

Guidelines for Developing Documentation to Support Minority Business Participation Programs.

This is a summary designed for public agencies (especially local governments) in North Carolina as they take steps to comply with recently enacted requirements for minority participation. More information about the new law and its requirements can be viewed at <http://ncinfo.iog.unc.edu/pubs/nclegis/nclegis2001/pdfs/Ch21web.pdf>.

1. Overview of North Carolina minority contracting provisions.

North Carolina public agencies are legally required by North Carolina General Statute (N.C.G.S.) 143.128.2 to have a program that provides for participation by minority business enterprises in building construction or repair contracts where the entire job costs \$300,000 or more. This law requires the state to have a 10 percent goal for participation by minority business enterprises. The 10 percent goal requirement also applies to projects done by a private entity on a facility to be leased or purchased by the state or local government, and to any building project costing \$100,000 to be done by a local government or other public or private entity that receives state appropriations or other state grant funds for the project. The law provides, however, that a local government may apply a different verifiable goal adopted prior to December 1, 2001, if it has a sufficiently strong basis in evidence to justify the use of that goal. For state projects and projects subject to the state goal, the Secretary of the Department of Administration is required to identify specific percentage goals for each category of minority business for each type of contract involved.

Local governments are also required to adopt a percentage goal for minority business participation in building construction contracts that involve only local funds. Goals are set following notice and a public hearing where local governments must adopt an “appropriate verifiable percentage goal” for participation. Local governments may use goals that have been previously adopted if they are confident that these goals continue to be valid and justifiable.

A minority participation goal can be identified as one of the following: percent of a particular contract, percent of particular kinds of contracts or a percent of all contracts awarded over a specified amount of time. In addition, the law requires both public agencies and bidders to make “good faith efforts” as defined by the statute. (See N.C.G.S. 143-128.2(e), (f).) These efforts include the development and implementation of a minority business outreach plan, attendance at prebid conferences and the provision of notice to minority businesses at least ten days prior to bid openings. The statute does not require that the percentage goal actually be met, but in cases where it is not met, the bidder must document that sufficient good faith efforts have been made.

2. Legal requirement for justification of minority participation program.

Legal challenges to governmental minority participation programs have been based on the argument that these programs are race-conscious measures that must be supported by a compelling governmental interest, and must be narrowly tailored under the “strict scrutiny” test for constitutionality. Programs have generally been justified as necessary remedies for past discrimination, as well as to avoid infusion of public funds into a discriminatory industry.

3. The role of disparity studies in satisfying these legal requirements.

Disparity studies have been used as a tool to document past discrimination in the awarding of contracts by a particular jurisdiction as well as in the industry in general. Specifically, disparity studies evaluate the past contracting practices of a public agency that proposes to implement a minority participation program or that already has an existing program, the market area from which the contractors doing business with the agency are drawn, and the availability of qualified minority contractors within the market area in the trades used by the agency. They are intended to establish factual evidence of past discrimination that supports the public agency's program to increase minority participation. Unfortunately, the court cases in this area have not identified the requirements for a legally acceptable disparity study, however courts have approved of the use of these studies as a way to document factual evidence for past discrimination.

4. Information that public agencies need to identify to enable them to meet these legal requirements.

At the present time, disparity studies, usually prepared by consultants, are the main line of defense for public agencies but these studies can be costly and time consuming. Agencies can keep detailed records and gather supporting documents and statistics, which could be used in the same way disparity study data and information is used, to defend the legality of their programs. The type of information that would be most useful includes:

A. Contractor Availability

Public agencies should keep an updated bidder list database, which can be used as an indicator for the number of firms that are ready, willing and able to compete for contracts. This database should include relevant information about each firm including the name, address, geographic location (particularly the county), construction category, type (black-, women-, white-owned, etc), last bid received and also a status indicator to show if the firm has been active in the past 6 months in bidding for contracts. This database should be updated regularly (i.e., every 6 months) and should be in electronic form. Many jurisdictions currently have this information but it is not usable because it is either outdated, unreliable, or it is in paper form. There is also the option of using Economic Census data which is released by The Bureau of the U.S. Census every 5 years to establish the number of total firms and minority- and women- owned firms in a given county. The problem with this data though is that it is not always indicative of the number of ready, willing, and able firms and it is also not broken down by industry and type of firm on a county-by-county basis. These data limitations have proven problematic in the past and usually have to be "cleaned up" by research experts when conducting full-scale disparity studies. If local jurisdictions can maintain a database similar to the one mentioned above, it can use the Census numbers as a baseline to support its own original local databases.

B. Contracting Agency Utilization

Public agencies should also keep a database that documents which vendors are being awarded contracts. This database should include all public construction contracts with the following information: name of firm, date, type of contract and amount of contract award, construction category firm falls under, location of firm and type of firm. This database should be cross-checked with the availability database to ensure that firms are not being duplicated or entered differently (i.e. the same firm listed under different names, addresses, etc). This too should be in electronic form and should not merely be

an extension of an accounting database unless that database can be easily integrated with the existing availability data.

C. Utilization Percentage Ratio

The above-mentioned databases can be used to create a disparity index or utilization percentage ratio which measures the relative percent of total revenues received by minority-owned enterprises versus all enterprises compared to the percent of total available minority-owned enterprises versus the number of total enterprises. The actual formula would be the percentage of the total dollars received by a particular minority-owned business enterprise group (i.e. black-owned) divided by the total dollars received by all enterprises compared to the percentage of the total number of minority-owned business enterprises in a particular group divided by the total number of all enterprises. This equation (shown below) would be the utilization percentage ratio and would indicate if certain types of firms were being over- or under- utilized.

$$\frac{\text{Total Dollars Received by Particular Minority-Owned Business Group}}{\text{Total Dollars Received by All Businesses}} = \%$$

$$\frac{\text{Total Number of Minority-Owned Businesses in a Particular Group}}{\text{Total Number of All Businesses}} = \%$$

D. Determining Market Area

When looking at the above availability and utilization numbers, agencies will need to establish and apply them to their market area. To establish their own market area, local jurisdictions will need to determine the counties where 75% of their contracts are going to - - in essence, where are the bulk of the firms you are contracting with located? Seventy-five percent is the number typically used in disparity studies. This market area establishment should be done for each construction category listed in a local jurisdiction particularly since a utilization percentage ratio will have to be determined for each construction category to determine over- or under- utilization.

E. Anecdotal Evidence

Beyond the above statistical measures, agencies can also use the following means to gather anecdotal evidence to support the need for their programs including:

- 1) *Public Hearings* to document perceptions in the community on fairness of contracting practices or discrimination by contractors in the industry that affect the ability of minority businesses to get work.
- 2) *Surveys* distributed to vendors to explore their business practices, their experiences with existing minority outreach programs, perceptions of problems in local jurisdictions and past experiences with discrimination.
- 3) *Personal Interviews* with community leaders, contractors, or minority contracting program coordinators to understand how they see the issue and to determine whether discrimination is evident in their jurisdictions.

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