Public Construction Projects: Not Always a Hollywood Ending

Workshop C: Pay It Forward: Social Programs, Preferences, and Incentives for Federal and State Projects

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Background on Preference Programs

• 1st DBE program in 1958 – goal to encourage firms to locate in/near “ghetto” areas, and to hire disadvantaged residents of those areas.

• In 1978, converted to Minority Business development program with the goal of diversity in ownership of businesses in the construction industry v just encouragement of non-minority, male business owners to relocate their business.

• 1983 - first U.S. DOT Disadvantaged Enterprise program was established.

• 1987 – First time women were included as “disadvantaged” owners.
Disadvantaged Businesses Programs First Considered

1958 Small Business Act §8(a) required assistance to “socially and economically disadvantaged” small businesses.

Since then, the number of diverse groups in the construction industry has expanded, but relatively nominally.
Small Business Laws & Regulations

• Public Law 85-536 / Small Business Act of 1958

“It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect insofar as is possible the interests of small business concerns in order to preserve free competitive enterprise, to ensure that fair proportion of the total purchases and contracts for supplies and services for the Government be placed with small business enterprises, and to maintain and strengthen the overall economy of the nation.” Section 201
Small Business Laws & Regulations

- 89.7% Construction Industry Sector Workers are male.
- Approximately 939,000 women were employed in various occupation sectors of the construction industry – 9.1%.

<table>
<thead>
<tr>
<th>Occupation Sector</th>
<th>Number of Women</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sales &amp; Office</td>
<td>423,000</td>
<td>45%</td>
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<tr>
<td>Professional &amp; Management</td>
<td>293,000</td>
<td>31%</td>
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<tr>
<td>Natural Resources,</td>
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<tr>
<td><strong>Construction &amp; Mtc.</strong></td>
<td>196,000</td>
<td>21%</td>
</tr>
<tr>
<td>Service Occupations</td>
<td>14,000</td>
<td>1.5%</td>
</tr>
<tr>
<td>Production, Transportation</td>
<td></td>
<td></td>
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<tr>
<td>&amp; Material Moving</td>
<td>13,000</td>
<td>1.4%</td>
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</table>
The Numbers Tell a Story - Representation by Group in Construction in the US

- Asian
- African American
- Women
- Hispanic
- White
Legal and Regulatory Foundations

• Federal Level
  • Statutes and acts
    • Small Business Act, Buy America Act, Davis Bacon Act
  • Implemented by various federal regulations
    • Federal Acquisition Regulation
  • Supplemented by various agency regulations
    • Defense Federal Acquisition Regulation Supplement
  • Agency websites
Legal and Regulatory Foundations

- State and Local Level
  - State
    - Statutes and acts
      - Small Business programs, buying local, and prevailing wage rates
    - Implemented by various regulations
      - State administrative codes
      - Agency/Department websites
  - Local – County or Municipal
    - County – Ordinances, regulations and procedures
    - Municipal – Charters, ordinances, regulations and procedures
- **REMEMBER** – If federal money is part of the funding for a state or local project it is going to have a federal tail with it! Example: Buy America - Buy American Acts
Nuts & Bolts of Compliance with Incentive Programs

- Public Works
  - Designed to increase opportunities for disadvantaged businesses
  - Use of public funds to assist in creating increased opportunities
- Small Business Certification Programs
  - Defined scope
  - Eligibility for certification and recognition in program
  - Requirements for participation in Program

- UNIVERSAL – must be 51% owned and controlled by a U.S. citizen of a defined eligible group
Nuts & Bolts of Compliance with Incentive Programs

• Federal
  • Small Business Administration
  • US Department of Transportation - SDBE program is exception and allows certification and participation in program by lawfully admitted permanent residents

• Certification and Participation Requirements
  • An individual personal net worth cannot exceed $1.32M;
  • Small business must meet SBA Size, annual gross income cannot exceed $23.98M;
  • Small business must be at least 51% owned by a minority; and
  • Small business must be independent of any other company
Nuts & Bolts of Compliance with Incentive Programs

• State and Local
  • State programs vary widely
  • Most states follow similar eligibility and program requirements as federal government
  • Vary approaches to suit objectives of the state
    • Require U.S. citizenship
    • Use of public funds
  • Local governments may have offices/departments that assist disadvantaged businesses
  • May also have ordinances giving preference to local companies or contractors
Nuts & Bolts – Private Projects

• Some Programs for Diversity & Inclusion, Local/Geographical
• Recognition by many businesses that diversity brings success
  • Pepper Construction
  • Skanska
  • PCL
Legal Pitfalls

• Company formation and documentation
• Contract terms/negotiations
• Representations
• False Claims Act/Fraud & Abuse
Company Formation and Documentation

NEW SINGLE MEMBER COMPANY—
EASY PEASY -- EXCEPT FOR FUNDING!

• Funding the acquisition of the company is something always closely examined by the agencies even if new, single member companies.

• The other main issue will be ensuring that the corporation documents clearly set out the commercially useful function the new company serves.
A NEW MULTI-MEMBER COMPANY

- The female/minority co-owner MUST have a majority interest (at least 51%);
- The female/minority co-owner MUST have **CONTROL** of the company and the attorney has to know what **CONTROL** means in the D/M/WBE context.
CONTROL! CONTROL! CONTROL!

The minority/female owner MUST:

• Hold the position as the highest officer in the company, **control** the board of directors, or serve as managing member or general partner;
• Control all business decisions with the power to direct or cause the direction of the firm;
• Make the day-to-day and longer-term decisions of the firm on **ALL** matters of management, policy and operations.
Controlling the Board of Directors

• CONTROL IS AN ISSUE AND A PITFALL!

• If you follow standard business practice and recommend that control of the firm rest with a multi-member board, with each officer or director having one vote, and majority rules, YOU HAVE COMMITTED MALPRACTICE in terms of setting up a company eligible for certification as a M/W/DBE
Forming the Board: How It Has to Be

• Male, non-minority co-owners can serve on the Board of Directors or be an Officer.

• The Board cannot operate on a Majority rules basis, except as to matters like dissolution of the firm or bankruptcy.

• The Board can only serve to advise the female/minority co-owner, who has to be the highest officer, and must control the Board of Directors.

• The Board cannot have the power to overrule decisions of the female/minority owner even by super-majority vote.
Buying into a Multi-Member Company
(with the intent to obtaining certification for the company in the future)

• CONTRACT TERMS AND NEGOTIATIONS IN THE PURCHASE ARE **VITAL** FOR FUTURE CERTIFICATION.

• CANNOT have it writing anywhere that the purpose of the sale is for certification purposes.

• Transactions between family members need special documentation of reasons for transfer, consideration paid, and participation of the male, non-minority former owner post acquisition.

• Male, non-minority co-owners MUST be aware of and accepting of the complete loss of control that will be necessary for them in order for the company to obtain certification.
Funding Issues for Eligibility

CONTRIBUTIONS OF MONEY OR EXPERTISE USED TO ACQUIRE INTEREST IN THE COMPANY (OR TO CREATE THE COMPANY) MUST BE “REAL AND SUBSTANTIAL”

• If relying on expertise as all or part of the female or non-minority’s contribution toward acquisition, the expertise must meet all of the following requirements:

1. Expertise must be in a specialized field;

2. Expertise must be critical, indispensable and specific to the type of work the firm performs, and documented in the records of the business;

3. The new co-owner must also have a significant financial investment in the firm.
Funding Issues (Cont.)

ACQUISITION THROUGH GIFTS:

**PRESUMPTION** THAT IF BUSINESS ACQUISITIONS ARE BY GIFT, THE OWNERSHIP AND CONTROL OF THE MINORITY OR FEMALE ARE **ILLUSORY**!

You have to overcome this presumption by **clear and convincing evidence** that:

1. The gift was made for purposes other than certification; and
2. The female or minority new owner actually controls the management and operation of the firm.
Representations in Application

• When applying for certification ALL representations made in the application are made under oath.

• If misrepresentations are made on the application, there is a presumption that the damages to the government as a result of those misrepresentations are the ENTIRE AMOUNT paid under any contract awarded because of the misrepresentation.

• Warn the clients and make sure that you have not participated in any way in any potential misrepresentations!
Interplay of Federal, State & Local Programs

• There are a multitude of Federal, State and Local laws and programs that impact social programs and set-asides. We will address a few of the key ones:

• Davis Bacon
• Prevailing Wage Rate Issues
• Miller Act
• Little Miller Act
• Buy American
Interplay of Federal, State & Local Programs

- Davis Bacon (Federal)
  - Requires payment of survey created wage rates to certain trade classification of workers on federal construction projects in excess of $2k
  - Other labor statutes for other types of federal procurements
    - Federal-Aid Highway Act, Service Contract Act
  - Implemented through various regulations
    - FAR Subpart 22.4 – Labor Standards for Contracts Involving Construction
    - FAR Clause 52.222-6 Construction Wage Rate Requirements
Interplay of Federal, State & Local Programs

• Prevailing wage rate - construction (State/Local)
  • Certain wage rate for these projects will be used
  • 23 states do not have prevailing wage rate laws
    • Wisconsin repealed in 2017
  • Each jurisdiction has different criteria
    • When applicable
    • Who is covered
    • Whether subcontractor employees are covered

• How to defend against an allegation of wage rate violation
Interplay of Federal, State & Local Programs

- **Miller Act (Federal)**
  - Requires performance and payment bond for any federal construction, repair or alteration of public building or public work contract in excess of $100k
  - Performance bond protects government against defaulting contractor
  - Payment bond for protection of subcontractor/suppliers
    - Only subcontractor with direct subcontract or sub-subcontractor with direct subcontract with subcontractor
    - Subcontractor – no notice and must wait 90 days after last labor performed or material provided before filing suit
    - Sub-subcontractor – notice within 90 days after last labor performed or material and must wait 90 days
    - SOL – no later than one year after the day on which the last labor performed or material provided to project
Interplay of Federal, State & Local Programs

• "Little" Miller Act (State)
  • Every state has some version of a Miller Act Statute requiring Contractor to provide performance and payment bond and requirements vary widely
  • Contractor and attorney need to understand
    • What is the threshold requirement for performance and payment bonds?
    • Who can make claim on the bond and what, if any, notice requirements are there?
    • What is the statute of limitations for a cause of action against the bonds?
  • Should contractor require subcontractors to provide performance and payment bonds?
## Interplay of Federal, State & Local Programs

<table>
<thead>
<tr>
<th>Buy American Act (&quot;BAA&quot;)</th>
<th>Buy America Programs (&quot;BAP&quot;)</th>
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<tbody>
<tr>
<td>• 1933 applies to federal construction projects</td>
<td>• 1978 applies to projects usually when grant money involved</td>
</tr>
<tr>
<td>• Federal government owner and contracting party</td>
<td>• State or local government is owner and contracting party</td>
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<tr>
<td>• Requires contractor procure construction material that is manufactured in US &quot;substantially all from articles, materials, or supplies mined, produced or manufactured in US&quot; unless waiver/exception</td>
<td>• FHWA (highway) and FTA (transit) projects</td>
</tr>
<tr>
<td>• Definition of &quot;component&quot; and &quot;subcomponent&quot;</td>
<td>• Stricter than BAA and requires all iron and steel to be US manufactured, limited waiver/exception</td>
</tr>
<tr>
<td></td>
<td>• Definitions of &quot;component&quot; and &quot;subcomponent&quot; differ substantially from BAA</td>
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What about State & Local Programs?
California – Golden Opportunities

• Public and Private push toward diversity and inclusion on construction projects

• PCC § 2050-2057
  • Certification meets the certification criteria contained in Part 23 of Title 49 of the Code of Federal Regulations

• PCC § 10500.5
  • Goal to facilitate participation of small businesses, particularly small disadvantaged or minority business enterprises, women business enterprises, and disabled veteran business enterprises, in business contracting with the University of California
California – Golden Opportunities

• California Code of Regulations
  • DBVE (CCR 1896.60, et seq.)
• Government Code Sections 14842(a) and 14842.5(a)
  • Fraud for Small Business/certification violations
California – Golden Opportunities

• State Level: edge toward race-averse programs

• Small Business Certification
  • The business has less than 100 employees and an average annual gross receipt for the last three years of $14 million or less.
  • Is a manufacturing business with less than 100 employees, or
  • Is a microbusiness or a business with gross annual receipts of less than $3.5 million or a manufacturing company with less than 25 employees.

• DVBE certification
  • At least 51% owned by disabled veteran(s) + one or more disabled veteran must control and manage daily operations.
  • Veteran from the U.S. military, naval, or air services, have at least 10% service-connected disability, and must currently reside in California.
California – Golden Opportunities

• CalTrans, DGS, PUC
  • Unified Certification Program (UCP) database of businesses
  • Small Business for the purpose of Public Works (SB-PW)
  • Office of Business & Economic Opportunity (OBEO)
  • California’s PUC supplier diversity program (Legis. & CPUC’s General Order 156)

• Local Level: more specific efforts toward MBE inclusion
  • Disadvantaged Business Enterprises (DBE)
  • Airport Concessions Disadvantaged Business Enterprises (ACDBE)
  • Minority Business Enterprises (MBE)
  • Women Business Enterprises (WBE)
  • Small Local Business Enterprises (SLBE)
  • Transportation Business Advisory Council for LA Metro
Texas

• Certification for disadvantaged business enterprises is the "Historically Underutilized Business Program" – Chapter 2161 and Subchapter E, Chapter 2252 Tx. Gov't Code
  • HUB criteria is very similar to the SBA criteria
    • U.S. citizen
    • At least 51% owned and controlled by individual or group who meet classification criteria
    • Percentage of work performance by contractor or subcontractor
  • Mentor-protégé program
  • TxDOT has unified certification program that utilizes U.S. DOT requirements for certification
  • Variety of other statutes allow counties, municipalities and combination of governmental entities to establish regional business certification programs
Kansas

- Kansas is relatively straightforward and requirements for certification follow the Federal Code
- 2 agencies that act in partnership in the program:
  - Kansas Department of Transportation (DBE program)
  - Kansas Department of Commerce (W/MBE program)
- Office of Minority and Women Business Development to assist business in the certification process
- Kansas provides DBE supportive services as well
There is Missouri State certification, MoDOT certification, and certification through various cities and agencies in Missouri.

- Not a one stop shop like Kansas.
- Each city and agency operates with their own rules, although most are similar to the federal rules.
- Approval for certification by an approved agency or city allows for an expedited procedure when requesting certification with the State of Missouri.
- In practice, most attorneys will have business clients apply for certification through one of the more lenient cities or agencies, and then apply for Missouri State certification.
Conclusion and Takeaways
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