

# Basic Knowledge about Supplier Diversity Programs

Colette Holt  
Colette Holt & Associates • [www.mwbelaw.com](http://www.mwbelaw.com)  
773.255.6844 • [colette.holt@mwbelaw.com](mailto:colette.holt@mwbelaw.com)

# What are Supplier Diversity 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)
  - Other terms (“diverse firms”, “emerging businesses”, etc.)

# What are Supplier Diversity 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
  - Evaluation points?
  - Price preferences?
- No quotas or set-asides

# Why Do Supplier Diversity 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

# Legal Standards for Public Sector Supplier Diversity 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

# Legal Standards for Public Sector Supplier Diversity Programs

- Compelling interest requirements
  - Disparate impact (statistical or quantitative) evidence
    - Determine the agency's specific industry & geographic marketplace
    - Determine the availability of D/M/WBEs as a percentage of all firms in that agency's specific marketplace
    - Determine the agency's utilization of D/MWBEs 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
    - Other agencies' experiences are relevant but each government must establish its separate compelling interest

# Legal Standards for Public Sector Supplier Diversity Programs

- Disparate treatment (anecdotal or qualitative) 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
  - Effective evidence gathering methods are focus groups & surveys

# Elements of Disparity Studies

- Legal review
- Program review
- Utilization, availability & (for non-USDOT programs) disparity analysis
- Economy-wide analysis
- Anecdotal data analysis
- Recommendations



# Elements of Effective Public Sector Supplier Diversity Programs

- Based on good disparity studies
- Set annual, overall goals that include a broad base of minority- & women-owned firms
- Set contract goals based upon a detailed, weighted & documented methodology
- Adopt effective & thorough certification programs
- Ensure flexibility & enforcement
- Implement electronic data collections system to provide information to firms, monitor program compliance, ensure that D/M/WBEs are used, report results in close to real time & assist with certification & outreach

# Challenges for Public Sector Supplier Diversity Programs

- Assistance to D/M/WBEs
  - What is acceptable while maintaining the D/M/WBE's independence?
    - Equipment
    - Personnel
      - Blurred roles
      - "Payroll jumping"?
    - Suppliers
      - Joint checks?
      - Price negotiations?

# Challenges for Public Sector Supplier Diversity Programs

- Good faith efforts to meet contract goals
  - Confusion about what Good Faith Efforts means
  - 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
    - When Is GFE documentation due
      - With the bid or proposal
      - Specified number of days after “cure” period?

# Challenges for Public Sector Supplier Diversity Programs

- Setting 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)
    - 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?
  - Go to [www.contractgoalsetting.com](http://www.contractgoalsetting.com) for free presentation & worksheet

# 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

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

# Veteran Business Programs

- Lower legal standard of “rational basis” review
- Federal goal is 3% for Service Disabled Veteran Owned Small Businesses; Veterans Administration’s goal is 7% for SDVOSBs
- Major problems with self-certification, pass throughs & ownership & control
- Are there data that there is a problem with discrimination against veteran-owned businesses?
- Effect on D/M/WBE opportunities?

# LGBTQ Programs

- Lower legal standard of “intermediate scrutiny” for gender discrimination?
- 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?