

Equal Opportunity Office Review City of Peoria Disparity Study

Background

In April 2000, members of the African American religious and business communities met with former Mayor Bud Grieves to discuss a perceived lack of opportunity for African American contractors on city-funded construction projects.

In response and with the Mayor's approval former City Manager Michael McKnight directed the Equal Opportunity Office to begin an investigation of the issues raised and explore the commission of a disparity study. A disparity study is an analysis performed to determine the existence of discrimination based on race or gender in the awarding of construction contracting opportunities.

A number of state supported universities were contacted and asked to submit proposals for doing the study. Bradley University's Center for Business and Economic Research communicated its interest and in July 2003, the project was awarded to the University. Bradley was asked to analyze the use of Minority Business Enterprises, particularly African American, and Women Business Enterprises on city-funded construction projects over a ten-year (10) period, 1992 through 2001. The study took seven months to complete.

Legal Foundation

Disparity Studies are the primary means by which a governmental unit determines whether there is legal justification for establishing programs involving set-asides for a portion of work to be contracted with Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs). The Supreme Court defined the levels and nature of disparity that must be present to justify said programs. The two leading legal precedents that set forth program requirements are *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (*Croson*) and *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200 (1995).

In the two cases cited above, the Supreme Court announced a single standard for evaluating public contracting programs that classify businesses by race, ethnicity, or gender and provide preference to some of them. Federal, state, and local M/WBE programs must be subjected to a “**strict scrutiny**” standard in order to survive judicial review for legality. This standard is also well known as a “compelling interest”. Furthermore, the Court establishes that racial preferences can only be sustained if they are narrowly tailored remedies for carefully identified past discrimination and then, only if race neutral measures are not effective. For example, if there were instances of a defective procurement system, such as excessive bonding requirements that had an adverse impact on MBEs, the narrowly tailored race neutral solution would be to lower the bonding threshold. *Croson* considers the use of racial or gender based preferences as remedies an “extreme measure”, and should therefore, only be used as the last resort.

Disparity studies must be conducted within the guidelines articulated in the Court's majority opinion language in *Croson*. Therein, certain conditions for the statistical analysis of discrimination were set. Specifically, Justice O'Connor said:

"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, an inference of discriminatory exclusion could arise." (488 U.S. 469, 509)

Justice O'Connor's statistical test, as mentioned above, is very carefully worded. The test identifies several crucial requirements, which must be satisfied if a public body desires to use statistical analysis to justify the use of racial or gender based classifications in public contracting. The requirements are:

1. In comparing participation rates, the universe of M/WBEs and majority contractors should be similarly "qualified", and "willing and able". A mere headcount based on Census data or a vendor list of contractors located within or near a jurisdiction is not enough.
2. The businesses to be compared must be able to perform the same services.
3. There must be "a significant statistical disparity". This means more than just applying a statistical significance test to determine whether a result could have occurred by chance. The statistics must provide concrete evidence of significant systematic exclusion.
4. A balanced analysis of both statistical and anecdotal information must exist, before a narrowly tailored remedy can be attained.

The set-aside issue continues to be a hotly debated topic of municipal concern. This past summer, the U.S. District Court addressed the legality of race based set-aside programs in, *Builder's Association of Greater Chicago v. City of Chicago*, 298 F. Supp. 2d 725 (2003). In this case, the plaintiff, a builder's association based in Chicago, challenged the legality of Chicago's construction contract set-aside programs. The main issues were whether the City's program was appropriately remedial, whether there was sufficient evidence of a continuing need for the program, and whether the program was sufficiently narrowly tailored to avoid constitutional violations. The Court ultimately found that the City had a "compelling interest" in avoiding discrimination, and in preventing its tax dollars from perpetuating a market so flawed by past discrimination that it restricted existing M/WBEs from free competition. However, the Court determined that the City's program was not narrowly tailored to remedy either past discrimination or existing discrimination. The Court ordered an injunction designed to invalidate the City's program favoring M/WBE construction projects, but the injunction was

delayed for six months to afford the City an opportunity to prepare a new plan that adequately redressed the prior discriminatory policy.

Methodology

In the disparity study, Bradley had to assess the availability of African American and Women-owned construction firms. To be consistent with court rulings, they could only consider firms that were qualified, willing and able to perform on city-funded construction projects. Bradley utilized the Census data for the Peoria-Pekin Metropolitan Statistical Area (MSA), specifically the Economic Census of Minority & Women-owned Business for 1992 and 1997 to help make this assessment. The data in this report was broken down by minority group and gender; it was also separated by industry type, including construction.

The data showed that for both years African American firms made up a very small number of the construction businesses in our MSA. In 1992, African American businesses comprised only 1.10% (22 of 1,994) of all construction firms and 0.58% (3 of 516) of the firms with paid employees. By 1997, they comprised 0.81% (22 of 2,698) of all firms and 0.43% (4 of 917) of the firms with paid employees.

The availability of Women-owned businesses for the two years was much higher. In 1992, regardless of the number of paid employees, Women-owned businesses comprised 11.74% (234 of 1,994) of all construction firms and 14.73% (231 of 2,698) of the firms with paid employees. By 1997, the percentage of Women-owned businesses, regardless of the number of paid employees, declined to 8.56% (231 of 2,698) while increasing to 16.57% (152 of 917) for business with paid employees.

A further examination of the census data disclosed that it was the businesses with paid employees who obtained the vast majority of the construction sales for both years. Therefore, for the purposes of this study, Bradley considered businesses with paid employees as qualified, willing and able firms. Adoption of this premise meant only 3 African American and 231 Women-owned firms in 1992 and 4 African American and 152 Women-owned firms in 1997 were considered qualified to perform on city-funded construction projects.

After determining the availability of African American and Women-owned construction firms, Bradley then had to ascertain if both groups were not being utilized at a rate proportional to their numbers in the MSA. This was accomplished by calculating a disparity index. The index was calculated as follows:

Total revenues African American or Women-owned business received / total revenues all businesses received

Number of African American or Women-owned businesses available / all businesses available

It is worth noting here that because no African American and only one Women-owned business received a contract as a prime contractor, only the revenues derived from subcontracts were used to calculate the disparity index for both groups.

A disparity index of one (1) indicates there is full African American or Women-owned business participation. If the index is less than one (1) this demonstrates under-utilization. For disparity indices below .80, the courts have considered them determinative of significant disparity and proof of discrimination.

Over the study period, African American firms had years where the index showed over-utilization and significant under-utilization (See study for specifics). While there was no overall consistent trend, the disparity index for the last three years of the study did show a progressive increase. In fact, the disparity index averaged out to be 2.05 for the 10-year period, which meant African American firms were over-utilized.

However, for each study year, the index showed under-utilization for WBEs (See study for specifics). The index averaged out to be 0.15 for the 10-year period. By court standards this meant a substantial disparity existed, but Bradley did not consider it indisputable proof of discrimination. They believed other factors like business experience affected their participation.

A statistical analysis alone is insufficient proof of past discrimination. Per the courts, a valid disparity study must also use anecdotal evidence to help explain, interpret and support the statistical findings. The courts further said use of both statistical analysis and anecdotal evidence provides the best basis to demonstrate the existence of past discrimination. To gather this anecdotal information, confidential interviews were conducted with community leaders, African American and Women-owned businesses. The Equal Opportunity Office, upon request, provided Bradley a list of prospective community contacts that represented a variety of viewpoints (See attached list of contacts).

Major Findings and Conclusions

The Study resulted in a lack of evidence to support racial discrimination. African American contractors were not under-utilized by the City in the awarding of construction contracts over the 10-year period. Though no race discrimination was found, Bradley did find significant disparity in the rates of existing African American businesses relative to the proportion of black residents in the tri-county area. Based on what Bradley refers to as the availability ratio (the percentage of businesses with paid employees divided by the African American population of the MSA.), they concluded there should have been 20 times as many African American construction firms in existence in 1997.

The use of population figures to determine the availability rate for African American Construction firms is problematic because the African American

population figures include individuals who are legally too young to own or operate a construction company. Therefore, use of this factor is inappropriate.

Bradley further concludes outreach to African American contractors by prime contractors could be greatly improved. The study provides that out of the 81 projects where subcontracting was available, African American contractors were contacted for only 32 projects. A marked improvement in the contact of African American contractors over the latter years of the study period coincides with three things. This Office's creation of a more systematic approach to the monitoring of a prime contractor's outreach efforts, an increased utilization of personal meetings with prime contractors and the implementation of the Mentoring Independent Partners Program (MIPP). MIPP was an educational program for minority/women-owned construction firms. Through classroom instruction and in-the-field mentorship, eligible participants were provided technical assistance designed to increase their business acumen. The data showing improvement in the award of contracts to African American contractors over the latter part of the study period affirms this program and the previously mentioned initiatives produced positive results.

While for women-owned businesses, though the average disparity index (0.15) indicated there was statistical evidence of gender discrimination, there was no specific finding of evidence to prove the existence of such discrimination.

The past experiences of the Equal Opportunity Office suggest that the statistical proof of discrimination has more to do with the specialization of women-owned businesses. In the study, Bradley mentions 80 percent of all contract dollars received by women-owned businesses were for landscaping services. Typically, this scope of work produces the least amount of dollars, in terms of percentage of contract. So, even though women-owned businesses won 58 bids or 73 percent of the sub-contracts over the study period, their specialization caused a lower percentage of dollars to be awarded to them. Consequently, because of this low percentage the calculation of the disparity index gets skewed to favor under-utilization.

Recommendations

The study proposes recommendations to mitigate the issues impeding the utilization of African American and Women-owned construction firms on City projects. After each recommendation, in bold, is a response from the Equal Opportunity Office.

1. The City of Peoria, Equal Opportunity Office should be more vigilant in compelling prime contractors to contact African American contractors.

Some changes in how the City administers its monitoring responsibilities have already occurred. The Equal Opportunity Office instituted a systematic approach for collecting compliance information and a project to strengthen the specifications used to assess the good-

faith efforts of prime contractors is currently underway. The new language being developed will make the specifications more stringent. The goal is to have these new guidelines in place for enforcement during the 2004 construction season.

2. The City should work with other local governmental bodies to develop the same procedures and rules for construction contracting. The other governmental entities being Peoria Housing Authority, Peoria School District 150, Peoria County and Greater Peoria Sanitary District.

Though the report highlights how the Greater Peoria Sanitary District and the City are currently working through an intergovernmental agreement to enforce the same rules for construction contracting, this approach is not the solution to improving Minority/Women Business Enterprise participation. What will improve participation is consistency in the enforcement of whatever procedures and rules each entity has in place. The Equal Opportunity Office will work to facilitate consistent enforcement by meeting with the other governmental entities to discuss their compliance monitoring.

3. Anecdotal information disclosed there was a critical lack of business skills in African American firms. These needed skills should be provided through an individual consulting program for minority and women-owned firms.

The City understands and agrees with the Study's finding with regard to the lack of business skill and the need to enhance same. The City however, has neither the resources nor the expertise to assume responsibility for creating a program or strategy for addressing this issue. The City can be a partner in the dialogue necessary to how and where such a program can best be developed and directing the minority contractors with whom we have contact to that information source.

4. Anecdotal information indicated African American contractors had difficulty obtaining capital necessary to operate or expand their business. Bradley proposes that the City work with local financial institutions to provide capital and the City utilize the SBA loan programs administered by the Illinois Business Financial Services.

Access to financing for business operation and/or expansion is critical to the survival of any business. The City, through the Equal Opportunity Office is prepared to facilitate meaningful discussion between minority contractors, the banking community and other community-based organizations interested in devising a program that will best address this issue. Funding for this type of assistance could be derived from the dollars banks are mandated to expend under the Community Reinvestment Act.

5. Construction contractors emerge from people engaged in construction occupations. The City should mobilize resources for training workers in construction occupations as a way of fostering the development of construction firms.

The Equal Opportunity Office has worked proactively to encourage minority and female participation in the construction trades. By networking with groups like the Minority Advisory Coalition (MAC) Board and the Apprenticeship Information Committee (AIC), the office has assisted in the recruitment of candidates and the identification of issues that thwart participation.

6. The City should explore ways to expand the range of women-owned businesses bidding on City construction projects.

To get more diversity within the types of women-owned businesses bidding, the Equal Opportunity Office plans to undertake the following measures:

- **Contact women-owned firms in the City's M/WBE directory that have not bid on a project within the past three years and inquire why.**
- **Continue to send to WBEs mailings apprising them of contracting opportunities.**
- **Work with the local contractors association to identify women-owned firms not in the M/WBE directory, but who have the qualifications to bid as primes or subcontractors.**
- **Network with organizations that provide resources to women who wish to start and build a business in the construction industry.**

An additional item of note identified by Bradley University was that anecdotal information disclosed African American contractors were unable to secure a performance bond at competitive rates.

Current state statute requires bonding for public work costing over \$5,000. While we believe this level is too low, the statute may not be superseded by home rule and therefore, the requirement may not be waived. It may be necessary to work with our legislators to determine if support for a change in this statute exists. Providing assistance with the bonding process is a need that must be addressed. The City, through the Equal Opportunity Office and in collaboration with other interested partners is prepared to initiate meaningful dialogue between minority contractors and local surety companies to develop a program to improve the bond-readiness of these firms.

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