Metropolitan Water Reclamation District

Minority, Women-Owned and Small Business Program

Study Session

6 February 2020

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M/WBE Program Legal Standards

- Agency must have a "strong basis in evidence" to use the highly disfavored remedy of race-conscious behavior
  - Strict constitutional scrutiny applies to race-based government decision making
  - Government can use spending powers to eradicate private discrimination
  - Government must be a "passive participant" in a discriminatory marketplace
  - No need to prove the agency discriminated
  - Motive cannot be politics or racial stereotyping

M/WBE Program Legal Standards

§ Program must be narrowly tailored to the evidence in the disparity study

- "Societal" discrimination is not sufficient
- All racial and ethnic groups must suffer in the local marketplace
- Race-neutral measures must be seriously considered
- There must be a sunset provision requiring periodic program review

Pending Cases

§ *Memphis Mechanical Contractors v. Shelby County*

- Challenge to the County's local M/WBE program based on a Mason Tillman Associates, Ltd study
- Criticism of the study's availability methodology & goal setting

§ *Palm Beach County v. Mason Tillman Associates, Ltd.*

- MTA is refusing to turn over study documents to the County
- Documents were sought through records request by the AGC of America

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LGBTQ Programs

§ Lower legal standard of "intermediate scrutiny" for gender discrimination? Pending US Supreme Court Title VII case

§ 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?
- Equal Protection problem with lower standard of evidence for LGBTQ applicants than other groups?

LGBTQ Programs

§ Contract data collection issues

- Vendor applications?
- Bidders lists?
- Contract data collection?

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Trending Issues

§ Financial Services Programs

- Covers asset managers, bond underwriting, bond sales, etc.
- Assets under management versus annual gross receipts for size standards?
- Disparity studies?
  - § Data sources?
    Different paradigm?
- Personal net worth limits?
- Contract goals? Points? Setasides?

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Contract Goal Setting

- § 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 type and size of the contract: is subcontracting realistic?
      - § Goods contracts
      - § Professional services contracts
    - § Is the process described & the determination documented?
  - NY State lawsuit about how contract goal was derived

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Furnish and Deliver Contracts

§ Goals may only be set if there are identified subcontractable scopes of work

- Quotas and setasides are not legally permissible
- Beware pass-throughs and fronts
- Consider the effect on product warranties

§ Program enhancements

- Count second and lower tier M/WBE participation which could include these contracts
- Increase supplier participation to 60 percent from the current ceiling of 25 percent
- Expand the Program to industries beyond construction

Indirect M/WBE participation

- § "Indirect" participation on District contracts (*i.e.*, work not directly related to the District's contract)
  - Difficult and highly burdensome to track
  - Apportion to percentage value of District contracts?
  - What about multiple contracts?
  - Ceiling on percentage?
- § "Indirect" participation on non-District contracts (overall supplier diversity efforts)
  - Impossible to track
- § It should be an element of good faith efforts for bidders who did not meet the goal(s)

Intergovernmental Agreements

- § Purpose is to streamline and expedite the procurement process
- § Contract terms are set by the issuing agency, including M/WBE participation
- § Dictating new terms □ new contract
- § District efforts
  - Provide access to certification lists
  - Conduct outreach to certified firms

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