

NIGP Forum 2018

Procuring Diversity 101: Basic Knowledge about Supplier Diversity Programs

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What are D/M/WBE Programs?

- Race & gender-conscious measures to ensure equal access to contracting opportunities
 - Includes prime contracts & associated subcontracts
 - Can cover all industries (construction, professional services, services & goods)
- Alphabet soup
 - DBE (Disadvantaged Business Enterprise, usually USDOT program)
 - MBE (Minority-Owned Business Enterprise)
 - WBE (Women-Owned Business Enterprise)

What are D/M/WBE Programs?

- Possible elements
 - Overall, annual goals for total spend with D/M/WBEs
 - Contract specific goals for spend with D/M/WBEs as prime vendors or subcontractors to prime vendors
 - Based on:
 - The scopes of work of the contract
 - The availability of D/M/WBEs
 - The location of the project
 - Progress towards meeting the annual goal
 - Other factors
 - Price preferences
 - Evaluation points
- No quotas or setasides

Why Do D/M/WBE Programs Matter?

- Without goals, D/M/WBEs receive little work
- Systemic barriers remain
 - Entrenched networks
 - Explicit & implicit biases
 - Minority wealth gap
 - Impact on minority communities
 - Pressures on small businesses are worsened by race & gender
 - Prime awards are especially difficult to obtain

What Are The Legal Standards for D/M/WBE Programs?

- “Strict” constitutional scrutiny applies to race-based public contracting decisions, regardless of the label (DBE vs. M/WBE)
- Two pronged test
 - Strong basis in evidence of the government’s “compelling interest” in remedying discrimination
 - Remedies must be “narrowly tailored” to that evidence
- “Intermediate scrutiny” for gender?
 - Yes in theory; no in application
- Location, size, veteran status subject to “rational basis” scrutiny

What Are The Legal Standards for D/M/WBE Programs?

- Compelling interest requirements
 - Disparate impact evidence
 - Determine the agency's specific industry & geographic marketplace
 - Determine the availability of D/M/WBEs as a percentage of all firms in the agency's marketplace
 - Determine the agency's utilization of D/M/WBEs at a highly detailed level
 - Examine disparities between the agency's utilization of D/M/WBEs & availability ("disparity index")
 - Examine statistical proof of market-wide disparities beyond agency contracting
 - Review results of private sector/"unremediated" contracting, if available; relevant to the government's passive participation

What Are The Legal Standards for D/M/WBE Programs?

- Disparate treatment (anecdotal) evidence
 - Necessary but not sufficient; inadequate statistical proof will be fatal
 - Explore current effects of past biases & exclusion
 - Examine denials of full & fair access to government contracts & subcontracts
 - Evaluate existing programs for effectiveness
 - No verification requirement
 - Methods include focus groups, surveys, public meetings

What Are The Elements of Effective D/M/WBE Programs?

- Based on good disparity studies
- Annual, overall goals that include a broad base of minority- & women-owned firms
- Contract goals based upon a detailed, weighted & documented methodology
- Effective & thorough certification programs
- Flexibility & enforcement
- Electronic data collections systems to provide information to firms, ensure that D/M/WBEs are used, report results in close to real time & assist with certification & outreach



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