

FINDING 9-3: Anecdotal Comments

Among the M/WBEs who responded to questions about barriers to doing business, the biggest concern was competing with large firms (43 respondents, 15.0 percent of respondents). Other key issues noted were as follows:

- Size of contracts (24 respondents, 8.4 percent).
- Selection process (26 respondents, 9.1 percent).
- Pre-qualification requirements (29 respondents, 10.1 percent).
- Performance bond requirements (17 respondents, 5.9 percent).
- Financing (12 respondents, 4.2 percent).
- Bid specifications (19 respondents, 6.6 percent).
- Limited time to respond (23 respondents, 8.0 percent).

Eight M/WBEs (2.8 percent of M/WBE respondents) reported discriminatory experiences with COSA over the past five years. Twenty-six M/WBEs (9.0 percent of M/WBE respondents) felt that an informal network had excluded them from work on COSA projects.

Findings for Subcontracting

FINDING 9-4: M/WBE Subcontractor Utilization, Availability and Disparity

The 1994 COSA disparity study found that M/WBE subcontractors won \$12.2 million in subcontracts, 14.73 percent of the total, from 1989 to 1990. The dollar value of M/WBE construction subcontractors over the study period is shown in **Exhibit 9-3** below:

- One-hundred and four M/WBEs won 335 construction subcontracts for \$43.9 million (24.50 percent of the total).
- There was substantial disparity in the underutilization of available African American, Asian American and Native American construction subcontractors.

**EXHIBIT 9-3
M/WBE SUBCONTRACTOR UTILIZATION, AVAILABILITY AND DISPARITY
CITY OF SAN ANTONIO
SEPTEMBER 2004 THROUGH DECEMBER 2007**

Business Category	African American	Hispanic American	Asian American	Native American	Nonminority Women	M/WBE
Construction Subcontractor Utilization - Dollars	\$1,551,193	\$16,926,658	\$1,339,107	\$747,012	\$23,392,646	\$43,956,618
Construction Subcontractor Utilization - Percent	0.86%	9.43%	0.75%	0.42%	13.04%	24.50%
Subcontractor Availability - Percent	3.46%	7.31%	1.46%	0.66%	8.38%	21.28%
Disparity	Yes*	No	Yes*	Yes*	No	N/A

Source: Subcontractor bidders; Utilization and disparity findings are taken from the exhibit previously shown in **Chapters 3.0** and **4.0**.

N/A-not applicable.

*substantial disparity

Findings for Private Sector Analysis

Chapter 2.0 above, in part discusses legal precedents wherein passive participation in private sector discrimination by government has been established through analyses reflecting underutilization of M/WBE firms, disparities in self-employment and unequal access to credit. In those cases, when combined with a nexus with government contracting, such private sector analysis forms a sufficient factual predicate to establish a compelling interest for M/WBE initiatives.

FINDING 9-5: M/WBE Underutilization in Private Sector Commercial Construction

M/WBE utilization in private sector commercial construction in the San Antonio Metropolitan Statistical Area (MSA) was quite low, as measured by data from building permits and Reed Construction Data. M/WBE utilization was low in absolute terms (close to 1 percent, **Exhibit 9-4**), in comparison to M/WBE subcontractor utilization on COSA projects (about 24.5 percent), and in comparison to M/WBE subcontractor availability, which was almost 52 percent in the 2002 Survey of Business Owners from the U.S. Census Bureau.

There was some evidence of low use of M/WBE subcontractors by COSA prime contractors in the private sector commercial construction. There were 25 nonminority male primes that had prime contracts with COSA in the building permits data, but only two M/WBE subcontractors that worked on COSA projects were found in the building permits data.

**EXHIBIT 9-4
M/WBE UTILIZATION
PRIVATE COMMERCIAL CONSTRUCTION
SAN ANTONIO MSA
SEPTEMBER 2004 THROUGH DECEMBER 2007**

Business Category / Data Source	African American	Hispanic American	Asian American	Native American	Nonminority Women	M/WBE Firms
Prime Contractors						
Private Construction Prime Contractors (Building Permits) Excludes Not for Profits (January 2001 - December 2006)	0.00%	0.51%	0.00%	0.00%	0.48%	0.98%
Private Construction Prime Contractors (Reed Construction) Excludes Not for Profits (January 2001 - December 2006)	0.00%	0.72%	0.00%	0.00%	0.00%	0.72%
Subcontractors						
Private Construction Subcontractors (Permits) Excludes Not for Profits (January 2003 - December 2007)	0.00%	0.89%	0.00%	0.00%	0.00%	0.89%

Source: The City of San Antonio building permits data and Reed Construction Data.

FINDING 9-6: Disparities in the Census Utilization Data

There was evidence of disparities based on the firm revenue data in 2002 Survey of Business Owners from the U.S. Census Bureau (for groups for which data was available):

- **Construction Firms.** Hispanic American-owned firms were 13.0 percent of available firms, but represented only 3.5 percent of sales, with \$619,588 in average revenue per firm, and which was only 26.9 percent of the market place average revenue per firm.
- **Professional Services.** Hispanic American-owned firms were 4.2 percent of available firms, but represented only 1.2 percent of sales, with \$442,973 in average revenue per firm, and which was only 28.9 percent of the market place average revenue per firm. Women-owned firms were 6.4 percent of available firms, but represented only 1.3 percent of sales, with \$310,725 in average revenue per firm, and which was only 20.3 percent of the market place average revenue per firm.
- **Other Services Firms.** Hispanic American-owned firms were 20.7 percent of available firms, but represented only 11.0 percent of sales, with \$297,886 in average revenue per firm, and which was only 53.1 percent of the market place average revenue per firm. Women-owned firms were 14.6 percent of available firms, but represented only 8.0 percent of sales, with \$307,513 in average revenue per firm, and which was only 54.8 percent of the market place average revenue per firm.

FINDING 9-7: Disparities in Self-Employment and Revenue Earnings

In general, findings from the U.S. Bureau of the Census Public Use Micro Sample (PUMS) 2000 data for the San Antonio metropolitan area indicate that there were statistically significant disparities in entry into and earnings from self-employment by women and minorities after controlling for education, age, wealth, and other variables as compared to nonminority males. The percentage of the self-employed nonminority male was generally two to three times that of self-employed African Americans, Hispanic Americans, and women. After controlling for education, age, wealth, and other determinants of self-employment, there were statistically significant differences for entry into self-employment for Hispanic Americans and women when all industries were combined, and for construction and professional services. Similarly, earnings from self-employment for nonminority males were generally higher than earnings from self-employment for Hispanic Americans, African Americans, and women. Again, there were statistically significant differences for earnings from self-employment for Hispanic Americans, African Americans, and women when all industries were combined, and for construction and other services.²

² Similar results on disparities in self-employment were found based on Current Population Survey (CPS) data in a recent disparity study for the City of Austin.

FINDING 9-8: Disparities in Loan Denials and Interest Rates

An econometric analysis of data in the 2003 National Survey of Small Business Finance (NSSBF) found a statistically significant positive relationship between the probability of loan denial and African American ownership. The data also found that African American-owned businesses paid approximately 30 to 150 percent more in interest than non-African American-owned firms (the average interest rate charged on approved loans was about 4.5 percent). In the local survey data, the denial rates were 9.3 percent for women-owned firms, 7.3 percent for Hispanic American owned firms, and 3.7 percent for nonminority male-owned firms (there were no loan denials for the other nine firms from other ethnic groups that applied for commercial loans).

FINDING 9-9: Regression Analysis of Firm Revenue and Capacity

In a statistical analysis of survey data from the San Antonio area among the company characteristics variables, other than M/WBE status, revenue for all groups increased as a function of company age, owner's experience, and number of employees. When controlling for the effects of variables related to company demographics (such as, company capacity, ownership level of education, and experience), M/WBE status had a negative effect on 2007 company earnings of all minority groups except for Hispanic Americans.

FINDING 9-10: Anecdotal Comments on the Private Sector

Fifteen M/WBEs (5.2 percent of M/WBE respondents) reported discriminatory behavior in the last five years in the private sector.

Findings for COSA Small Business Economic Development Advocacy (SBEDA) Program

FINDING 9-11: Small Business Enterprise (SBE) Policy

COSA has had a small business program in some form since 1983. A Small Business Advocacy Committee is in place, which meets monthly and advises COSA on S/M/WBE issues.

FINDING 9-12: S/M/WBE Goals

COSA has set overall S/M/WBE aspirational goals for construction, purchasing and professional services. M/WBE aspirational goals are set forth in **Exhibit 9-5** below. SBE goals are 50 percent across the board. COSA places good faith efforts language and specific project S/M/WBE goals into its bid documents. For discretionary contracts that are not subject to low bid requirements COSA has granted points to businesses with headquarters in San Antonio, Historically Underutilized Enterprises and for Small Business program compliance. COSA has also granted points for compliance with the SBEDA ordinance objectives for the evaluation of alternative construction delivery methods and investment banking.

**EXHIBIT 9-5
EXISTING CITY OF SAN ANTONIO ASPIRATIONAL M/WBE GOALS
BY ETHNIC, GENDER GROUP AND PROCUREMENT CATEGORY**

	Construction	Purchasing	Professional Services*
Minority Business Enterprise	24%	15%	31%
Women-Owned Business Enterprise	11%	10%	10%
African American Owned Business Enterprise	1.5%	3%	2.2%
Small Business Enterprise	50%	50%	50%

Source: SBEDA Ordinance, Attachment A,

*includes Lease & Concessions and Other Services Contracts

FINDING 9-13: S/M/WBE Program Data

COSA tracks S/M/WBE COSA spending, in dollar and percentage terms, on an annual basis. The tracking of subcontracting information is left to departments that have not been consistent in their subcontractor data management efforts. The COSA financial system does maintain ethnicity and gender classification information. COSA has adopted the B2G data management system. It is anticipated that B2G and COSA Contract Management System (CCMS) will ensure more timely payments to subcontractors.

FINDING 9-14: Business Development

COSA has a number of relationships with local business development efforts, including partnering with the South Texas Women’s Business Center and the South Texas Business Fund and hosting the Procurement Technical Assistance Center.

FINDING 9-15: Commercial Anti-discrimination Rules

COSA has had a formal commercial anti-discrimination policy in place since May 1989.³

9.2 Commendations and Recommendations

Commendations and Recommendations for Race-Neutral Alternatives

COMMENDATION 9-1: Outreach

COSA should be commended for its outreach efforts, including: co-sponsoring with Bexar County the annual Small, Minority, and Women Business Owners Conference (a national best practice); requiring the solicitation of S/M/WBEs on small purchases; using the South Central Texas Regional Certification Agency lists for solicitations; sponsoring workshops; partnerships with business development organizations and chambers of commerce; seeking to use M/WBEs on Texas state contracts; the Bridge to 550

³ City of San Antonio, Code of Ordinances, Article 1, Section 2.8.

outreach efforts for the 2007 bond financed projects; and publishing *The Contracting Insider* newsletter.

RECOMMENDATION 9-2: Vendor Rotation*

COSA should consider the selective use of vendor rotation to expand utilization of under-utilized M/WBE groups. Some political jurisdictions use vendor rotation arrangements to limit habitual repetitive purchases from incumbent majority firms and to ensure that S/M/WBEs have an opportunity to bid along with majority firms. Generally a diverse teams of firms are prequalified for work and then team alternate undertaking projects. A number of agencies, including the City of Indianapolis, Fairfax County, Virginia, the Port Authority of New York and New Jersey, and Miami-Dade County, use vendor rotation to encourage utilization of under-utilized M/WBE groups, particularly in professional services.

COMMENDATION AND RECOMMENDATION 9-3: SBE Program for Prime Contracts*

COSA should be commended for its longstanding SBE program. A strong SBE program is central to maintaining a narrowly tailored program to promote M/WBE utilization. In particular, COSA should focus on increasing M/WBE utilization through the SBE program. COSA does not face constitutional restrictions on its SBE program, only those procurement restrictions imposed by state law. Specific suggestions for COSA's SBE program can be found in features of other SBE programs around the United States, including:

- Setting aside contracts (typically up to \$50,000) for SBEs (City of Phoenix, Arizona, SBE Program; Broward County, Florida, SBE Program; Miami-Dade County, Florida, Community SBE Program)
- Setting aside small financial consulting projects (Port Authority of New York and New Jersey SBE Program).
- Providing bid preferences to SBEs in bidding on contracts (Miami-Dade County, Florida, Community SBE Program; Port Authority of New York and New Jersey SBE Program; East Bay Municipal Utility District Contract Equity Program, Port of Portland).⁴
- Setting SBE goals on formal and informal contracts (City of Charlotte, North Carolina, SBE Program).
- Setting department goals for SBE utilization (City of Charlotte, North Carolina, SBE Program).
- Access to low cost insurance on small projects (City of San Diego, California, Minor Construction Program).

⁴ The Port of Portland found that 10 percent bid preferences were more effective than 5 percent bid preferences.

- Providing bid preferences to SBEs on tax-assisted projects (City of Oakland, California, Local Small Business Enterprise Program, and Port of Portland Emerging Small Business Program).
- Making SBE utilization part of department performance reviews (City of Charlotte, North Carolina, SBE Program).
- Mentor-protégé programs for small businesses (Port of Portland Emerging Small Business Program).

COMMENDATION AND RECOMMENDATION 9-4: SBE Program for Subcontracts

Small business programs are an important component of race-neutral alternatives to address identified disparities in purchasing. COSA should be commended for setting SBE goals and good faith efforts on subcontracts. COSA should consider imposing mandatory subcontracting clauses where such clauses would promote S/M/WBE utilization, and be consistent with industry practice.⁵

RECOMMENDATION 9-5: HUBZones

Another variant of an SBE program provides incentives for SBEs located in distressed areas. For example, under the 1997 Small Business Reauthorization Act, the federal government started the federal HUBZone program.⁶ To qualify as a HUBZone firm, a small business must meet the following criteria: (1) it must be owned and controlled by U.S. citizens; (2) at least 35 percent of its employees must reside in a HUBZone; and (3) its principal place of business must be located in a HUBZone.⁷ The same preferences that can be given to SBEs can be given to HUBZone firms, such as contract set-asides.⁸

HUBZone programs can serve as a vehicle for encouraging M/WBE contract utilization. In the state of Texas, there are 813 women and minority HUBZone firms, representing 74.7 percent of total HUBZone firms.⁹ In the San Antonio MSA, there are 140 M/WBE HUBZone firms, 80.9 percent of total HUBZone firms. COSA's Procurement Technical Assistance Center should be commended for holding workshops on the federal HUBZone program.

⁵ San Diego as part of its Subcontractor Outreach Program (SCOPE) has mandatory outreach, mandatory use of subcontractors, and mandatory submission of an outreach document. Whether a contract has subcontracting is determined by the engineer on the project.

⁶ The federal HUBZone program should be distinguished from the State of Texas HUB program which does not certify firms based on location in distressed areas.

⁷ 13 C.F.R. 126.200 (1999). The state of California provides a 5 percent preference for a business work site located in state enterprise zones and an additional 1-4 percent preference (not to exceed \$50,000 on goods and services contracts in excess of \$100,000) for hiring from within the enterprise zone. (Cal Code Sec 4530 *et seq.*) Minnesota's bid preferences are limited to small businesses operating in high unemployment areas.

⁸ Miami-Dade has a Community Workforce Program that requires all Capital Construction Projects contractors to hire 10 percent of their workforce from Designated Target Areas (which include Empowerment Zones, Community Development block grant Eligible Block Groups, Enterprise Zones, and Target Urban Areas) in which the Capital Project is located. (Miami Ordinance 03-237).

⁹ Based on the SBA pro-net database located at <http://pro-net.sba.gov/pro-net/search.html>.

COMMENDATION AND RECOMMENDATION 9-6: Commercial Anti-discrimination Rules*

COSA should be commended for having a commercial anti-discrimination policy. Some courts have noted that establishing anti-discrimination rules is an important component of race-neutral alternatives. Features of a complete anti-discrimination policy selected from other entities include:

- Submission of a business utilization report on M/WBE subcontractor utilization.
- Review of the business utilization report for evidence of discrimination.
- A mechanism whereby complaints may be filed against firms that have discriminated in the marketplace.
- Due process, in terms of an investigation by agency staff.
- A hearing process before an independent hearing examiner.
- An appeals process to the agency manager and ultimately to a court.
- Imposition of sanctions, including:
 - Disqualification from bidding with the agency for up to five years.
 - Termination of all existing contracts.
 - Referral for prosecution for fraud.

COMMENDATION and RECOMMENDATION 9-7: Business Development Assistance*

COSA should be commended for its business development initiatives, including COSA collaboration with the Procurement Technical Assistance Center. COSA should evaluate the impact of these initiatives on S/M/WBE utilization. COSA should follow the example of the Port Authority of New York and New Jersey, for which management and technical assistance contracts have been structured to include incentives for producing results, such as increasing the number of M/WBEs being registered as qualified vendors with the Port, and increasing the number of M/WBEs graduating from subcontract work to prime contracting.

M/WBE Policy Commendations and Recommendations

RECOMMENDATION 9-8: Narrowly Tailored S/M/WBE Program

This study provides evidence to support the establishment of a moderate program to promote M/WBE utilization. This conclusion is based primarily on some statistical disparities in current M/WBE utilization, substantial disparities in the private marketplace, evidence of discrimination in business formation and revenue earned from self-employment, some evidence of passive participation in private sector disparities, and some anecdotal evidence of discrimination. COSA should tailor its women and minority participation policy to remedy each of these specific disparities.

The case law involving federal DBE programs provide important insight into the design of local M/WBE programs. In January 1999, the United States Department of Transportation (USDOT) published its final DBE rule in Title 49, Code of Federal Regulations, Part 26 (49 CFR 26). The federal courts have consistently found the DBE regulations to be narrowly tailored.¹⁰ The federal DBE program has the features in **Exhibit 9-6** that contribute to this characterization as a narrowly tailored remedial procurement preference program. COSA should adopt these features in any new narrowly tailored M/WBE program.

**EXHIBIT 9-6
NARROWLY TAILORED M/WBE PROGRAM FEATURES**

Narrowly Tailored Goal-Setting Features	DBE Regulations
COSA should not use quotas.	49 CFR 26(43)(a)
COSA should use race- or gender-conscious set-asides only in cases where other methods are inadequate to address the disparity.	49 CFR 26(43)(b)
COSA should meet the maximum amount of its M/WBE goals through race-neutral means.	49 CFR 26(51)(a)
COSA should use M/WBE contract goals only where race-neutral means are not sufficient.	49 CFR 26(51)(d)
COSA should use M/WBE goals only where there are subcontracting possibilities.	49 CFR 26(51)(e)(1)
If COSA estimates that it can meet the entire M/WBE goal with race-neutral means, then COSA should not use contract goals.	49 CFR 26(51)(f)(1)
If it is determined that COSA is exceeding its goal, then COSA should reduce the use of M/WBE contract goals.	49 CFR 26(51)(f)(2)
If COSA exceeds goals with race-neutral means for two years, then COSA should not set contract goals the next year.	49 CFR 26(51)(f)(3)
If COSA exceeds M/WBE goals with contract goals for two years, then COSA should reduce use of contract goals the next year.	49 CFR 26(51)(f)(4)
If COSA uses M/WBE goals, then COSA should award only to firms that made good faith efforts.	49 CFR 26(53)(a)
COSA should give bidders an opportunity to cure defects in good faith efforts.	49 CFR 26(53)(d)

COMMENDATION AND RECOMMENDATION 9-8: Annual Aspirational M/WBE Goals

COSA should set annual aspirational goals by business category, not rigid project goals. To establish a benchmark for goal setting, aspirational goals should be based on relative M/WBE availability. The primary means for achieving these aspirational goals should be an SBE program, race-neutral joint ventures, outreach, and adjustments in COSA procurement policy. As in the DOT DBE program goals on particular projects should in general vary from overall aspirational goals. Possible revised aspirational goals based on M/WBE availability are proposed below in **Exhibit 9-7**. These aspirational goals can be further decomposed by procurement category, ethnicity and gender.

¹⁰ *Adarand v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *Gross Seed. v. State of Nebraska*, 345 F.3d 968 (8th Cir. 2003); cert denied, 158 L.Ed. 2d 729 (2004), *Northern Contracting v. Illinois DOT*, 2005 U.S. Dist. LEXIS 19868 (ND IL 2005).

**EXHIBIT 9-7
PROPOSED M/WBE ASPIRATIONAL GOALS
CITY OF SAN ANTONIO
BY PROCUREMENT CATEGORY**

Procurement Category	Aspirational Goal
Construction Prime Contractors	35%
Construction Subcontractors	22%*
Architecture & Engineering	35%
Professional Services	30%
Other Services	21%
Goods	28%

Source: Availability estimates are taken from the exhibits previously shown in **Chapter 3.0.**

*of total subcontract dollar value

RECOMMENDATION 9-9: Joint Ventures

COSA should consider adopting a joint venture policy similar to the one implemented by the city of Atlanta. The City of Atlanta requires establishment of joint ventures on large projects of over \$10 million.¹¹ Primes are required to joint venture with a firm from a different ethnic/gender group in order to ensure prime contracting opportunities for all businesses. This rule applies to female and minority firms as well as nonminority firms. This rule has resulted in tens of millions of dollars in contract awards to female and minority firms.

COMMENDATION AND RECOMMENDATION 9-10: M/WBE Subcontractor Plans*

COSA should be commended for having good faith efforts requirements on contracts and improving its contract compliance process. COSA should consider adjusting the good faith effort requirements in its contracts. The basis for retaining good faith efforts requirements is some disparities in construction subcontracting, the very low utilization in private sector commercial construction and other evidence of private sector disparities, even after controlling for capacity and other race neutral variables. The core theme should be that prime contractors should document their outreach efforts and the reasons why they may have rejected qualified M/WBEs that were the low-bidding subcontractors. Accordingly, the following narrow tailoring elements should be considered:

1. Good faith effort requirements should apply to both M/WBE and nonminority prime contractors.
2. Projects goals should vary by project and reflect realistic M/WBE availability for particular projects.
3. A documented excessive subcontractor bid can be a basis for not subcontracting with an M/WBE.

¹¹ City of Atlanta Ordinance Sec. 2-1450 and Sec. 2-1451.

4. A documented record of poor performance can be a basis for not subcontracting with an M/WBE.¹²

COSA's good faith effort requirements are generally well-crafted and do satisfy points 1, 3, and 4 noted above, but evidence was not found of wide variance in project goals.¹³

COMMENDATION AND RECOMMENDATION 9-11: RFP Language*

COSA should be commended for seeking S/M/WBE utilization in investment banking and other nontraditional areas of professional services, given the disparities identified above. COSA should continue putting in its RFPs, particularly for large projects, language asking proposers about their strategies for M/WBE inclusion on the project. A number of agencies, including the Port Authority of New York and New Jersey, have had success in soliciting creative responses to these requests, even in areas such as large-scale insurance contracts.

COMMENDATION AND RECOMMENDATION 9-12: Economic Development*

COSA should be commended for the level of effort expended on S/M/WBE inclusion for economic development projects (for example, tax increment financing and public improvement districts) in collaboration with Bexar County. Such efforts are a national best practice. Jersey City and the City of Saint Paul have established offices that focus on employment and S/M/WBE utilization on economic development projects. COSA should also consider establishing a Small Developer Ownership Construction Program, following the example of the City of Saint Paul.

COMMENDATION AND RECOMMENDATION 9-13: Certification*

COSA should be commended for its participation in the regional certification body.

Two-Tier Size Standards. The federal case law points to the use of size standards and net worth requirements as one factor in the narrow tailoring of remedial procurement programs. At present, COSA uses the SBA size standard, having previously used a percentage of the SBA size standard.

Size standards for remedial procurement programs still face a dilemma. If the size standard is placed too high, large firms crowd out new firms. If the size standard is placed too low, too many experienced firms lose the advantages of the remedial program. One solution to this dilemma is to adopt a two-tier standard for M/WBE and SBE certification. The states of Oregon and New Jersey and the federal government use a two-tier size standard. Thus, for example, contracts could be set aside for small and very small firms and goals that included very large S/M/WBEs could be established on large projects. A standard approach is to use the SBA size standard for small firms and a percentage of the SBA size standard (e.g., 25 or 50 percent) for very small firms.

Program Participation Limits. Another graduation provision is to restrict the overall amount of dollars a program participant can receive. For example, the city of New York

¹² The last two elements were adopted by the North Carolina Department of Transportation (NCDOT). 19A NCAC 02D.1110(7).

¹³ NCDOT project goal setting is discussed in the Best Practices chapter.

graduates firms that have received more than \$15 million in prime contracts within the past three years.¹⁴

COMMENDATION AND RECOMMENDATION 9-14: M/WBE Program Data Management

COSA should be commended for implementing the B2G data management system. It is important for COSA to closely monitor the utilization of all businesses by race, ethnicity, and gender, and by prime and subcontractor utilization, over time to determine whether COSA's S/M/WBE policy has the potential to eliminate race and gender disparities without applying specific race and gender goals.

RECOMMENDATION 9-15: Performance Measures*

COSA should add performance measures other than S/M/WBE percentage utilization. Some suggested measures come from Florida Department of Transportation's Small Business Initiative (discussed in the best practices section of this report). COSA should develop additional measures to gauge the effectiveness of its efforts. Possible measures include:

- Growth in the number of S/M/WBEs winning their first award from the COSA.
- Growth in percentage of S/M/WBE utilization by COSA.
- Growth in S/M/WBE prime contracting.
- Growth in S/M/WBE subcontractors to prime contractors.
- Number of S/M/WBEs that receive bonding.
- Number of S/M/WBEs that successfully graduate from the program.
- Number of graduated firms that successfully win COSA projects.
- Percentage of S/M/WBE utilization for contracts not subject to competitive bidding requirements.
- Growth in the number of S/M/WBEs utilized by COSA.
- Number of joint ventures involving S/M/WBEs.
- Largest contract won by an S/M/WBE.
- Comparability in annual growth rates and median sales for S/M/WBEs and non-S/M/WBEs in COSA contracts.

¹⁴ Local Laws of New York, Section 6-1292 (c) (17).