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THE PUBLIC RELEASE OF BODY CAMERA VIDEOS

PUBLIC NUISANCE: MUNICIPALITIES AND THE COMMON GOOD



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DIVERSITY

RITA McNEIL DANISH, *Partner, Taft, Stettinius & Hollister, LLP, Columbus, Ohio, and* JARROD D. BLUE, *Strategic Partnership Agreements Administrator, Oak Ridge National Laboratory, Knoxville, Tennessee*

Contracting in a New World Requires New Tools

The past year is one that many of us would not like to repeat! Despite the many challenges that 2021 has brought, it has forced governments at all levels, private businesses, and nonprofits to evaluate how contracts are formed and to evaluate how new business ventures may be achieved. These organizations must evaluate new business ventures in a world that is very different: a new White House administration, a dynamic economic environment with shifts in demand and supply, the variable impacts of the coronavirus pandemic on the world, and a social justice awakening reverberating across the United States. Businesses and governments are now tasked with pursuing new projects that balance the changing economic and social climates of the United States.

In the case of procurement lawyers, it is essential to make certain that the best contracting tools are utilized to tackle new business opportunities. Popular contracting tools like public-private partnerships and tax increment financing (TIFs) have their place in the public contracting sphere, but they are subject to scrutiny in a new economic and social world.

Public-Private Partnerships

A public-private partnership involves a long-term contract between a public entity and a private entity for the delivery of public services, or the development of infrastructure (e.g., roads, buildings, etc.), where the private party assumes substantial financial, technical, and operational risk in the project.[1] Public-private partnerships offer the opportunity to take advantage of the strengths of either entity for an economic or technical benefit. Specifically, public-private partnerships provide the benefit of shared cost, increased project speed, and risk sharing, while accounting for maintenance costs.[2]

However, a disadvantage of public-private partnerships is the potential to stymie the participation of small and medium-size businesses, leading to a lack of competition.[3] The complexity of public-private partnerships results from the bundling of various project phases. The bundling of phases does not allow for small and minority business owners to engage in the procurement process, as they may have only been available to take part in smaller-valued contracts. As a result, public-private partnerships do not always allow for small and minority businesses to appear on the radar of large contractors pursuing major deals.

TIFs

Another tool beneficial to procurement lawyers is Tax Increment Financing (TIFs).[4] TIFs serve to stimulate private investment in economically deprived areas that are in need of revitalization.[5] The completion of a TIF-funded project has the potential to enhance the value of surrounding real estate, which ultimately generates added tax revenue or increased sales-tax revenue as businesses create jobs in these newly revitalized areas.[6] There are many examples of TIFs used by cities, like Arlington, Virginia, and the $28 million TIF for Amazon HQ2 infrastructure upgrades, and the $250 million TIF by the Detroit Downtown Development Authority for the Red Wings Hockey Stadium.[7] Despite the touted economic benefits of TIFs, they can lead to favoritism for politically connected developers and exclude businesses that do not have the benefit of well-placed connections.

Public-private partnerships and TIFs have been trusted tools for procurement lawyers within state and local governments for decades and serve a

beneficial economic purpose in many instances. However, our world has been forever changed by recent events, and new tools should be considered for community economic prosperity. In particular, the increasing recognition of racial and socioeconomic inequality demands that procurement lawyers consider tools that will allow for all groups to have equal economic opportunities.

Economic Inclusion Tools

Economic inclusion is a key component of an overarching goal of building a prosperous economy. Economic inclusion tools have achieved significant gains for low-income and multicultural communities. Often, economic inclusion is only an add-on to a fully developed economic development strategy. In addition to general economic strategies, economic inclusion tools need to be developed, implemented, and integrated into large-scale job creation, economic development, and public investment strategies that connect women- and minority-owned businesses to economic and business opportunities. For example, Cincinnati has created a licensing and bidding tool to create opportunities for minority- and women-owned businesses to contract with the city.[8]

Economic inclusion tools have achieved significant gains for low-income communities and multicultural communities. Through assisting diverse entrepreneurs in launching businesses and expanding their existing operations, they establish proven opportunities for inclusive job creation. Studies have shown that entrepreneurs of color are more likely to hire people of color and locate their firms in communities of color, and, therefore, their growth leads directly to more job opportunities for the groups that need them the most.[9] Further, these businesses will ultimately revitalize communities and bring tax revenues into the local economy. Minority-owned firms are also twice as likely to export, indicating that more diverse business ownership could help the nation connect to global markets and meet its goals to increase exports.[10]

Disparity Studies

Local governments and utilities can change their economic development models to encourage growth for minority- and women-owned businesses and to create jobs. An important tool in the toolbox for inclusive economic development is the disparity study. A disparity study is methodology used to advance the dialogue regarding the inequities and inform the development of new and innovative solutions for all involved.[11] Government agencies at the federal, state, and local levels typically can commission disparity studies to examine the extent to which minority and women contractors are underutilized in public procurement. For example, Cook County, Illinois, has commissioned a disparity study to determine if women and minority contractors are being underutilized by the County as contractors for public projects.[12] Well-conducted disparity studies present information on actual contracting disparities experienced by minority- and women-owned businesses in a particular industry and geographic region, as well as facilitate an investigation into the extent to which there is discrimination in the marketplace.

A disparity study is a comprehensive effort that analyzes a wealth of data pertaining to the legal, legislative, and contracting environment facing women and minority-owned businesses in a particular jurisdiction or when procuring contracts from a specific federal, state, or municipal agency. Disparity studies typically include an overview of the legal precedent that influences key methodologies, computations, and evidence necessary to justify or support existing or proposed contracting programs, including those that are race conscious. In addition to the legal review, disparity studies typically include an overview of the rules, regulations, and ordinances that govern public contracting for a particular agency. In order to determine the extent to which disparities exist among different racial and ethnic groups and women, disparity studies compute numerical disparity ratios using agency procurement data, information on winning bidders, and a comprehensive analysis of actual and potential bidders to determine which firms are ready, willing, and able to bid on contracts. This information is used to determine utilization and availability, the two inputs of the disparity ratio calculation.

Conclusion

As local and state governments begin the process of evaluating the lessons learned from the past year, this should not be a time for them to lean solely on the tools that have served them well in the past. Governments and their attorneys should consider utilizing resources, like disparity studies and economic inclusion tools, that have the potential to serve the need of the public for economic equality for all. **ML**

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Rita McNeil Danish is the Diversity, Equity and Inclusion Strategic Business partner at Taft, Stettinius & Hollister, and also heads JD2 Strategists LLC, focusing on small, minority, and women-owned businesses and government procurement. She has served as Judge and Magistrate in the Franklin County Court of Common Pleas, City Attorney to Dayton, Cincinnati, and Greensboro, North Carolina, and is a member of the Ohio Civil Rights Commission.



Jarrod Blue is a Strategic Partnership Agreements Administrator at Oak Ridge National Laboratory in Knoxville, Tennessee. He has more than five years of experience in government contracting and procurement law. Jarrod is a graduate of the University of Tennessee College of Law.

jurisprudence has held that appeals should be dismissed where applicants are unable to demonstrate a nexus greater than any other member of the public.

The Court was satisfied that the evidence did not demonstrate that the Applicant was an affected person, meaning that the Board did not have the jurisdiction to hear the appeal. Therefore, the Court held this was not a question of law. The Applicant argued that the Board erred in law by determining the issue of standing prior to hearing the merits of the argument. The Court noted that procedural fairness does raise a question of law; however, in the matter before it the Board had discretion to hold a merits hearing and was not required to do so as peer *Rau v. Edmonton (City)* 2015 ABCA 136. The Court was not persuaded that the Applicant's evidence was sufficient to merit a further appeal. Application to appeal dismissed. ML

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Notes

1. Jens K. Roehrich, Michael A. Lewis & Gerard George, *Are Public-Private Partnerships a Healthy Option? A Systematic Literature Review*, 113 Soc. Sci. & Med. 110 (2014).
2. Grame A. Hodge & Carsten Greve, *Public–Private Partnerships: An International Performance Review*, 67 Pub. Admin. Rev. 545 (2007).
3. Adam Burroughs, *Why Useful Public/Private Partnerships Often Go Undiscovered*, Smart Bus. (May 26, 2020), https://www.sbnonline.com/article/why-useful-public-private-partnerships-go-undiscovered/.
4. Kelo v. City of New London, 545 U.S. 469 (2005). The Court held that a governmental taking of property from one private owner to give to another in furtherance of economic development is a permissible "public use" under the Fifth Amendment. The Court ruling moved forward that only a rational relation to a legitimate purpose is needed for economic development takings.
5. Currently, every state except Arizona allows for some form of TIFs, which are considered one of the most popular economic incentive tools. Benjamin Schneider, *CityLab University: Tax Increment Financing*, Bloomberg CityLab (Oct. 24, 2019), https://www.bloomberg.com/news/articles/2019-10-24/the-lowdown-on-tif-the-developer-s-friend.
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11. According to the Minority Business Development Agency, "a disparity study is a comprehensive effort that analyzes a wealth of data pertaining to the legal, legislative, and contracting environment facing MBEs in a particular jurisdiction or when procuring contracts from a specific federal, state or municipal agency." News Release, Minority Bus. Dev. Agency, Executive Summary—Contracting Barriers and Factors Affecting Minority Business Enterprises: A Review of Existing Disparity Studies, https://archive.mbda.gov/news/news-and-announcements/2017/01/executive-summary-contracting-barriers-and-factors-affecting.html (last visited July 10, 2021).
12. *Cook County Disparity Study*, Cook Cnty., Ill., http://cookcounty.disparity-study.com/ (last visited July 6, 2021).