

Which Way for “Preference Programs” for State and Local Government in the U.S. : Comparison to Federal U.S. Preference Programs

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Commentary

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ABSTRACT

For instance, there may be targets for “minority owned businesses” which includes a wide range of ethnicities such as African American (black), Hispanic, American Indian, Alaskan Aleut, India Asian, Asian, Pacific Islanders and Hawaiians. Another target area is “veteran owned small businesses” and “service disabled veteran owned small business”. In fact, the Veterans Administration is required to subcontract all their work to veteran owned businesses. Now, they have step by step, built up the category of subcontracting to “women owned businesses”. Under President Jimmy Carter, they first started keeping track of contract awards to this group, but no preferences. Now they actually have preferences for this category. And there is such a thing as “women owned veteran’s small businesses” and they are a fast growing group according to linked in group member reports.

INTRODUCTION

The Rules for Preference Programs at the State and Local Government level in the U.S. were given specific guidance in the 1989 U.S. Supreme Court decision. At that time, the City of Richmond was creating a rule for preference programs for contractors with their jurisdiction that had never been challenged before. Specifically, the policy required that non-minority contractor awardees subcontract 30 percent of the work on their contract to minority held or controlled businesses. The company appealed the case which was heard at the State of Maryland Supreme Court and then up to the U.S. Supreme Court.

The ruling requires specific evidence that is current to justify state and local government jurisdictions to establish MBE programs in their procurement policies. The court is accepting the use of “disparity studies” to establish a record of statistical and anecdotal record of discrimination to document non-inclusion of minority contractors in the work of the contract award system within a current time span. Only with a written report produced by either the jurisdiction hired consultant or the jurisdiction itself, is the establishment of MBE preference programs to be allowed ^[1].

Hurdles for MBE Preference Programs at State and Local Level

Given that the practice of writing “disparity studies” is a rather new field in the craft of consulting firms, the typical cost of such an endeavor can be in the hundreds of thousands of dollars. Moreover, they must be updated periodically i.e., every five years ^[2]. This is a tremendous burden for State and Local governments as they seek to level the playing field for underrepresented members of their jurisdiction to participate in the contracting business.

How Does this Compare to “Preference Programs for Contracts at Federal Programs?”

The U.S. Congress has established with the Competition in Contracting Act (CICA, 198410 U.S. Code § 2304 Contracts: competition requirements) the creation of a Federal Acquisition Regulations (FAR) Council composed of DOD, GSA and NASA. They publish in the Federal Register proposed changes to the FAR and allow for comment. The FAR has a wide range of preference programs for minority businesses, veteran owned businesses, and women owned businesses that are administered through the U.S. Small Business Administration Program such as the 8(a) program for minority businesses, set-asides and requirements for subcontracting to disadvantaged businesses by Prime Contractors. And they set targets for certain categories, i.e., ethnic minorities (i.e., 8a program), veteran owned businesses or service disabled veterans’ businesses or women owned or the certified labor surplus areas (LSA), hub zone areas, etc.

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For instance, there may be targets for “minority owned businesses” which includes a wide range of ethnicities such as African American (black), Hispanic, American Indian, Alaskan Aleut, India Asian, Asian, Pacific Islanders and Hawaiians. Another target area is “veteran owned small businesses” and “service disabled veteran owned small business”. In fact, the Veterans Administration is required to subcontract all their work to veteran owned businesses.

Now, they have step by step, built up the category of subcontracting to “women owned businesses”. Under President Jimmy Carter, they first started keeping track of contract awards to this group, but no preferences. Now they actually have preferences for this category. And there is such a thing as “women owned veteran’s small businesses” and they are a fast growing group according to linked in group member reports.

And we would be remiss if we didn’t mention the preferences for HUBZONE and Labor Surplus Area owned businesses, also certified by the U.S. SBA. These apply to depressed areas of a geographic location and underemployed pockets of cities or geographic areas. And don’t forget that in evaluation of federal contracts awards, each of these categories received points for category of preference and in fact can receive double points if they encompass more than one category ^[1,3].

That is separate discussion, the award evaluation as a stand-alone company or as subcontractor working under a prime contractor. And some companies do both types of business. If a prime contractor is given a contract (over a certain dollar value such as \$750,000), they must then source minority contractors or disadvantaged or minority businesses and build a sub-contracting plan that is reviewed by U.S. SBA and the agency they have a contract with in order to receive approval to continue on their contract. For those contracts subject to an annual funding with exercising options to renew for the out years, a subcontracting plan report must be submitted and approved before the option can be exercised. That is in addition to the review and approval of the previous year’s subcontracting results compared against the submitted plan.

Why Do Federal and State and Local Government Preference Programs Differ So Dramatically?

The authorities at the Federal Level vs. the State Level (including local or municipal and county level) and the system of law are distinctly different. The State and Local government are subject to using the Uniform commercial code (UCC – that state’s version) (based on common law unless Louisiana then it is based on civil law), whereas the Federal system follows the Federal Acquisition Regulations (FAR, Code of Federal Regulations) (also based on common law). Congress makes legislation which finds its way into the FAR through the FAR Council. Also the Presidents’ Office of Federal Procurement Policy (OFPP), instigates pilot programs, new policies etc. which may result to being proposed as new rules after being published in the Federal Register ^[4].

At the State and Local Level, each system is more or less a stand-alone with maybe communication one with another and imitation of similar rules and policies. Municipal jurisdictions may have commissions they report to and so on. Of course, State governments have legislatures, but as far as preference programs, the rules made at the U.S. Supreme Court in the case of 1989 have not been challenged since then.

What Choices for State and Local Municipalities to Create MBE Programs in Procurement?

It appears the consulting industry has made a good return on the creation of disparity studies. With the high caliber training programs for PhD students at places like Florida Atlantic University School of Public Administration and their extensive use of statistical analysis on par with business school rigor, these fresh products of the system should be equipped to do a disparity study at less cost than a name brand consulting firm with overhead and fringe benefit staff ^[1,2].

Maybe courses should be designed and taught to students to establish disparity studies reports as a service for state and local governments.

Anecdotally, it was heard said by a local Florida county procurement director that many counties in Florida had no idea of such rules laid in place by the landmark decision in 1989 by the U.S. Supreme Court, making them vulnerable to expensive lawsuits once business wises up.

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