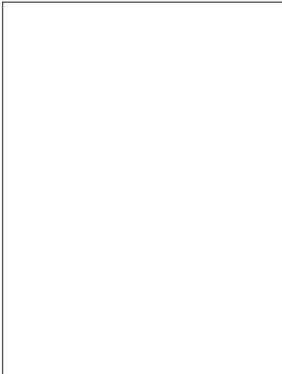


Government Contracting Preference Programs After Schuette: What's Next? Achieving Parity Through Race-Neutral Methods

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After the signing of Civil Rights Act of 1965, the federal, state, and local governments developed affirmative action programs designed to give minority – and women-owned businesses an opportunity to compete for government contracting dollars. These programs were designed to set aside a percentage of contracts or provide preferences for the inclusion of minority and women businesses. These programs are popular in the public construction works industry. Today, construction contractors working within the federal, state, and local government contracting systems are required to comply with some form of minority or small business contracting goals. Most of these programs require prime contractors to commit to using a certain percentage of minority, women, or small businesses as subcontractors or suppliers.

These programs have played an important role in diversifying the construction industry. Many successful minority – and women-owned construction businesses credit their existence to the opportunities afforded by minority – and women-owned business enterprise programs (MWBE).¹ But MWBE programs have been subjected to constitutional scrutiny since their inception. The attack has been largely successful, so much so that many state and local governments have largely abandoned MWBE programs in favor of race-neutral or small

business programs. In many jurisdictions state and local agencies now operate small business programs where eligibility is based on the gross receipts of the business and not the race or gender of the owner.

The future of MWBE programs is bleak because many government agencies are not collecting and recording the data necessary to survive judicial scrutiny. As a result, MWBE programs are often dead on arrival at the courthouse steps. Additionally, with the recent Supreme Court decision in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*,² the existence of MWBE programs is in danger in states where there is no political will for such programs.

The loss of MWBE programs has led to a lack of opportunities for minority – and women-owned firms in construction. Unfortunately, studies show that despite the availability and willingness to perform the work, minority – and women-owned businesses remain underutilized. The question remains: How does the government ensure that all businesses have equal access to contracting opportunities in the absence of race and gender preference programs? The answer is important because, even though we strive to be a truly color-blind society, disparity studies from around the country show that minority – and women-owned construction businesses are not competitive even in areas where minority populations are rapidly growing.

This article will explore the history and provide an analysis of MWBE programs. The discussion will include a look at the development of case law that led to the demise of MWBE programs. Next we discuss the fallout from the legal and political abandonment of MWBE programs. Finally, the discussion focuses on how agencies can use alternative race and gender-neutral methods to ensure inclusion of minority – and women-owned construction businesses in the public construction industry.

The Economy, Stupid

“The economy, stupid” is a phrase coined by James Carville, a political campaign strategist for Bill Clinton’s 1992 presidential campaign. More than two decades later the number one political issue remains the economy. With burgeoning immigrant and minority populations, ensuring the inclusion of minorities and women in the American economy is increasingly important. The Small

[Author Bio here]

Business Administration reports that in 2011 there were approximately 28.2 million small businesses in the United States, and they employed 55 million workers.³ Small businesses make up more than 90 percent of the employers in every state.⁴ There are slightly more than 3 million small businesses in the construction industry, and they employ 84 percent of construction workers.⁵ With the prediction that current minorities will reach majority status in 2042, it is important that minority entrepreneurs have the ability to successfully start and develop businesses that will create employment in their communities.⁶

Unfortunately, minority construction business owners continue to report barriers to the formation and development of companies.

Unfortunately, minority construction business owners continue to report barriers to the formation and development of companies. Some barriers include lack of financial capital because minorities have lower incomes, lack assets, have less access to business loans, and lack of social capital as minorities historically do not have access to business networks.

Overall women-owned businesses make up 28 percent of all small business numbers.⁷ The construction industry has the lowest concentration of women-owned businesses⁸ despite the fact that the American Institute of Architects reports that female architect membership nearly doubled from 9 percent in 2000 to 17 percent in 2011.⁹ Similar increases are seen in the engineering sector.¹⁰

Women seeking to start construction companies also report lack of access to capital as a major obstacle. A recent report given to the Senate Committee on Small Business and Entrepreneurship revealed that women entrepreneurs receive only 4.4 percent of the total dollar value of all conventional small business loans. Further, women-owned business accounted for only 17 percent of the total number of SBA 7(a) loans and SBA 504/CDC loans.¹¹ The denial rate for nonminority women-owned firms is twice the rate of white-male-owned firms and women seeking first-year financing receive about 80 percent less capital than their male counterparts.¹²

MWBE programs provide access to minorities and women to participate in the economy. As MWBE programs disappear, it is important that government agencies find creative ways to reach and engage minority and women entrepreneurs.

The History of MWBE Programs

Government contracting programs targeting the use

of small businesses can be traced back to 1932 when President Herbert Hoover created the Reconstruction Finance Corporation (RFC). The purpose of the RFC was to find solutions to the financial crisis caused by the stock market crash of 1929, which led to the Great Depression.¹³ During World War II government agencies were created to help small businesses compete for wartime contracts.¹⁴ In 1942 the Smaller War Plants Corporation (SWPC) was formed. The SWPC contracted directly with the federal government and subcontracted work to small businesses.¹⁵ In 1951 the Small Defense Plants Administration (SDPA) was formed and certified small businesses to the RFC. In 1953 the Small Business Act established the Small Business Administration (SBA). The stated purpose of SBA is to

aid, counsel, assist and protect, insofar as possible, the interests of small business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts and subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair and construction) be placed with small business. . . .¹⁶

In 1958 the Small Business Act was amended to authorize “set-aside” programs for small business. Section 8(a) was designed to assist minority-owned businesses. Currently under the 8(a) program the SBA enters directly into contracts with federal agencies and, in turn, subcontracts the work to businesses certified as an 8(a) firm.¹⁷

The struggle for civil rights in the 1960s led to the birth of affirmative action programs in government contracting. On March 6, 1961, President John F. Kennedy issued Executive Order 10925, which required that government contractors utilize “affirmative action” to ensure that applicants were provided employment and fair treatment without regard to color, creed, race, or national origin.¹⁸ This was the first time the phrase “affirmative action” was used by the federal government.¹⁹ On March 5, 1969, President Richard Nixon issued Executive Order 11458, establishing the Office of Minority Business Enterprise.²⁰ The Public Works Employment Act of 1977 established set-asides of 10 percent of all procurement dollars for minority-owned business.²¹ This program began the precedent of using set-asides or other preferences in the federal programs.²²

After the establishment of the federal programs, many state and local government agencies enacted minority preference programs to award government contracts to minority businesses. Today in jurisdictions where those programs still exist, it is not uncommon to find different programs for different agencies within the same state, county, or city. These programs are often subjected to constitutional challenges with seminal cases arising out of the construction industry. Construction trade associations have been successful in mounting challenges to federal, state, and local preference programs all across

the country.

The Judicial Scrutiny

The Supreme Court first addressed minority set-asides in *Fullilove v. Klutznick*.²³ In *Fullilove* a group of construction contractors, subcontractors, and construction trade associations challenged the constitutionality of the Public Works Employment Act of 1977. They sought to prevent the enforcement of the 10 percent set-aside goal for minority-owned companies. The plaintiffs alleged economic injury due to the enforcement of the set-aside requirement and that the requirement violated the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. The Supreme Court found the minority set-aside was a legitimate exercise of Congress's spending power and its power to regulate interstate commerce. Relying on the legislative history of the Act, the Court found that Congress could reasonably determine that the inequality between minority and nonminority participation in public contracting had an impact on interstate commerce.²⁴ The *Fullilove* court rejected the notion that the Constitution is colorblind and requires racial neutrality in its application.²⁵ Commentators have noted that the court in *Fullilove* failed to articulate a specific equal protection standard for analyzing the constitutionality of minority preference programs.²⁶ This "standardless" standard made it easier to challenge other minority business programs.²⁷

Strict Scrutiny Applied to State and Local MBE Programs

The Supreme Court first examined the constitutionality of a nonfederal minority preference program in the case of *City of Richmond v. J.A. Croson Co.*²⁸ *Croson* established an evidentiary standard for review of race-based programs. The City of Richmond enacted a Minority Business Utilization plan that required prime contractors to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises.²⁹ The City issued an invitation to bid on a project for plumbing work at a city jail. Croson, a white plumber, determined that in order to meet the 30 percent goal, the MBE would have to supply the fixtures because the fixtures were 75 percent of the total contract price.³⁰ Croson contacted six MBEs it located from a list maintained by the City.³¹ Initially no MBE expressed interest in the project.³² The day the bids were due, Croson again reached out to a group of MBEs; this time Continental Metal House (Continental) expressed interest in submitting a bid. Unfortunately, Continental experienced difficulty in obtaining quotes for the fixtures.³³ Continental was able to get a quote for the fixtures, but the price was significantly higher than the price Croson budgeted for the fixtures.³⁴ Croson submitted a bid without the 30 percent MBE goal and requested a waiver of the requirement, but the request was denied. Croson was the only bidder on the project and its bid was deemed nonresponsive.³⁵ Croson sued the City arguing that the ordinance was unconstitutional on its face and its application.³⁶

The district court upheld the City's plan and the Fourth Circuit affirmed after applying the test derived from *Fullilove*.³⁷ The Supreme Court vacated the decision and remanded the case for further consideration in light of the decision of *Wygant v. Jackson Board of Education*,³⁸ which applied strict scrutiny to an affirmative action layoff plan. On remand the Fourth Circuit struck down the City's plan, holding that the plan did not survive the strict scrutiny standard. The City appealed and the Supreme Court affirmed, finding that the plan failed to satisfy either prong of the strict scrutiny standard.

One problem with the City's argument was that the City did not have any statistical evidence to show that the City either actively or passively participated in discrimination against minority contractors. The City argued that minority contractors only received 0.67 percent of prime contracts while minorities constituted 50 percent of the City's population.³⁹ The Court held that the City could not rely upon general evidence of societal discrimination; instead the Court held that the City had to show the number of qualified minority contractors available to do the work versus the amount of contracts awarded to minority contractors.⁴⁰ The Court also found that the City failed to consider race-neutral methods to increase minority participation. The City cited a number of seemingly race-neutral barriers faced by minority contractors such as access to capital and bonding, and general knowledge about the bidding process.⁴¹

The *Croson* case gave way to an all-out assault on MBE programs across the county. In Florida the district courts around the state heard several cases challenging local county MBE programs. In *Cone Corp. v. Hillsborough County*,⁴² several construction companies challenged Hillsborough County's minority business plan. The Eleventh Circuit found there were material issues of fact as to whether the MBE plan violated the Equal Protection Clause. The court stated that "[t]he statistics gleaned from . . . studies prove a prima facie case of discrimination sufficient to clear the summary judgment hurdle."⁴³ In *Engineering Contractors Association of South Florida v. Metropolitan Dade County*,⁴⁴ various trade associations challenged the Miami Dade County's Black Business Enterprise, Hispanic Business Enterprise, and Women Business Enterprise programs. The court found the evidence offered by the county in support of its Black Business Enterprise and Hispanic Business Enterprise was not sufficient to show discrimination. Fifteen years after *Croson*, the Florida A.G.C Council, Inc. challenged the Florida's MBE program. In *Florida A. G. Council, Inc. v. Florida*,⁴⁵ at issue was a Florida law that mandated state agencies to allocate a certain percentage of construction and engineering contracts for blacks, Hispanics, Asians, Native Americans, and women. The district court granted summary judgment in favor of the A.G.C. Council, finding no evidence to support the spending goals. As part of a settlement agreement ending the *A. G. C. Council* case, the state of Florida agreed not to permit or require the consideration of race, ethnicity, or gender of contractors in

public construction contracting for a period of 99 years.

In Washington the Associated General Contractors of America challenged King County's MWBE set-aside program in *Coral Construction Co. v. King County*.⁴⁶ The county amended the program in an attempt to comply with the dictates of *Croson*.⁴⁷ The MWBE program provided two methods of preferences. The first, the "percentage preference" method, gave an MWBE or a contractor using an MWBE a preference if its bid was within five percent of the lowest bid. The second preference was a "subcontractor set-aside," which prescribed that a contractor must use a certain percentage of MWBEs.⁴⁸ The Ninth Circuit struck down the program because the county did not have any existing statistical data showing discrimination. Further the court found that the program was not narrowly tailored because it permitted participation by minority businesses that had no prior contact with the county. The gender-based program, which was virtually identical to the race-conscious project, survived under the less-rigid intermediate scrutiny standard.⁴⁹

In Pennsylvania, the Contractors Association of Eastern Pennsylvania challenged the City of Philadelphia's MBE program that set-aside 15 percent of city works contracts for black contractors.⁵⁰ There the City attempted to justify the preference program by introducing evidence that minority contractors faced discrimination in the private sector and by local trade associations. The court found it unnecessary to determine whether the City had a past history of discrimination because the program was not narrowly tailored.⁵¹

Strict Scrutiny Applied to Federal Programs

Croson eliminated most state and local MBE programs, but until *Adarand Constructors, Inc. v. Peña* many federal programs remained intact.⁵² *Adarand* was the first time the Supreme Court held that strict scrutiny applied to federal preference programs. *Adarand* challenged the constitutionality of the Department of Transportation's (DOT) Disadvantaged Business Enterprise Program (DBE). At issue were the financial incentives provided to prime contractors that employed "socially and economically disadvantaged" subcontractors.⁵³ The DOT awarded to a contractor a prime contract that contained the financial incentive clause. The contractor solicited bids from subcontractors and both *Adarand* and a certified DBE submitted bids. *Adarand* was the lowest bidder, but the contractor awarded the subcontract to the DBE. *Adarand* filed suit against the DOT arguing that the financial incentive was unconstitutional in that it violated the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment.

The district court granted summary judgment in favor of the DOT applying the intermediate scrutiny standard as articulated in *Metro Broadcasting Inc. v. FCC*.⁵⁴ The Tenth Circuit affirmed, but the Supreme Court reversed and remanded, ordering that strict scrutiny be applied. The Court articulated the proper standard to apply to federal race-based affirmative action programs by first

looking at three general propositions since *Croson*.⁵⁵ The first is skepticism. Any racial or ethnic preference must receive "the most searching examination."⁵⁶ The second is consistency in the application of the equal protection analysis regardless of the race of the benefited or burdened group. The third is the congruence between the equal protection analysis under the Fifth and Fourteenth Amendments. The Court rejected the application of intermediate scrutiny to the equal protection analysis under the Fifth Amendment.

After *Adarand* many federal agencies attempted to revise their preference programs. President Clinton issued a directive for all agencies to reform or eliminate any program that (1) created a quota, (2) created preferences for unqualified individuals, (3) created reverse discrimination, and (4) continued even after equal opportunity purposes have been achieved.⁵⁷ In response the Department of Justice eliminated its DBE category and a practice called the "Rule of Two." The Rule of Two authorized contracting offers to limit bidding on particular contracts to only minority firms if two or more such firms were potential bidders and the officer determined that the prevailing bid would likely be within 10 percent of the fair market price.⁵⁸

Political Initiatives Provide the Proverbial Nail in the Coffin

In 1996 starting in California, several states adopted laws or amended the state constitutions to prohibit race and gender preference programs. These laws effectively preclude state and local agencies from enacting any race – or gender-conscious programs. The result has had a chilling effect on minority – and women-owned firms in public contracting.

California Proposition 209

In California race-conscious preferences were banned after voters approved the California Civil Rights Initiative (CCRI) in 1996. Better known as Proposition 209 and modeled after the Civil Rights Act of 1964, it was the first ballot measure in the country banning affirmative action programs. The relevant part of the CCRI reads:

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The CCRI was subjected to immediate challenge from pro-affirmative action groups. In *Coalition for Economic Equity v. Wilson*, the Ninth Circuit found that the CCRI did not violate the federal Equal Protection Clause.⁵⁹ In *Wilson* the Ninth Circuit addressed whether Proposition 209 imposed an unequal "political structure" that denied women and minorities the right to seek preferential treatment.⁶⁰ The "political structure" doctrine derived from the Supreme Court cases of *Hunter v. Erickson*⁶¹ and

*Washington v. Seattle School District No. 1*⁶² prohibits the state from imposing extra burdens on legislation benefiting minorities. In *Hunter* the Supreme Court struck down an amendment to a city charter that required a referendum on the enactment of any ordinance prohibiting racial bias in real property transactions. The Supreme Court held that the law “place[d] special burdens on racial minorities within the governmental process” as it “disadvantages those who would benefit from laws barring racial, religious or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor.”⁶³ In *Seattle School District*, the Court struck down a state constitutional amendment that prohibited school bussing absent a court order, thereby taking the power away from local school boards to address segregation in schools.⁶⁴

In *Wilson* the Ninth Circuit found the “political structure” doctrine inapplicable because it protects individuals against unequal treatment, not to protect preferential treatment.⁶⁵ The Supreme Court declined to hear the case, thereby leaving the Ninth Circuit’s ruling intact.

The California Supreme Court looked at the constitutionality of the CCRI in the context of public construction contracting. In *Hi-Voltage Wire Works, Inc. v. City of San Jose*,⁶⁶ the California Supreme Court considered the constitutionality of a preference program that required contractors bidding on a City of San Jose project to document that they employed outreach measures to subcontract work to minority and women contractors. A bid failing to document outreach would be rejected as nonresponsive and the contractor’s bid would be disqualified. The court held that state and local governments cannot give minority and women firms preferential treatment under the guise of outreach without violating the CCRI. The City argued that equal protection laws do not preclude race-conscious programs. The court rejected the City’s argument, holding that federal equal protection laws do not preclude a state from providing its citizens with greater protection.⁶⁷

Michigan Proposal 2

On November 7, 2006, Michigan voters approved Proposal 2, which amended the Michigan Constitution to ban public institutions from discriminating against or giving preferential treatment to groups or individuals based on their race, gender, color, ethnicity, or national origin in public education, public employment, or public contracting.⁶⁸ Several pro-affirmative action groups banded together to fight the implementation of Proposal 2, and their actions included filing a lawsuit to strike Proposal 2 on the basis that it violated the “political process” doctrine. Specifically, they argued that it took away from university officials the ability to implement race-based admission preferences.⁶⁹ The district court distinguished the *Hunter* and *Seattle School District* cases as involving laws that protect against unequal treatment as opposed to advantageous treatment on the basis of race.⁷⁰ The Sixth Circuit sitting en banc reversed the district court’s ruling,

finding that Proposal 2 had reordered the political process to place special burdens on minority interests and was subject to strict scrutiny in accordance with the precedence of *Hunter* and *Seattle School District*.⁷¹

The Supreme Court granted certiorari and, in a plurality opinion written by Justice Kennedy, concluded that there was no authority in the federal Constitution or the Court’s jurisprudence to set aside Michigan laws determined by the voters with respect to whether racial preferences may be considered in governmental decisions. The Court starts its opinion by defining what the case is not about. The Court states that “[t]he question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions. . . .”⁷² The Court rejected the broad reading of *Seattle School District* as employed by the Sixth Circuit. The Court found that the Sixth Circuit’s reading of *Seattle School District* went beyond the holding of that case and was contradictory to equal protection principles.⁷³ The Court found that to adopt the principles of *Seattle* would be to propose that all individuals of the same race think alike.⁷⁴ The Court found that by approving Proposal 2 Michigan voters “exercised their privilege to enact laws as a basic exercise of their democratic power.”⁷⁵

After the establishment of the federal programs, many state and local government agencies enacted minority preference programs to award government contracts to minority businesses.

Justice Sotomayor, joined by Justice Ginsburg, wrote a blistering dissent that some pro-affirmative groups hail as heroic. The dissent contextualizes Proposal 2 within a century-long history of the variety of ways people of color have been denied access to the political process. In direct response to Justice Roberts, who wrote in *Parents Involved in Community Schools v. Seattle School District No. 1* that “the way to stop discrimination on the basis of race is to stop discrimination on the basis of race,”⁷⁶ Justice Sotomayor stated, “the way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”⁷⁷ Justice Sotomayor accused the majority of wishing away the effects of racial inequality instead of confronting it.⁷⁸

The dissent goes on to criticize the majority as discarding the political process doctrine in *Hunter* and *Seattle School District* without justification. The dissent held

that by discarding the political process doctrine, Michigan university boards are stripped of their authority to make decisions with respect to constitutionally permissible race-sensitive policies.⁷⁹

Although *Schuette* does not affect the ability to enact race-based preference programs in public contracting by permitting voters the choice of whether to prohibit race-based preferences through the democratic process, *Schuette* has given affirmative action opponents ammunition. Washington has a law modeled after California's Proposition 209. Arizona, Florida, Nebraska, New Hampshire, and Oklahoma have laws that prohibit use of race preferences in education. Although the Court addressed Michigan's constitutional amendment in the context of college admissions, *Schuette* has broader implications for public contracting. Proposal 2 explicitly prohibits the use of race in public contracting. The *Schuette* Court implicitly endorsed the CCRI. Therefore, any legislative effort to ban the use of race, ethnicity, or gender in public contracting will likely pass constitutional muster.

The Croson case gave way to an all-out assault on MBE programs across the county.

Underutilization Remains

In order to maintain any race or gender preference program, governmental agencies must conduct and maintain disparity studies. A survey of recent disparity studies shows that minority businesses are still underutilized in public contracting even with race-conscious programs in place.

The California Department of Transportation (Caltrans) conducted a disparity study in 2007. The disparity study compared the availability of DBEs for work on transportation-related projects to the percentage of contract dollars paid to DBEs on actual projects. The disparity study looked at transportation projects between 2002 and 2006 to determine utilization of MWBEs by Caltrans.⁸⁰ The study was able to compare utilization on federally funded projects with DBE goals to state-funded projects that did not utilize DBEs, giving a good indication on whether having goals impacted utilization.⁸¹ The study was also able to examine contracts after May 2006 when Caltrans moved to a race-and-gender-neutral program. The study showed that utilization of MWBEs on state-funded projects without goals was lower than on federally funded projects to which the goals were applied.⁸² A decrease in utilization was also found when

pre – and post-May 2006 contracts were examined.⁸³

The study found that MWBE companies did not have the same participation rates on contracts with DBE goals compared to contracts without DBE goals. On Caltrans projects with no DBE goals, MWBE participation was only 25 percent, compared to 39 percent on federally funded contracts with DBE goals.⁸⁴ Of those numbers, African-American – and Asian-Pacific-American-owned firms were the least utilized on projects with no DBE goals.⁸⁵

The most glaring disparity was the ability of minority-owned firms to compete for prime contracts. The disparity study revealed that when it came to prime contracts, MWBE firms received 4 percent of prime contract dollars on federally funded projects. The anecdotal evidence showed that access to capital and capacity continues to be the main hindrance for minority contractors in competing for prime contracts. The study contained interviews with minority and female business owners. Many minority contractors reported the inability to obtain bonding to be a major barrier to their ability to bid for public construction work.⁸⁶ Contract requirements for insurance and liquidated damages also were cited as factors prohibiting minority contractors from bidding on Caltrans work.

In 2012 Caltrans updated its disparity study in response to a legal challenge to its DBE program. This time the study examined contracts from 2007 through 2010. The study found substantial disparities in utilization of African Americans, Asian-Pacific Americans, Hispanic Americans, and Native Americans.⁸⁷

In March 2013 the Los Angeles County Metropolitan Transportation Authority (Metro) published a disparity study. The study reviewed construction, architecture, engineering, goods and services, and other nonprofessional contracts awarded between January 1, 2008, and December 31, 2010. The stated purpose of the study was “to determine whether or not a statistically significant disparity existed in the relevant market area regarding Metro's award of contracts to available [DBEs] which includes certified DBEs and other MWBEs.”⁸⁸

Metro's disparity study results were startling. MBEs received 0.19 percent of the construction prime contract dollars. WBEs received 0.01 percent and majority businesses received 99.81 percent (allowing for rounding). Broken down by ethnicity, African-American-owned business received zero prime contracts during the study period.⁸⁹ For prime contracts under \$500,000, MBEs received 12.47 percent of all dollars, WBEs received 0.58 percent, and majority firms received 86.95 percent.⁹⁰ When availability of MWBE firms was factored for all prime contracts less than \$500,000, all MBEs were underutilized.⁹¹

When it came to subcontracting dollars, MBEs received 7.34 percent of all construction subcontract dollars and WBEs received 17.31 percent. By race and ethnicity, again African Americans received no construction subcontracts during the study period. When availability of MWBEs for construction subcontracts was factored, statistically

significant disparity was found for MWBE firms including all racial and ethnic subcategories.⁹²

Race- and Gender-Neutral Programs Can Have an Impact on Diversity in Public Contracting

In lieu of a bona fide MWBE or “race conscious” program, public and governmental agencies are turning to “race-neutral” programs in an effort to address diversity concerns in their procurement process. Race-neutral programs, often referred to as small business enterprise (SBE) programs, are based on factors such as gross annual receipts, number of employees, owner net worth, and industry. In contrast to MWBE programs, SBE programs do not consider race, ethnicity, or gender as a requirement for participation. In recent years, SBE programs have proven to be a highly effective alternative to MWBE programs and when structured appropriately have resulted in a significant increase of MWBE participation at the agencies where they have been established. Additionally, these programs (which do not require agencies to establish a “compelling interest” or “factual predicate”) have substantially reduced expenses associated with disparity studies and litigation costs needed to support or defend MWBE programs. In fact, evidence that governmental agencies are turning to SBE programs as a mechanism to address diversity concerns was shown in a recent study conducted by the Insight Center for Community Economic Development. The study, which was released in January 2014, revealed that 13 percent (five jurisdictions) of the 40 cities and counties that were analyzed initiated an SBE program in the last five years, with important elements targeting racial and gender diversity aims. Moreover, five percent (two jurisdictions) of the sample reviewed had ended M/WBE programs and initiated SBE programs.⁹³

Structuring a Successful Small Business Enterprise Program

One of the most important considerations in developing a successful SBE program is the establishment of the criteria by which vendors will qualify for the program. SBE programs have historically used the US Small Business Administration’s definition of a small business or a variation of the same. The SBA, for most industries, defines a “small business” in terms of either the average number of employees over the past twelve months or the average annual receipts over the past three years. In determining what constitutes a small business, the definition will also vary to reflect industry differences, such as size standards. Currently, the SBA uses the following size standards in the area of construction: general building and heavy construction contractors, \$36.5 million average annual receipts; special trade construction contractors, \$15.0 million average annual receipts. It is recommended that public and governmental agencies examine relevant and updated census data within their designated market area to determine the most appropriate size standards within their local area. The size standards established by an agency for its SBE program will directly impact

the percentage of participation of MWBE vendors. In addition, consideration should be made with respect to distinguishing between “small” firms and “micro” or “emerging” businesses within the SBE program.⁹⁴

In Miami-Dade County, Florida, Miami-Dade County Public Schools (MDCPS) has developed a multitiered SBE program, including certification for micro business enterprises in the areas of construction and specialty trades as well as construction-related professional services for architectural and engineering services and nonarchitectural and engineering services (e.g., program management services). MDCPS uses the following size standards in the area of construction and specialty trades: Micro Business Enterprises (less than \$1 million), Small Business Enterprises Tier 1 (less than \$3 million), Small Business Enterprises Tier 2 (less than \$6 million). By tailoring the size standards to the Miami market, MDCPS has achieved the following M/WBE percentages of participation in its SBE Program: 30 percent African American, 51 percent Hispanic American, 6 percent white female, 2 percent Asian American, 10 percent nonminority, and 1 percent service-disabled veteran.⁹⁵ Race-neutral programs that foster MWBE participation can effectively use procurement initiatives, such as set-asides, to dramatically increase their MWBE utilization on construction projects and procurement of goods and services.

Tools to Increase Minority and Women Business Participation

SBE programs currently use several methods to encourage and increase minority participation in public and government contracting through race neutral means. These procurement methods, which are also known as “affirmative procurement initiatives,”⁹⁶ include (1) mandatory subcontracting goals, (2) sheltered markets (also referred to as set-asides), (3) bid evaluation preference points, (4) bonding waivers, (5) matchmaking events, and (6) mentor-protégé programs. These procurement initiatives are often used in similarly structured MWBE programs; however, when utilized within the context of a race-neutral program, they permit the agencies using them to be more aggressive in their implementation (through, for example, higher goals). Public and government agencies are not confined by the “narrow tailoring” requirements of MWBE programs in their establishment of subcontracting goals or use of set-asides and are therefore able to

maximize the utilization of MWBE firms in their contracting efforts.

As discussed above, the use of set-asides can be highly effective in leveling the playing field for small and minority-owned firms that cannot compete with larger, more established vendors for prime contracting opportunities. However, when using set-asides, agencies must consider the capacity (both bonding and volume of work) of the small minority businesses that will be competing for such contracts. In doing so, an emphasis should be placed on designing a program that will permit the small businesses participating to grow gradually over time by assigning them smaller projects initially and larger projects as they become more established. Agencies can also effectively use mentor-protégé programs to pair larger, more established contractors with smaller minority contractors on large-scale projects. In doing so, the smaller minority contractor can be exposed to the various stages of construction including preconstruction services, construction management, construction, and postconstruction services, while learning the internal processes involved with contracting with a public or governmental agency (e.g., bid submission, evaluation procedures, project management, etc.).

Moreover, matchmaking events, or events targeted at introducing larger contractors to smaller subcontractors, can be effective in providing MWBE firms with access to potential future business partners. Large established prime contractors tend to utilize subcontractors with whom they have formed relationships over the years and smaller minority subcontractors have difficulties in gaining access to these firms. Knowledge and awareness of prime contractors' prequalification standards and processes can also be shared at matchmaking events, providing for technical assistance and training opportunities for the agencies that use them.

Additional Considerations to Increase Minority and Women Business Participation

Additional steps that a public or governmental agency can take towards increasing M/WBE participation may include (1) revising current contracting selection procedures, (2) increasing community outreach efforts, (3) simplifying certification procedures (e.g., reciprocal agreements with other local agencies), (4) forming strategic alliances and partnering agreements with trade/community organizations, (5) creating bonding and financial assistance programs, and (6) establishing a centralized bidder registration system.

One of the most important characteristics of a successful race-and-gender-neutral program will be the support from the senior/executive leadership within the agency that establishes it (e.g., mayor, superintendent, governor, county commissioners, and board). This leadership will establish the policies and procedures that will govern the SBE program, the compliance mechanisms that will monitor the program to ensure transparency, and the allocation of resources that will be dedicated to the program, including the hiring of the personnel who will

ultimately oversee the program and its implementation.

Conclusion

Long-standing racial and gender discrimination has prevented minorities and women from starting and developing businesses. Lack of access to capital, business networks, training, and other resources prevents otherwise competent minority – and women-owned businesses from competing for public contracting dollars. Historically MWBE programs were utilized to direct dollars to minority businesses. These programs are important because they support economic growth in communities in which they operate. However, in light of the current legal and political environment, these programs are dwindling and are being replaced with small business programs. If structured properly, small business programs can be all-inclusive. Government agencies need to maintain their commitment to ensure that minority – and women-owned businesses are utilized in public contracting. Race neutral does not have to mean “left out” or “left behind.”

Endnotes

1. Throughout this article we will refer to minority business enterprises as MBE and women business enterprises as WBE.

2. 134 S. Ct. 1623 (2014).

3. *Small Business Profiles for States and Territories*, SMALL BUS. ADMIN. (SBA) (June 2014), <http://www.sba.gov/advocacy/848>.

4. *Id.*

5. *Id.*

6. Carol Morello & Ted Mellnik, *Census: Minority Babies Are Now Majority in United States*, WASHINGTONPOST.COM (May 17, 2012), http://www.washingtonpost.com/local/census-minority-babies-are-now-majority-in-united-states/2012/05/16/gIQA1WY8UU_story.html.

7. See *Small Business Profiles*, *supra* note 3, at 2.

8. Elizabeth Kraus, *Fast Facts About (and For) Female Entrepreneurs in 2014*, DB SQUARED (Jan. 24, 2014 3:12 PM), <http://www.dbsquaredinc.com/women-owned-business-financing-1>.

9. *Facts, Figures, and the Profession*, AM. INST. OF ARCHITECTS, <http://www.aia.org/press/AIAS077761>.

10. Brian L. Yoder, *Engineering by the Numbers*, AM. SOC'Y FOR ENG'G EDUC., <http://www.asee.org/papers-and-publications/publications/college-profiles/2011-profile-engineering-statistics.pdf>.

11. U.S. SENATE COMM. ON SMALL BUS. & ENTREPRENEURSHIP, MAJORITY REPORT: 21ST CENTURY BARRIERS TO WOMEN'S ENTREPRENEURSHIP 16 (July 23, 2014), http://www.sbc.senate.gov/public/?a=Files.Serve&File_id=3f954386-f16b-48d2-86ad-698a75e33cc4.

12. *Id.* at 17.

13. SMITH, CURRIE & HANCOCK'S FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS: A PRACTICAL GUIDE FOR INDUSTRY PROFESSIONAL 177 (Thomas J. Kelleher Jr. et al. eds. 2010).

14. *Id.*

15. Act of June 11, 1942, ch. 404, § 4(f)(5), 56 Stat. 351, 354 (repealed 1966).

16. 15 U.S.C. § 631.

17. 15 U.S.C. § 637; 13 C.F.R. § 124.501(a).

18. Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961), superseded by Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

19. Dr. Bessie House-Soremekum, *The Impact of Minority Set-Aside Programs on Black Business Success in Cleveland, Ohio: Implications for Public Policy*, 30 W. NEW ENG. L. REV. 19.

20. Exec. Order No. 11458, 34 Fed. Reg. 4937 (Mar. 7 1969),

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