Civil Rights Legal Update
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Race and Gender Conscious Programs

• Designed to eliminate discrimination and to remedy the lingering effects of past discrimination
• Percentage goals for participation are commonly based on the availability of DBEs in a particular area
• Must satisfy constitutional legal standards
• Must be properly and consistently administered
Legal Framework – Federal DBE Program

- Congress established the DBE Program in 1982
- It has been reauthorized several times, including in Fixing America’s Surface Transportation Act (FAST Act) and in the Moving Ahead for Progress in the 21st Century Act (MAP-21)
- USDOT regulations
  - 49 C.F.R. Part 26
  - Airport Concessions – 49 C.F.R. Part 23
DBE Program

• DBEs are small businesses owned and managed by “individuals who are both socially and economically disadvantaged.”

• Women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA are presumed to be socially and economically disadvantaged.

• The presumption may be rebutted.
  – If an individual’s PNW exceeds $1.32 million
  – Or an individual’s collective assets lead a reasonable person to conclude that he or she is not economically disadvantaged.

• Certification is also available to individuals who are not presumptively disadvantaged, but can demonstrate actual social and economic disadvantage.
Constitutional Analysis

• Strict Scrutiny (applies to race or ethnicity)
  – Must be narrowly tailored to serve a compelling government interest.

• Intermediate Scrutiny (applies to gender)
  – Must be substantially related to an important government interest.

• Rational-Basis Test (applies to other bases)
  – Must be reasonably related to a legitimate government interest.
Strict Scrutiny

• “Compelling interest” in remedying identified discrimination.
  – With respect to the federal DBE program, courts have found that Congress has satisfied this test.

• Remedies must be “narrowly tailored” to that evidence.
Compelling Interest

“Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction... where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”

Narrow Tailoring - Factors

“Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” but it does “require serious, good faith consideration of workable race-neutral alternatives.”


- Simplifying the bonding process or reducing bonding requirements
- Communications regarding contracting opportunities
- Providing technical assistance and other support services
- Distributing your DBE directory
Narrow Tailoring – Factors Continued

• The flexibility and duration of the race-conscious remedy
  – Quotas or set-asides are not permitted
  – Sunset provisions
  – Good faith efforts

• The relationship of the numerical goals to the relevant labor market

• And the impact of the remedy on third parties
## Distinction between Quotas and Goals

<table>
<thead>
<tr>
<th>Quotas</th>
<th>Goals</th>
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<tbody>
<tr>
<td>Rigid numbers</td>
<td>Flexible numbers</td>
</tr>
<tr>
<td>Not based on specific availability</td>
<td>Considers availability in specific scopes of work</td>
</tr>
<tr>
<td>Quotas are less tailored or overinclusive</td>
<td>Goals are more tailored and less overly inclusive</td>
</tr>
<tr>
<td>Quotas do not consider good faith efforts</td>
<td>Meeting goals or demonstrating good faith efforts are treated the same</td>
</tr>
<tr>
<td>Less socially acceptable</td>
<td>More socially acceptable</td>
</tr>
<tr>
<td>Constitutionally suspect</td>
<td>Constitutionally acceptable</td>
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</tbody>
</table>
Circuit Split

• In the Ninth Circuit, state and local transportation agencies must provide evidence of discrimination within their own contracting market in order to demonstrate that its DBE program is narrowly tailored.
  – See Western States Paving, Inc. v. Washington State Dep’t of Transp. and its progeny

• Compare with appellate cases out of the Seventh Circuit where state and local agencies implementing the Federal DBE Program are “insulated from a constitutional attack, absent a showing that the state exceeded its federal authority.”
The United States Courts of Appeals

Source: https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf
Practical Takeaways

• Should you do a disparity study?
• What should you include in the study?
• How should you develop the solicitation documents and scope of work?
• How should you evaluate the proposals?
• How should you address contract performance issues?
• How should you implement your program after the disparity study is completed?
Solicitation and Scope of Work

• Everything you do can be evidence in a lawsuit
• The agency is not the expert, so keep it general
  – Do not dictate a specific methodology
  – Do not require adherence to legal, scientific, and statistical standards
• Require sample disparity studies from other jurisdictions of similar size and scope
• Request references
• Establish deliverables, including meetings
Evaluating the Proposals

- Focus on the SOW and responsiveness
- Did the sample studies reflect the methodology accepted in your jurisdiction?
- Conduct interviews
- Caution on placing too much emphasis on price
- Will the personnel be cooperative?
Addressing Contract Performance Issues

- Begin with a risk assessment based on the contractor’s past performance and references
- Insist on a carefully drafted contract
- Include a termination for convenience provision and standard breach provisions
- Consider including performance guarantees and/or liquidated damages, if permissible
- Appoint a contract manager to monitor performance
- Incorporate different ways to monitor, such as site visits and audits
Implementing Programs

• When adopting or amending a policy or program:
  – Include robust findings based on the study
  – Describe the implementation of race-neutral alternatives
  – Reasonably calculated goals
  – Flexibility in contract-specific goals

• Keep in mind:
  – Agency resources
  – Federal, state, and local procurement law
  – Procurement policies
  – Clear guidance for implementation
Emerging Issues

- Individuals seeking certification are required to submit signed, notarized statements that they are a member of one of the groups.
- Because eligibility relies on self-identification, this presents certain challenges.
  - Gender identity
  - DNA Testing
Civil Rights Update

• DBE Program Issues:
  – Contract Goal Setting
  – Overconcentration
  – USDOT Program Waivers
  – Contract Compliance, Monitoring and Enforcement
  – Assistance to D/M/WBEs

• Disparity and Availability Studies

• Defining Success
DBE Program Issues: Contract Goal Setting

Increased scrutiny under narrow tailoring of DBE contract goal setting

• Can you explain how the number was derived?
  – Must be based on the scopes of work of the contract (including the prime dollars) and availability in those scopes
  – Agencies without detailed availability studies (or disparity studies for 9th circuit recipients) are often making it up
    ▪ “Are there enough DBEs?”
    ▪ “Is DBE availability high/medium low?”
    ▪ Assumptions about DBEs?
  – Is the process described and the determination documented?

• NY State was recently sued over goal setting methodology and transparency of the process
DBE Program Issues: Overconcentration

• Defined in Part 26 as DBEs are so heavily represented in a given type of work that non-DBEs are squeezed out
  – This issue has been raised unsuccessfully in some challenges

• What is the definition?

• What is the response?
  – Drop for goal credit?
  – SBE setasides?
  – Additional supportive services?
DBE Program Issues: Overconcentration

What about overconcentration of non-DBEs?

• DBEs are often “ghettoized”
  – 237110- Highway, Street, and Bridge Construction
    ▪ Non-DBEs received 94% from NCDOT, with Blacks receiving 0.3%; 88% from WSDOT, with Blacks receiving 0.0%
  – 237990- Other Heavy and Civil Engineering Construction
    ▪ Non-DBEs received 100% from NCDOT; 94% from WSDOT, with Blacks receiving 0.0%
DBE Program Issues: USDOT Program Waivers

• Disparity studies recommended dropping certain groups for goal credit (CalTrans, WSDOT, ORDOT, etc.)

• Challenges
  – Certification status must be clear to primes (“UDBEs”)
    ▪ Dropped groups remain “in the program” ⇒ confusion
  – Eligible under the individual approach?
  – Tracking the results
    ▪ Utilization
    ▪ Withdrawals from the program/bankruptcy
DBE Program Issues: USDOT Program Waivers

• What is the standard
  – Statistical “overutilization”?  
    ▪ How to separate from the effect of the program
  – Level playing field and equal opportunities?
  – Role of anecdotal information

• Confusion of cause (contract goals) with effect (utilization)
  – Where have racism and sexism been “fixed”?

• Pilot “no goals” contracts BEFORE seeking waiver?
DBE Program Issues:
Contract Compliance, Monitoring and Enforcement

• Prompt payment
  – Pay for sub’s completed work even if all subs have not invoiced the prime contractor?

• Diversity Management Software
  – Partial info in; incomplete data collection and monitoring out

• What about professional services?
  – Quality of work to DBEs?
  – Contract goal setting?

• On call or job order contracts
  – Task order goals or overall goal?
  – Transparency of the process
DBE Program Issues: Assistance to D/M/WBEs

• No new court standards or USDOT guidance
• What is acceptable while maintaining the DBE’s independence?
  – Equipment
  – Personnel
    ▪ Blurred roles
    ▪ “Payroll jumping”?  
  – Suppliers
    ▪ Joint checks?
    ▪ Price negotiations?
Disparity/Availability Studies

National trends

- Different methodologies ⇒ different outcomes
- Different groups experience different degrees of discrimination
  - Blacks remain at the bottom
  - Sexism still constrains women in the construction industry
- Adding groups
  - VBEs
    - Lower legal standard of “rational basis” review: no need for a study
    - Limited data
    - Data that there is a problem?
    - Effect on D/M/WBE programs?
Disparity/Availability Studies

LGBT-owned firms

• What standard of review: lower legal standard of “intermediate” review for gender discrimination?
• Virtually no data
• Certification issues
  – What type of proof of sexual orientation?
  – Full transition & change in legal status for transgendered persons?
• Collect contract data?
  – Vendor applications?
  – Bidders lists?
Disparity/Availability Studies

• Goals mostly determine utilization
  – Entrenched systems?
  – Poor contract goal setting?
  – Unprepared DBEs?

• Don’t do disparity testing on USDOT contracts outside the 9th Circuit
Disparity/Availability Studies

Limits of Data

• Data = values
  – Unconscious bias
    ▪ “I don’t see color”

• Life experiences

• Choice of variables is critical
  – Amazon Prime refused to deliver to certain zip codes
  – Google searches show women lower paying jobs
  – Reinforcing Facebook feeds

• Data ≠ truth
Defining Success

• Why isn’t the DBE program more effective, especially for Black contractors?
  – Capacity building versus “new” DBEs
  – Unrealistic and national size and PNW limits
  – Lack of focus and assistance to become prime contractors
  – Money, money, money

• What about agency imposed barriers?
  – Prequalification and experience standards/agency “skin in the game”
  – “Who’s in the club?”
Defining Success

• What does “success” mean?
  – More DBEs get work?
  – DBEs’ revenues increase?
  – Increased DBE prime contracting awards?
  – DBEs enter new lines of business?
  – Construction industry stratification
    ▪ Only a tiny number of firms get large transportation contracts
    ▪ Explosion of very large national firms

• What does “level playing field” mean in the real world?