State and Municipal Disadvantaged Business Programs – An Alternative to the Disparity Study Approach

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1. Disparity Studies. Federal constitutional law limits the ability of municipalities and other governmental entities to create affirmative procurement programs benefitting disadvantaged business enterprises (DBEs) and designed to remedy past discrimination.
    a. See City of Richmond v. J.A. Croson Co., 488 U.S. 469,109 S.Ct. 706,102 L.Ed.2d 854 (U.S. Sup. Ct. 1989), and its progeny.
    b. To address the constitutional issues, governmental entities often undertake disparity studies that seek to quantify the impact of discrimination on past contracting opportunities.
    c. Disparity studies do have utility.

i. Such studies confirm what is conventional wisdom, are easy to understand, and are actively promoted by the relevant consultant community.

ii. Also, larger programs have a certain "economy of scale" that provides justification for use of disparity studies.

1) A recent Pennsylvania study costing in the low seven-figures addressed the impact on disadvantaged business enterprises, in the context of state construction and services contracting worth several billion dollars in annual spend.

2) Unfortunately, the study required several years to complete and was not implemented until 2021, the last year of an eight-year gubernatorial administration.

2. Pennsylvania Programs. An earlier Pennsylvania state-level program, promulgated in 1990, and more recently programs adopted in Pennsylvania at the municipal level, have taken a different approach, one that does not require a disparity study, and is quicker and less expensive to implement.

   a. The 1990 state-level program first focused on construction contracts, and thereafter included service contracting for professional and nonprofessional services.

   b. Legal support for the state-level program (and for that matter municipal programs) was found in the Pennsylvania state law requirement that all governmental entities (both state and municipal) review the "contractor responsibility" of bidders and proposers before making awards.

      i. Typically, such reviews encompass examination of financial strength, bonding capacity, operational capability, and integrity.

      ii. Similar requirements are operative in many if not all of the other states. A random search of five states disclosed "responsible contractor" requirements or the equivalent in all five.

c. Pennsylvania's 1990 program required the review of whether prospective construction contractors had discriminated in the selection of subcontractors and subconsultants in preparing their bids or proposals.

   i. A bidder or proposer that discriminated against DBEs in the process of selecting its subs would be denied the award on the basis of the contractor-responsibility requirement.

      1) Challenges to the program as written and as applied were rejected by a federal court.

      2) The key distinction between this program and the disparity -study approach is that the focus in the contractor-responsibility program is on <u>current</u> discrimination, obviously a disqualifying event, and not on establishing a market-wide pattern of discrimination in the <u>past</u>.

ii. In order to avoid unnecessary administrative reviews, and in all frankness to encourage majority contractors to use DBEs, minimum participation levels (MPLs) expressed in percentages of the construction bid were adopted at tailored levels on a project-by-project basis.

1) The MPLs were set in each project on the basis of a variety of factors, including DBE availability for that project (current and potential) and the program's overall goals.

2) Majority-contractor bidders which met the MPLs were in effect given a "safe harbor" and presumed to have been responsible in the solicitation of subcontractor bids.

3) The bids of majority contractors that did not meet the MPLs on the project were reviewed, and the majority contractors that were found to have discriminated were disqualified.

d. Thereafter, Pennsylvania extended its policy of encouraging the use of DBEs to services.

   i. Professional and nonprofessional services were covered.

   ii. Service contracts were graded using a system of point allocations set for technical competence and cost, to which the level of DBE participation was an added consideration.

      1) Specifically, points of up to 20% of the total were available to be allocated for DBE participation, with the actual point allocation given to each proposer being normalized, with the highest level of participation given for example the full 20% and remaining proposers were given fewer points on a proportional basis.

      2) The system's use was particularly significant from an economic perspective in the context of the state's $2 billion in annual information technology (IT) acquisitions.

   iii. This approach remained in effect for over two decades without challenge.

3. Municipal Adoption of the MPL Program for Construction. The MPL model for assessing contractor responsibility has been adopted in a handful of local jurisdictions in Pennsylvania, without challenges, and with results varying from 9% to 26% of contract value in DBE participation.

    a. The Harrisburg City School District implemented a MPL requirement for a $200 million dollar construction renovation program and achieved about 26% minority and women business enterprise participation.

        i. This extraordinary result was a function of a combination of unique factors in the marketplace for the DBE subcontracting services and should not be seen as a benchmark for MPL programs but rather as what can in certain very favorable circumstances be achieved.

ii. Great care was taken there to insure that selected DBEs did not function as "pass-through" entities – a potentially fraudulent practice that defeats the purpose of building real DBE capacity.

b) The Harrisburg Authority achieved about 9% in DBE participation for its low seven-figure and six-figure water and sewer projects over a number of years.

c) The successor entity, Capital Region Water, has in a more recent period achieved about 10% for projects of about the same size.

d) These local and regional results compare favorably to the previously mentioned MPL program operated by Pennsylvania.

4. Creating a Contractor-Responsibility/MPL Construction Program for Municipalities.

   a. Municipalities can create a disadvantaged business enterprise (DBE) program for construction using the minimum participation level (MPL) approach to assess contractor responsibility prospectively.

   b. The state or local law governing the municipality and the municipality solicitation documents must of course explicitly or implicitly require that bidders and proposers on public contracts be responsible in a relevant manner, i.e. the law must prohibit the award of a public contract to an entity which has engaged in discriminatory activity.

      i. There are numerous examples of how discrimination can occur, including:

         1) Providing bidding or proposal documentation unequally;

2) Giving majority subs longer periods of time to respond than that given to DBEs;

3) Soliciting DBEs indiscriminately through mass emails and the like, without regard to the relevant scope of work;

4) Ignoring available information on DBEs that are able to perform;

5) Imposing unnecessary requirements; and

6) Restricting sub solicitations to a pre-existing group.

ii. There may be no fully developed law supporting the application of the responsibility requirement in this context – indeed there was none in Pennsylvania before the federal cases.

c. There must be the adequate resources provided, including additional personnel to administer the program.

d. The temptation to set arbitrary, across-the-board percentages for participation goals must be resisted.

   i. Goals that are not project-specific will breed disrespect for the program among the construction contractors.

   ii. Setting unrealistic goals will encourage the use of pass-throughs and other evasions and will not be as effective in creating capacity in the DBE communities.

   iii. Unrealistic goals will require an excessive amount of administrative time in performing reviews of responsibility.

e. In drafting the program, there are key questions must be addressed:

   i. What is the legal basis for the program?.

   ii. What identifiable disadvantaged groups will be included?

   iii. Will the municipality rely on certification of true ownership and control of the DBE by third-party certifying entities?

   iv. Will the municipality reach out to majority-owned contractors?

   v. How will the municipality assist the DBE communities?

vi. What forms will be developed to provide ease of administration?

vii. Will the residency of DBE employees be woven into the contractor-responsibility/MPL program in some fashion?

viii. Will the municipality maintain a list of potential DBE subs?

ix. Will there be a threshold for the application of the program to exclude smaller-value contracts?

x. How will the MPLs be set and what factors will be included?

xi. To what degree will non-stocking suppliers be given MPL credit?

xii. How will the MPL credit be determined for a DBE that qualifies in more than one category?

xiii. For DBEs providing labor, what will be the requirement for self-performance?

xiv. What credit will be given to joint ventures that include a DBE partner?

xv. For bidders not meeting the MPLs, what will be the mechanism for reviewing documents and information to determine responsibility?

xvi. What standard will apply to a bidder's disqualification?

xvii. To what extent will bidders be permitted to supplement their initial submissions?

xviii. How will a contractor's commitments to its subs be memorialized?

xix. What routine reporting will be required of the contractor and its subs?

xx. What document retention requirements will apply to the contractors?

xxi. What mechanisms for monitoring will be in place to guard against pass-throughs, where self-performance standards are not being met?

xxii. What enforcement mechanisms will be employed for contractors departing from DBE commitments?

5. Creating a Municipal Services Program that Includes DBEs.

   a) Happily, the process for creating a services program is more direct, less complex and less likely to be challenged.

   b) The Pennsylvania program in effect for over two decades until 2021 was based upon the allocation of request-for-proposal (RFP) solicitation points among competing vendors.

   c) The legal basis for this program was never challenged.

      i. There was no disparity study conducted.

      ii. The conventional wisdom was accepted: DBEs were not participating in state services contracting to a satisfactory degree.

iii. Vendors competed without protest for the points allocated to DBE participation.

iv. The protests and challenges that were asserted by the vendor community, especially in connection with information technology (IT) solicitations, dealt instead with the application of general solicitation requirements.

v. The program was successful in encouraging the formation and development of DBE businesses providing services on state contracts.

1) The principal compliance problem was in ferreting out woman -owned businesses that were not truly owned and controlled by female ownership.

d. In drafting a services program, there are key questions that must be addressed, many of which parallel those that need to be answered in connection with a construction MPL/contractor-responsibility program:

i. What is the legal basis for the services program and for the ability of the municipality to provide solicitation points for DBE participation?

ii. What identifiable disadvantaged groups will be included in the services program?

iii. Should the program incorporate small businesses and not just DBEs?

iv. Will the municipality rely on certification of true ownership and control of the DBE by third-party certifying entities?

v. Will the municipality reach out to vendors?

vi. How will the municipality assist the DBE communities?

vii. What forms will be developed?

viii. How will the DBE points (e.g., 20% of the total) be allocated and will the points be normalized?

ix. To what extent will proposers be permitted to supplement their initial submissions?

x. How will a vendor's commitments to its subs be memorialized?

xi. What routine reporting will be required of the vendor and its subs?

xii. What document retention requirements will apply to the vendors?

xiii. What mechanisms for monitoring will be in place to guard against entities whose ownership and control is not in the hands of a qualifying individual or individuals?

xiv. What enforcement mechanisms will be employed?

6. Private Entity Collaboration.

   a. A largely untapped avenue for building DBE capacity in the municipality and the surrounding region is a program of collaboration between the municipality and regional for-profit and nonprofit businesses.

   b. This envisions a process of enlisting the businesses.

   c. The program would be voluntary.

   d. The mechanism for this collaboration can be as simple as a letter or memorandum of understanding.

7. Conclusion

Municipalities have options for incorporating disadvantaged business enterprises into public contracting. The contractor-responsibility/MPL model can be considered in the construction context, and the RFP model with allocations for DBE participation can be used for services. Private entity collaboration is a largely untapped avenue for leveraging the buying power of cooperating private and nonprofit entities within a municipality's jurisdiction and region.

Time for Questions



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