Designing Defensible Public Sector Supplier Diversity Programs: Recommended Disparity Study & Program Design Elements

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Disparity Study Objectives

- Provide a litigation defense
  - Studies aren't challenged; programs are challenged
- Meet regulatory requirements (*e.g.*, 49 CFR Part 26 & Part 23)
  - Set overall, annual D/M/WBE goal
  - Develop D/M/WBE contract goals
- Make administrative improvements
  - Obtain confidential customer feedback
  - Create focus on data collection & monitoring

Recommended Disparity Study Elements

- Determine utilization of D/M/WBEs
  - Empirically establish geographic & product marketplaces
  - Use highest level of detail (6 digit NAICS vs. "construction") to establish compelling interest & narrowly tailor program elements
  - Fill in missing non- D/M/WBE subcontractor data
  - Do not limit the size of contracts studied (*e.g.*, >$500K)
  - Analyze the large majority of contracts & contract dollars (*e.g.*, 85%)

Recommended Disparity Study Elements, cont.

- Use the "Custom Census" availability methodology
  - Create a database of relevant agency projects
  - Count all businesses in the relevant markets
  - Identify firms' industries & locations
  - Identify & verify all listed M/W/DBEs in those markets
  - Estimate D/M/WBE availability for each racial and ethnic group & white women at the highest level of industry detail

Recommended Disparity Study Elements, cont.

- Use the "Custom Census" because it:
  - Provides dollar-weighted availability estimates to set overall, annual D/M/WBE goals
  - Provides detailed availability estimates to set DM/WBE contract goals
  - Casts a "broad net" as held by courts to meet contracting affirmative action programs' remedial purpose
  - Counts all businesses in relevant markets, not just those known to the agency or willing to respond to surveys

Recommended Disparity Study Elements, cont.

- Do not use the "bidders list" approach for availability
  - Existing discrimination may lead to under-representation
  - Popularity of the existing D/M/WBE program may lead to over-representation
  - Remedial aspect of the program is lost by looking only at current results without regard to the continuing effects of discrimination
- Do not determine availability by surveys
- Do not conduct separate prime & sub availability calculations

Recommended Disparity Study Elements, cont.

- Do not conduct a separate "capacity" availability analysis
  - Ignores the elasticity of supply
  - "Capacity" variables (revenues, years in business, bonding limits, etc.) are impacted by discrimination & lock in the results of past discrimination
  - Disparities persist even when "capacity" variables are controlled for
  - "Capacity" limitations have been rejected by courts when explained by expert testimony

Recommended Disparity Study Elements, cont.

- Conduct an agency contracts disparity analysis
  - Necessary but not sufficient for an existing D/M/WBE program because of the effect of remedial market intervention
  - A finding of no disparity isn't the end of the analysis
    - Effects of the current program
    - Continuing impact of discrimination
- Include a program review
  - Evaluate the effectiveness of contract goals & race-neutral measures
  - Examine utilization on no-goals contracts

Recommended Disparity Study Elements, cont.

- Conduct an economy-wide disparity analysis
  - Look outside agency's own contracting activities
  - D/M/WBEs' vs. non-DM/W/BEs' business formation rates & earnings from Census data sources
  - Credit market discrimination analysis based on Federal Reserve & SBA surveys
  - Critical element of legal defense for existing government supplier diversity programs

Recommended Disparity Study Elements, cont.

- Include anecdotal evidence
  - Necessary but not sufficient
  - Explore current effects of past biases & exclusion
  - Examine denials of full & fair access to government contracts & subcontracts
  - Evaluate existing programs for effectiveness in remedying discrimination & providing opportunities

Recommended Disparity Study RFP Design & Process

- Allow at least one year for study completion
- Include legal counsel at all steps
- Use a general rather than a detailed scope of work
- Conduct face-to-face interviews with finalists to:
  - Clarify proposals & methods
  - Evaluate potential expert witnesses
- Review standard contract terms to avoid FOIA fishing expeditions & data misuse

Program Design Recommendations

- Program eligibility
  - Each included group must suffer some discrimination in the market area but it need not be the same quantum of evidence
  - Require a personal net worth limit for owner(s) (*e.g.*, $1.32 is the current USDOT DBE program ceiling)
  - Require that the firm be small (*e.g.*, apply the SBA size standards)
  - Permit white males to participate by establishing individual social disadvantage (*e.g*., disabled individuals)

Program Design Recommendations, cont.

- Set an annual, aggregate goal for agency spending
  - Must be based upon the study
  - Can be segmented into general industry categories (*e.g.*, construction,professional services, etc.)
  - Review progress by departments annually
- Set contract specific goals
  - Starting point is the study's detailed industry estimates
  - Must reflect the anticipated scopes of work of the contract & D/M/WBE availability
  - Adjust based on staff experience, current market conditions & progress towards meeting the annual goals

Program Design Recommendations, cont.

- Adopt flexible good faith efforts standards
  - Goals cannot function as quotas or setasides
  - Waivers must be available to bidders who make documented good faith efforts
  - Bidders who make good faith efforts must be treated the same as those that achieve the goal; no extra credit for meeting goals
  - Look to Appendix A to 49 CFR Part 26 for detailed standards
  - Develop documents to assist bidders (checklists,contact forms, request forms, etc.)
  - Fully discuss the standards at pre-bid meetings

Program Design Recommendations,cont.

- Ensure adequate program oversight & resources
  - Include specific monitoring & enforcement mechanisms
    - DBEs must do work committed to at contract award or per contract modification
    - Review contract records & monitor work sites ensure subs perform a commercially useful function & no unauthorized substitutions
    - Enforce prompt payment of subs by primes
    - Promptly pay primes
    - Guard against balkanization of responsibility: “D/M/WBE compliance is somebody else’s job”
  - Hire enough staff to competently manage the program

Program Design Recommendations, cont.

- Include race- & gender-neutral remedies
  - Focus on prime contracting opportunities
  - Possible strategies
    - Race-neutral small business setasides
    - Unbundling contracts
    - Fostering small business joint ventures
    - Reducing bonding, insurance & experience requirements
    - Bonding & financing & owner controlled insurance programs
    - Prompt payment of small contractors
    - Rotation lists
    - Mentor-protégé programs

Program Design Recommendations, cont.

- Install a good electronic compliance system to reduce study costs & increase program compliance
  - Use it for management reporting; disparity studies; tracking program trends; & business development & outreach
  - Track contract, vendor & subcontractor data, **including non-certified firms**
    - Dollars awarded & paid; number of contracts awarded; D/M/WBE utilization by race & gender & detailed industry code; change orders & modifications; subcontractor substitutions; close out rates, etc.
  - Buy an off the shelf program; in-house efforts are generally not successful

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