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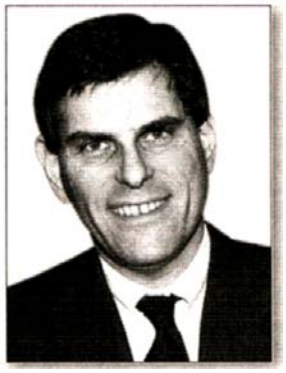
Promoting Participation By Minorities, Women In City Contracts



On July 1, 2006, New York City launched a new program to promote city contract opportunities for businesses owned by minorities (minority business enterprises or MBEs) and women (women's business enterprises or WBEs).

As explained below, one of the keys to the success of the program is for MBEs and WBEs to "certify" themselves with the city so that city agencies, including the Law Department, will have an added incentive to enter into contracts with them.

MWBE Program

The "minority and women-owned business enterprise" program (MWBE), enacted by the City Council and signed by Mayor Michael Bloomberg as Local Law 129 of 2005, was jointly drafted by the City Council and the administration, represented by attorneys in our contracts and real estate division and the division of legal counsel.

Now the Law Department, along with all other city agencies, will be striving to meet citywide goals set in the legislation for the categories of professional services, standard services, goods and construction. Later this year the city will launch a related program for "Emerging Business Enterprises" owned by persons who are economically and socially disadvantaged. This program was enacted as Local Law 12 of 2006. Lessons learned from decades of federal, state and local affirmative action programs for contractors guided the development of our new programs.

The Law Department's involvement in this issue goes back nearly 30 years with its successful defense of a contractor affirmative action program, leading to the U.S. Supreme Court's first ruling on this subject. *Fullilove v. Klutznick*, 448 US 448 (1979), upheld a requirement of the Public Works Employment Act of 1977 that at least 10 percent of each federal grant be expended for minority business enterprises.[1] Congress had modeled this MBE program on a program for businesses owned by persons who were "economically and socially disadvantaged," established pursuant to §8 (a) of the Small Business Act of 1953.

The MBE program had a number of features which persuaded the Court that it was a proper exercise of Congress' "broad remedial powers." The Court found that there was a "rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, that this inequity has an effect on interstate commerce" and that "Congress acted within its competence to determine that the problem was national in scope." Only bona fide minority-owned businesses could participate in the program. Administrative waivers were available on a case-by-case basis where minority businesses were not available to meet the goal or where an MBE might try to exploit the program by demanding an unreasonable price. The court found the burden on nonminority contractors to be "relatively light" when considering overall construction contracting opportunities available to them.

A decade after *Fullilove*, the Court decided *City of Richmond v. J.A. Croson Co.*. 488 US 469 (1989), where it announced for the first time that strict scrutiny applies to a government affirmative action program.[2] The Court found it "clear, however, that state and local governments have the authority to eradicate the effects of private discrimination" within their own jurisdiction, as long as the authority is exercised within the constraints of the Fourteenth Amendment, which requires that the discrimination to be remedied "be identified with particularity."

In addition, the Court found that where a city could show that it has "become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, . . . the city could take affirmative steps to dismantle such a system." A state or local government must have more to act on than a "generalized assertion" that there has been past discrimination in an entire industry; it must have a "strong basis in evidence" for its conclusion that remedial action is necessary. An inference of discriminatory exclusion could arise 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 actually engaged by the locality or the locality's prime contractors."

Race-neutral means to increase minority participation in government contracts should be considered before adopting race-conscious methods. In a later case the Court clarified that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative," but does "require serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 US 306 (2003).

Charter Amendment

Just months after *Croson* was decided, the city's voters approved a recommendation of the 1989 City Charter Revision Commission that the Charter be amended to require that the city take steps to ensure the "meaningful participation" of MBEs and WBEs in the city procurement process. The city commissioned a "disparity study" that found statistically significant disparities between availability and utilization of such businesses in all sectors of city procurement. The disparities existed despite race-neutral measures employed by the city over a number of years to ensure open access to its procurements, including antidiscrimination laws and programs for "locally based enterprises" and "small business enterprises." The Law Department's executive and legal counsel divisions assisted the Department of Business Services to adopt regulations establishing a process for businesses to become certified as "MBEs" and "WBEs," setting citywide goals for procurements from minority-owned and women-owned businesses, and authorizing city agencies to use a number of race- and gender-conscious methods in the pursuit of the goals.

Questions

When a constitutional challenge was brought by an unsuccessful bidder, this office successfully defended the program against plaintiff's motion for summary judgment. *North Shore Concrete and Assoc., Inc. v. City of New York*, 1998 USDistLEXIS 6785 (EDNY 1998).[3] The court found that the city presented sufficient evidence of "gross statistical disparities" against black Americans, Hispanic americans, Asian Americans and women to prevail on the motion, but identified a number of factual issues to be resolved: Did the methodology of the city's consultant "accurately depict the existence of discrimination in the construction industry?" Did the consultant fairly calculate availability? Were the MBEs and WBEs considered "willing" and "able" to take on a public contract?

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These questions were never tried because the goal-setting portion of the program sunset by its own terms, and the plaintiff reached a settlement with the city. The city's certification program remained in effect, and the city continued to promote open competition for its procurements, and to encourage prime contractors to consider subcontracting with MBEs and WBEs. A system for providing small businesses special notice of contract opportunities by fax was established. The city also instituted a "5 + 5" process where agencies soliciting bids for small purchases were required to use two computer-generated lists: the first list was randomly selected from all registered contractors who perform the relevant work and the second list was randomly selected from all MBEs and WBEs who perform such work.

In early 2002, the City Council commissioned a new disparity study. While the disparity study was in progress, Mayor Bloomberg issued Executive Orders Nos. 36 and 71, directing agencies to take steps to promote meaningful participation of MBEs and WBEs. Once the results of the study were known, the mayor and the City Council agreed that the city should have two new programs setting goals for prime contracts and subcontracts: the MWBE program that authorizes the use of race- and gender-conscious methods for firms owned by women and the minority groups for which statistically significant disparities were found, and the "Emerging Business Enterprise" program for firms owned by persons who demonstrate, in accordance with regulations promulgated by the commissioner of Small Business Services, that they are socially and economically disadvantaged.

'Socially . . . Disadvantaged'

Local Law 12 provides that a "socially and economically disadvantaged" person is someone who "has experienced social disadvantage in American society as a result of causes not common to persons who are not socially disadvantaged, and 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. A person's race, national origin, or gender by itself, will not qualify the person as "socially disadvantaged." The law requires that the commissioner, in drafting regulations, consider criteria developed for federal programs established to promote opportunities for businesses owned by persons who are socially and economically disadvantaged, including criteria for determining initial and continued eligibility in relation to the net worth of persons claiming to be economically disadvantaged. The law specifies that the net worth of a person claiming disadvantage must be less than $1 million, excluding the ownership interest in the business enterprise and the equity in the primary personal residence.

The new laws, which are codified together at Charter §1304 and Administrative Code §6-129, set citywide goals for awarding prime contracts under $1 million for construction, professional services standard services, and goods, and subcontracts under $1 million for construction for amounts.

The million-dollar threshold is based on the disparity study's findings about the capacity of minority- and women-owned businesses in the market where the city conducts its procurement activity. City agencies are required to encourage eligible firms to become "certified" as minority-owned, woman-owned, and emerging business enterprises. Certified firms will appear in an on-line directory maintained by the city's Department of Small Business Services. City agencies must use this directory and make other outreach efforts to identify firms and encourage them to make bids and proposals for city business. Agencies will set participation goals for professional and construction contracts where it is expected that subcontracts for under $1 million will be awarded, and contractors will be required to make good faith efforts to meet the goals as a term of their contract.

City agencies will be tracking and reporting our success in achieving goals to the Department of Small Business Services, the Mayor's Office of Contract Services, and the City Council.

Flexibility Measures

The laws incorporate the types of flexibility measures that the Court has indicated are necessary to show that a program is narrowly tailored. Bidders may seek a full or partial waiver of a goal before the contract is awarded. In determining whether to grant a waiver, the contracting agency will consider factors including: whether the bidder has the capacity and the bona fide intention to perform the contract without any subcontracting or to perform the contract without awarding the amount of subcontracts anticipated by the contracting agency, whether the utilization plan is consistent with the bidder's past subcontracting practices, and whether the bidder has made good faith efforts to identify portions of the contract that it intends to subcontract. A contractor may seek a modification of a goal, but must establish that it has made all reasonable, good-faith efforts to meet the goals set by the agency for the contract. The city is required to update the disparity study every two years, and to make appropriate adjustments in goals based on the results. Annual reports will be submitted to the Council, which is required to repeal provisions for goals upon finding that they are no longer necessary to address the impact of discrimination on the city's procurement.

Information about the new programs is available on the Web sites of the Department of Small Business Services, www.newyorkbiz.com/mwbe/ and the Law Department, http://www.nyc.gov/html/law/html/opportunities/opportunities.shtml.

Conclusion

Their success largely depends on eligible businesses becoming certified (and so helping us to fulfill the Supreme Court's requirement that benefits of affirmative action programs are limited to firms with bona fide ownership by eligible persons). The Department of Small Business Services offers classes to assist with the certification process. A class schedule, as well as applications for certification (in both Spanish and English) may be found on the Department of Small Business Services Web page.

Members of the bar can help the city pursue its goal of increasing opportunities for MBEs, WBEs and Emerging Business Enterprises in a number of ways:

• law firms that are eligible may become certified,

• all of us can use our networks to encourage others who are eligible, including clients and colleagues, to become certified. and, of course,

• attorneys and their clients and colleagues in the private, public and nonprofit sectors may all use the city's directory for outreach efforts to promote diversity in their own procurement activities.

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Endnotes:

1. In Fullilove, the Law Department represented the city of New York, the state attorney general represented the state of New York, and the U.S. Department of Justice represented the Department of Commerce.
2. In Adarand Constructors, Inc. v. Pena, 515 US 200 (1989), the Court held that strict scrutiny applies to federal affirmative action programs that use racial and ethnic criteria as a basis for decision-making.
3. The district court did strike a provision of the program that included Native Americans and Alaskan natives because there was no evidence of discrimination against them.