

NIGP Forum 2018

Procuring Diversity 201: Advanced Knowledge about Supplier Diversity Programs

Colette Holt
Attorney at Law

Small Business Programs

- Increasing defaults to SBE programs
 - No need for disparity studies because size & location are not protected classifications
 - Inadequate to remove systemic race & gender barriers because the vast majority of firms are small
 - BUT only remedies to increase access to prime contract opportunities
 - What basis for annual or contract goal setting since the great majority of firms are “small”?

Small Business Programs

- DBE Program must include small business element (49 C.F.R. § 26.39)
- Possible strategies
 - Race-neutral small business set-asides or points
 - Unbundling
 - On contracts without goals, mandated subcontracting
 - Fostering small business joint ventures
 - Disfavored: SBE contract goals added to D/M/WBE contract goals

Assistance to D/M/WBEs

- Assistance to DBEs
 - No new court standards or USDOT guidance
 - What is acceptable while maintaining the DBE's independence?
 - Equipment
 - Personnel
 - Blurred roles
 - "Payroll jumping"?
 - Suppliers
 - Joint checks?
 - Price negotiations?

Counting D/M/WBE Participation

- Counting joint venture participation
 - Fee & conditions of the JV prime contractor
 - Increasing the utility of JVs
- Counting race-neutral participation in the DBE program
 - 2014 DBE rules changes deletes reference to “strict low bid system”
 - Utilization in excess of the contract goal
 - Contract goal as the cause of utilization
 - Goal setting is not a science & conditions change during performance
 - Effect on the projection of future race-neutral participation

Good Faith Efforts

- Confusion about what Good Faith Efforts means
 - GFE means the goal was not met
 - Do not require if the goal is met
- Good faith efforts reviews
 - Standards must be detailed
 - How much notice to give D/M/WBES?
 - How many &/or what percentage must be contacted?
 - What is the role of price?
 - Waiver request procedures must be clear & easily accessible
 - Use forms & checklists
 - Allow sufficient time for consideration

Good Faith Efforts

- When Is GFE documentation due
 - With the bid or proposal
 - Specified number of days after
 - “Cure” period?
- What about losing bidders?
 - DBE regulations say they must submit good faith efforts
 - Incentives to comply
 - Affect prequalification?
 - Withholding of bid bond?

D/M/WBE Contract Goals

- Increased scrutiny under narrow tailoring
 - Can you explain how the number was derived? Must be based on the scopes of work of the contract (including the prime dollars) & availability in those scopes
 - Consider the size of the contract: subcontracting realistic?
 - Cannot use the same goal in every contract or rely on an overall annual goal
 - Is the process described & the determination documented?
 - Apply a “but for” adjustment?
 - NYS litigation

D/M/WBE Substitutions

- Greater oversight of substitutions or terminations
 - Primes must receive prior written agency approval
 - Good cause means:
 - Failure to execute a contract
 - Failure to perform to normal industry standards
 - Failure to meet reasonable bonding requirements
 - Bankruptcy or credit unworthiness
 - Suspension or debarment from public work
 - Determination by the agency of lack of responsibility
 - Voluntary withdrawal by the D/M/WBE
 - Ineligibility for goal credit for work committed
 - Death or incapacity of the D/M/WBE owner
 - Other good cause determined by the agency

Veteran Business Programs

- Increased development of Veteran-Owned Small Business & Service Disabled Veteran-Owned Small Business programs
 - Lower legal standard of “rational basis” review
 - DBE program does not include veterans component
 - Federal goal is 3% for SDVOSBs; Veterans Administration’s goal is 7% for SDVOSBs
 - Major problems with self-certification, pass throughs & ownership & control
 - Data that there is a problem? Effect on D/M/WBE programs?

LGBTQ Programs

- Lower legal standard of “intermediate scrutiny” for gender discrimination? Title VII coverage?
- Certification issues
 - What type of proof of sexual orientation?
 - Full transition & change in legal status for transgendered persons?
 - Certify under the individual approach of Part 26?
- Collect contract data
 - Vendor applications?
 - Bidders lists?

Prosecutions for D/M/WBE Fraud

- Major focus of USDOJ Inspector General
- Local law enforcement interest is increasing
- Types of successful fraud prosecutions
 - False information in certification applications
 - Ability to independently perform
 - False financial information
 - Qualifying individual does not manage & control the firm
 - Lack of independence from non-certified firm
 - Passthroughs/fronts
 - False business cards & vehicle decals
 - False certified payrolls, invoices, other documents
 - Failure to fully perform a commercially useful function

Limits of Data

- Data = values
 - Unconscious bias
 - Life experiences
 - Choice of variables is critical
 - Amazon Prime refused to deliver to certain zip codes
 - Google searches show women lower paying jobs
 - Reinforcing Facebook feeds
- Data \neq truth



3350 Brunell Drive • Oakland, CA 94619

773.255.6844 • colette.holt@mwbelaw.com

www.mwbelaw.com

Twitter: @mwbelaw

