

Recommendations for Revised Contracting Policies and Procedures

Our principal recommendations for the consideration of ARC policy makers, based on the present state of the case law and the Study's findings, are presented in this memorandum. While all of these recommendations should be carefully considered, we are in no way suggesting that all must be implemented to operate an effective and constitutional program.

As detailed in the 2009 Disparity Study, we conducted a thorough examination of the evidence regarding the experiences of minority- and women-owned firms in ARC's geographic and procurement marketplaces. As required by strict scrutiny, we have analyzed evidence of such firms' utilization by ARC on its prime contracts and subcontracts, as well M/WBEs' experiences in obtaining contracts in the public and private sectors. We gathered statistical and anecdotal data to provide ARC with the evidence necessary to consider whether it has a compelling interest in remedying identified discrimination in its marketplace for locally-funded contracts. We have further presented evidence relevant to the narrow tailoring of any race- and gender-based remedies. Based upon our results, we make the following recommendations.

A. Race- and Gender-Neutral Initiatives

1. Appoint a Contracting Task Force

A wide spectrum of firms supported a regular process for their industries to "talk" to ARC about concerns with policies, procedures and forms. Members would be comprised of representatives from industry groups, business owners and ARC procurement and major user department staff. Such a Task Force could meet monthly until consensus has been reached on broad measures, then less frequently as problems are redressed.

2. Streamline Procurement Procedures and Forms

Firms of all types repeatedly discussed barriers to contracting with ARC presented by burdensome and duplicative processes and forms. Current policies should be reviewed to reflect best procurement practices, with an emphasis on using technologies to reduce compliance concerns, *e.g.*, electronic submission of questions and answers regarding solicitations, regular updates to vendors, etc.

3. Increase Vendor Communication and Outreach

Increased communication with the contracting community is critical. Owners of all types of firms reported difficulties in accessing information about particular solicitations, as well as policies and procedures. Regular vendor fairs, clear instructions in addition to a Contracting Task Force were common suggestions.

4. Increase Contract “Unbundling”

Recognizing the need to segment contracts to facilitate bidding by small firms, the LSBOP ordinance specifically mandates that contracts be disaggregated to the maximum feasible extent. This approach was endorsed by M/WBEs and non-certified prime contractors. In conjunction with reduced insurance and bonding requirements, smaller contracts should permit firms to move from quoting solely as subcontractors to bidding as prime contractors. ARC should continue its emphasis on this important race- and gender-neutral measure.

5. Review Surety Bonding and Insurance Requirements

ARC should review surety bonding and insurance requirements to ensure that amounts are no greater than necessary to protect its interests. This might include reducing or eliminating insurance requirements on smaller contracts, adopting standard professional liability insurance limits, and removing the cost of the surety bonds from the calculation of lowest apparent bidder on appropriate solicitations.

6. Ensure Prompt Payments on ARC’s Contracts

Construction firms complained about slow payment by ARC. This seemed to result from the number of steps and sign offs required. Change orders were especially problematic. The recommended Task Force should evaluate how to streamline the process, as well as address other issues. An electronic contract tracking system, whereby contractors and subcontractors could see where the prime contractor’s invoice is in the process, would be helpful. “Off the shelf” software programs are available to meet this need.

7. Augment the Local Small Business Opportunities Program

At the time of our interviews, the Local Small Business Opportunities Program (“LSBOP”) had been implemented for less than one year. We therefore make the following suggestions, recognizing that ARC’s initiative is still being developed.

a. Increase LSB Certification Outreach

ARC should increase its efforts to identify businesses to encourage their owners to apply for LSB certification. The “listed M/WBEs” identified in the Study’s availability analysis

that are not currently certified should be contacted. This will help to increase the pool of firms from which prime contractors may solicit to make good faith efforts to meet goals.

b. Adopt a Local Small Business Target Market Component

If permitted by state law, ARC should consider amending the LSBOP ordinance to add a LSB Target Market for LSBs seeking work as prime contractors or consultants. Contracts subject to this market would be reserved for bidding solely by LSBs. The size of the contract, the type of work, the availability of at least three LSBs to perform the work of the contract (to create adequate competition), and ARC's progress towards meeting the annual LSB goal are factors relevant to the decision to set aside a contract. There might also be limits on the number of contracts for which a LSB could bid per designated time period.

This approach will permit small firms to compete on a more level playing field with firms of comparable size, thereby somewhat equalizing some of the barriers faced by M/WBEs to obtaining bonding, financing, access to supply networks, etc., without resort to race- and gender-based preferences.

Given the judicial prohibition on race-based contract set-asides, this is a critical race- and gender-neutral tool to provide opportunities for M/WBEs and other small firms to compete for prime contracts. Providing preferences to small firms on a race- and gender-neutral basis will also reduce ARC's reliance on race- and gender-conscious subcontracting goals, should that approach be adopted, to meet the overall annual goals, as most M/WBEs are likely to qualify as LSBs. This approach would further address the narrow tailoring requirement to reduce the burden on non-certified firms to the greatest feasible extent.

c. Adopt a Guaranteed Surety Bonding and Financing Component

A key component of a LSB initiative is a bonding and contract financing program for LSBs seeking work as prime contractors. These firms find it difficult to obtain bonding or financing or cannot obtaining bonding or financing at reasonable rates. This approach could be implemented in conjunction with other local governments or private sector owners. Business owners reported that such efforts by other agencies have been helpful.

Programs that guarantee bonding and contract financing to firms that successfully complete the diagnostic process have proven to be successful in other jurisdictions in increasing the capacity of such businesses to perform as prime contractors. Necessary participants would be a surety company, a lender, and an experienced construction business development specialist to evaluate each firm's capabilities, financials and other criteria relevant to obtaining bonding and financing.

d. Adopt a Mentor-Protégé Program

ARC should consider adopting a Mentor-Protégé Program. This component would provide direct mentoring and assistance to eligible firms through on-the-job training. This LSBOP element would seek to further the development of small firms by providing assistance in performing larger projects, moving into non-traditional areas of work and competing in the marketplace outside the Program.

The mentor-protégé relationship should be based upon an ARC-approved written development plan, including criteria for graduation from the Program, which clearly sets forth the parties' objectives and roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. Generally, mentors provide the protégé with financial assistance, assistance with subcontracts, assistance in performing prime contracts, management assistance, and technical assistance. Protégés should be viable firms and in a business that either is similar to the mentor firm's or is a component of the mentor firm. Mentors would receive credit towards meeting LSB goals, and protégés would have greater access to contracts and increased opportunities to grow into prime contractors. Additional incentives, such as reimbursement for participation costs, would greatly increase the attractiveness of a Program to potential mentors. The mentor-protégé agreement may include a fee schedule to cover direct and indirect costs for the services rendered by the mentor to train the small business.

e. Collect Race and Sex Data

Finally, it is critical that race and sex data be collected on firms participating in the Program. This will facilitate the next study, which should include review of the effectiveness of the LSBOP in remedying disparities on a race- and gender-neutral basis.

8. Improve Contracting and Procurement Data Collection and Retention Procedures

a. Prime Contracting and Purchasing Activity

For 2003-2007, not all ARC contract records contained all the information necessary for more efficient and comprehensive monitoring of M/WBE activity. Examples include:

- Unique prime contractor identification numbers are not in universal use throughout ARC;
- Telephone number and address information could not be easily related across files due to lack of universal use of unique prime contractor identification numbers;
- Data concerning change orders, contract renewals, and similar circumstances were not tracked completely or consistently and often could not be linked back to the original unique contract identification number.

This situation could be improved through increased training and guidance for ARC contracting and purchasing personnel and by introducing additional controls into the financial and contract management information systems to encourage data entry personnel to provide all the requisite information for any given contract or purchase.

b. First-Tier Subcontractor, Subconsultant, and Supplier Activity

In recent years ARC's ability to track non-M/WBE subcontractor, subconsultant, and supplier activity was limited. Non-M/WBE subcontracting records are equally as important as M/WBE subcontracting records for purposes of evaluating contracting affirmative action at the level of detail specified by *Croson* and *Adarand*. This is because narrow tailoring requires the allocation of contracting and procurement dollars by industry category and it has been demonstrated that expenditures with M/WBE subcontractors are likely to be distributed differently across industry categories than expenditures with non-M/WBE subcontractors.

B. Adopt a Disadvantaged Business Enterprise Program for Locally-Funded Contracts

1. Compelling Evidence of Discrimination in ARC's Marketplaces

Based upon this Report, ARC has a firm basis in evidence to adopt a race- and gender-conscious program for its locally-funded contracting activities. This record establishes that M/WBEs in ARC's marketplace continue to experience statistically significant disparities in their access to private and public sector contracts and to those factors necessary for business success, leading to the inference that discrimination is a significant cause of those disparities. Further, individuals recounted their experiences with discriminatory barriers to their full and fair participation in ARC's contracting activities. The Study provides the statistical and anecdotal evidence to answer in the affirmative the question whether there is strong qualitative evidence that establishes ARC's compelling interest in remedying race and gender discrimination, because absent government remedial intervention, ARC will be a passive participant in a discriminatory marketplace. There is ample evidence that ARC can choose to affirmatively intervene to reduce racial and gender barriers to participation in its locally-funded contracting opportunities.

Whatever the extent of new initiatives, more staff support and resources will be critical to success. At present, the M/WBE function at ARC is performed by one person. Should a new M/WBE program be adopted, additional staff will be necessary to conduct more outreach activities, set contract goals, monitor goal attainment and review contract performance.

2. Adopt Narrowly Tailored Race- and Gender-Conscious Remedies

In general, we recommend that any local program mirror the US Department of Transportation’s Disadvantaged Business Enterprise (“DBE”) Program, contained in 49 C.F.R. Part 26, to the greatest feasible extent. Not only have the criteria for eligibility and the implementing provisions of Part 26 been unanimously upheld by the courts, but also following Part 26 has the advantage of being familiar to those ARC staff, prime contractors and DBEs who have worked on federally-funded projects at the Airport or other agencies and DBEs certified by the Georgia Unified Certification Program.

a. Adopt the USDOT’s DBE Program’s Eligibility Standards

ARC should consider adopting the DBE Program’s eligibility requirements.¹ This provides two important benefits. First, it creates uniformity in certification requirements and processes with the Georgia Unified Certification Program,² which lessens the burden on applicants and ARC. Second, the eligibility standards of Part 26 have been unanimously upheld by the federal courts, so ARC can be confident that its program is narrowly tailored to only benefit individuals who have clearly suffered social and economic disadvantage and whose firms are small.

Two exceptions should be considered. Part 26 provides that an applicant can be located anywhere; there is no location requirement for a federally funded contract. In contrast, case law suggests that a local government, unlike the national legislature, can only remedy discrimination in its contracting marketplace. While this does not mean that ARC’s Program eligibility must be limited to only the boundaries of the jurisdiction, we have generally counseled clients to limit automatic geographic eligibility to firms located within the marketplace established by the Study. As developed in Chapter III, ARC’s geographic market is the Augusta-Richmond, GA-SC MSA. However, while this reflects the location of the vast majority of firms that have done business with ARC, that does not mean that firms located outside the MSA should not be eligible for participation in the Program. There is no evidence to suggest that a disadvantaged firm seeking to do business with ARC is somehow less likely to suffer the effects of discrimination in the market because its principal office or facility is outside ARC’s marketplace. If anything, the old boys network could be even more impenetrable to a minority or female “outsider.” Therefore, ARC should permit firms outside the MSA to make an individual showing of efforts to do business in the MSA (*e.g.*, contracts received, quotes provided, marketing efforts, etc.).

Next, ARC should consider adopting the Small Business Administration size standards,³ but without the statutory size cap embodied in 49 CFR § 26.65(b). This will permit firms

¹ 49 C.F.R. §§ 26.61-73.

² 49 C.F.R. § 26.81.

³ 13 CFR Part 121.

to grow, without deviating from the national standards. The current limit in the LSBOP of \$500,000, averaged over three years, is probably too low to permit firms to grow their capacity.

b. Adopt an Overall, Annual M/WBE Goal

The Study's estimates of the availability of M/WBEs in ARC's marketplace are provided in Chapter IV. These form the starting point for consideration of setting an overall, annual target for ARC's spending with M/WBEs. However, this snapshot of firms doing business in the ARC's geographic and procurement marketplace does not *per se* set the level of M/WBE utilization to which ARC should aspire. As discussed in Chapter V, current M/WBE availability is depressed by the effects of discrimination. A case can be made for setting a goal that reflects a discrimination-free marketplace rather than the results of a discrimination infected marketplace.⁴ Using the disparities in the business formation of M/WBEs compared to non-M/WBEs can provide a quantitative basis for such a determination.

Should ARC choose to adopt a new DBE Program, we recommend setting an overall, annual goal for minority- and women-owned firms, as in the prior DBE Program, rather than subdivided goals, because this was ARC's prior practice. This also provides added flexibility to ARC and prime firms in meeting the Program's objectives.

ARC should annually review of its progress towards the annual M/WBE goal. ARC should further determine whether race- and gender-conscious remedies continue to be necessary to meet the previously established goals, or whether subcontracting goals should no longer be set for some types of contracts. However, there is no legal requirement to set a new goal every year; indeed, there will not be new availability data until the next disparity study, and the Census Bureau conducts the *Survey of Business Owners* only every five years. Thus, the annual goal adopted based upon the current evidence should continue until full and accurate data are analyzed in a future study.

c. Set Contract Specific Goals

This Study's detailed industry and group availability estimates provide an objective starting point for contract goal setting. A contract goal should reflect the availability of firms to perform the anticipated scopes of the contract, weighted by the extent those scopes represent of the total contract price.

We also recommend that the minimum number of available M/WBEs be at least three to set a contract goal. This will ensure that there is adequate competition within those industry sectors and reduce the burden on non-certified firms—a key component of narrow tailoring.

⁴ See, e.g., 49 CFR §26.45(d) (DBE goal must reflect the recipient's "determination of the level of DBE participation you would expect absent the effects of discrimination").

We urge ARC to permit M/WBEs to count their own participation towards the contract goal. This permits the firms to grow and enhance their capabilities. It also mirrors the practice in the USDOT DBE program.⁵

ARC should bid some contracts it determines have significant opportunities for M/WBE participation without goals. These “control contracts” will illuminate whether M/WBEs are used or even solicited in the absence of goals. Such unremediated markets data will be probative of whether ARC still needs to implement M/WBE contract goals to level the playing field for its contracts.

d. Contract award procedures

Once goals have been set on a contract, it is critical that standards be adopted for contract award. This includes consideration of the commercially useful function of a proposed DBE, and provision for bids what do not meet the contract goal.

Determination of commercially useful function

All proposed M/WBE utilization must be evaluated to determine whether the M/WBE is serving a commercially useful function. Even a firm that is legitimately owned by a minority or woman can be used as a “pass through” or “front” on a specific contract. Commercially useful function means responsibility for the execution of a distinct element of the work of the contract and carrying out the M/WBE’s responsibilities by actually performing, managing, and supervising the work involved, or fulfilling its responsibilities as the joint venture partner. The determination that a M/WBE is performing a commercially useful function will be based upon the amount of work subcontracted, normal industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing, and other relevant factors. It should be noted that the setting of contract goals based upon the real subcontractable scope of work should reduce the incentives to claim credit for work that is not commercially useful to meet artificial goals.

Good faith efforts reviews

The courts have categorically held that narrow tailoring requires that waivers of goals be available to a bidder that made good faith efforts. A bidder that made good faith efforts must be treated the same as one that met the goals. To do otherwise- that is, to favor utilization above good faith efforts- will undoubtedly be held to be an impermissible race- and gender-based quota. That so few waivers were granted by the City of Chicago was a major cause of its M/WBE Program’s constitutional infirmity. Standards for demonstrating good faith efforts must be adopted, so that bidders and ARC staff have clear guidelines about when good faith efforts have been met. We recommend the

⁵ 49 C.F.R. § 26.55(a).

outlines of the good faith efforts provisions of Part 26 CFR §26.53 as a guide for ARC's legislation and policies.

e. Monitor Contract Performance Procedures

Once a contract with M/WBE commitments has been awarded, it is crucial that those commitments be monitored and that sanctions for non-conformance with the contract be available. Contract closeout is very late in the process to determine that a prime contractor has failed to utilize M/WBEs or that firms have not been paid. As previously discussed, the implementation of a comprehensive data tracking and monitoring system is a necessary element of a successful Program, as well as prompt payment and prohibitions on unauthorized substitutions of subcontractors. It is also obviously preferable to correct problems rather than sanction firms after the fact. In addition, the standards and processes for substituting subcontractors should be clarified and documented.

f. Increase Program Administration

A new DBE Program cannot be implemented without additional resources. The DBE Coordinator's office will require more staff to conduct outreach, certify applicants, set goals, review bids and monitor contractor performance. Further, it is essential that other departments become responsible for meeting ARC's Program objectives. The Program will be less successful if it is seen as "the M/WBE" Program," rather than a ARC-wide initiative for which all department heads will be held responsible. Job descriptions should reflect this priority, with meeting Program objectives one evaluation criterion for raises and promotions.

g. Develop Performance Measures for Program Success

While recognizing the systemic barriers faced by minorities and women in competing for ARC contracts and subcontracts on a full and fair basis, developing quantitative performance measures for certified firms and overall Program success would provide measures for evaluating the Program. Possible benchmarks are the achievement of business development plans similar to those used in the Small Business Administration's 8(a) Program; revenue targets for certified firms; increased prime contracting by M/WBEs; and increased graduation rates. It will be important to track the progress of graduated firms to evaluate whether they succeed without the Program, and if not, why not. Further, data should be kept on requests for waivers of goals, to determine the accuracy of goal setting and areas for additional M/WBE outreach.

h. Review Guidelines and Procedures for Program Violations

Contract terms and conditions should be reviewed to ensure that ARC has the maximum legal ability to enforce the Program's provisions and the contractual commitments of contractors. ARC's attorneys should work with the M/WBE Coordinator and the Purchasing Department to develop staff guidelines for sanctions.

i. Mandate Program Review and Sunset

ARC should require that the evidentiary basis for the Program be reviewed at least every five years, and that only if there is strong evidence of discrimination should it be continued. The Program's goals and operations must also be evaluated to ensure that they remain narrowly tailored to current evidence. A sunset date for the Program, when it will end unless reauthorized, should be included as in the policy.