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Supplier Diversity Programs

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2022 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2022 Annual Conference, held October 19-23, 2022, in Portland, Oregon. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

Overview

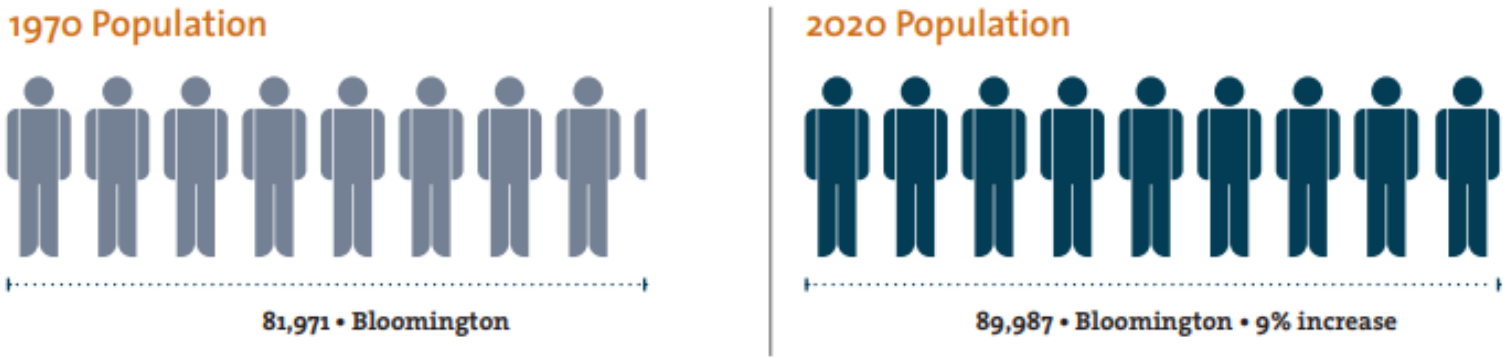
- What is a supplier diversity program?
- Why did we decide to implement one?
- What initial steps did we take?
- What legal considerations should be kept in mind?
- Where are we now?

Bloomington by the Numbers: The Data Story

Bloomington's evolution over 50 years

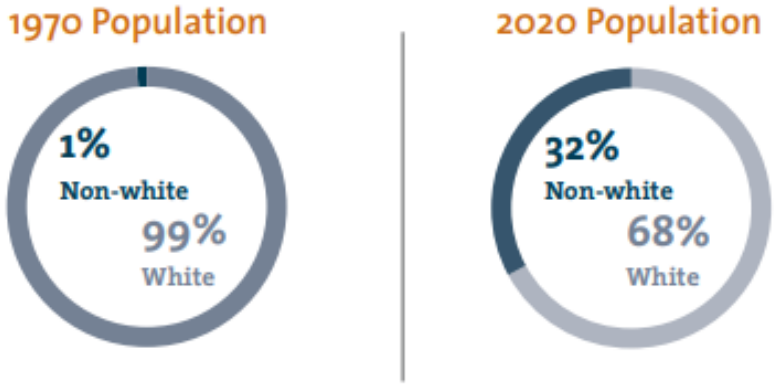
While the overall size of Bloomington's population has remained stable since 1970, there have been notable shifts in the demographics of its residents.

Bloomington's total population in 2020 was relatively similar to its population 50 years ago.



Two major demographic shifts have shaped Bloomington over the past fifty years – the aging and diversification of the city's population.

The percentage of Bloomington's non-white population is 32 times what it was in 1970.



Business-owner demographics are shifting, too

- WMBEs have been growing at 4.5x the rate of population growth
- LatinX-owned businesses have been growing at a rate of two- to-four times the rate of the overall population

https://www.forbes.com/sites/elizabethmacbride/2021/05/23/white-men-are-now-the-minority-of-business-owners-in-the-united-states/?sh=4f3ce5bd1582

BLOOMINGTON.
tomorrow. together.

CITY OF BLOOMINGTON MINNESOTA

Core Values

We believe that . . .

- When diversity is embraced, the community is strengthened.
- Everyone benefits when there is equitable access to opportunity

Strategic Objective

- The City of Bloomington will achieve significant improvement in indices measuring equitable economic growth.

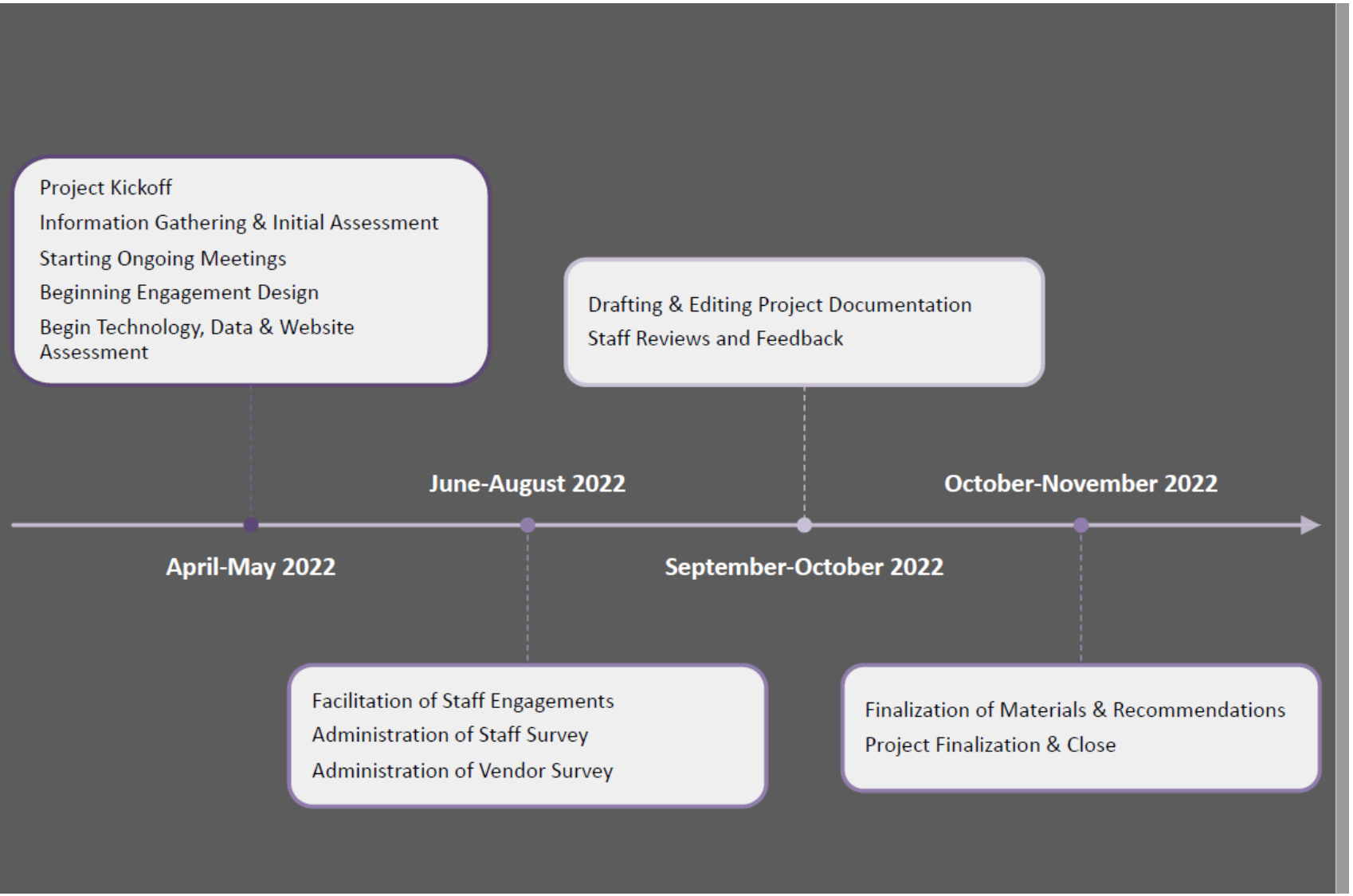
Commercial Advantages

- An inclusive procurement strategy widens the pool of potential suppliers and promotes competition in the supply base, which can improve product quality and drive down costs
- By providing more sourcing options, inclusiveness can make supply chains more resilient and agile — an increasingly important advantage in these uncertain times
- Supplier diversity programs are also a selling point when hiring

https://hbr.org/2020/08/why-you-need-a-supplier-diversity-program

Comprehensive Supplier Diversity Assessment

Original Project Timeline: Big Benchmarks



S&S STRONG & STARLIKE CONSULTING, INC.

Overarching Theme Categories

STRONG & STARLIKE CONSULTING, INC.



POLICIES, PROCEDURES, & PRACTICES



OUTREACH, ENGAGEMENT & EDUCATION



DATA, METRICS, ACCOUNTABILITY & IMPACT

Staff Insight: What do you think may be the City's biggest challenge to advance supplier diversity efforts citywide?



Staff Highlights on Data, Metrics, Accountability & Impact

STRONG & STARLIKE CONSULTING, INC.

What Staff Want to See	Staff Ideas
• Reporting Metrics	• Tangible reporting metrics to prove we made a difference • Increase the number of vendors/suppliers that are out their. • Hope that the city defines diversity in a simple, measurable way and it is not left ambiguous so that we can know what the outcome really has been.
• Money to Local Businesses	• Contract more SB [small business] vendors who are local and minority-owned • Being able to buy more things locally while still meeting deadlines • A new way of thinking that includes broader representation of our local businesses • I'd love for the City to be able to use local vendors as much as possible, keeping the taxpayers' money in Bloomington.
• Diverse, Larger Vendor Pool That Can Drive Competition	• I hope that we have a larger group of vendors to work with which drives competition. • More vendors to choose from • Better competition and higher quality vendors • I hope the city's vendor pool is more diverse in 5 year

Options

- Race and Gender-Neutral Programs
  - Focus on local, small, and emerging small businesses
  - Increase access across the board

- Race and Gender-Conscious Programs
  - Focus on business ownership

Legal Foundation for Race-Conscious Program

Fullilove v. Klutznick, 448 U.S. 448 (1980) 🚩

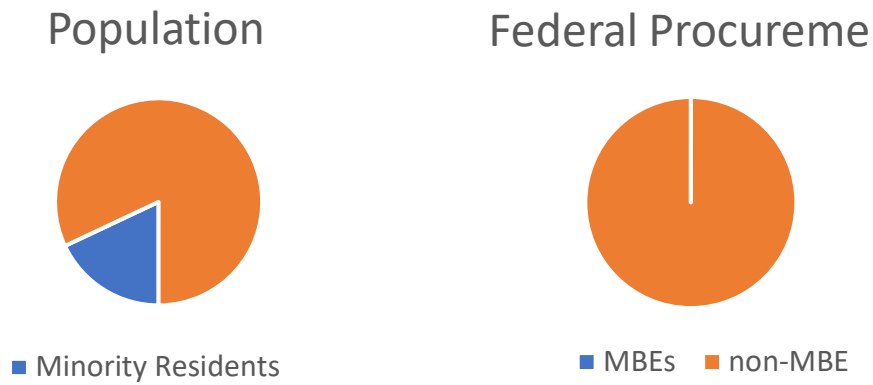
- Public Works Employment Act of 1977
  - At least 10% of federal funds granted for local public works projects must be used to procure services or supplies from businesses owned by minority group members
- Equal Protection Challenge
  - "A program that requires racial or ethnic criteria, even in remedial context, calls for **close examination;** yet we are bound to approach our task with appropriate **deference** to Congress"

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)

Legal Foundation for Race-Conscious Program

Fullilove v. Klutznick, 448 U.S. 448 (1980)

- Objective: Within Spending Power
  - To ensure grantees would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities



- Means: Not Unconstitutional
  - a limited and properly tailored remedy to cure the effects of prior discrimination

Legal Foundation for Race-Conscious Program

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)

- City required prime contractors to subcontract at least 30% to Minority Business Enterprises (MBEs)

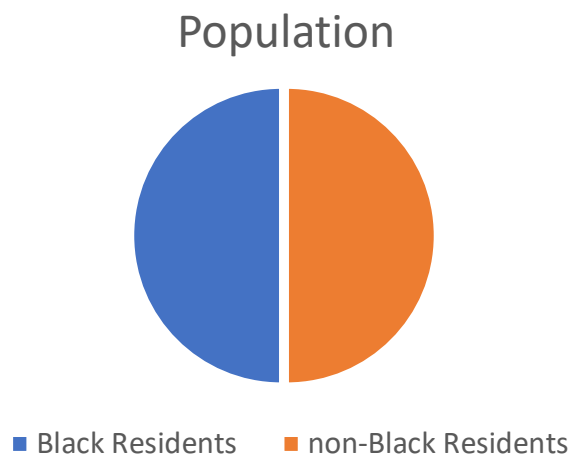
Equal Protection Challenge

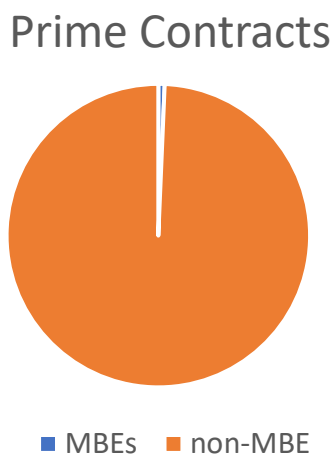
- Government race-based classifications are subject to **strict scrutiny**

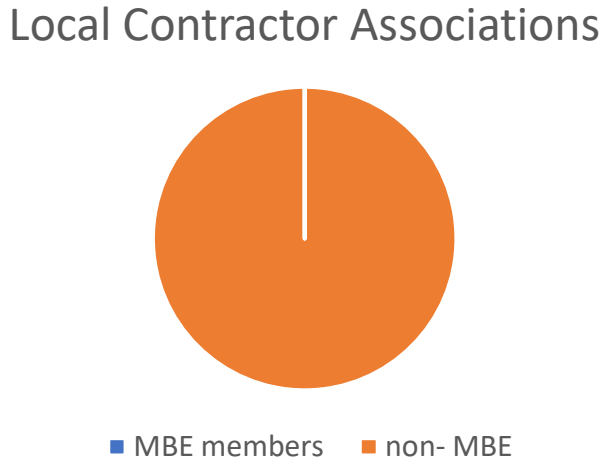
Legal Foundation for Race-Conscious Program

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)

- *Compelling Government Interest*
  - City articulated widespread history of discrimination in local, state, and national construction industries,
  - population-based disparities and
  - reasoning from ***Fullilove v. Klutznick***







Legal Foundation for Race-Conscious Program

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)

- *Compelling Government Interest*
  - Data did not establish the type of identified past discrimination in city's construction industry that would authorize race-based relief
  - A generalized assertion that there has been past discrimination in the entire construction industry cannot justify the use of an unyielding racial quota
    - Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment

- *Narrow Tailoring*
  - No evidence that the city considered using alternative, race-neutral means to increase minority participation in city contracting
  - 30% quota based on local population, not construction industry population

Legal foundation for Race-Conscious Program

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)

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 engaged by the locality or locality's prime contractors, inference of discriminatory exclusion could arise

under such circumstances, city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on basis of race or other illegitimate criteria,
and in the extreme case, some form of **narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.**



Legal Foundation for Race-Conscious Program

Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964 (8th Cir. 2003)

- Challenge to MnDOT implementation of Small Business Act
  - Requires ten percent of federal highway construction funds be paid to small businesses owned and controlled by "socially and economically disadvantaged individuals"
    - Those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group
    - Those whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged
  - Rebuttable presumption that women and members of most racial minority groups are socially and economically disadvantaged

Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964 (8th Cir. 2003)

Strict Scrutiny

Compelling Government Interest

- Congress has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry
- We readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements

Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964 (8th Cir. 2003)

Narrow Tailoring

- **Relationship between goals and relevant market**
  - GOAL: based on the number of DBEs who are ready, willing, and able to participate as contractors
  - May be adjusted upward to reflect the likely number of minority contractors that would have received federally assisted highway contracts but for the effects of past discrimination
- **Efficacy of alternative remedies**
  - Implement race-neutral policy, compare results to goal
  - If race-neutral means are projected to fall short of goal, the State must give preference to firms it has certified as DBEs
- **Flexibility: Race is relevant, but not determinative**
  - Presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged but can demonstrate actual social and economic disadvantage

Legal Foundation for Race-Conscious Program

Virdi v. DeKalb County School. District., 135 Fed. Appx. 262 (11th Cir. 2005)

- While narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake
- Because the state's proffered interest could be served equally well by race-neutral measures, the adoption of a racial classification is not narrowly tailored to achieving that interest

N. Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir. 2007)

- "Narrowly tailored" component of Equal Protection Clause challenge to state's application of federally mandated program that employs racial classifications is limited to question of whether state exceeded its authority under federal mandate; if state did not exceed its authority, challenged application is sufficiently narrowly tailored

Legal Foundation for Race-Conscious Program



Disparity Study:

Is there evidence that discrimination affects minority- and women-owned firms in the marketplace?

- Evaluate the percentage of dollars that minority- and women-owned businesses received on prime contracts and subcontracts during the study time period ("**utilization analysis**"); and
- Evaluate the percentage of dollars that those firms might be expected to receive based on their availability to perform those prime and subcontracts ("**availability analysis**").

The comparison between an entity's utilization of minority- and women-owned businesses and the availability of those businesses to perform that work is referred to as "**disparity analysis**."

https://mn.gov/admin/disparity-study/

https://www.racialequityalliance.org/resources/contracting-equity-best-local-government-practices-advance-racial-equity-government-contracting-procurement/

Where are we now?

Prep work for next Joint Disparity Study

- Data collection and organization
- Track and categorize internal spends so we can analyze utilization



Where are we now?

- Start with a focus on small and local vendors
- Remove barriers
  - Staff and business owner training on process
  - Forecasting business opportunities
  - Advertise and educate within the community
  - Simplify process
  - Right-size contracting and insurance elements
- Create a searchable database of diverse vendors in the community
- Full report coming soon!

City of Philadelphia Supplier Diversity Program



Origins: A Race Conscious Program

- **1982 -** City Council of The City of Philadelphia enacts **"Chapter 17-500 of The Philadelphia Code,"** an affirmative action program for the participation of disadvantaged minority, women and disabled owned business enterprises in City contracts.
    - *[E]stablishing goals for the participation of Minority and Female Owned Businesses [hereinafter "MBE" and "FBE"] in the awarding of City contracts including but not limited to supplies and services, equipment, materials and public works construction; establishing a Minority Business Enterprise Council [(MBEC)]; providing procedures and penalties to monitor and enforce compliance"). As stated in the preamble, one of the goals of the Ordinance, is "to encourage participation in the awarding of City contracts for supplies and services, equipment, materials and public works construction regardless of race, color, sex, religion, national origin, or ancestry." The preamble also states that the most important intent and purpose of the Ordinance is "the Economic Development of the minority and female owned business community through a 'sheltered market' process."*
- **Remedial** - Among the stated reasons for the Ordinance is "[a] pattern of past and present racial, sexual and economic discrimination" in the awarding of contracts with the City of Philadelphia. Preamble, Bill No. 1174–A.
- **Established a 15% City Contract participation goal for MBEs and a 10% City Contract participation rate for FBEs related to total dollar amounts of City Contracts per fiscal year.**
- MBEC could grant waivers to contractors unable to comply with established goals for MBE/FBE participation but demonstrated that there had been **good faith effort to comply.**

Litigation

- **January 23, 1989 - *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) -** United States Supreme Court enunciates a strict standard of review for race-based affirmative action programs.
- **April 14, 1989** - Contractors Association of Eastern Pennsylvania file lawsuit in the Eastern District of Pennsylvania, challenging Chapter 17-500 as violative of Equal Protection citing *Croson.*
- **April 5, 1990** - Chief Judge Louis T. Bechtle rules in favor of the Contractors Association in ***Contractors Association of Eastern Pennsylvania, Inc. v. City of Phila.***, 735 F.Supp. 1274 (E.D. Pa. 1990) relying on reasoning in *Croson,* specifically a "lack of specific identified evidence of prior systematic discrimination by the enacting body in the relevant industry."
  - Notes "striking similarities between the set aside programs of Philadelphia and Richmond
  - Permanently enjoins the City from implementing Chapter 17-500.
  - The City appeals.

Litigation

- **September 30, 1991 -** Court of Appeals vacates Chief Judge Bechtle's April 1990 Order and allows the City a period of time to discover information relating to instances or a pattern of discrimination in the Philadelphia construction industry prior to the passage of Chapter 17-500, ***Contractors Association of Eastern Pennsylvania, Inc. v. Phila.*, 945 F.2d 1260 (3d Cir. 1991) ("Contractors I").**
- **September 22, 1992 –** Chief Judge Bechtle, unpersuaded by the City and UMEA's submission of additional evidence, again rules Chapter 17-500 is unconstitutional, ***Contractors Association of Eastern Pennsylvania, Inc. v. Phila.*, 1992 U.S. Dist. LEXIS 14416 (E.D. Pa. Sept. 22, 1992).**

Litigation

- **October 7, 1993 -** Court of Appeals partially vacates Chief Judge Bechtle's ruling by limiting the Contractors' standing to challenge only those sections of Chapter 17-500 pertaining to construction contracts and orders a trial on the issue of whether there was evidence of discrimination sufficient to support the City's use of goals for the participation of businesses owned by Black people in City construction contracts
  - The Court of Appeals concluded that the City had not presented, at the summary judgment level, adequate evidence of discrimination against businesses owned by Hispanic, Native, Asian-American and female persons in the Philadelphia construction industry so the City remained enjoined from applying the goals program for these businesses on City Construction Contracts, ***Contractors Association of Eastern Pennsylvania, Inc. v. Phila.,*** **6 F.3d.990 (3d Cir. 1993) ("Contractors II").**

Litigation

- **January 11, 1995** - Following a nine (9) day bench trial, Chief Judge Bechtle rules that the City failed to identify racial discrimination in the Philadelphia construction industry sufficient to warrant the use of a race-based remedy for black construction firms, ***Contractors Association of Eastern Pennsylvania, Inc. v. Philadelphia*** **, 893 F. Supp. 419 (E.D. Pa. 1995).**
  - The City takes another appeal.
- **July 31, 1996** - The Court of Appeals affirms Chief Judge Bechtle's January 1995 judgment, ***Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia*****, No. 95-1095 (3d Cir. July 31, 1996) ("Contractors III").** The Court of Appeals ruled that although it is a "close call" whether the City had presented evidence of discrimination in the prime contracting market sufficient to support a race-based remedy, since Chapter 17-500 focused primarily on subcontracting and the City had been unable to produce adequate evidence of discrimination in construction industry subcontracting, Chapter 17-500 failed.

Litigation

- **December 4, 1996** - City files petition with the United States Supreme Court for a *writ of certiorari* to review the judgment of the Court of Appeals.
- **February 18, 1997 -** United States Supreme Court denies City's petition for *certiorari*.

- **January 1, 1998 -** Chapter 17-500 of The Philadelphia Code expires.

Parallel Strategy:

Rather than remedial, preventative, race neutral antidiscrimination policy emerges

Executive Orders: EO No. 6-90

- **June 1990** - The Honorable W. Wilson Goode issues **Executive Order 6-90**, relating to the nondiscriminatory solicitation and use of businesses owned by minorities, women and disabled persons on City contracts.
  - "*WHEREAS, it is the policy of the City of Philadelphia to provide equal opportunity to participate in City contracts for all businesses and to assure that City funds are not used to promote, reinforce or perpetuate discriminatory practices.*"
  - *"bidders on City contracts shall not discriminate against any business because of race, color, religion, national, origin, sex or disability. In furtherance of this policy the Minority Business Enterprise Council (MBEC) shall review all bids to ascertain whether discrimination has occurred in the solicitation or selection of contract participants in accordance with the provisions of this ORDER."* Section 1.
  - Cites commitment to **preventing discrimination** by citing the Pennsylvania Human Relations Act, the Preamble to the Home Rule Charter, and the Pennsylvania Constitution

Executive Orders: EO No. 6-90

- Applies to all Contracts including (1) vending, to include materials, equipment, services and supplies; (2) construction; (3) personal and professional services; and (4) concessions. Section2 (C).
- Notes number of qualified minority owned, female owned, and disabled owned businesses in the region willing and able to participate in City Contracts (more than 1900).
- Bid is responsive when it included "**documentary evidence** of MBEs, WBEs, and DSBEs who have been contacted and who are to be used on the contract. Section L (emphasis added).
- Defines a responsible bid as one that "**demonstrates** that the bidder has not engaged in discriminatory conduct." Examines whether bid reflects participation commensurate with projected ranges of M/W/DSBE. If participation commensurate with projection, rebuttable presumption of non-discrimination. If participation not commensurate with projected ranges, MBEC initiates an investigation to determine whether discrimination occurred.
    - Failure to cooperate with investigation or finding of discrimination renders bid **not** responsible and bid rejected. Section K.

Executive Orders: EO No. 6-90

- Authorizes MBEC and directs it, among other things, to:
  - Certify M/W/DBEs;
  - Maintain a directory for the purpose of identifying the numbers and business classifications;
  - Establish projected ranges of MWDBE participation for each City contract based upon analysis of factors like the size and scope of the contract the bid specifications and availability of certified M/W/DSBEs to perform various elements of the contract;
  - Review bids and forward findings to the department letting the contract; and
  - Perform investigations into whether discrimination occurred. Section M

Executive Orders: EO No. 1-93

- The Honorable Edward G. Rendell issues **Executive Order 1-93**, relating to the nondiscriminatory solicitation and use of businesses owned by minorities, women and disabled persons on City Contracts.
- More than1200 qualified socially and economically disadvantaged minority owned, female owned, and disabled-owned businesses certified by MBEC are located in the region "willing and available to participate" in all types of City Contracts.
- Requires documentation of solicitation of M/W/DSBEs be submitted for a bid to be responsive.

Executive Orders: EO No. 1-03

- The Honorable John F. Street issues **Executive Order 1-03**, relating to the participation of disadvantaged minority, woman and disabled businesses in City Contracts.
- More than 1100 qualified socially and economically disadvantaged minority owned, female owned, and disabled-owned businesses certified by MBEC are located in the region "willing and available to participate" in all types of City Contracts.

Executive Orders: EO No. 1-03

- Notes that in 1996, the City conducted a business utilization study to investigate the existence of discrimination against MBEs/WBEs in the region and the need for remedial action
  - Examined City contracting and census data and used statistical models
  - Found "significant statistical" disparities in the utilization of both MBEs/WBEs due to past and present day discrimination in both the public and private contracting sectors
  - **Less than 10%** of all City Contract dollars are spent with MBEs/WBEs

Executive Orders: EO No. 1-03

- Establishes a revised system of reviewing contracting activities of contractors doing business with the City to identify contractors who discriminate
- Establishes a system for monitoring labor union employee composition to be reported semi-annually to City Council
- Developing a mechanism for monitoring contracting activities of quasi-public agencies to be reported semi-annually to City Council and the Administration
- Reinforces continued need for race-neutral programs like the small business bonding program which builds capacity for M/W/DSBEs

Executive Orders: EO No. 1-03

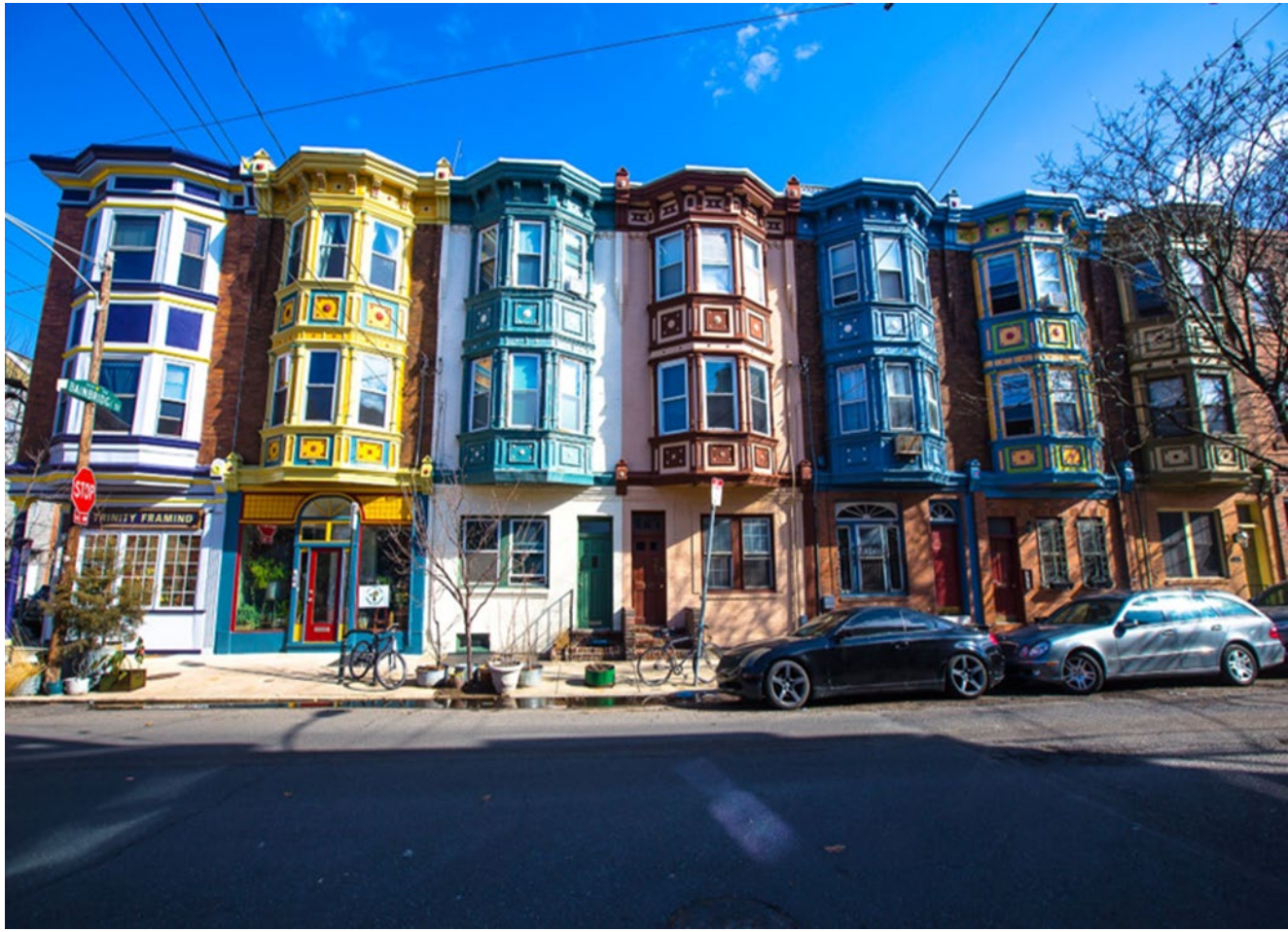
- Adds requirements that bidders give adequate assurances that they do not and will not discriminate
- Defines *Commercially Acceptable Function* – engaging in meaningful work that provides for performance of a distinct element of the contract. Section 2(F).
- Establishes an Economic Opportunity Task Force of business community members to advise the Mayor & make recommendations to increase employment of minorities and contracting with M/W/DSBEs.
- Adds a Section on enforcement via legal remedies including termination of the contract and debarment of the bidder

Executive Orders: EO No. 02-05

- Notes that in 2004, the City conducted a study on the City's contracting with MBEs and WBEs
  - Found that less than 2% of all City Contract dollars are spent with MBEs/WBEs
- Notes more than 800 qualified socially and economically disadvantaged minority owned, female owned, and disabled-owned businesses certified by MBEC are located in the region prepared to compete and participate in all types of City Contracts.
- Commissions an annual disparity study analyzing participation of M/W/DSBEs compare to qualified percentage of M/W/DSBEs available.

Executive Orders

- EO No. 05-10 reauthorizes EO 02-05
- EO No. 03-12 most comprehensive expression of antidiscrimination policy
- EO No. 03-17 Establishes Departmental Office of Economic Opportunity Officers
- EO No. 01-21 shifts MBEC to Office of Economic Opportunity



Antidiscrimination Policy on Minority, Women, and Disabled Owned Business Enterprises

- States the purpose of the Policy - to provide equal opportunity for all businesses and to assure that City funds are not used, directly or indirectly, to promote, reinforce or perpetuate discriminatory practices;
- Outlines the projected participation ranges of each certified M/W/DSBE available market absent discrimination in the solicitation and selection of these businesses and through applicant's **exercise of Best and Good Faith Efforts** (those efforts, the scope, intensity and appropriateness of which are taken to achieve meaningful and representative opportunities for participation by M/W/DSBEs)
- M/W/DSBE participant must perform a commercially useful function.

OEO Certification Registry www.phila.gov/OEO/directory. Approved certifying agencies are identified on the OEO webpage found at www.phila.gov/OEO. Pennsylvania Unified Certification Program Directory which offers a robust listing of DBEs at www.paucp.com.

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