

## Acknowledgements

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# Introduction

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This manual explores procurement and compliance best practices used by regional agencies that provide enforcement and oversight for business and workforce inclusion programs. In an effort to produce equitable outcomes for disadvantaged firms and workers<sup>1</sup>, this manual documents best practices – programs, techniques and methodologies – that are, or have been, successful in any of the following focus areas:

## **Business Inclusion**

- Disparity Study
- Best Value Procurement
- Certification
- Goal Setting
- Good Faith Efforts
- Contract Monitoring
- Business Development/ Supportive Services and Technical Assistance

## **Workforce Inclusion**

- Affirmative Action Plan

## **Accountability**

- Non Compliance Strategies

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<sup>1</sup>In this manual the term disadvantaged business refers to a business which has been discriminated against by current or historical exclusionary practices in the solicitation and awards of procurement opportunities. This includes, but is not limited to, minority-owned businesses, women-owned businesses, veteran-owned businesses, and small businesses. The term disadvantaged workers refers to workers who are/have been discriminated against by current or historical exclusionary employment practices. This includes, but is not limited to, women and minorities.

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# Background

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In March 2015, the Minneapolis Department of Civil Rights (MDCR) was asked to research and identify the best practices and processes used on the projects in Minneapolis and the region that have been most successful in meeting workforce and business inclusion goals. To complete this task, MDCR enlisted the help of its regional partners. In April 2015, MDCR invited agencies to share best practices, promising programs, and techniques and methodologies in “best practices conference calls”.<sup>2</sup> MDCR provided participants with guiding questions to stimulate conversation. From April 2015 to May 2015 MDCR hosted four conference call discussions: two focused on business inclusion and two focused on workforce inclusion. Later that spring, MDCR developed a questionnaire which allowed agencies to provide detailed accounts of the policies and practices utilized in their organizations<sup>3</sup>.

While collecting information, MDCR learned that many agencies wanted to gather for a regional discussion on best practices, which would include both procurement staff and compliance practitioners. Acting on this request from practitioners, MDCR convened administrators and practitioners of both business and workforce inclusion programs to discuss initiatives and practices that maximize inclusion. From this initial convening a valuable regional collaboration has evolved. This collaboration is known as the “Best Practices Roundtable” (Roundtable).

The Best Practices Roundtable is led by administrators from the following organizations: Minnesota Department of Administration, Minnesota Department of Human Rights, Minnesota Department of Transportation, Minnesota Sports Facilities Authority, Metropolitan Council, Metropolitan Airports Commission, Hennepin County, Ramsey County, City of Minneapolis, City of St. Paul, and the University of Minnesota.

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<sup>2</sup>Invited agencies include: The Office of Governor Mark Dayton, Minnesota Department of Administration, Minnesota Department of Human Rights, Minnesota Department of Transportation, Minnesota Sports Facilities Authority, Metropolitan Council, Metropolitan Airports Commission, Hennepin County, Ramsey County, City of Minneapolis, City of St. Paul, and the University of Minnesota.

<sup>3</sup>Conference Call Guiding Questions

What is the purpose of the program, technique, methodology (hereafter referred to as technique)? How long has the technique been in existence? How is the technique implemented? How long did it take for the technique to become effective? What are the technique’s key successes? What tools are used to measure effectiveness? What is needed to make the technique more successful? Describe recent and future attempts targeted at technique improvement. Were there mistakes/opportunities for growth? Are there things you know now that you wish you knew at the onset of technique implementation? Describe the challenges encountered when implementing this technique. Provide general advice for those attempting to model your technique.

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Roundtable members include both contract compliance and procurement staff of the respective organizations.<sup>4</sup> Since its inception, the Best Practices Roundtable has worked to equip regional contracting practitioners and procurement staff with the tools needed to fulfill their responsibility to include women, minority, and small businesses and women and minority workers in projects and contracts. The Best Practices Roundtable facilitates **information sharing, training and development, and process improvement**. Today, the Best Practices Roundtable emerges as a leading forum for equitable contracting/procurement process improvement discussions and planning.

### **Information Sharing**

On June 24, 2015 the Minneapolis Department of Civil Rights, Minnesota Unified Certification Program (MNUCP), and the Government Alliance on Race & Equity hosted the first regional Best Practices Roundtable. The Roundtable was divided into two segments. During the morning, participants shared testimonies of inclusion efforts which they are most proud of and which have achieved the most success. Participants next identified the most challenging issues and barriers to successful inclusion. Julie Nelson, Director of Government Alliance on Racial Equity, presented on national best practices used by government agencies involved in equitable contracting.

In the afternoon, participants separated into small workgroups and non-participatory facilitators led a series of breakout sessions. Equipped with flipcharts and probing questions, participants began building a catalog of best practices in the following focus areas: Certification, Goal-Setting, Good Faith Efforts Use and Evaluation, Contract Monitoring, Contractor Compliance Reviews, Handling Violations, Supportive Services & Technical Assistance, Race & Gender Neutral Initiatives, Business Development, Use of Technology, Work Force Planning and Projection, and Affirmative Action Compliance Reviews.

Afterwards, representatives from each of the breakout groups summarized their work. During the presentations, participants were encouraged to ask questions and offer constructive feedback. At the conclusion of the day, participants pinned three distinct recommendations for future work:

1. Continued Regional Collaboration
2. Develop a Best Practices Manual
3. Capture Demographic Information (Disparities Study)

### **Training and Development**

On December 2, 2015, the Minneapolis Department of Civil Rights, the Metropolitan Council, the City of St. Paul, and the University of Minnesota hosted the second Best Practices Roundtable. For the second convening, the Roundtable collaborative partnered with two of the nation's leading experts in government and business procurement, and contracting and government racial equity.

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<sup>4</sup>Minnesota Department of Administration, Minnesota Department of Human Rights, Minnesota Department of Transportation, Minnesota Management and Budget, Minnesota Sports Facilities Authority, Metropolitan Council, Metropolitan Airports Commission, Hennepin County, Ramsey County, City of Minneapolis, City of St. Paul, and the University of Minnesota.

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Colette Holt, of Colette Holt and Associates, and General Counsel to the American Contract Compliance Association, presented on best practices in contracting inclusion, and provided a synopsis of the most recent updates in legal standards. Colette's presentation was useful as it informed participants not only of best practices for increasing business and workforce inclusion but, equally as important, how to ensure these efforts are within the confines of legal mandates. Julie Nelson, Director of Government Alliance on Racial Equity, discussed the importance of viewing procurement improvement through a racial equity lens and explained how efforts to promote equality yields a robust economy for all.

### **Process Improvement**

After the December convening, the Best Practices Roundtable decided to drill deeper in small group discussions. Participants self-elected to develop process improvement solutions in the following areas: Business and Workforce Certification, led by Jessica Kingston, City of St. Paul; Best Value Procurement, led by Christopher Gran, Hennepin County; Business Development, led by Dan Bonilla, City of Minneapolis; and Regional Workforce Collaborations, led by Kevin Lindsey, Minnesota Department of Human Rights. On March 30, 2016, the small work groups presented their recommendations to the larger convening.

## Process

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This manual was principally authored by the Minneapolis Department of Civil Rights (MDCR); however the content reflects the work of a regional collaborative. Recognizing the importance for guidance, this manual compiles information gleaned from Roundtable discussions. The information found in this manual is a compilation of both anecdotal and academic research.

In assembling this manual, MDCR developed an inclusion practices questionnaire which was completed by regional content experts and researchers. MDCR also reviewed regional literature and law, summarized existing programs and initiatives, and analyzed the effectiveness of current efforts.

## Glossary

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**CERT** - Central Certification Program –The Central Certification Program is a small business certification program recognized by Hennepin County, Ramsey County and The City of Saint Paul. The CERT Program includes certification for Minority-Owned Business Enterprise (MBE), Women-Owned Business Enterprise (WBE), and Small Business Enterprise (SBE).

**Disadvantaged Business Enterprise (DBE)** – In this manual disadvantaged business enterprise refers to businesses certified through the federal program established by Congress. To be certified as a DBE, a firm must be a small business owned and controlled by socially and economically disadvantaged individuals. DBE Regulations 49 C.F.R. Part 23 and 49 C.F.R. Part 26 describes entire certification requirements.

**Disadvantaged Firms** – In this manual the term disadvantaged firms refers to a business which has been discriminated against by current or historical exclusionary practices in the solicitation and awards of procurement opportunities. This includes, but is not limited to, minority-owned business, women-owned business, veteran-owned business, and small businesses.

**Disadvantaged Workers** – In this manual the term disadvantaged worker refers to workers who have been discriminated against by current or historical exclusionary employment practices. This includes, but is not limited to, minorities and women.

**MNUCP** – Minnesota Unified Certification Program –A group of state and local agencies who work together to certify small women-owned and small minority-owned businesses to participate in business inclusion programs in US Department of Transportation-funded initiatives and in the City of Minneapolis Small and Underutilized Business Program. The current certifying agencies are: City of Minneapolis, Metropolitan Airports Commission, Metropolitan Council, and the Minnesota Department of Transportation.

**Primary Contract Recipient** – In this manual the term primary contract recipient refers to a non-disadvantaged business awarded a contract.

**Race- and Gender-Conscious** – In this manual race- and gender-conscious refers to a program that is focused specifically on assisting minority and women firms.

**Race- and Gender-Neutral** – In this manual race- and gender-neutral refers to a program that is, or can be, used to assist all small businesses, without making distinctions or classifications on the basis of race or gender.

**Sub-Contractor** – This refers to a disadvantaged business which has received a portion of work from a primary contract recipient.

**TGB** – Targeted Group Business – Term used to identify Targeted Group, Economically Disadvantaged and Veteran-Owned small businesses. These firms are designated as such by the Commissioner of the Minnesota Department of Administration. Targeted Group small businesses must be certified as such by the Materials Management Division in order to participate in the State's procurement program.



# Building Successful Business and Workforce Inclusion Programs

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Inclusion does not occur by happenstance. It requires intentional commitments and collective efforts. Generally speaking, the process to successful business and workforce inclusion includes six deliberative steps.



## **Value and Commitment**

Success begins with a commitment from elected officials, followed by executive leadership support, and culminates through the work of fully capable and equipped staff. Each Roundtable participant represented an organization whose stated commitment provides that we must confront discrimination to remedy its past effects on historically disadvantaged persons, and that discrimination menaces the institutions and foundations of democracy, degrades individuals, fosters intolerance and hate, and creates and intensifies socio-economic disparities.

## **Statute, Ordinance, Policy**

A statute, ordinance, or policy serves as a sound expression of the elected body/organization administrator, to commit them to addressing past and present discrimination.

## **Strategies & Resources**

To be effective, business and workforce inclusion programs must have sufficient tools necessary to sustain procurement initiatives and enforce compliance. Such tools include both adequate staffing and technology.

## **Goals & Accountability**

Goals are the targets that drive the work to provide opportunities for disadvantaged firms and workers. Successful programs set aggressive goals and hold contract recipients accountable for making sure goals are met.

## **Evaluation & Accountability**

Self-evaluation is critical. Successful business and workforce inclusion programs are comprehensive and pursue continuous improvement through consistent opportunities for program analysis and feedback. Additionally, such programs are accountable for both successes and disappointments and work earnestly to correct errors.

# Barriers to Business and Workforce Inclusion Programs

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Even though there are many intentional efforts in the region to foster growth and development for disadvantaged firms, many are still struggling to survive or prosper. These struggles continue despite the vested interest of government, community, and business stakeholders. Likewise, similar earnest efforts to increase the number of disadvantaged workers on projects often yields unfavorable outcomes. As a result, business and workforce inclusion programs are scrutinized for effectiveness. Roundtable member organizations all experience challenges to business and workforce inclusion. Over the past several months, the group has worked to catalog the most pressing common challenges in the region and propose process improvement solutions. These challenges and solutions inform the best practices set forth in the manual.

## Common Challenges Across The Region

### **Businesses**

- Insufficient number of firms to meet demands
- Lack of capacity by eligible business to meet demand

### **Workforce**

- Insufficient supply of workers to offset demand

### **Agencies/ Organizations**

- Different compliance thresholds across different agencies
- No way to consistently measure inclusion performances
- Institutional knowledge is lost with practitioner turnover
- Lack of commitment by leadership at all levels

## Proposed Process Improvement Solutions

### **Create A State Program To Support Business Development And Technical Assistance For Disadvantaged Firms.**

Many Roundtable member agencies/organizations - including BTAP<sup>6</sup> (City of Minneapolis) and Mentor Protégé<sup>7</sup> (Minnesota Department of Transportation) - provide supportive services and technical assistance to disadvantaged firms. However, the various programs are limited in their capacity to serve all disadvantaged firms in the region. Creating a standard state program to support disadvantaged firms would allow for maximum benefit.

### **Standardize Threshold For Workforce Inclusion.**

There are many different thresholds for workforce inclusion/participation throughout the region. The current thresholds are: State (\$100K), City of Minneapolis (\$50K), and University of Minnesota (\$500K). This is confusing for contractor participants, but could be resolved with legislation.

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<sup>6</sup>Minneapolis Business and Technical Assistance Program See Promising Programs

<sup>7</sup>See Promising Programs

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**Provide Training And Development Opportunities For Procurement And Compliance Staff.**

The success of business and workforce inclusion programs is challenged most greatly by the inadequate staffing and the loss of institutional knowledge in practitioner turnover. The Best Practices Roundtable has begun to take on this challenge by developing this manual which chronicles best practices, bringing in guest lecturers to inform practitioners on legal updates, and hosting an implicit bias training for procurement and compliance staff. However, these works need to be further developed and made available to more practitioners.

## Why Inclusion Matters

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The guiding regulations for many regional equity and inclusion programs state that the programs exist to confront discrimination and to remedy the effects of past discrimination against historically disadvantaged persons. It is immediately evident to anyone reading that these organizations believe that discrimination menaces the institutions and foundations of democracy, and degrades individuals, fosters intolerance and hate, and creates and intensifies socio-economic disparities. Thus, it follows that the business and workforce inclusion initiatives described in this manual are adopted to correct or compensate for past or present discrimination and/or to prevent discrimination from recurring in the future.

Many of the inclusive business and workforce practices highlighted in this manual mirror or implement federal policies and programs. It has long been the policy of the federal government to help small businesses become fully competitive. Federal policy makers have endeavored to assist minority- owned and other disadvantaged small businesses in becoming viable, competitive enterprises since at least the 1950's. These efforts have largely focused on the federal procurement process, and have emphasized set-asides or preferences for, or mandatory participation by, minority business enterprises (MBEs) and other disadvantaged business enterprises (DBEs) in federal contract and subcontract awards.

Such programs were enacted as a response to specific executive and congressional findings that widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority owned businesses to have an equal chance at developing in our economy.<sup>8</sup> This congressional cognizance was recognized by the Court in *Fullilove v. Klutznick*, when it upheld a set-aside program established by Congress at the Department of Transportation.

In *Fullilove*, Chief Justice Burger reviewed the legislative history of the Public Works Employment Act of 1977 and its documentation of the extensive history of discrimination against minorities in contracting, especially federal procurement. The Chief Justice quoted from the 1977 Report of the House Committee on Small business, which explored discrimination in contracting in the construction industry and found: "The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation."<sup>9</sup> The report concluded that "minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular."<sup>10</sup>

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<sup>8</sup>Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1979).

<sup>9</sup>58 *Fullilove*, 448 U.S. at 466 n.48, quoting H.R. Rep. No. 1791, 94th Cong., 2d Sess., p. 182 (1977).

<sup>10</sup> *Id.*

<sup>11</sup> Thomas J. Hasty, *Minority Business Enterprise Development and the Small Business Administration's 8(a) Program: Past, Present, and (Is There a) Future*, 145 *MIL. L. REV.* 1 (1994) (citing H.R. REP. No. 97-956 1982 stating that minority businesses traditionally have been "hit first, hit hardest, and hit longest" in troubled economic times)

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Congress has also recognized that in troubled economic times “minority business has been traditionally that segment of the economy ‘hit first, hit hardest, and hit longest.’”<sup>11</sup> As a result, the federal government implements a wide range of socioeconomic programs through the federal procurement process, and uses federal procurement agency dollars, specifically appropriated for goods and services, to support these programs.

Federal assistance comes in many forms and includes preferential treatment in obtaining procurement contracts and subcontracts, management and technical assistance, grants for education and training, loans and loan guarantees, and surety bonding assistance. The legal timeline found in Appendix A gives a complete overview of the evolution of the federal DBE programs and constitutional requirements and justifications for inclusion programs. It outlines the origins of disadvantaged business enterprise programs, judicial responses to DBE programs, and state and local government responses. The legal standards outlined influence best practices described in this manual.

# Best Practices Business Inclusion

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# Disparity Study

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A Disparity Study determines whether an agency, either in the past or present, engages in exclusionary practices in the solicitation and award of contracts to minority - and women -owned business enterprises. Disparity studies are commissioned by a city, county, agency, etc. to determine if there is disparity between the availability of firms in a market area and the utilization of those firms by a city, county, agency, etc.

An affirmative action contracting program, in order to be deemed constitutional, must pass strict scrutiny. First, the legislative body must state a compelling governmental interest. Second, such a program must be narrowly tailored – it must not be overly broad and must suit the defined, specific purpose for which it was created. A Disparity Study provides the analysis and evidence that satisfies “narrowly tailored”.

To institute a **race-and gender-conscious policy**, a public entity must show that it has a “strong basis in evidence” for its conclusion that remedial action (e.g. race- and gender-based goal setting) was necessary. A disparity study is based on a collection of gross statistical data. Such statistical data demonstrates a strong basis in evidence. Using this data, a disparity study provides an analysis of whether there is a constitutional rationale for race- and gender-conscious programs. This analysis is the evidence used to defend a challenge to the constitutionality of race- and gender-conscious policies and allows programs to satisfy the strict scrutiny standard applied by the courts.

## Best Practices for Comprehensive Disparity Study

- Study includes comprehensive legal review.
- Study determines availability of disadvantaged firms.
- Study determines geographic marketplace.
- Study determines product marketplace.<sup>12</sup>
- Study determines utilization of disadvantaged firms (based on scope of program).
- Study conducts economy-wide disparity analysis outside of respective agency affirmative action programs.
- Study includes anecdotal evidence (qualitative evidence).
- Study includes a program review and provides recommendations.

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<sup>12</sup>In this manual the geographic marketplace refers to the region which accounts for a majority of overall contracting and procurement spending by a given disadvantaged business program.

# Best Value Procurement

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Best Value Procurement is a process by which other factors, in addition to price, may be considered in evaluating a bid. Other factors may include timeliness of performance, customer satisfaction, on- budget performance, and equity. Best Value Procurement allows business and workforce inclusion programs to consider the intended use of disadvantaged firms and individuals in the contract awarding and bidding process.

For contracts in which disadvantaged firms may not be able to participate as a prime contractor, Best Value Procurement allows non-disadvantaged firms to assemble a team with strong disadvantaged business participation, and that participation will then be evaluated and scored by the public agency as one of the evaluation factors used to award the contract.

As previously mentioned, traditionally price has been the sole factor considered in selection of construction contractors by state departments of transportation. Best Value Procurement allows other factors, such as qualifications, schedule, quality, and performance-based criteria, to be used in evaluation and selection.

The best value method rewards proposers who work to advance participation of disadvantaged individuals as opposed to the traditional low bid method, where the contract is awarded to the low-priced bidder and the contractor's compliance with the business inclusion requirements are monitored by the public agency.

## Best Practices for Best Value Procurement

- Use the best value approach when a project has unique objectives or challenges that may be difficult to meet using traditional low-bid procurement.
- Early coordination with the contracting industry will allow the industry to prepare for best value procurement and increase competition on the project.
- Determine the pass/fail best value evaluation criteria that will be used in the procurement. Evaluation criteria should be based on the elements that will bring the most value to the project.
- The RFP<sup>13</sup> document should state that participation is an evaluation factor, and it should identify the relative weight it will receive.
- Host optional pre-bid conference prior to submission of technical proposals and cost proposals. Technical proposals should be reviewed in detail at the pre-bid conference (or at least two weeks before receiving cost proposals) as to accurately assess responsibility.

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<sup>13</sup>Request for Proposal



# Certification

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Certification by a purchasing agency ensures that only eligible businesses gain access to the appropriate affirmative action contracting programs.

For the purpose of counting business participation toward race- and gender-conscious goals, the recommended best practice is to accept business certifications that mirror the U.S. Department of Transportation's Disadvantaged Business Enterprise Program, contained in 49 C.F.R. Part 26, to the greatest extent feasible.

The criteria for eligibility, and the implementing provisions of Part 26, have been unanimously upheld by the courts, and satisfy the "narrow tailoring" component of the court's "strict scrutiny" analysis.

There are three primary certifications used regionally: Minnesota Unified Certification Program (MNUCP), the Central Certification (CERT) Program, and the Targeted Group Business Program (TGB).

## Best Practices for Certifying Disadvantaged Firms

- Perform an on-site visit and interview.
- Check applicant's personal net worth and firm's gross receipts.
- Review owners' resumes.
- Review the process by which the company was founded.
- Scrutinize ownership transfers, independence issues, and familiar relationships. (It is further recommended that if an agency has the available staff and resources, it should also receive and evaluate application requests for certification as part of the Minnesota Unified Certification Program (MNUCP) collaborative<sup>14</sup>.)
- Participate in online certification training.<sup>15</sup>
  - The National Highway Institute offers training that explains the historical foundation of disadvantaged business enterprise programs<sup>16</sup> and sets down a process by which to perform a full review and analysis of businesses seeking certification. The training provides an interactive understanding of how to apply regulations through scenario-based learning modules.

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<sup>14</sup><http://mnucp.org/about.htm>

<sup>15</sup>FHWA Training Course

<sup>16</sup>Id.

## Goal Setting

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Goal setting is used to determine what percentage of disadvantaged firms represent all firms that are ready, willing, and able to compete for contracting. This best practice establishes an avenue for accountability and provides a metric for success.

There are two key types of goal setting: annual overall goal setting and project/contract specific goal setting. It is recommended that contracting agencies use both types of goals.

### Best Practices for Goal Setting

- Set both annual goals and project/contract specific goals. Goals for a particular solicitation should reflect the particulars of the contract, not reiterate annual aggregate targets; goals must be contract specific.<sup>17</sup>

### Overall Annual Goal-Setting

For a delineated guideline of goal-setting best practices, review the United States Department of Transportation [Tips for Goal Setting in the Disadvantaged Business Enterprise Program](#)

- Federal regulations and guidance outline processes and considerations for setting realistic and defensible overall goals. Such guidelines are set forth in 49 CFR Part 26 §26.45.
- Set contract goals based upon availability of DBEs to perform work. Use availability data from a disparity study specific to the DBE program's geographical area.
- Show your work. It is extremely important to include all of your calculations and assumptions in your submission, so that evaluators can follow your thinking process.<sup>18</sup>

### Contract/Project Specific Goal Setting

- Set contract goals based upon availability of disadvantaged firms to perform the anticipated scopes of subcontracting.
- Again, use Disparity Study to determine actual disadvantaged firm availability. However, calling firms during the goal-setting process is often a good idea if you have the time – especially if there appears to be borderline availability.<sup>19</sup>
- Consider location, scopes of work, cost of each scope of work, and availability of small subcontractors to perform those scopes.
- Have an in-depth understanding of your agency, community, and program, past utilization, and any other factors that may impact the ability of firms to meet the goal.

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<sup>17</sup>When setting project specific or contract specific goals, it's important for practitioners to work with the project experts.

<sup>18</sup>[Tips for Goal Setting in the Disadvantaged Business Enterprise Program](#) "Set out explicitly what your data sources were, what assumptions you made, how you calculated each step of the process, etc. Along these lines, you should make sure that your goal submission contains a clear description of your public participation process, a good summary of the comments received during that process and a summary of what, if any, changes were made based on those comments. Without this information, it is difficult for anyone to evaluate the actual goal you have selected."

<sup>19</sup>Questions for Consideration: Ask firm if they can do the needed type of work. Ask if they can handle the size of the project. Ask if they are busy, or available, during the expected work period. When calling disadvantaged firms and you notice that certain firms are unreachable more than once, they may not need to be considered "available". Or, the contact info in the directory may require updates.

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- Consider the physical space where the project will be performed. Consider spacing restrictions on the job site. Is there room for crews and equipment from multiple firms?
  - If a contracting agency often chooses to set separate disadvantaged firm (small, minority-owned, women-owned etc.) goals on its contract, the agency should combine (aggregate) those goals when appropriate. Small overall project size, and/or a limited number of significant subcontracting opportunities may warrant one combined goal instead of many goals.
  - Many questions relevant to setting a particular contract goal may remain unclear until the goals are already set and the job is underway. Contracting agencies should set contract-specific goals based on the best information available at the early stages of the project. Again, at least one court has ruled goal-setting is not an exact science.

# Good Faith Efforts

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Requiring a showing of “good faith efforts” ensures primary contract recipients work earnestly to include DBE in subcontracting opportunities. Good faith efforts are the steps taken to achieve a contract goal which demonstrate that the bidder took all necessary and reasonable steps to achieve a DBE goal, such that it could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful. Good Faith Efforts are monitored by business and workforce inclusion program compliance staff.

## Best Practices for ensuring contract recipients make Good Faith Efforts **Pre-**

### Award

- Set expectations and describe good faith efforts during pre-bidding conversations.
- Describe good faith efforts as “actual work”. Encourage primary contract recipients to exhaust every option to ensure goals are met.
- Engage in a thorough discussion of what efforts would be deemed unsatisfactory and provide specific examples.
- Distribute a list of types of actions which will be considered as part of the bidder’s good faith efforts to obtain disadvantaged firm participation.
- Have potential contract recipients submit disadvantaged firm utilization Plan.
  - a. Firms included in the utilization plan should be certified at the time of bid/proposal submittal.

*Types of actions which you should consider as part of the bidder’s good faith efforts to obtain disadvantaged firm participation during pre-award process:*

- Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified disadvantaged firms who have the capability to perform the work of the contract.<sup>20</sup>
- Selecting portions of the work to be performed by disadvantaged firms in order to increase the likelihood that the DBE goals will be achieved.<sup>21</sup>
  - This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.<sup>22</sup>
- Providing interested disadvantaged firms with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.<sup>23</sup>
- Making efforts to assist interested disadvantaged firms in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.<sup>24</sup>
- Making efforts to assist interested disadvantaged firms in obtaining necessary equipment, supplies, materials, or related assistance or services.<sup>25</sup>

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<sup>20</sup>Effective Good Faith Efforts American Contract Compliance Association 2015 ACCA National Training Institute by Armand Resource Group, Inc.

<sup>21</sup>Id.

<sup>22</sup>Id.

<sup>23</sup>Id.

<sup>24</sup>Id.

<sup>25</sup>Id.

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- Effectively using the services of available minority/women community organizations and minority/ women contractors' groups.

### Post Award

- Include in each contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with program requirements.
- Distribute and maintain a list of qualified disadvantaged firms that can be solicited for construction, equipment, services and/or supplies and make it available to contract recipient.

### Procedural Requirements

- Require that a prime contractor not terminate a disadvantaged firm without your prior written consent.<sup>26</sup>
- Require monthly DBE progress reports (primary contract recipient and disadvantaged firm)
- Require submittal of subcontract agreements/purchase orders.
- Require contractor give notice in writing to the subcontractor, its intent to request to terminate and/ or substitute, before transmitting to you its request to terminate and/or substitute a subcontractor.<sup>27</sup>

### Good Faith Efforts Determination

In determining whether a bidder has made good faith efforts:

- Consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made.
- Take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal.

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<sup>26</sup>Id.

<sup>27</sup>Id.

# Contract Monitoring

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Contract monitoring requires that contract recipients submit proof of their compliance with the terms of their contracts and provide proof of disadvantaged firm utilization. Contract monitoring is critical because oftentimes disadvantaged firms that are listed to meet goals are substituted or have the scope of their work reduced by the prime contract recipient after award.

## **Best Practices for Contract Monitoring**

- Encourage disadvantaged firms to raise complaints immediately as they arise.
- Verify and approve subcontractor participation commitments.
- Monitor payment activity.
- Certified Payrolls
  - Determine what software is best for your program and the contractors you work with. Quick Pay is an example of a program designed to find a way for businesses to be paid faster.
- Conduct compliance reviews
- Desk audits
- Project and/or office on-site visits.
- Interview participants to determine contractor's compliance status.
- Verify payments to disadvantaged firms, either as the project progresses, after project completion, or both.
- Facilitate qualitative tracking - discussions with General Contractors, DBEs, and stakeholders (Community Progress Meetings).

# Business Development/Supportive Services and Technical Assistance

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Business Development programs provide supportive services and technical assistance to disadvantaged firms.

## **Best Practices for Providing Business Development/Supportive Services and Technical Assistance**

- Collaborate with other local agencies to provide supportive services. o
  - Joint Procurement Fairs
    - Joint Networking Events
- Help disadvantaged firms establish on-going relationships with suppliers for better pricing, payment terms, etc.
- Help disadvantaged firms develop relationships with prime contractors in their area of expertise.

## **Examples of Business Development Programs**

### **Minnesota Department of Transportation Mentor Protégé Program**

#### [Program Overview](#)

The Mentor Protégé Program was started to give DBEs the help they need to build their businesses and successfully compete for work in transportation related contracts. The program is designed to increase the statewide capacity and availability of DBEs and help the prime consultant or contractor develop relationships that foster DBE participation on projects. Mentors receive credit to partner with DBEs, and DBEs receive assistance to foster their business development. Common types of assistance includes: cash flow analysis, marketing plan, bidding, estimating technical assistance, equipment utilization, financial counseling, bonding, capital formation, record keeping, business planning.

### **Minneapolis Business and Technical Assistance Program (B-TAP)**

#### [Program Overview](#)

The Business Technical Assistance Program or B-TAP program was created to provide consulting support to businesses located in the City of Minneapolis. Through B-TAP, the City contracts with local non-profit organizations focused on entrepreneur training and economic development to provide direct services to new and existing businesses. B-TAP assists entrepreneurs who are: considering starting a new business in Minneapolis; looking to expand business operations in Minneapolis; pursuing certification as a minority- or woman-owned disadvantaged business; need general business advice (i.e. guidance on payroll withholding, ensuring their business licenses are in order, creating or improving their business marketing strategy) to retain their existing business operations in Minneapolis.

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## City of Saint Paul Community Technology Empowerment Project (CTEP)

### [Program Overview](#)

To help small businesses participate in public contracting opportunities, Contract Compliance works closely with numerous community partners that provide resources and training opportunities to local small businesses and residents.

Through CTEP, the City of St. Paul Contract Compliance office has partnered with the St. Paul Public Libraries to provide assistance for businesses navigating the city's compliance and procurement systems. Businesses needing technical assistance on city compliance systems visit Saint Paul Libraries for technical support. St. Paul Public Libraries also offer résumé and computer skills classes.

## Examples of Business Development Collaboration Events

### Constructing Success

Constructing Success is a multi-agency event that is held every other year and brings together the best of the region's major prime contractors, small businesses, and community leaders for a day-long series of workshops led by industry professionals.

Participants:

Associated General Contractors of MN

- Association of Women Contractors
- City of Minneapolis
- City of Saint Paul
- Hennepin County
- Hispanic Contractors Association of Minnesota
- Metropolitan Airports Commission
- Metropolitan Council
- Metropolitan Economic Development Association
- Minnesota Department of Administration
- Minnesota Department of Human Rights
- Minnesota Department of Transportation
- National Association of Minority Contractors
- Ramsey County, Small Business Association
- University of Minnesota
- Veteran-Co



# Best Practices Workforce Inclusion

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# Affirmative Action

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An Affirmative Action Plan (AAP) is a combination of policies and procedures a company uses to prevent discrimination and promote equal employment opportunities. The AAP gives the contract recipient an opportunity to analyze its workforce, determine problem areas, and develop action-oriented programs to address issues of underutilization of disadvantaged workers. Business and workforce inclusion program administrators should require all primary contract recipients to complete and maintain an AAP.

## Best Practices for Affirmative Action Plan

- Require contract recipients include the following items in its AAP<sup>28</sup>:
  - Company policy statement.
  - Assignment of affirmative action/equal employment opportunity responsibilities. o Procedures for dissemination of policy and plan.
  - Workforce analysis, including availability and utilization analyses. o Goals, objectives and timetables for completion.
  - Identification of deficiencies or problem areas.
  - An internal auditing and reporting system to measure progress.
- Conduct a desk audit of all AAPs submitted. An Audit Review should include<sup>29</sup>
  - Thorough review of data contained in or in support of the plan.
  - In-depth analysis when apparent deficiencies are determined in contractor's utilization of minorities, women or qualified disabled individuals.
  - Employee interviews as appropriate.
  - Review of any other materials relevant to determination of compliance.

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<sup>28</sup>Minnesota Department of Human Rights, Affirmative Action Plan Requirements, [http://mn.gov/mdhr/compliance/aa\\_plan\\_requirements.html](http://mn.gov/mdhr/compliance/aa_plan_requirements.html)

<sup>29</sup>Id.

# Best Practices Accountability

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# Non-Compliance Remedies

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Non-compliance remedies are best practice techniques that hold primary contract recipients accountable for their responsibility to include disadvantaged firms and workers on projects after goals have been set.

## **Best Practices for Non-Compliance Remedies**

- Withholding of payment to the contractor under the contract until compliance is achieved.
- Disallow use of funds for all or part of the cost of the activity or action not in compliance.
- Suspend or debar the developer, contractor, subcontractor, supplier, vendor or sub-recipient as ineligible for all current or potential contracts.
- Terminate contract.
- Designate the developer, contractor, subcontractor, supplier, vendor or sub-recipient as high-risk for future contracts and require increased reporting, audits, or similar.
- Denial of future awards for a period of up to three years; or Contract termination.

# Best Practices Profiles of Promising Programs

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## Promising Programs

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The programs described in this section of the manual represent new or recent initiatives which show great promise. To learn more about a specific program please contact the submission sponsor identified at the beginning of each profile.

### **Program Name: Quick Pay**

**Summary Submitted by: Hennepin County Purchasing & Contract Services**

#### **Stated Purpose**

- This program is designed to find a way for small businesses that are certified under the county's Small Business Enterprise (SBE) Program to be paid faster.
- Small businesses face an uphill battle when competing for work on county construction projects. A significant barrier for small businesses is covering initial expenses while they wait to get paid. A small business often needs to purchase long-lead time materials early in the project, and they may not be reimbursed for 90 days or more. This forces the small business to bid a high price that includes the cost of a loan for the materials, or they forgo bidding on the project. In addition, five percent is held back until the jobs are certified as complete.

#### **How is the program implemented?**

- A cross-functional team was identified and challenged to find a way for small businesses that are certified under the county's Small Business Enterprise (SBE) Program to be paid faster. The team was made up of representatives from Purchasing involved in the procurement and contract development process, and from Facility Services representatives who manage the construction contract and process payment requests.
- After thorough discussion, an approach was agreed upon which speeds payments to the certified SBEs with minimal additional administrative work. SBEs will be able to submit their pay claims to the general contractor immediately upon ordering the materials for the project, provided the materials were approved by the owner through a submittal, and an executed purchase order is submitted with the pay application.

#### **Describe Effectiveness**

- It's expected that "Quick Pay" will greatly speed payments to SBEs, with the result that SBEs can avoid having to borrow money while waiting to get paid, and therefore can bid more competitively and increase their participation in county contracts. In addition to faster payments, the customary five-percent retainage will be waived on material purchases by SBEs, and they will be paid in full.
- Small businesses will now be able to better compete for work on county construction projects, advancing the goal of the county's SBE Program by increasing the participation of SBEs in county contracts.

# Promising Programs

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## Areas of Improvement

- Other changes will be put in place to support SBEs. For example, requests by SBEs for release of their five-percent retainage for labor will be considered. This will alleviate the long and unnecessary withholding of retainage in cases where the SBE completes its work early in the project and then must wait until the project is complete to get final payment. They will then be able to apply their bond capacity to another project. Also, the general contractors will be encouraged to extend their pricing discounts for materials to their SBE subcontractor.
- The next challenge will be to scale these elements for smaller projects.

# Promising Programs

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## **Program Name: Awards, Incentive & Recognition (AIR) Program**

**Summary Submitted by: University of Minnesota (This program is managed the University of Minnesota's Office for Business & Community Economic Development)**

### **Stated Purpose**

- The Awards, Incentive & Recognition (AIR) Program is designed to recognize University departments, as well as individual staff persons that demonstrate exemplary efforts in supporting and doing business with Targeted Businesses (women/minority/disabled owned business enterprises - WMDBEs). Through this program departments can receive financial rewards based on their efforts to purchase goods and services from Targeted Businesses while individual staff will also be recognized and rewarded for their work in assisting and creating business opportunities for Targeted Businesses.

### **Goals**

- Provide financial incentives to departments doing business with Targeted Businesses
- Increase spending with Targeted Businesses on non-competitive bidding contracts
- Recognize individual staff efforts for increasing opportunities for Targeted Businesses
- Increase expenditures with Targeted Businesses to 10% of all University purchases

### **How is the program implemented?**

In FY2015 the University will allocate \$50,000 to fund the AIR Program. Financial awards will be made based on using a four-tier category award system.

- Tier 1 = \$10,000: Awarded to the area with an expenditure budget of \$1M + and having the highest percentage amount spent with Targeted Businesses.
- Tier 2 = \$10,000: Awarded to the area with an expenditure budget of \$500K - \$999k having the highest percentage amount spent with Targeted Businesses.
- Tier 3 = \$10,000: Awarded to the area with an expenditure budget of \$200k to \$499K and having the highest percentage amount spent with Targeted Businesses.
- Tier 4 = \$10,000: Awarded to the area with an expenditure budget of \$25k to \$199K and having the highest percentage amount spent with Targeted Businesses.\*

\* Tier 4 award amounts cannot be greater than 25% of the actual dollars spent with Targeted Businesses in that fiscal year.

Competing departments will be selected based on a percentage of their total purchasing/spending activity with Targeted Businesses for a twelve (12) month period. These award funds are unrestricted and may be used by the department/unit for any purpose they deem appropriate (staff retreat, business travel, budget supplement, etc.).

- Individual Awards (The "Fitz Award") recognizes University staff persons (buyers, end users, department heads, deans, etc.), that demonstrate outstanding commitment to supporting and creating opportunities for Targeted Businesses. Individuals receiving special recognition will be selected through a formal nominations process. Awards will be handed out at a special Awards Recognition luncheon each year by a senior level Officer of the University.



# Promising Programs

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## **Program Name: Target Market Program Summary**

**Submitted by: City of Minneapolis**

### **Stated Purpose:**

- The purpose of the Program is to permit small businesses to compete on a more level playing field with other firms of comparable size. The Program is structured to lessen some of the barriers to market entry encountered by small firms, including obtaining bonding and financing and accessing professional networks. This program will be race and gender -neutral and expand opportunities for, and develop the capacity of, small and local businesses so that all segments of the community may participate in contracting so long as they meet the size requirements.

### **Goals:**

- This program will allow small businesses to compete against other small businesses in a race- neutral and gender-neutral way. The Program's ultimate goal is to progress participating small businesses into viable, competitive contractors capable of competing on the open-market for larger City contracts.
- It would also allow for participation, counting and contractor credit for inclusion of minority and women firms that are too large to participate in small business programs and too small to compete with large firms. Tiers or thresholds could be the distinction.

### **Program Implementation:**

- City staff have developed a draft plan and implementation plan, but it has not yet been adopted. Once adopted and implemented, it too could be revised and extended to the State.
- The City will require a TMP-eligible business to submit program certification forms along with a notarized affidavit of veracity. Further, the City will require a TMP-certified business to regularly submit a no-change affidavit stating the business has not outgrown TMP certification size.
- In addition to self-certifying, a TMP eligible business can submit proof of certification in an existing program such as CERT Certification or MNUCP Certification as another means of enrolling in the TMP. Accepting many different certifications maintains the Program's neutrality, but can also incidentally increase minority- and women-owned business participation.

### **Distinct Challenges:**

- Care must be taken to ensure that the program remains neutral in its application. Incidental inclusion of more members of one group over another, on its own, does not warrant a finding of unconstitutionality.
- Ensuring the availability of certified small businesses to participate in the Program. Without certified businesses the Program is useless. An integral step in TMP setup is developing a certified contractor database to be monitored and updated throughout the life of the Program. Currently the City is in the process of creating such a database.
- Identifying City contracts currently eligible for the Program. Each City Department must examine its current expenditures and determine if it has TMP eligible contracts, or if it can create TMP eligible contracts by unbundling current contracts

# Promising Programs

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# Best Practices

## Appendix

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# Appendix A

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The following legal timeline gives a high-level overview of the evolution of disadvantaged business programs.<sup>30</sup>

## **Disadvantaged Business Enterprise Programs—the Legal Landscape—A Brief Outline**

### **I. ORIGINS OF DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS**

#### A. Origin

- 1.1958 Small Business Act §8(a) required assistance to “socially and economically disadvantaged” small businesses
  - Small Business Administration (SBA) used §8(a) to obtain contracts from federal agencies and subcontract to firms that agreed to locate in/near “ghetto” areas and provide jobs to disadvantaged residents
- 2.1969 Executive Order 11458 (Nixon)
  - Created Office of Minority Business Enterprise (OMBE)
  - Directed federal agencies to promote and assist MBEs
- 3.1971 Executive Order 11625 (Nixon)
  - Extended mission of OMBE to include provision of technical managerial assistance to MBEs 4.1977
- Public Works Employment Act
  - First time numerical goals appeared for MBE participation in federal contracts, directing 10% of procurement be expended with MBEs
- 5.1978 Amendments to §8(a)
  - Authorized SBA to enter into contracts w/other fed. agencies and sub-contract to small businesses owned by “socially and economically disadvantaged individuals”
  - Applied presumption of social disadvantage to Blacks, Hispanics, and Native Americans
6. Minority Small Business Contracting Program, §8(d)
  - Codified presumption of disadvantage
  - Recipients of major federal contracts required to negotiate with procuring agency subcontracting plans with percentage goals for MBEs and other small socially and economically disadvantaged businesses
- 7.1980 Congress adds Asian Pacific Americans to list of disadvantaged persons who qualify under 8(a) and 8(d) 8.1983
- Executive Order 12432
  - Directed each federal agency w/substantial procurement or grant making authority to develop a Minority Business Enterprise development plan
- 9.1988 Business Opportunity Development Reform Act:
  - Directs president to set annual, govt.-wide procurement goals
  - At least 20% for small businesses; and
  - At least 5% for businesses owned by disadvantaged persons
- 10.1990 Clean Air Act Amendment
  - Required fair share 10% participation of MBEs and WBEs in contracts made by sub-recipients (states, counties, etc.) of EPA funding
  - In 1998, amended so that each sub-recipient could set its own fair share goal
  - In 2003, EPA changed its MBE/WBE program to a DBE program, more consistent w/Adarand and the USDOT program. EPA began accepting DBE certification for its program
- 11.1997 Small Business Reauthorization Act
  - Increased overall small business procurement goal to 23%;
  - Maintained 5% goal to disadvantaged MBEs; and
  - Established a 5% goal to small women-owned enterprises (federal-agency-wide)

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## II. TRANSPORTATION PROGRAMS

- A. 1980-US Department of Transportation (USDOT) regulations establish a minority and women's business enterprise program for highway, airport and transit projects
- B. 1982-Congress enacts Surface Transportation Assistance Act 1. Requires a minimum of 10% of the funds be expended w/small businesses owned and controlled by "socially and economically disadvantaged individuals"
- C. 1987-Surface Transportation and Uniform Relocation Assistance Act
  - 1. Continued 10% expenditure requirement
  - 2. Added non-minority women to statutory definition of "socially and economically disadvantaged individuals"
- D. 1991-Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) + Transportation Equity Act for the 21st Century (TEA-21) o  
Continued the 10% DBE set-aside provision
- E. 1998-Transportation Equity Act for the 21st Century (TEA-21) enacted as Public Law 105-178
  - 1. Continued 10% goal within USDOT
  - 2. Authorized the Federal surface transportation programs for highways, highway safety, and transit for the 6-year period 1998-2003
  - 3. Regulations
    - 49 CFR Sec. 26.21; all recipients of FHWA and most FTA/FAA must set DBE goals and plan in order to receive funding
    - 49 CFR Sec. 26.81; all DOT recipients in a given state must participate in a Unified Certification Program (UCP)
- F. 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEA-LU) enacted
  - 1. Extended 10% DBE goal through FY2009

## III. JUDICIAL RESPONSES TO DBE PROGRAMS

- A. Challenges to DBE programs often allege unconstitutional discrimination in violation of the 14th Amendment
- B. Evaluation of 14th Amendment challenges - levels of scrutiny
  - 1. Rational basis/lowest level; distinction involves:
    - legitimate exercise of government power; and
    - government actor has a rational basis for making distinction
  - 2. Strict scrutiny/highest level; classification must be:
    - legitimate exercise of governmental power;
    - justified by a "compelling governmental interest";
    - "narrowly tailored" to serve the compelling interest, and
    - the "least restrictive means" available to achieve it
- C. Major Cases
  - 1. **Fullilove v. Klutznick**, 448 U.S. 448 (1980): Court defers to Congressional redress of past discrimination
    - Challenge to MBE provision of Public Works Employment Act, requiring recipients of federal grants for local public works projects to use 10% of federal funds to procure services or supplies from MBEs
    - Requirement was 'to the extent feasible'
    - Waiver available
    - Court applied 2-part analysis:
      - Remedying present effects of past discrimination was within the scope of Congressional spending power when accomplished by placing conditions on use of funds
      - Limited, flexible use of race/ethnic criteria was narrowly tailored means of achieving goal
    - Despite application of narrowly tailored test, opinion does not state level of scrutiny used or discuss whether program serves compelling govt. interest
  - 2. **City of Richmond v. J.A. Croson**, 488 U.S. 469 (1989): state and local govts. are limited to redressing discrimination w/in their own jurisdictional borders.
    - EP challenge to municipal requirement that at least 30% of the dollar value of contracts be subcontracted to MBEs
    - Court applied strict scrutiny

# Appendix A

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- Distinguished local governments' power to redress discrimination within their borders from Congress' power to remedy general societal discrimination. Concluded that City failed to present a compelling interest for remedying discrimination because there was no evidence that it had discriminated against MBEs

## 1. Adarand Constructors: series of interconnected cases on MBE preferences

- Adarand I: **Adarand Constructors, Inc. v. Pena**, 515 U.S. 200 w(1995);
  - Contractor challenged the constitutionality of "a race-conscious subcontracting compensation clause" (SCC) that awarded incentive payments to prime contractors whose subcontracts with DBEs exceeded 10% of total contract value
  - Court rejected **Fullilove**, stated that strict scrutiny was appropriate
  - Remanded to District Ct. for strict scrutiny analysis
- Adarand II: **Adarand Constructors, Inc. v. Pena**, 965 F.Supp. 1556 (D. Colo. 1997);
  - District Court determined Congress had a compelling govt. interest in redressing discrimination, but concluded that DOT incentive program was not narrowly tailored because benefits were available to all minorities regardless of disadvantage and would exclude disadvantaged whites
  - Enjoined enforcement of program
- Post-Adarand II;
  - Adarand sues state of Colorado, challenging its use of DBE programs
  - CO modifies its regulations, requiring all DBE contractors to certify disadvantage
  - Adarand becomes certified as DBE under new regs.
  - 10th Circuit Court of Appeals rejects government's appeal as moot because Adarand is a DBE
  - SCt reverses 10th Circuit decision, concluding that case is not moot because Adarand's DBE certification is suspect and he may need further judicial protection
  - SCt remands to 10th Circuit
- Adarand III: **Adarand Constructors, Inc. v. Slater**, 228 F.3d 1147 (10th Cir. 2000);
  - 10<sup>th</sup> Cir. Court considered constitutionality of original and revised programs reversed District Court's injunction against future implementation of DOT's DBE program in CO
  - Agreed with District Court's conclusion that SCC system of financial incentives in Adarand I was not narrowly tailored, but concluded that new DBE program, as revised under the post-Adarand DOT regulations, was constitutional

## IV. POST ADARAND

### A. Regulatory Changes; new USDOT regulations include

1. Overhauling agency's DBE goal-setting process/eligibility requirements
2. Shifting program's focus to achieving a "level playing field"
3. Requiring states and transit authorities to base their DBE participation goals on demonstrable evidence
4. Requiring states to meet maximum feasible portion of their DBE goals using race-neutral measures
5. Requiring states and transit authorities to submit their DBE participation goals to USDOT for approval on an annual basis
6. Requiring state and transit authorities to create and maintain a bidders list and develop/participate in a statewide unified certification program ("UCP")

### B. Judicial Decisions;

1. Since Adarand, lower courts have concluded that govt. has compelling interest in adopting affirmative action programs
  - But, lack of judicial consensus re: "narrowly tailored" test
  - Whether states or localities must independently justify the use of racial preferences to implement federal mandates w/ in their individual jurisdictions?

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2. *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d964 (8th Cir. 2003) and *Gross Seed Co. v. Dep't of Transp.*, 345 F.3d964 (8th Cir. 2003);
  - Under revised USDOT regulations and TEA-21, Minnesota and Nebraska state highway departments established specific goals for the award of federally-funded contracts to DBEs
  - 8th Cir. agrees with 10th Cir. conclusion in *Adarand III* that Congress had satisfied showing of compelling interest to remedy race discrimination in federal highway contracting
  - Court holds that neither Minnesota DOT nor Nebraska road dept. was required to make an independent showing of compelling interest and that program was narrowly tailored as implemented at the state level
3. *Western States Paving Co., Inc. v. Washington State Dep't of Transp.*, 407 F.3d983 (9th Cir. 2005);
  - 9th Cir. ruled that TEA-21's MBE and WBE preferences for highway contractors were facially valid
  - Govt. had a compelling interest in ensuring that federal funding was not distributed in way that reinforced effects of public/ private discrimination w/in transportation-related construction
  - TEA-21's racial preferences were narrowly tailored to further that interest b/c revised DOT regs. prohibited use of quotas and required state to meet its maximum goal by using race-neutral means
  - Strikes down state's implementation program as not being sufficiently narrowly tailored to further Congress' remedial objectives
  - Ct. concludes that remedy requires showing of actual discrimination
  - Note: in the wake of this ruling, Caltrans adopted race-neutral policy b/c it could not show sufficient evidence that minority groups had suffered disc. in the state's contracting industry.
4. *Rothe Dev. Corp. v. U.S. Dept. of Def.*, 262 F.3d 1306 (Fed. Cir. 2001); imposes heavier burden on fed. govt. to demonstrate necessity for minority contracting preferences.
  - Ct. declined to uphold §1207 of the National Defense Authorization Act of 1987
  - Provision establishes a 5% participation goal for DBEs in Dept. of Defense contracts, incorporates §8(a) presumption of racial disadvantage and authorizes Dept. of Defense to apply a price evaluation adjustment of 10% to attain 5% goal
  - Ct. held that district court's standard of review was too deferential, concluding that proper inquiry was whether a 'strong basis in evidence' supported Congress' conclusion that discrimination existed
  - 'Mere listing' of evidence before Congress when it enacted original statute was insufficient
  - Detailed statistical information regarding existence of disc. in 1992 necessary to find reauthorized §1207 constitutional
  - Govt. must also produce evidence of pre-enactment discrimination

## V. STATE AND LOCAL GOVERNMENT RESPONSES

### ***A. To survive legal challenges, state and local race-conscious DBE programs must;***

1. Be justified by studies that are based on statistically valid samples; Examples of Washington, Illinois, and Maryland disparity studies
2. Include an assessment of the qualifications and availability of DBEs in the specific jurisdiction;
3. Incorporate race-neutral alternatives; and
4. Avoid being overly burdensome by incorporating waivers and good faith provisions.

### ***B. State plans adopted to enforce federal requirements: cts. have not resolved whether different fact-finding standards apply.***

### **C. Scan of state MBE, WBE, and DBE programs (including USDOT and state funds)**

1. Trend from 1995 to the present
2. Race-conscious program strategies: mandated sub-contractor participation; preference bid discounts; preference bid ranking points.
3. Race-conscious programs – Maryland, Texas, Massachusetts, North Carolina, Indiana, Colorado, and Pennsylvania
4. Hybrids – Ohio and Minnesota
5. Race-neutral initiatives – Florida, Delaware, Missouri, Arizona, and Washington.
6. Update on Michigan
7. Targeted business services, including financing programs and legal services

# Appendix A

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D. A brief look at local race-/gender-neutral programs in California and Washington

1. Los Angeles and OBE
2. San Francisco – moving forward with targeted vendor outreach
3. King County and Seattle Public Schools

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