

Assuring Non-Discrimination in MBE/WBE Utilization In Non- Federally Assisted Contracts

PORT OF OAKLAND

Non-Discrimination Policy Additional Focus: Minority and Women-Owned Business Participation

In the last Board presentation, staff was asked to return to present strategies to enhance minority and women-owned business participation at the Port, including:

- The implications of doing a disparity study
- Legal framework
- Recommended action specific to MBE/WBE participation

Current Policies

	Non-Federally Assisted Program	Federally-Assisted Program
Port Current Practice	<p>Port Non-Discrimination Small Local Business Utilization Policy</p> <p>Preference pts for public works and professional services</p> <p>There are no race conscious goals.</p>	<p>FEDERAL DBE/ACDBE Program</p> <p>Have neutral goals:</p> <p>Disadvantaged Business Enterprise Program 10.28% overall goal</p> <p>Airport Concessions Disadvantaged Business Enterprise Program 20.26% overall goal</p> <p>DBE Definition: includes Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Native Americans, Hispanic Americans and Women.</p>
<i>To Pursue Race-Conscious Goals</i>	<p>This policy is based upon geography and size, and is not based upon ethnic background.</p> <p>Policy does not have racial preferences/goals.</p>	<p><i>To pursue race-conscious goals: Have to show evidence/study to demonstrate disparate contracting practices</i></p>

Disparity Study:

What Is It? How Is It used?

To study whether there is a statistically significant “disparity” between the rate of an agency’s use of MBE and WBE’s and the rate of availability of such MBE’s and WBE’s in the market

- Studied by each race and ethnicity and by gender
- Significant tool to support remedial efforts, may not be solely sufficient to support efforts
- Provides a look at past market practices and past contract awards to inform future policy decisions.
- Proposition 209 exception: where federal grant conditions require MBE/WBE programs

Disparity Study: Legal Framework

Proposition 209 prohibits use of “preferential treatment” based on race, sex, color, ethnicity, or national origin in public contracting (i.e. preferential points or goals not permitted), except:

- Where federal grant conditions require remedial measures; or
- Where there is evidence that an agency has “purposefully or intentionally discriminated against MBE’s and WBE’s” (i.e. more than just a “disparity”)

California Supreme Court addressed San Francisco MBE/WBE program under Proposition 209 in *Coral Construction v. San Francisco* (Cal. Sup. Ct., 2010):

- “Outright racial balancing is patently unconstitutional”
- “That the [U.S.] Constitution *permits* the race-based or gender-based preference hardly implies that the state cannot ban them altogether [under Proposition 209]”
- City must show that “City has purposefully or intentionally discriminated against MBE’s and WBE’s”

Disparity Studies: Legal Framework

City Charter Section 808:

“Every two years, the City shall conduct a race and gender disparity evaluation to determine if the City has been an active or passive participant in actual, identifiable discrimination within its relevant market place.”

- City has been intending to do a study, upon which the Port may rely for information.
- Query: Relevance given Proposition 209 and *Coral* case decision.

Two Examples of Public Agency M/WBE Policies without a Disparity Study

- East Bay Municipal Utilities District
 - MBE/WBE/OBE
- City and County of San Francisco
 - Local Business Enterprise Ordinance

EBMUD Contract Equity Program

- Primarily focuses on *subcontracting*
- Prime contractors must either meet percentage goals or demonstrate “Good Faith Outreach Efforts” regarding all “availability groups”

CONTRACTING OBJECTIVES			
AVAILABILITY GROUP	CONTRACTING CATEGORIES		
	Construction	Professional or General Services	Materials & Supplies
White Men	25%	25%	25%
White Women	9%	6%	2%
Ethnic Minorities (Men and Women)	25%	25%	25%

San Francisco Local Business Enterprise Program

- MBE/WBE and OBE (“Other Business Enterprises”) certification as subset of local business enterprises
- City must collect data on MBE/WBE/OBE availability. No preferential goals in the aftermath of the *Coral* case. Firms in certification included in outreach.
- “Good faith” efforts to assure non discrimination with measures such as outreach and soliciting bids from a diversity of contractors and subcontractors
- Provides for complaint and investigations procedures

Recommended Actions: MBE/WBE

- Analyze and compile historical data of Port utilization of MBE/WBEs
- Assemble MBE/WBE availability data to inform project-specific contracting/professional services
- Using guidance from data to prevent illegal discrimination through race-neutral means such as outreach and bid solicitations, including measures proposed as part of the recommended pilot program.

Recommended Pilot Program for Overall Nondiscrimination Policy

- Establish a minimum contract-by-contract participation target for small and very small local businesses, based on their market availability.
- Grant bid/rating preferences for joint partnerships
- Develop and implement a mentor-protégé program
- Unbundle large contracts into smaller contract opportunities and/or identify subcontracting scopes
- Conduct direct marketing/outreach to the small businesses with a matchmaking
- Institute robust surety bonding/financial assistance
- Refine data collection and tracking techniques to ensure accurate reporting of contractor participation data.

QUESTIONS?