



HUB Participation in Building Construction Contracting by N.C. Local Governments: Statutory Requirements and Constitutional Limitations

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North Carolina local governments are required to engage in certain activities aimed at increasing participation by historically underutilized businesses (HUBs) in certain public building construction and repair projects. The North Carolina General Assembly has granted some local governments the authority to extend HUB participation programs to other types of contracting, such as purchases and service contracts. Whether satisfying statutory requirements for building construction and repair or expanding to other contracting opportunities pursuant to a local act, local governments must develop and implement HUB programs in a manner consistent with all applicable legal requirements under both state and federal law.

This bulletin focuses on two aspects of HUB participation in local government contracting: Part I outlines the statutory requirements under North Carolina law for HUB participation in public construction and repair projects, while Part II examines the constitutional limitations placed on such programs by federal court jurisprudence. To have legally valid HUB programs, local governments must understand their obligations under both state and federal law.

Part I. Statutory Requirements

Overview of State Competitive Bidding Requirements

Most public entities in North Carolina, including such units of local government as cities, counties, and local school systems, must comply with all applicable statutory competitive bidding requirements when entering into a contract; if these requirements are not followed, the contract could be rendered void and unenforceable. In fact, when contracting for construction and repair projects, local governments may not assume responsibility for construction contracts or guarantee payments for materials or labor unless all competitive bidding requirements are followed.¹

Three types of contracts are subject to procurement requirements under state law. First, contracts for the purchase of apparatus, supplies, materials, and equipment are subject to informal competitive bidding requirements if the estimated cost of the contract is between \$30,000 and \$90,000; formal competitive bidding requirements apply if the estimated cost of the contract is \$90,000 or more.² Second, contracts for construction or repair work are subject to informal competitive bidding requirements if the estimated cost of the contract is between \$30,000 and \$500,000, and formal bidding requirements apply if the estimated cost of the contract is \$500,000 or more.³ Third, contracts for engineering, architectural, surveying, or construction management at-risk are subject to the qualifications-based selection process of the Mini-Brooks Act regardless of the cost of the contract, unless the unit of local government elects to exempt itself in writing from these requirements.⁴ All other contracts, such as service contracts, real property purchases, and purchase and construction or repair contracts less than \$30,000, are not subject to state competitive bidding requirements.⁵

1. Section 143-129(b) of the North Carolina General Statutes (hereinafter G.S.); Hawkins v. Town of Dallas, 229 N.C. 561, 50 S.E.2d 561 (1948); Nello L. Teer Co. v. N.C. State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965). Only four public entities are exempt from state competitive bidding, bonding, and other general contracting requirements: public housing authorities (G.S. 157-9 (a)), hospital authorities (G.S. 131E-23(d)), joint municipal power agencies (G.S. 159B-11(10)), and soil and water conservation districts (G.S. 139-8(11)).

2. G.S. 143-129; G.S. 143-131.

3. *Id.*

4. G.S. 143-64.31; G.S. 143-64.32. If a unit of local government elects to exempt itself from the Mini-Brooks Act and the cost of the contract is \$30,000 or more, the local government must include in its written exemption "the reasons therefore and the circumstances attendant thereto." G.S. 143-64.32(b).

5. Although not legally required to do so, units of local government will often use a Request for Proposals (RFP) process to solicit competitive pricing for larger service contracts, such as solid waste collection. In addition, some units of local government have established more stringent competitive bidding requirements than those under state law, such as lowering the informal bidding threshold for purchase contracts to \$5,000. Units of local government are always advised to consult their local purchasing policies to determine if additional competitive bidding requirements apply to a particular contract.

In addition to the general competitive bidding requirements discussed above, more requirements apply to contracts for construction and repair work, and even more requirements apply to certain construction and repair projects involving public buildings.⁶ These additional requirements include measures intended to promote HUB participation in building construction and repair projects.

Overview of HUB Participation Requirements under North Carolina Law

Since 1989, state law has required units of local government to employ measures designed to promote the participation of minority businesses (eventually referred to as historically underutilized businesses) in certain public construction projects.⁷ These measures fall into three general categories:

1. *setting goals* for HUB participation in building construction and repair contracting;
2. *engaging in good faith efforts* to solicit HUB participation in the bidding process for building construction and repair projects; and
3. *reporting* HUB participation activities and efforts.

These HUB participation requirements vary depending on the cost and funding source of the building construction project. Smaller-cost projects are subject to some requirements for the unit of local government; larger-cost projects are subject to greater requirements for both local governments as well as bidders.⁸

It is important to note that North Carolina law has *never established or mandated specific quotas or set-asides* for HUB participation; rather, it has established procedures designed to *promote and facilitate* HUB participation. In fact, state law specifically requires that public building contracts, including those subject to informal and formal competitive bidding requirements and those awarded under the construction management at-risk building method, shall be awarded “without regard to race, religion, color, creed, national origin, sex, age, or handicapping

6. For more information on procurement requirements for construction and repair projects, including building construction and repair projects, see A. Fleming Bell, II, *Construction Contracts with North Carolina Local Governments*, 4th ed. (Chapel Hill: UNC School of Government, 2007); Norma Houston, “Basic Legal Requirements for Construction Contracting with North Carolina Local Governments,” (Nov. 2011), available at www.sog.unc.edu/sites/www.sog.unc.edu/files/Construction%20Contracting%20Legal%20Outline_0.pdf. For more information in general on competitive bidding requirements under state law, see Frayda S. Bluestein, *A Legal Guide to Purchasing and Contracting for North Carolina Local Governments*, 2nd ed. (Chapel Hill: UNC School of Government, 2004), with supplement (2007); Eileen Youens, “Local Government Purchasing and Contracting Update: Statutory Requirements and Local Policies,” *Local Government Law Bulletin* No. 118 (Feb. 2009).

7. Minority participation goals for certain building construction contracts were enacted by the N.C. General Assembly in June 1989 (S.L. 1989-490), presumably in response to the U.S. Supreme Court’s landmark decision in *Croson* decided in January of that year. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989). This case and subsequent decisions related to minority business participation efforts are discussed in part II of this bulletin.

8. HUB participation efforts do not apply to building construction projects costing less than \$30,000 or to any construction or repair projects not involving public buildings. Local governments may choose to apply these goals to these categories of projects under their local policies; they may also choose to extend these goals to other types of contracts, such as those for the procurement of goods and services.

condition.”⁹ In addition, state law also specifies that contracting authorities (including contractors and subcontractors) are not required to enter into contracts with HUBs that are not the lowest responsive, responsible bidders, which is the standard of award for contracts in the informal and formal bidding ranges.¹⁰ In short, HUB participation requirements do not override the competitive bidding standard of award. And, while intended to rectify past discrimination, HUB participation requirements are not to be construed to now mandate discrimination (or, rather, reverse discrimination) in public contracting.

Key Terms

Because North Carolina law imposes HUB participation requirements on certain public construction and repair projects involving buildings, it will be helpful to the remainder of this discussion to first define the terms *HUB* and *building*.

First, what is a “HUB”? North Carolina law defines a HUB, or, “historically underutilized business” as a business that is at least 51 percent owned (or, in the case of a corporation, at least 51 percent of the stock is owned) and day-to-day management and daily business operations are controlled by one or more citizens or lawful permanent residents who are members of a minority or socially and economically disadvantaged group. A “minority person” is a member of one or more of the following demographic groups:

1. Black—a person having origins in any of the black racial groups of Africa;
2. Hispanic—a person of Spanish or Portuguese culture having origins in Mexico, South or Central America, or the Caribbean islands, regardless of race;
3. Asian American—a person having origins in any of the original peoples of the Far East, Southeast Asia, Asia, Indian continent, or Pacific islands;
4. American Indian—a person having origins in any of the original Indian peoples of North America;
5. Female;
6. Disabled—a person with a disability as defined in G.S. 168-1 or G.S. 168A-3.¹¹

A “socially and economically disadvantaged person” is someone who qualifies as such under federal law.¹²

While the terms *minority-owned business* or *M/WBE* (minority- and women-owned business enterprise) are commonly used, North Carolina law generally defines all these businesses, especially minority-owned businesses, as “historically underutilized businesses.”¹³ To be consistent with North Carolina law, this bulletin uses the term *historically underutilized business*, or *HUB*, when referring to North Carolina statutory requirements.

Second, what is a “building”? The North Carolina General Statutes do not define the term *building* for the purposes of competitive bidding or HUB requirements. In the absence of a statutory definition, the term’s plain and ordinary meaning applies.¹⁴ Webster’s Eleventh defines

9. G.S. 143-128.2(h).

10. *Id.*

11. G.S. 143-128.4(a), (b). *See also* N.C. Office for Historically Underutilized Businesses FAQs at www.doa.state.nc.us/hub/faq.aspx.

12. G.S. 143-128.4(b)(7); 15 U.S.C. § 637(a)(5).

13. G.S. 143-128.4(a1).

14. *State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967), *cert. denied*, 390 U.S. 1028 (1968); *State v. Felts*, 79 N.C. App. 205, 208, 339 S.E.2d 99, 101, *discretionary review denied*, 316 N.C. 555, 344 S.E.2d 11

a building as “a roofed and walled structure built for permanent use.”¹⁵ The North Carolina Court of Appeals has looked to *Black’s Law Dictionary* in defining a building as a “[s]tructure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like. A structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof.”¹⁶

Though not exclusively, the word *building* is usually associated with construction projects that require plumbing, electrical, and heating or air conditioning (HVAC) contractors. Most jurisdictions interpret *building and construction repair* to mean that the requirements do not apply to other types of construction, such as streets or utilities. Sometimes the particular nature of a construction or repair project can cause confusion over whether the structure involved is actually a building (for example, a gazebo has a roof but no walls; is it a building?). When in doubt, it may be safer to follow the more stringent statutory requirements that apply to building construction and repair projects to ensure the validity of the contract in the event of a legal challenge.

It should be noted that federal and state grant requirements sometimes apply minority participation requirements to construction projects not involving buildings. In these instances, such requirements must be complied with regardless of the nature of the construction project.¹⁷

As outlined above, HUB participation requirements fall into three general categories: setting goals, engaging in good faith efforts, and reporting on HUB activities and efforts. These requirements are discussed individually in the following sections.

HUB Participation Goals

Under North Carolina law, the application of HUB participation goals to building construction projects depends on the cost of the project and the source of funding.

For state-funded projects costing \$100,000 or more, the state has a verifiable HUB participation goal of 10 percent of the total project value for each *state* building project, including building projects done by a private entity on a facility to be leased or purchased by the state. If an entity, whether public or private (including local governments), receives appropriations or grant funds from the state for a construction project with a cost of \$100,000 or more, the entity must have a verifiable 10 percent HUB participation goal in the total value of the work on that project. If the local government adopted a different verifiable goal prior to December 1, 2001, the local government unit may apply its local goal to the project if it had and continues to have a sufficiently strong basis in evidence to justify the use of that goal.¹⁸

The 10 percent state goal requirement applies to the “total value of work” of a specific building construction project costing \$100,000 or more. This does not mean that the amount of state funds contributed to the project must equal or exceed \$100,000; rather, it is the total cost of the project that triggers the requirement. Presumably, this means that a contribution of *any* amount

(1986).

15. *Merriam-Webster’s Collegiate Dictionary*, 10th ed. (Merriam-Webster Inc., 2002).

16. *Davidson Cnty. v. City of High Point*, 85 N.C. App. 26, 38, 354 S.E.2d 280, 287 *aff’d and modified*, 321 N.C. 252, 362 S.E.2d 553 (1987) (quoting Black’s Law Dictionary 176 (5th ed. 1979)).

17. See Opinion of the Attorney General to Mr. John T. Carter Jr., Jacksonville city attorney (July 18, 2002), www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/City-of-Jacksonville-Wastewater-Collection-Facilit.aspx.

18. G.S. 143-128.2(a).

of state funds to the project will trigger the requirement if the total project cost is \$100,000 or more. For example, a project costing \$500,000 that is funded in part with a \$50,000 grant from the state must comply with the state HUB participation goal requirement.

It is important to note that the requirement is based on the *total project cost*, not the cost of *individual contracts* that constitute the total project. For example, if a building renovation project consists of three individual contracts (such as plumbing, HVAC, and general) each costing \$75,000, the requirement would still apply because the total project cost is \$225,000. Even though the individual contracts are all less than \$100,000, the total cost of the project exceeds the \$100,000 threshold, thus triggering the requirement.

For locally funded projects costing \$300,000 or more, local governments must adopt an “appropriate verifiable percentage goal” for HUB participation in the “total value of work” for all building construction projects costing \$300,000 or more if the project is funded entirely with nonstate funds.¹⁹ As with the 10 percent state goal requirement, the local goal requirement is based on the cost of the “total value of work,” not the cost of individual contracts.

For all other building construction projects, if the project is funded in whole or in part with state funds and costs less than \$100,000, or if the project is funded entirely with nonstate funds and costs less than \$300,000, state law does not require HUB participation goals. In addition, HUB participation goals are not required for the purchase and erection of prefabricated buildings (though HUB participation requirements would apply to on-site construction work, such as constructing foundations).²⁰

All of these HUB participation requirements are based on “appropriate, verifiable goals” adopted by the local government. How do local governments adopt these goals? State law merely provides that the local government must adopt its goals after notice and public hearing, and specifies that the goals must be “appropriate, verifiable percentages.”²¹ What does this really mean? How do local governments ensure that their HUB participation goals are “appropriate, verifiable percentages?” These issues are discussed in Part II of this bulletin.

Good Faith Efforts

In addition to adopting HUB participation goals, local governments and, in some instances bidders, must engage in efforts to recruit HUB participation in certain building construction projects. These efforts vary depending on the cost and funding source of the project.

For building construction and repair projects in the informal bidding range (\$30,000–\$500,000), local governments must:

1. solicit HUB participation in contracts,
2. document efforts to recruit HUB participation,
3. maintain a record of HUB contractors solicited, and
4. report all data on HUB participation efforts to the N.C. Office for Historically Underutilized Businesses.²²

19. *Id.*

20. G.S. 143-128.2(j).

21. G.S. 128.2(a).

22. G.S. 143-131(b).

Figure 1. Building Construction or Repair Projects: Basic HUB Requirements under North Carolina Law

Estimated Total Project Cost	Competitive Bidding Requirements	HUB Requirements
Below \$30,000	None	None
\$30,000 to \$300,000	Informal Bidding (G.S. 143-131)	Informal HUB (G.S. 143-131)*
\$300,000 or more	Informal Bidding (G.S. 143-131)	Formal HUB (G.S. 143-128.2)
\$500,000 or more	Formal Bidding (G.S. 143-129)	Formal HUB (G.S. 143-128.2)

Note: See the Appendix to this article for a checklist of specific informal and formal requirements for HUB participation.

*For projects costing \$100,000 or more and funded wholly or in part with state funds, state law requires the local government to use a 10 percent goal unless the local government has previously established and maintained another verifiable goal.

No statutory requirements are imposed on bidders and contractors involved in informal bidding projects. Only the local government is required to comply with these informal HUB requirements.

It is important to note an inconsistent overlap in the statutory requirements for HUB participation in building construction projects costing between \$300,000 and \$500,000. While one statute (G.S. 143-131) imposes the HUB solicitation and reporting requirements described above on construction projects in the informal bidding range—which extends to projects costing up to \$500,000—another statute (G.S. 143-128.2) imposes more stringent requirements on building projects costing \$300,000 or more. For projects costing between \$300,000 and \$500,000, the safest course of action is to follow the more stringent requirements of G.S. 143-128.2, a discussion of which follows.

For building construction and repair projects costing \$300,000 and more, good faith efforts to encourage minority business participation apply to both local governments and bidders.

The local government must establish its good faith efforts prior to bid solicitation. Its good faith efforts must include the following steps:

1. develop a HUB outreach plan to identify businesses that engage in public building projects and implement outreach efforts to encourage participation in these projects (efforts can include such activities as education, recruitment, and interaction between minority and nonminority businesses);
2. attend scheduled pre-bid conferences and explain minority goals;
3. notify interested HUBs of the opportunity to bid on a project at least ten days prior to bid opening (even though the required advertising period for formal construction projects is only seven days and no formal advertising is required for projects in the informal bidding range); the advertisement must include a description of the work as well as state the date, time, and location where bids are to be submitted, the public entity's contact person for the project, where bid documents can be reviewed, and any special requirements for the project;
4. advertise the project through media outlets likely to inform HUBs of the opportunity to bid;
5. maintain documentation of any contacts, correspondence, or conversation with minority firms in an attempt to meet goals;

6. review HUB participation requirements with the project designer prior to recommendation of the contract award;
7. evaluate bidder's documentation to determine that good faith efforts required of the bidder have been satisfied;
8. provide relevant documentation to the State Construction Office and the N.C. Office for Historically Underutilized Businesses upon request and satisfy all HUB Office reporting requirements.²³

It is important to note that the local government's good faith requirements are *in addition* to other competitive bidding and public contracting requirements mandated under state law and established by local policy.

While state law provides the required framework for a local government's good faith efforts, many details are left to local discretion, such as what education and recruitment activities to develop and implement. Good sources of practical information on strong HUB outreach plans are other units of local governments that have developed robust plans as well as the North Carolina MWBE Coordinators' Network.²⁴

The local government must also require bidders to make good faith efforts to encourage HUB participation in their bids, including the ten specific actions listed in the statute.²⁵ The N.C. Office for Historically Underutilized Businesses assigns points to be awarded for compliance with the statutory list.²⁶ Each action can be assigned up to ten points, and no contractor can be required to earn more than fifty points. While bidders must make good faith efforts to solicit HUB participation, the level of minority participation in bidders' bids does *not* affect the contract award decision. The lowest responsive, responsible bidder standard of award still applies regardless of the level of minority participation. However, failure to submit required documents of good faith efforts renders the bid nonresponsive.

Some documentation requirements apply to all bidders while additional requirements are imposed on the apparent low bidder. When submitting a bid, all contractors must identify *on their bid* the HUB businesses to be used on the project and include an affidavit listing the bidder's good faith efforts to solicit HUB participation and the total dollar value of work to be performed by HUBs.²⁷ This requirement applies even if the prime contractor is itself a HUB. Failure to satisfy these documentation requirements renders the bid nonresponsive, and the unit of government must reject it. Once the apparent low bidder is selected, and prior to the awarding of the contract, the contractor must submit either an affidavit describing the percentage of HUB work to be performed which is equal to or greater than the local government's minority participation goal or documentation of the bidder's good faith efforts to meet the local government's HUB participation goal.²⁸ Within thirty days after contract award, the winning bidder must submit a list of all subcontractors to be used on the project.²⁹

23. G.S. 143-128.2(e); N.C. ADMIN. CODE (hereinafter N.C.A.C.) tit. 1, ch. 301, § .0306(a).

24. See their website at www.mwbenetwork.org.

25. G.S. 143-128.2(f).

26. 1 N.C.A.C. 301 .0102.

27. G.S. 143-128.2(c). If a bidder proposes to perform *all* of the work with its own forces (employees) in lieu of hiring subcontractors, it can submit an affidavit to this effect in lieu of the HUB participation affidavit.

28. G.S. 143-128.2(c)(1).

29. Sample HUB participation affidavits are available on the N.C. State Construction Office website at www.nc-sco.com/docBidding.aspx.

Reporting HUB Participation Efforts

The third basic HUB participation requirement that local governments must adhere to is reporting their HUB participation efforts. For building construction and repair projects subject to HUB participation requirements, local governments must report certain information related to these project to the N.C. Office for Historically Underutilized Businesses. As with participation goals and good faith efforts, reporting requirements vary depending on the cost of the project and must be submitted in the format and contain the data prescribed by the secretary of administration.³⁰

For building construction or repair projects costing \$300,000, local governments must report semiannually the following information on each project using the HUBSCO Formal Project Report Form:

1. the verifiable percentage goal for the project;
2. the type and total dollar value of the project;
3. HUB utilization by:
 - a. minority business category,
 - b. trade,
 - c. total dollar value of contracts awarded to each minority group for each project,
 - d. applicable good faith effort guidelines or rules used to recruit minority business participation, and
 - e. good faith documentation accepted by the public entity from the successful bidder;
4. utilization, as both prime contractors and subcontractors, of minority businesses under the various construction methods listed under G.S. 143-128(a1), which are single-prime, separate-prime (also referred to as multi-prime), dual-bidding, construction management at-risk, and any alternative contracting methods approved by the state building commission or authorized by the General Assembly in a local act.³¹

For building construction or repair contracts costing between \$30,000 and \$300,000, local governments must, upon completion of each project, report the following information on each project using the HUBSCO Informal Project Report Form:

1. type of project,
2. total dollar value of the project,
3. dollar value of minority business participation in each project, and
4. documentation of efforts to recruit minority participation.³²

30. G.S. 143-128.3(a).

31. *Id.* The HUBSCO Formal Project Report Form is available on the N.C. Office for Historically Underutilized Businesses website under “Forms and Documents,” www.doa.state.nc.us/hub/forms.aspx.

32. G.S. 143-131(b). The HUBSCO Informal Project Report Form is available on the N.C. Office for Historically Underutilized Businesses website under “Forms and Documents” at www.doa.state.nc.us/hub/forms.aspx.

Figure 2. Summary of HUB Requirements under North Carolina Law

Project Cost	Goals	Good Faith Efforts	Reporting
Below \$30,000	Not required	Not required	Not required
\$30,000 to \$300,000	Not required (unless \$100,000 or more and funded with state funds*)	<i>Local Government:</i> Informal solicitation <i>Bidders:</i> No requirements	<i>Local Government:</i> Informal reporting to HUB Office
\$300,000 and above	Required	<i>Local Government:</i> Formal outreach and good faith efforts <i>Bidders:</i> Formal good faith efforts	<i>Local Government:</i> Formal reporting to HUB Office

*For projects costing \$100,000 or more and funded wholly or in part with state funds, state law requires the local government to use a 10 percent goal unless the local government has previously established and maintained another verifiable goal.

Becoming HUB Certified

All businesses that seek to qualify as a HUB must be certified through the Statewide Uniform Certification Program administered by the N.C. Office for Historically Underutilized Businesses. A business wishing to become HUB Certified may apply free of charge to the N.C. Office for Historically Underutilized Businesses. When applying for certification, the business must provide documentation that demonstrates ownership, management, and control of the company by a minority, a woman, a disabled or a socially and economically disadvantaged individual or group of individuals as required by state law. Once awarded, certification remains effective for four years provided the business remains eligible for HUB designation.

Only those businesses that are certified through this program will count toward a local government's HUB participation percentage goal.³³ However, lack of HUB certification does not preclude a business or firm from submitting a bid to a state or local government entity, nor can lack of HUB certification be considered by the governmental entity in making a contract award decision, especially for those contracts subject to the lowest responsive, responsible bidder standard of award under state law.

Sanctions

A public entity may be subject to penalties for failing to comply with statutory requirements for minority business participation programs³⁴ as well as face significant costs if the constitutionality of its goals program is challenged in court.³⁵

33. G.S. 143-128.4(e). More information on this program is available at the website for the N.C. Office for Historically Underutilized Businesses, www.doa.state.nc.us/hub.

34. G.S. 143-128.3(b); *see generally* G.S. 143-128.2 (detailing statutory requirements for HUB participation goals).

35. *See H.B. Rowe. Co., Inc. v. Conti*, No. 5:03-cv-00278-BO, ¶ 8 (E.D.N.C. 2011) (amended judgment awarding attorneys' fees to plaintiff).

Statutory Penalties

Failure to meet the statutory requirements for goal setting and good faith efforts under G.S. 143-128.2 can result in a loss of time, money, and even the ability to bid contracts without Department of Administration (DOA) and attorney general pre-approval.³⁶ If a public entity has failed to meet the requirements established in G.S. 143-128.2 for any of its projects, the secretary of the DOA can require the entity to implement a corrective plan to address whatever deficiencies the secretary has identified.³⁷ The corrective plan should apply to the current project to the extent feasible but may also apply to future building construction projects.³⁸

If the public entity does not file a corrective plan after being notified by the secretary, or submits a plan that is not in accordance with the secretary's terms, the secretary can

1. require the entity to consult with the DOA HUB Office to create a new corrective plan subject to approval by the secretary and the attorney general³⁹ and/or
2. restrict the public entity's ability to bid contracts under G.S. 143-128 without the secretary and attorney general's pre-approval of the entity's good faith compliance plan for each project for up to a year.⁴⁰

Litigation Costs and Penalties

Litigating a constitutional challenge to a minority business participation program is often costly and time consuming. Generally, these challenges are brought by contractors (or their respective associations) who lost a bid on a building contract for not meeting either minority participation or good faith effort goals and who believe that the entity's policy violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.⁴¹ Not everyone who disagrees with the policy can challenge it; the plaintiff must have been injured by the policy.⁴² While it is difficult to predict with certainty what remedies a judge will require, recent case law gives some indication of possible costs. In *H.B. Rowe, Co., Inc. v. Tippett*, the Fourth Circuit Court of Appeals upheld the Department of Transportation's (DOT) minority business participation program as it applied to African Americans and Native Americans⁴³ but determined it was unconstitutional as applied to other minorities because there was not enough statistical evidence of discrimination.⁴⁴ Because part of the program was found unconstitutional, DOT was required to pay the plaintiff's reasonable attorneys' fees, in addition to its own litigation costs.⁴⁵

36. See G.S. 143-128.3(b)(1)-(2).

37. G.S. 143-128.3(b).

38. *Id.*

39. G.S. 143-128.3(b)(1).

40. G.S. 143-128.3(b)(2).

41. See generally *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 483 (1989); *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 238 (4th Cir. 2010).

42. See *Md. Hwy. Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1250–52 (contractors' association could not bring challenge to minority business enterprise statute where neither the association, nor any of its members, had been injured by the statute). In order to bring a claim, a party "must be able to demonstrate a 'distinct and palpable injury' that is likely to be redressed if the requested relief is granted." *Id.* at 1250 (quoting *Valley Forge Coll. v. Ams. United*, 454 U.S. 464, 488 (1982)).

43. *Rowe*, 615 F.3d at 257.

44. See *id.* at 251 n.8.

45. See *supra* note 35.

Part II. Constitutional Review of Minority Business Participation Programs

Introduction

Not only must a local government's minority business participation program comply with statutory requirements, it also must be able to survive judicial review if it is challenged in court. Although classifications based on race and gender are treated similarly for HUB participation requirements under state law,⁴⁶ these classifications are subject to different levels of judicial scrutiny under the Equal Protection Clause.⁴⁷ When the government uses a racial classification, that classification is subject to the strict scrutiny evidentiary standard of review, regardless of whether the program seeks to benefit minority groups.⁴⁸ Strict scrutiny is applied even if the race-based program merely establishes aspirational goals as opposed to quotas or set-asides; that race is the basis for the classification is sufficient to trigger the highest level of judicial scrutiny.⁴⁹ Gender classifications, on the other hand, are subject to a lesser evidentiary standard, known as intermediate scrutiny.⁵⁰

In order to satisfy strict scrutiny and enable the court to uphold its minority business participation program, the local government must demonstrate (1) a "compelling interest 'in remedying the effects of past or present racial discrimination'"⁵¹ and (2) that the program is narrowly tailored to serve the government's compelling interest.⁵² To satisfy intermediate scrutiny, the local government must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."⁵³ Because the strict scrutiny standard sets a higher bar, a HUB program that satisfies this standard will most likely also satisfy the lesser standard of intermediate scrutiny; the following discussion will therefore examine the constitutional requirements for HUB programs under the strict scrutiny analysis.

46. See G.S. 143-128.4(b).

47. See *Rowe*, 615 F.3d at 242 (discussing the lower level of scrutiny that applies to gender classifications); *see also id.* at 243 (plaintiff claiming the statute violates the Equal Protection Clause).

48. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (plurality opinion); *Adarand Constructors, Inc. v. Pena (Adarand III)*, 515 U.S. 200 (1995) (applying strict scrutiny to review of federal programs with racial classifications).

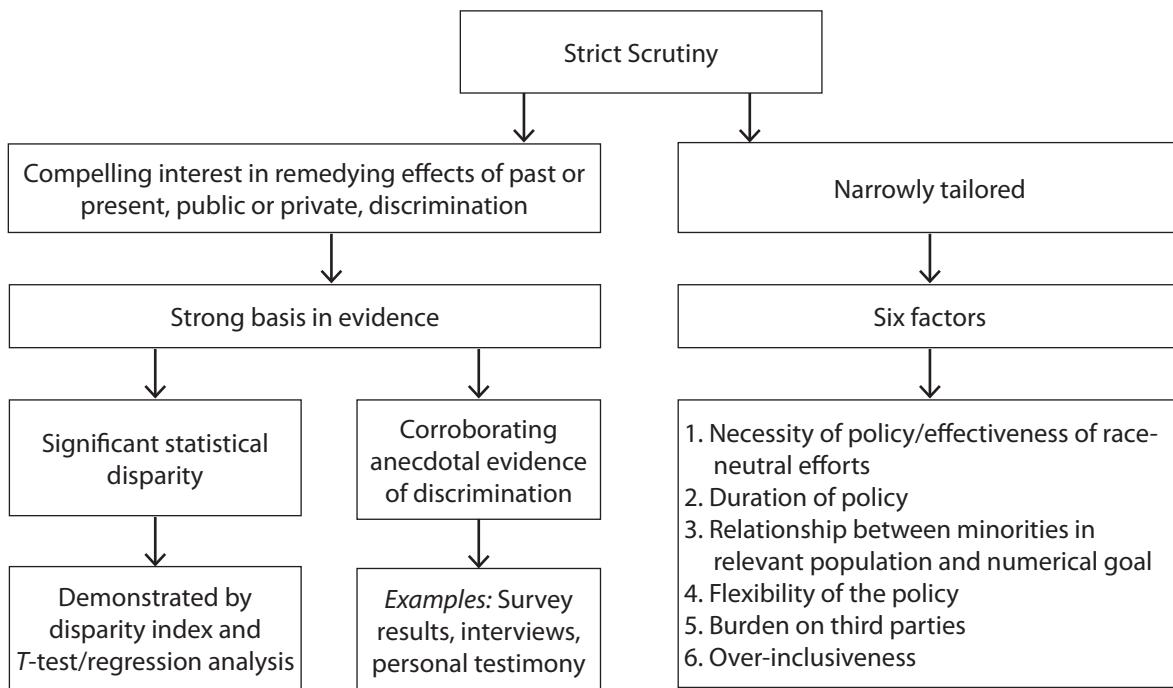
49. *DynaLantic Corp. v. U.S. Dep't of Def.*, No. CIV.A. 95-2301 EGS, 2012 WL 3356813 (D.D.C. Aug. 15, 2012) (quoting *Adarand III*, 515 U.S. at 205, 223–27) ("Defendants fail to recognize, however, that the Supreme Court explicitly adopted the *Croson* standards in *Adarand III*, a case involving race-based 'goals' as opposed to 'quotas.'").

50. *Rowe*, 615 F.3d at 242 (citing *Adkins v. Rumsfeld*, 464 F.3d 456, 468 (4th Cir. 2006)).

51. *Id.* at 241 (quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996)).

52. *Id.* at 242 (citing *Alexander v. Esteppe*, 95 F.3d 312, 315 (4th Cir. 1996)).

53. *Id.* at 242 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

Figure 3. Constitutional Requirements for HUB Programs under Strict Scrutiny Analysis

Compelling Governmental Interest

Proper evidence of discrimination is necessary to define both the scope of the injury caused by discrimination and the extent of the remedy needed to cure its effects.⁵⁴ The main U.S. Supreme Court case in this area, *Richmond v. J.A. Croson Co.*, requires a “strong basis in evidence”⁵⁵ to justify the need for remedial action. There is no “precise mathematical formula” to assess the amount of evidence needed to meet the *Croson* “strong basis in evidence” threshold.⁵⁶ Instead, the courts have critiqued each public entity’s evidence of discrimination on a case-by-case basis, giving indications of what data meet the standard.⁵⁷ A “strong basis in evidence” does not mean that the local government has to “conclusively prove the existence of past or present racial discrimination” to be justified in taking action.⁵⁸ Instead, it can satisfy its burden by showing a “significant statistical disparity” between the number of “qualified, willing, and able” minority

54. *Croson*, 488 U.S. at 510.

55. *Id.* at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

56. *Rowe*, 615 F.3d at 241 (citing *Rothe Dev. Corp. v. Dep’t of Def. (Rothe II)*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n.11 (5th Cir. 1999)).

57. See Heather Martin, Maureen Berner, and Frayda Bluestein, “Documenting Disparity in Minority Contracting: Legal Requirements and Recommendations for Policy Makers,” *Public Administration Review* 67, no. 3 (May/June 2007): 511, 513, <http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6210.2007.00733.x/abstract>.

58. *Rowe*, 615 F.3d at 241.

subcontractors available in the relevant industry and local market area and how often they are utilized by prime contractors or the public entity.⁵⁹

Several courts have approved of the use of disparity indices for this purpose,⁶⁰ where a result of one hundred signifies full participation by minority businesses given their availability in the market area.⁶¹ Any score less than eighty is generally considered to be an indication of discrimination.⁶²

Once a statistical disparity is established using a disparity index, statistical methods need to be employed to validate that the disparity is actually the result of discrimination.⁶³ In addition, the Fourth Circuit requires that the statistical evidence “be corroborated by significant anecdotal evidence of racial discrimination.”⁶⁴ These indications of a “strong basis in evidence” will be discussed in detail below.

Pre-Enactment versus Post-Enactment Evidence

As previously discussed, when a local government uses a racial classification there has to be a strong basis in evidence that remedial action is needed.⁶⁵ There has been some disagreement in the various circuit courts regarding whether local governments must meet that evidentiary burden using only evidence they possessed prior to enacting their minority participation programs⁶⁶ or whether they may justify their programs using post-enactment statistical data and evidence.⁶⁷ Several circuit courts have upheld the use of a combination of pre-and post-enactment evidence.⁶⁸ As the Tenth Circuit Court of Appeals explained, a local government must,

59. *Id.* (citing *Croson*, 448 U.S. at 509).

60. *Id.* at 243–44 (referencing that six other circuits had recognized the utility of disparity indices for determining disparity in minority- and women-owned business utilization). A disparity index is created by “divid[ing] the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multipl[ying] the result by 100.” *Id.* at 243.

61. Martin, Berner, and Bluestein, “Documenting Disparity in Minority Contracting,” *supra* note 57, at 515. For example, if African American subcontractors represented 30 percent of the available labor pool and earned 30 percent of the subcontracting dollars spent, the disparity index would be one hundred, indicating full participation. Similarly, if African American subcontractors represented 30 percent of the available labor pool and won 15 percent of the subcontracting dollars, then the disparity index would be fifty or half participation. *Rowe*, 615 F.3d at 243.

62. *Rowe*, 615 F.3d at 244. For a more in-depth discussion of disparity study methodology, see Martin, Berner, and Bluestein, “Documenting Disparity in Minority Contracting,” *supra* note 57, at 515.

63. See Martin, Berner, and Bluestein, “Documenting Disparity in Minority Contracting,” *supra* note 57 (discussing that *t*-tests indicate whether disparity index results represent an actual disparity).

64. *Rowe*, 615 F.3d at 241 (citing *Md. Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993)).

65. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

66. See *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 738–39 (upholding the denial of the state’s request for continuance to gain more statistical disparity evidence because the state “must have had sufficient evidentiary justification . . . in advance of its [program’s] passage”).

67. See *Concrete Works of Colo., Inc. v. Denver* (*Concrete Works II*), 36 F.3d 1513, 1521 (10th Cir. 1994) (discussing that several circuits endorse the use of post-enactment evidence to help determine whether government has met the strong basis in evidence standard); *see also Contractors Ass’n of E. Pa., Inc. v. Philadelphia*, 6 F.3d 990, 1004 (3d Cir. 1993) (determining that post-enactment evidence is admissible and useful, particularly where the principle relief sought is an injunction).

68. See *Concrete Works II*, 36 F.3d at 1521; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1003–04; *Eng’g Contractors Ass’n of S. Fla. v. Metro. Dade Cnty.*, 122 F.3d 895, 911–12 (11th Cir. 1997).

at a minimum, have some pre-enactment evidence of discrimination in order to satisfy strict scrutiny analysis.⁶⁹ The Fourth Circuit has not directly weighed in on the use of post-enactment evidence, but in *Rowe* the court upheld the state's minority participation program as it applied to certain minorities based primarily on a 2004 disparity study done several years after the statute went into effect.⁷⁰ Given this uncertainty, rather than set goals and attempt to justify them after the fact, a local government should assume it will need to justify its program based on pre-enactment evidence and gather the statistical and anecdotal evidence necessary to show a strong basis in evidence prior to setting its goals.⁷¹

Significant Statistical Disparity: Availability of HUB Firms That Are Qualified and Willing to Compete

When evaluating the availability of qualified minority firms and their utilization in public contracting, the case law is clear that the relevant sample pool is those minority firms qualified to do the job, not the minority's prevalence in the general population.⁷² In conducting a disparity study, a local government needs to determine (1) the relevant market area the disparity study should evaluate and (2) the minority businesses within that market area that are "qualified, willing, and able" to compete for public subcontracts.⁷³

Determining market area: Evidence of discrimination should be local and industry specific. Proof of past or present discrimination must be particular to the local construction industry.⁷⁴ In *Croson*, national congressional studies of industry-wide discrimination were not specific enough to enable the City of Richmond to meet the strong basis in evidence standard.⁷⁵ In *Rowe*, the Fourth Circuit did not speak directly to the correct method for identifying the relevant market area for statistical analysis,⁷⁶ but case law from another circuit provides some guidance. Interpreting *Croson*, the Tenth Circuit Court of Appeals explained that, while the relevant market for statistical analysis is the local construction market, it is not necessarily confined to specific governmental jurisdictional boundaries, such as cities or counties.⁷⁷

69. *Concrete Works II*, 36 F.3d at 1521 (explaining that *Croson* requires some evidence before instituting the program but does not foreclose the courts from considering post-enactment evidence). In *Croson*, the Court specified that a municipality "must identify [the] discrimination . . . with some specificity before [it] may use race-conscious relief." 488 U.S. at 504.

70. See *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 250 (4th Cir. 2010).

71. See *Associated Gen. Contractors of Ohio*, 214 F.3d at 738 ("[T]he time of a challenge to [a] statute, at trial, is not the time for the state to undertake factfinding.").

72. *Croson*, 488 U.S. at 501–02. In *Croson*, the City of Richmond attempted to justify its minority participation quota based on evidence that during a five-year period only .67 percent of the city's prime construction contracts had been awarded to minority businesses, despite African Americans constituting 50 percent of the city's general population. *Id.* at 479–80. The Court emphasized that where special qualifications are necessary, the relevant pool for documenting disparity is those qualified for the job. *Id.* at 501–02.

73. See *Martin, Berner, and Bluestein*, "Documenting Disparity in Minority Contracting," *supra* note 57, at 516; see also *Rowe*, 615 F.3d at 246 (discussing the use of vendor and bidder data to show availability of qualified and willing subcontractors).

74. See *Croson*, 488 U.S. at 500 (stating that generalized statements by public officials were "of little probative value in establishing identified discrimination in the Richmond construction industry").

75. *Id.* at 504.

76. See *Rowe*, 615 F.3d at 244. In *Rowe*, the state seemed to identify the relevant market area as the entire state of North Carolina because it utilized a vendor list focusing on contractors able to work on state-funded projects. *Id.* at 244–45.

77. *Concrete Works of Colo., Inc. v. Denver (Concrete Works II)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

What does this mean for public entities?

- Public entities should use local construction industry-specific data as proof of discrimination.⁷⁸
- The “local construction industry” is not necessarily limited to a city, county, or other set jurisdictional boundary, especially if this is inconsistent with where the majority of contracts are awarded.⁷⁹
- To determine the relevant market area, look to the area where the contractors that are awarded a significant majority of the public entity’s contracts are from.⁸⁰

Qualified, willing, and able: Measuring availability accurately. Another required factor that must be analyzed is the availability of “qualified” and “willing” minority firms.⁸¹ However, as with defining market area, the courts have not prescribed a specific methodology for making this determination, and dispute has arisen over whether “vendor data” or “bidder data” provide the most accurate measurement of qualified and willing minority firm availability.⁸² Vendor data (sometimes referred to as bidders lists) generally consists of a compiled list of minority contractors able to work on government contracts,⁸³ while bidder data is a list of only the minority contractors who have bid on projects for the public entity.⁸⁴ It is common for units of local government to maintain vendor data (bidders lists).

In *H.B. Rowe Co., Inc. v. Tippett*, the Fourth Circuit upheld a statistical study based on a vendor list comprised of (1) subcontractors approved to perform subcontracting work on state-funded projects, (2) subcontractors that performed this work during the study period, and (3) contractors qualified to perform prime contractor work on state-funded projects.⁸⁵ The plaintiff challenging the state’s minority participation plan argued that bidder data was better, but the only source of bidder data available showed a higher availability of minority contractors, thus actually supporting the state’s position.⁸⁶ Because the plaintiff could not show that the vendor data was unreliable, how bidder data would change the outcome, or provide a better viable option, the court upheld the use of vendor data.⁸⁷ Similarly, the Tenth Circuit rejected a challenge to the use of vendor data, reasoning that bidder data provided no better insight into whether firms were qualified.⁸⁸ Some unqualified firms would bid, while some qualified firms would choose not to.⁸⁹

78. See *Croson*, 488 U.S. at 504 (explaining that nationwide study of discrimination in construction industry was not particularly probative of the existence of discrimination in Richmond.)

79. See *Concrete Works II*, 36 F.3d at 1520.

80. See *id.* In *Concrete Works II*, the court upheld the use of the six-county Denver Metropolitan Statistical Area (MSA) for statistical analysis because more than 80 percent of the public contracts at issue were awarded to contractors within the MSA. *Id.*

81. *Croson*, 488 U.S. at 509.

82. See *Rowe*, 615 F.3d at 246–47.

83. See *id.* at 246. For further guidance on documenting the availability of qualified firms, see Martin, Berner, and Bluestein, “Documenting Disparity in Minority Contracting,” *supra* note 57, at 517.

84. See *Concrete Works of Colo., Inc. v. Denver* (*Concrete Works IV*), 321 F.3d 950, 983 (10th Cir. 2003). Plaintiff unsuccessfully argued that only contractors that bid are actually available. *Id.* at 983.

85. *Rowe*, 615 F.3d at 244. Prime contractors were considered relevant because of expert testimony that prime contractors were qualified to perform subcontractor work and often performed that type of work. *Id.* at 244–45.

86. *Id.* at 246.

87. *Id.* at 246–47.

88. *Concrete Works IV*, 321 F.3d at 983.

89. *Id.* at 983.

Measuring Utilization

The final component of a disparity index is utilization. *Utilization* is a comparison between the total number of dollars received by all construction contracting businesses in the market area and the total number of dollars received by each particular minority group.⁹⁰ Identifying what money is spent on construction contracting by a public entity and determining what percentage of that money is received by minority businesses will likely be relatively straightforward for local governments where all contracting awards are executed from one centralized location. If the unit of government is larger, however, gathering verifiable data from the relevant market area can be more challenging. For example, in *Rowe*, several DOT offices throughout the state awarded contracts.⁹¹ The court determined that the amount of subcontracting dollars awarded by the DOT's central office in Raleigh was a sufficient sample because the central office's data accounted for the majority of total highway contracting dollars awarded by the department.⁹²

While local governments would not have a statewide market area, as was the case with the DOT in *Rowe*, larger units of local government with highly decentralized procurement functions should be mindful of the need to collect construction contracting data from all departments that are authorized to perform this function. Comprehensive data collection would be even more important if the local government has been granted authority by the North Carolina General Assembly to extend its HUB participation program to purchases and/or other contracts beyond those construction contracts required by general state law.

Validation: Level of Certainty That Statistical Disparity Is the Result of Discrimination

When disparity has been identified, it is important for local governments to demonstrate that the disparity is the result of discrimination rather than the result of chance or some other nondiscriminatory factor.⁹³ This can be accomplished through the use of statistical methodologies, such as *t*-tests and regression analysis.⁹⁴ *T*-test results demonstrate the level of statistical certainty that the disparity was the result of discrimination rather than mere chance.⁹⁵ Regression analysis "tests all possible disparity-causing factors" to rule out other possible factors before determining discrimination is the cause.⁹⁶ In *Rowe*, *t*-test results were a major factor in determining whether certain minorities qualified for inclusion in the minority business participation program.⁹⁷ The program was held unconstitutional as applied to Hispanic American— and Asian

90. Martin, Berner, and Bluestein, "Documenting Disparity in Minority Contracting," *supra* note 57, at 515.

91. See *Rowe*, 615 F.3d at 244 n.6. In addition to the data from the central office, the state had compiled data from fourteen DOT divisions throughout North Carolina. However, the state's expert did not rely on it because it was incomplete, and the court declined to discuss it. *Id.*

92. *Id.*

93. See Martin, Berner, and Bluestein, "Documenting Disparity in Minority Contracting," *supra* note 57, at 517.

94. See *Rowe*, 615 F.3d at 245–46.

95. *Id.* at 245.

96. Martin, Berner, and Bluestein, "Documenting Disparity in Minority Contracting," *supra* note 57, at 517. In *Rowe*, regression analysis controlled for the effects of several variables, including the company's age as well as the owner's gender, level of education, and race, and determined that minority and women ownership had a negative effect on business revenue. *Rowe*, 615 F.3d at 245–46.

97. See *Rowe*, 615 F.3d at 251 n.8.

American-owned businesses,⁹⁸ despite statistical evidence of underutilization, in part due to lower levels of statistical certainty that discrimination caused the disparity.⁹⁹ Without *t*-test, regression analysis, or some other verification that discrimination is the cause of the disparity, the court may determine that the local government's statistical data is not entirely reliable.¹⁰⁰

Corroboration: Anecdotal Evidence of Discrimination

In addition to statistical evidence, the Fourth Circuit requires corroborating anecdotal evidence of discrimination in the local industry to show a compelling government interest.¹⁰¹ This anecdotal evidence may come from a variety of sources, including:

- mail-in surveys,¹⁰²
- testimony from public hearings,
- focus groups,¹⁰³
- telephone surveys,¹⁰⁴
- personal interviews.¹⁰⁵

Anecdotal evidence and testimony should come from contractors involved in the local construction industry.¹⁰⁶ Just as each minority's disparity data should be analyzed separately,¹⁰⁷ responses from each racial and gender classification should be noted separately to look for any trends among certain minority groups.¹⁰⁸ In *Rowe*, the state used a telephone survey, focus groups, and personal interviews to support its disparity data.¹⁰⁹ The telephone survey revealed that a significant portion of all minorities surveyed, particularly African American and Native American contractors, believed there was an informal "good old boys" network within the construction industry that excluded their businesses from winning or bidding on contracts.¹¹⁰ In addition, participants reported that double standards in qualifications for minority firms made it difficult for minority subcontractors to win bids, that contractors viewed minority firms as less competent than nonminority firms, and that their businesses had been dropped by nonminority firms after winning contracts.¹¹¹

98. *Id.* at 258 (reversing the district court where it upheld the program's constitutionality as applied to Asian Americans and Hispanic Americans).

99. *Id.* at 245, 251 n.8. Asian and Hispanic American data showed approximately 60 percent certainty that the disparity was not the result of chance, while data on African Americans showed 95 percent certainty. *Id.* at 245.

100. See *id.* at 255. The court determined it was unable to confirm that discrimination caused the underutilization of women-owned businesses in the private sector because the state had not provided *t*-test analysis. *Id.*

101. See *id.* at 241 (citing Md. Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1077 (4th Cir. 1993)).

102. Concrete Works of Colo., Inc. v. Denver (*Concrete Works IV*), 321 F.3d 950, 968 (10th Cir. 2003).

103. *Rowe*, 615 F.3d at 248.

104. *Id.*

105. *Id.*

106. See *id.* (discussing survey of both minority and nonminority subcontractors within state).

107. Martin, Berner, and Bluestein, "Documenting Disparity in Minority Contracting," *supra* note 57, at 517 (explaining that data for all targeted groups in minority participation programs need to be evaluated separately).

108. See *Rowe*, 615 F.3d at 248–49 (evaluating each minority groups' responses separately).

109. *Id.* at 248.

110. *Id.*

111. *Id.*

Anecdotal evidence does not have to be verified—and often cannot be—because it consists of individuals' stories based on their own perspectives and personal perceptions.¹¹² Anecdotal evidence also does not require verification because it simply supplements the statistical evidence on which the public entity relies.¹¹³ Also, oversampling of minorities for anecdotal evidence surveys is permissible where the purpose is to find out about issues impacting minorities.¹¹⁴

Narrowly Tailored Program

Even if a local government or public entity can demonstrate a strong basis in evidence that minority participation goals are necessary, goal programs can still be held unconstitutional if they are not narrowly tailored to achieve the entity's compelling interest in remedying discrimination.¹¹⁵ The Fourth Circuit has identified six factors it considers when evaluating whether a state statute is narrowly tailored.¹¹⁶ Each is discussed in detail below.

The Necessity of the Policy and the Effectiveness of Race-Neutral Efforts

Narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives” but not that the government exhaust every possible race-neutral approach.¹¹⁷ In *Crosen*, there was no evidence that the Richmond City Council had considered any race-neutral alternatives to using a race-based quota.¹¹⁸ By contrast, in *Rowe*, the court determined that the state had given serious good faith consideration to race-neutral alternatives before instituting its minority participation goals, in part, because of the state’s considerable Small Business Enterprise Program.¹¹⁹ In addition, the court emphasized that the state had undertaken most of the race-neutral alternatives identified in the regulations governing the federal Disadvantaged Business Enterprise Program,¹²⁰ underscoring the fact that the state had done almost everything possible to find a race-neutral solution. Furthermore, the plaintiff was unable to identify any race-neutral alternatives the state had not considered.¹²¹ Where local governments have utilized available race-neutral remedies but disparities between minorities and nonminorities persist, this further supports the justification for a race-conscious remedy.¹²²

112. *Id.* at 249.

113. *Id.*

114. *Id.* The court noted that where minorities were oversampled, the samples were randomly selected. *Id.*

115. *Id.* at 251–52.

116. *Id.* at 252.

117. *Id.* at 252 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

118. *Richmond v. J.A. Crosen Co.*, 488 U.S. 469, 507 (1989).

119. *Rowe*, 615 F.3d at 252. This program favored small businesses, regardless of race or gender, for highway construction procurement contracts of \$500,000 or less. It also waived bonding and licensing requirements on these contracts and provided bookkeeping and other support services to small businesses. *Id.*

120. *Id.*; see also 49 C.F.R. § 26.51(b).

121. *Rowe*, 615 F.3d at 252.

122. *Id.* at 252–53. Since local governments are required by state law to engage in HUB participation efforts, the local government has no discretion to abandon compliance with statutory requirements in favor of race-neutral alternatives. Nonetheless, to the extent that a local government has employed race-neutral efforts, those efforts could serve to bolster the local government’s defense if its HUB participation program is challenged.

The Duration of the Policy

“Deviation from the norm of equal treatment for all” should be limited in duration only to what is necessary to remedy the discriminatory impact on minorities.¹²³ Therefore, local governments need to somehow indicate that minority participation programs will be evaluated and adjusted if and when conditions change.¹²⁴ While not the only potentially effective approach, the Fourth Circuit has found specific expiration dates for minority participation programs and mandatory disparity studies at set intervals indicative of narrow tailoring.¹²⁵

The Relationship between Minorities in the Relevant Population and the Numerical Goal

Local governments and public entities need to ensure that minority participation goals are related to the percentage of minority-owned contracting firms in the relevant market.¹²⁶ This requirement reinforces the idea that courts only want local governments to remedy discrimination that can be specifically identified¹²⁷ rather than set overly inclusive goals.¹²⁸ The Eleventh Circuit agreed with the district court that there was not an appropriate relationship between African American–owned businesses making up between 3.4 and 5.2 percent of the firms doing business in the relevant market and the county’s 15 percent participation goal.¹²⁹ However, the court of appeals emphasized that there was “nothing impermissible about setting numerical goals at something less than absolute parity” where the county set participation goals below minority business availability—in other words, a goal that is *lower than availability* appears to be more defensible than one that is higher than availability.¹³⁰

In *Rowe*, the state established a relationship between the availability of minority businesses and the program’s percentage goals by evaluating the availability of minority-owned businesses in the geographic region of each project and setting participation goals on a project-by-project

123. See *Croson*, 488 U.S. at 510; see also *Rowe*, 615 F.3d at 253.

124. See *Rowe*, 615 F.3d at 239 (noting that the statute at issue required the department to “reevaluate the Program over time and respond to changing conditions.”); see also *Builders Ass’n of Greater Chi. v. Chicago*, 298 F. Supp. 2d 725, 739 (N.D. Ill. 2003) (criticizing minority set-aside program for not having a termination date or “any means for determining a termination date”).

125. *Rowe*, 615 F.3d at 253. The statute in *Rowe* included a sunset provision and required a new disparity study every five years. *Id.* In the federally-funded highway construction context, a court in another jurisdiction approved the duration of a program where businesses were only certified as Disadvantaged Business Enterprises (DBE) for a set number of years, and company finances were evaluated annually to determine if they remained eligible for DBE status. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1179 (10th Cir. 2000).

126. See *Rowe*, 615 F.3d at 253.

127. See *Croson*, 488 U.S. at 504.

128. See *id.* at 506. In *Croson*, the City of Richmond’s plan consisted of a 30 percent minority set-aside for city construction projects. *Id.* at 477. The Court heavily criticized the plan because it failed to consider the availability of qualified minority subcontractors, and the 30 percent quota seemed to assume that minorities would choose a trade in proportion to their prevalence within the local population. *Id.* at 507–08, 510.

129. See *Eng’g Contractors Ass’n of S. Fla., Inc. v. Metro. Dade Cnty.*, 943 F. Supp. 1546, 1583 (S.D. Fla. 1996) (narrow tailoring analysis regarding program’s application to African American–owned businesses), *aff’d*, 122 F.3d 895, 929 n.6 (11th Cir. 1997).

130. *Eng’g Contractors Ass’n of S. Fla.*, 122 F.3d at 929 n.6 (stating that a 19 percent goal is not irrational where there is a 22–30 percent prevalence of Hispanic-owned businesses in the relevant construction market).

basis.¹³¹ The court also found it significant that during an almost two-year period the department set a goal of zero percent minority participation on approximately ten percent of projects.¹³²

The Flexibility of the Policy

The flexibility of a minority participation program also can be a strong indication of narrow tailoring.¹³³ Flexible good faith requirements, the provision of waivers, and a history of prime contractors consistently meeting program standards can help prove narrow tailoring under this factor.¹³⁴ The program in *Rowe* was considered flexible by the court¹³⁵ because:

- it provided waivers of project-specific goals if prime contractors could show that they made good faith efforts to meet the participation goals;¹³⁶
- its good faith requirements were not particularly rigid or burdensome;¹³⁷
- it did not require prime contractors to accept bids from unqualified bidders or to accept any bid that was not the lowest; and¹³⁸
- prime contractors could bank excess minority participation on projects for use toward future goals for up to two years.¹³⁹

As a result, very few prime contractors had difficulty meeting the good faith efforts standard.¹⁴⁰ It should be noted also that several of the provisions the court approved of in *Rowe* are similar to North Carolina's minority participation requirements for building contracts.¹⁴¹

Burden on Third Parties

When a local government or public entity's goal is to eradicate racial discrimination, innocent third parties can bear some of the burden imposed by the remedial measure¹⁴² as long as it is not "too intrusive" or "unacceptable."¹⁴³ In *Rowe*, the plaintiff argued that the program imposed

131. *Rowe*, 615 F.3d at 253. Under the program, the department would generate a list detailing the type of work it anticipated subcontractors performing for a specific project. Next, it would consult a database of minority subcontractors in the geographic region capable of performing the work and "set[] a project-specific participation goal." *Id.*

132. *Id.*

133. *See id.* In *Croson*, the Court disapproved of a program that used a "rigid numerical quota" for minority participation, particularly because the city had a mechanism in place for reviewing bids and waiver applications on a case-by-case basis. *Croson*, 488 U.S. at 508.

134. *See Rowe*, 615 F.3d at 253–54.

135. *Id.* at 253.

136. *Id.*

137. *See id.* (emphasizing that "[g]ood faith efforts [under this program] essentially require[d] only that the prime contractor[s] solicit and consider bids from minorities").

138. *Id.*

139. *Id.* at 253–54.

140. *Id.* at 254. Under the program, only 13 of 878 submissions—including the plaintiff's—had failed to demonstrate the good faith efforts necessary to allow for waiver of project-specific goals. *Id.*

141. *See G.S. 143-128.2(b)–(c), (f), (h).*

142. *Concrete Works of Colo., Inc. v. Denver (Concrete Works IV)*, 321 F.3d 950, 973 (10th Cir. 2003) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280–81) (plurality opinion)).

143. *Id.* (referencing *Wygant*, 476 U.S. at 283; *United States v. Paradise*, 480 U.S. 149, 182 (1987) (plurality opinion)).

too much of a burden by creating “onerous solicitation and follow-up requirements.”¹⁴⁴ However, testimony from the company president showed that the company’s secretaries ran the program without the dedication of additional staff.¹⁴⁵ The company also argued that the law required it to subcontract out “millions of dollars of work” it could perform itself for less, which was refuted by the state’s evidence that prime contractors were not required to subcontract out work they could self-perform.¹⁴⁶ When developing a minority participation plan, local governments and public entities should be conscious of the burdens that program requirements place on prime contractors and be prepared to respond to arguments that the requirements are too burdensome.

Over-inclusiveness

The final factor in the court’s consideration is whether the minority participation program is overly inclusive, that is, whether it benefits minority groups that have not experienced discrimination in the locality’s construction industry.¹⁴⁷ In *Rowe*, the statutory language was not overly inclusive because it granted relief only to racial classifications that had been (1) subject to discrimination in the relevant marketplace and (2) adversely impacted in their ability to obtain department contracts.¹⁴⁸ While the statutory language was constitutional on its face, in practice, the state certified two racial classifications for inclusion in the program without a strong basis in evidence that those groups had experienced discrimination.¹⁴⁹ The court found the program unconstitutional as it applied to those two racial classifications and enjoined the state from allowing those groups to participate.¹⁵⁰

Local Government Authority to Remedy Discrimination

A local government has a constitutional basis to remedy the effects of its own discrimination, as well as the effects of discrimination by private actors, in the construction industry where the local government has essentially been a “passive participant” in the discrimination.¹⁵¹ The local government can demonstrate its passive participation by compiling evidence of discrimination in the relevant overall marketplace and then linking the government’s spending practices to the private discrimination.¹⁵² A court in another circuit held that a local government showed a

144. *Rowe*, 615 F.3d at 254.

145. *Id.*

146. *Id.*

147. See *id.* In *Croson*, the Court criticized Richmond’s plan because it gave the same preference to an African American citizen of Richmond as it would to an Aleut citizen who just moved to the city and had never experienced discrimination in the region. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989).

148. *Rowe*, 615 F.3d at 254 (quoting G.S. 136-28.4(c)(2)).

149. *Id.* at 254 n.10. The state did not have a strong basis in evidence that Asian Americans and Hispanic Americans were subject to discrimination justifying remedial action. See *id.*

150. *Id.* at 257.

151. *Croson*, 488 U.S. at 491–92 (plurality opinion). This applies as long as the local government has been given the authority to remedy the past discrimination within its own legislative jurisdiction, as North Carolina has provided in G.S. 143-128.2. *Id.*

152. *Concrete Works of Colo., Inc. v. Denver (Concrete Works IV)*, 321 F.3d 950, 976 (10th Cir. 2003) (citing *Croson*, 488 U.S. at 492).

compelling interest in remedying marketplace discrimination,¹⁵³ despite evidence that minorities were overused in the city's subcontracting.¹⁵⁴ The city utilized disparity studies showing that minorities and women contractors were overutilized where the city had set participation goals¹⁵⁵ but remained underutilized on non-goal public projects and within the overall marketplace.¹⁵⁶ The city corroborated this data with anecdotal evidence that prime contractors who employed minority and women contractors on public projects refused to hire them for private sector projects.¹⁵⁷ In addition, there was testimony of minority bids being rejected despite being the lowest,¹⁵⁸ of verbal and physical harassment of minority subcontractors on jobsites, and of additional pre-qualification requirements for minority firms.¹⁵⁹

By contrast, where disparity data indicated that women had been overutilized in state construction contracting, the state in *Rowe* attempted, in part, to justify the inclusion of women in its program based on discrimination in the private sector.¹⁶⁰ The state provided statistical evidence that women-owned businesses were significantly underutilized in private sector subcontracting in the statewide general construction industry.¹⁶¹ However, the court found fault with this data because the state did not (1) establish the amount of overlap between general construction and road construction subcontracting;¹⁶² (2) conduct *t*-test analysis, leaving it unclear whether the underutilization "was the result of mere chance";¹⁶³ (3) establish the extent to which women-owned businesses that were awarded public contracts sought private sector contracts;¹⁶⁴ and (4) support its assertions with strong anecdotal evidence.¹⁶⁵

North Carolina local governments have been statutorily mandated to remedy racial and gender discrimination in the award of certain building construction and repair contracts,¹⁶⁶ but this power is subject to some constitutional limits. When utilizing a racial classification, even to benefit historically underutilized groups,¹⁶⁷ local governments must establish the requisite strong basis in evidence¹⁶⁸ to prove a compelling interest in remedying the effects of past racial discrimination¹⁶⁹ as well as demonstrate that their minority participation programs are

153. See *Concrete Works IV*, 321 F.3d at 975.

154. See *id.* at 984.

155. *Id.* at 984. In a pretrial motion, the parties stipulated that minority business utilization exceeded availability in 18.75 of the 20.75 years measured on projects subject to the goals program. *Id.* There was no similar stipulation regarding women-owned businesses. *Id.*

156. See *id.* at 984–85.

157. *Id.* at 976–77. Witnesses specifically named the contractors who engaged in this practice, and eighteen of these contractors had performed city contracts. *Id.*

158. *Id.* at 969.

159. *Id.* at 969–70.

160. H.B. Rowe Co., Inc. v. Tippett, 615 F.3d 233, 254–55 (4th Cir. 2010).

161. *Id.* at 255.

162. *Id.* at 256.

163. *Id.* at 255 (quoting Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade Cnty., 122 F.3d 895, 914 (11th Cir. 1997)).

164. *Id.* The court found this troubling because it left open the possibility that women were seeking less private sector work because they were overutilized and busy working in the public sector. *Id.*

165. See *id.* at 255–56.

166. See G.S. 143-128.2.

167. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (plurality opinion).

168. See H.B. Rowe Co., Inc. v. Tippett, 615 F.3d 233, 241 (4th Cir. 2010) (quoting *Croson*, 488 U.S. at 500).

169. See *id.* (quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996)).

narrowly tailored to achieve that compelling interest.¹⁷⁰ While case law gives local governments an indication of how to satisfy these requirements, there remains no set formula to ensure that a program will be held to be constitutional.¹⁷¹ However, gleaning as much as possible from the case law, local governments should be prepared to justify their minority participation programs based on statistical evidence of disparity that is not the result of chance¹⁷² and is supported by anecdotal evidence of discrimination.¹⁷³ Local governments also should consider the various narrow tailoring factors previously discussed¹⁷⁴ to ensure that minority participation programs are not overly broad, burdensome, or inflexible.¹⁷⁵

Conclusion

Local governments in North Carolina are required by statute to establish HUB participation programs for certain building construction and repair projects that include setting goals, engaging in good faith efforts to solicit HUB participation in the contracting process, and reporting HUB program efforts. It is important to remember that these activities, while required by statute, are aspirational. North Carolina's HUB participation statutes do not set quotas or authorize set-asides; local governments are still required to award contracts subject to competitive bidding requirements to the lowest responsive, responsible bidder, regardless of race, gender, ethnicity, or level of minority participation. In addition, HUB programs that seek to facilitate the participation of racial minorities in the public contracting process must satisfy the constitutional requirements and limitations discussed in Part II of this bulletin. To ensure the legal validity of its HUB program, a local government should understand and adhere to these legal requirements.

170. *Id.* at 242 (citing *Alexander v. Estep*, 95 F.3d 312, 315 (4th Cir. 1996)). Gender classifications are subject to a lesser, “intermediate scrutiny” standard. *See id.*

171. *Id.* at 241 (citing *Rothe Dev. Corp. v. Dep’t of Def. (Rothe II)*, 545 F.3d 1023, 1049 (Fed. Cir. 2008).

172. *Id.* at 244.

173. *Id.* at 242 (quoting *Md. Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

174. See the section titled “Narrowly Tailored Program,” *supra*.

175. *See generally Rowe*, 615 F.3d at 252–54 (discussing the six narrow tailoring factors the court considers).

Additional Resources

Publications

- Bell, A. Fleming, II, *Construction Contracts with North Carolina Local Governments*, 4th ed. (Chapel Hill: UNC School of Government, 2007).
- Bluestein, Frayda, *A Legal Guide to Purchasing and Contracting for North Carolina Local Governments*, 2nd ed. with supp. (Chapel Hill: UNC School of Government, 2004; 2007).
- Houston, Norma, "Basic Legal Requirements for Construction Contracting with North Carolina Local Governments" (Nov. 2011), www.sog.unc.edu/sites/www.sog.unc.edu/files/Construction_Contracting_Legal_Outline_0.pdf.
- Martin, Heather, Maureen Berner, and Frayda Bluestein, "Documenting Disparity in Minority Contracting: Legal Requirements and Recommendations for Policy Makers," *Public Administration Review* 67, no. 3 (May/June 2007): 511–20, <http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6210.2007.00733.x/abstract>.
- Youens, Eileen, "Local Government Purchasing and Contracting Update: Statutory Requirements and Local Policies," *Local Government Law Bulletin* No. 118 (Feb. 2009).

Websites and Manuals

- N.C. Department of State Treasurer, Checklist for Purchasing and Contracting, www.nctreasurer.com/slgi/Audit_Manual/ContractsCheckList.pdf.
- N.C. Department of State Treasurer, Policy Manual for Local Governments, Section 35: Purchasing and Contracting Manual, www.nctreasurer.com/slgi/Policies_Manual/35Purchasing.pdf.
- N.C. Office for Historically Underutilized Businesses, Certification Program, www.doa.nc.gov/hub/programs.aspx?pid=certification.
- N.C. Office for Historically Underutilized Businesses, Statewide Uniform Certification Procedures Manual, www.doa.nc.gov/hub/programs.aspx?pid=certification.
- N.C. State Construction Office, Guidelines, www.nc-sco.com/guidelines.aspx.
- School of Government, Local Government Purchasing and Contracting website, www.sog.unc.edu/programs/purchase.
- School of Government, Coates' Canons: NC Local Government Law Blog, <http://canons.sog.unc.edu>.

Appendix: HUB Participation Program Checklist

I. HUB Participation Goals

Covered Projects

- Building construction or repair
- \$100,000 or more and funded in whole or in part with state funds (10% goal or local goal established prior to 12/1/2001)
- \$300,000 or more and funded with local funds (goal established by local government)

Statutory Requirements for Adopting Goals

- Verifiable goal
- Public hearing (prior to adoption)
- Governing board approval

Constitutional Requirements for Verifying Goal

- Compelling governmental interest in remedying past and current discrimination proven by
 - significant statistical disparity
 - between availability of qualified, willing, and able minority contractors
 - and utilization of these firms in the public and private sector
 - in the unit of government's market area
 - that has been validated as resulting from discrimination
 - and is corroborated by anecdotal evidence.
- Program is narrowly tailored to achieve compelling governmental interest by
 - considering workable, race-neutral alternatives
 - evaluating continuing need and duration of policy
 - ensuring goals are related to percentage of minority-owned firms in relevant market area
 - providing for flexibility in the policy
 - limiting the burden on third parties
 - avoiding over-inclusiveness

II. Good Faith Efforts

Informal Requirements (Projects Costing between \$30,000–\$300,000)

Local government must

- Solicit HUB participation in contracts,
- Document efforts to recruit HUB participation,
- Maintain a record of HUB contractors solicited, and
- Report all data on HUB participation efforts to the N.C. Office for Historically Underutilized Businesses.

Formal Requirements (Projects Costing \$300,000 or More)

Local government must

- Develop HUB outreach plan
- Attend scheduled pre-bid meetings

- Notify interested HUBs of bidding opportunity at least ten days prior to bid opening
- Advertise projects through media outlets likely to inform HUBs of bidding opportunity
- Maintain documentation of contacts with HUBs in attempt to meet goals
- Review HUB participation requirements with project designer prior to contract award recommendation
- Evaluate bidder's documents to determine bidder good faith efforts requirements are satisfied
- Satisfy HUB reporting requirements

All bidders must

- Identify on their bids the HUB businesses used on the project and
- Submit with bids an affidavit listing good faith efforts to solicit HUB participation and total dollar value of work by HUBs.

Apparent low bidder must

- Submit affidavit describing percentage of HUB work compared to unit's HUB goals or
- Document good faith efforts to meet local goals and
- List all subcontractors on the project.

III. Reporting Requirements

Informal Requirements (Projects Costing between \$30,000–\$300,000)

Report to the HUB Office upon completion of each project

- Type of project
- Total dollar value of project
- Dollar value of minority business participation on each project
- Documentation of efforts to recruit minority participation

Formal Requirements (Projects Costing \$300,000 or more)

Report to the HUB office semiannually

- The verifiable percentage goal for the project
- The type and total dollar value of the project
- HUB utilization by
 - minority business category
 - trade
 - total dollar value of contracts awarded to each minority group for each project
 - applicable good faith effort guidelines or rules used to recruit minority business participation
 - good faith documentation accepted by the public entity from the successful bidder
- Utilization of minority businesses under the various construction methods authorized under state law

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