

A Commercial Non-Discrimination Policy

What is the basic purpose of the Commercial Non-Discrimination Policy?

The basic purpose of a commercial non-discrimination policy is to cause all businesses that seek to do business with the City or State to give serious consideration to the manner in which they conduct business, and where appropriate, to change their corporate behavior to eliminate the effects of discrimination from their business decisions. This legislation is intended to fulfill this basic purpose through achievement of three broad objectives:

- Establish a clear policy for the government not to enter into contracts with business firms that discriminate in their solicitation, selection, or treatment of vendors, suppliers, subcontractors, or commercial customers (whether in public sector *or* private sector business contexts).
- Establish a formal complaint process and investigation process for alleged violations of this policy.
- Provide a fair process for hearing evidence, rendering findings, and imposing sanctions for violations of the commercial non-discrimination policy. Available sanctions for violation of the policy include termination or suspension of existing contracts, debarment, referral for criminal prosecution for fraud, voluntary agreements among the parties to remedy the effects of the discrimination and to prevent future discrimination, and liquidated damages.

How is the term “discrimination” defined for purposes of this policy?

“Discrimination” is defined to mean “any disadvantage, difference, distinction, or preference in the solicitation, selection, hiring, or treatment of a vendor, supplier, subcontractor or commercial customer on the basis of race, gender, religion, national origin, ethnicity, age or disability, or on the basis of any otherwise unlawful use of characteristics regarding such vendor’s, supplier’s, or commercial customer’s employees or owners.” However, the definition of discrimination used in this ordinance expressly excludes “otherwise lawful efforts to remedy the effects of discrimination that has occurred or is occurring in the marketplace.”

Why is a commercial non-discrimination policy necessary when other civil rights laws already exist?

Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. §1981) and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000(d)) make it unlawful to discriminate on the basis of race, religion, and ethnicity in the making and enforcement of contracts. However, as currently interpreted, these laws do not address discrimination on the basis of gender. The draft commercial non-discrimination legislation seeks to extend such prohibitions against commercial discrimination to other types of suspect classifications, such as gender, age, disability, and national origin. In addition, a major shortcoming of these federal statutes is in their lack of effective investigation

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and enforcement mechanisms. The judicial process has proven to be a woefully inadequate means for seeking redress against violators. Most small and minority-owned businesses cannot afford to spend tens of thousands of dollars over several years of litigation to pursue recourse under these statutes.

What legal precedents are there to establish that a city or state is competent to adopt and enforce such a policy?

Such a commercial non-discrimination policy approach has been favorably commented upon by the United States Supreme Court in **City of Richmond v. J. A. Croson**, 488 U.S. 469, 509-510 (1989), and by other federal courts. In this landmark decision, the Supreme Court issued the following statements:

- “It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination [488 U.S. 469, 492] within its own legislative jurisdiction... As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.”
- “It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. Cf. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).”
- “The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.”
- “Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973). Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. See *Teamsters*, *supra*, at 338.”

The authority of local government to leverage its spending powers to influence and address conduct in the private sector marketplace was litigated and upheld in the case of *Board of Trustees of Employees' Retirement System of City of Baltimore v. City of Baltimore*, 562 A.2d 720 (1989). In upholding this City “anti-apartheid” ordinance, the court noted the ““legitimate, local public interests... in the City and its citizens to distance themselves from the moral taint of co-venturing in firms that, in the view of many, help to maintain South Africa's system of racial discrimination.”

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Is there any reason for optimism that such a policy can actually work?

In the 1980s, a grass roots movement led to the use of local government spending policies to change corporate behavior that indirectly supported the regime of racial apartheid in South Africa. Many governments took the principled position that they would not enter into contracts with, nor invest pension funds in, those corporations that engaged in business in South Africa so long as the South African regime maintained a system of racial apartheid. The rationale for the anti-apartheid measures was that American corporations that continued to engage in business there were indirectly supporting the racist South African regime of apartheid through commerce and economic investment. Many spokespersons for the American business community expressed considerable fear that these sanctions would harm American business interests more than South Africa. Others expressed fear that major corporations would refuse to do business with jurisdictions that adopted these policies. Some expressed fears about the legality of such divestment policies. Some of these policies were even attacked in court (unsuccessfully). All of these fears proved to be unfounded.

Faced finally with these daunting sanctions, corporate America decided that domestic markets were important enough to warrant a change in behavior. On a large scale, these companies divested their South African operations. According to ANC leader and future prime minister Nelson Mandela upon his release from South African prison, the threat of these anti-apartheid sanctions against American business interests resulted in such massive economic pressure on the South African regime that the walls of apartheid came tumbling down.

There is every reason to believe that a comparable approach here at home to use the leverage of government spending to change discriminatory corporate behavior can be equally successful.

Do other jurisdictions have similar policies?

At least three other local governments have adopted similar commercial non-discrimination ordinances or policies in the last few years:

- The Memphis City School Board adopted such a policy in 1996 and recently updated it in 2001.
- Miami-Dade County adopted a similar policy during this same time frame.
- The City of San Diego City Council unanimously adopted its commercial non-discrimination policy in 2000.

Who will be eligible to file a complaint under this policy?

This policy is patterned after the “whistle-blower” anti-fraud model to avoid the dilemma of retaliation that frequently confronts businesses that complain about the conduct of potential customers or business partners. Accordingly, complainants need not be aggrieved parties.

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Administrative complaints about commercial discrimination may be filed by any of the following that have knowledge of the offending conduct:

- Adult persons
- Business entities
- Government agencies
- Organizations or trade associations

What are the expected costs to the government from adoption of this policy?

- Cities that have had similar commercial non-discrimination policies have not typically had a great number of claims filed, nor have they experienced anything other than nominal impact with respect to staffing. While it may be difficult to estimate the potential number of complaints to be filed in any given year, the policy does provide the government with the flexibility to reallocate its staff and to hire outside consultants as necessary to conduct investigations of complaints.
- Conservative estimates for the costs of preliminary investigations that do not proceed to administrative hearing are under \$5000 per investigation.
- For complaints that proceed to administrative hearing, the cost in staff resources is estimated to range between \$10,000 and \$20,000 per claim.
- This policy permits recovery by the government of some or all costs associated with knowingly false or frivolous allegations.

What are the expected benefits of a Commercial Non-Discrimination Policy?

If the City or State adopts a Commercial Non-Discrimination Policy, the benefits will be significant:

- Effective enforcement will send a strong message to both the minority business and the majority business communities that the city or state is serious about doing all that it can to provide equal business opportunity in its marketplace.
- It will set the tone and standard in both private sector and public sector business dealings that discrimination in the solicitation, selection, and treatment of other business firms is unacceptable.

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- The self-evaluation that will result from this new law will go a long way to changing behavior for every business firm to break down those barriers (both formal and informal) that have resulted in a very racially polarized outcome in the marketplace.
- A marketplace that is free from the effects of discrimination is a marketplace that will provide the maximum opportunity for new business creation, new job creation, greater competition and lower prices, and new tax revenues for the city or state.

What is to be lost by failing to enact the Commercial Non-Discrimination Policy?

Lost will be an opportunity to establish public confidence that the government sincerely cares about equal business opportunity and is prepared to take aggressive and principled action towards that end. Such a failure will mean that the government has preferred to provide only lip service regarding the principle of equal business opportunity, rather than to engage in any meaningful examination of claims of commercial discrimination. The resultant “business as usual” attitude will mean that local government may continue to underutilize significant segments of its business population for reasons unrelated to legitimate business concerns. Also lost will be a golden opportunity for local government to provide leadership to the broader business community to take the concept of “equal business opportunity” seriously, and to set a standard of conduct that will transform private and public sector business practices to eliminate barriers on the basis of race, gender, national origin, disability, etc.

Conclusion

In the final analysis, there are only three positions that the government may take regarding the proposed Commercial Non-Discrimination Policy. The government either:

- A. Is opposed to doing business with firms that discriminate;
- B. Is in favor of doing business with firms that discriminate; or
- C. Simply does not care whether or not it is doing business with firms that discriminate.

The choice really is that simple and that clear. In appealing to the highest ideals of fairness and decency of the business community and its political leadership, we strongly support enactment of the Commercial Non-Discrimination Policy. It is the right thing to do.

An ordinance amending Title 4 of the Metropolitan Code to establish a commercial nondiscrimination program, all of which is more particularly described herein.

BE IT ENACTED BY THE COUNCIL OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY:

Section 1. That Title 4 of the Metropolitan Code of Laws is hereby amended by adding the following new Chapter 4.46:

CHAPTER 4.46 COMMERCIAL NONDISCRIMINATION PROGRAM

4.46.010 Policy and objectives.

A. Policy Statement. It is the policy of the Metropolitan Government of Nashville and Davidson County to promote full and equal business opportunities for all persons doing business with the Metropolitan Government by increasing the purchase of goods and services from small businesses within the area of the Metropolitan Government.

B. Promotion of Equal Opportunity. Discrimination against businesses based on race, color, national origin, or gender is strictly prohibited. No person shall be denied the benefit of, or otherwise discriminated against, on the grounds of race, color, national origin or gender in connection with the award and/or performance of contracts or modification of a contract between a vendor or contractor and the Metropolitan Government which contract is paid for, in whole or in part, with monetary appropriations by the Metropolitan Government.

C. Program Objectives. The objective of the Commercial Nondiscrimination Program ("the Program") is to promote and encourage full and open competition in Metropolitan Government procurement and purchasing; encourage all Metropolitan Government personnel involved with procurement and contracting activities to maintain good faith efforts and appropriate purchasing procedures; to protect the Metropolitan Government from becoming a passive participant in any unlawful discrimination; and to otherwise spur economic development in the public and private sectors of the local economy.

4.46.020 Definitions.

For the purpose of this Chapter, the following words, terms, phrases and abbreviations shall have the following meanings:

"Benchmarks" means the method which enables the Metropolitan Government to track the inclusion of LSBEs in the procurement process. Benchmarks are not quotas or goals, rather, they are percentage ranges based on a LSBE availability, current LSBE participation, and previous LSBE participation in the Nashville-Davidson-Murfreesboro Metropolitan Statistical Area ("MSA").

"Certification" means the qualifying process that ensures buyers and local, state, and federal agencies that a particular business is a LSBE which performs a commercially useful function

"Commercially Useful Function" means performance of real and actual services by a Participant who contracts with the Metropolitan Government, or subcontracts with another business enterprise which contracts with the Metropolitan Government. A business enterprise serving as a conduit for another business shall not be deemed to perform a commercially useful function. In determining whether a

business is performing a commercially useful function, factors, including but not limited to the following, will be considered:

- i) the nature and amount of work contracted;
- ii) whether the LSBE has the skill and expertise to perform work for which it has been certified;
- iii) whether the LSBE actually performs, manages and supervises the work;
- iv) whether the LSBE intends to purchase commodities and/or services from a non-LSBE and simply resell same to the general or prime contractor for the purpose of allowing those commodities and/or services to be counted towards assessment of a Benchmark or fulfillment of a goal (if implemented);
- v) standard industry practices relating to the use of the subcontractors. Consistent with standard industry practices, a LSBE subcontractor may enter into second tier subcontracts. If a LSBE subcontractor subcontracts a significantly greater portion of the work of its subcontract to a non-LSBE inconsistent with standard industry practices, the LSBE subcontractor shall be presumed not to be performing a commercially useful function.

“Compliance” means the condition existing when a Participant has met the requirements of this Program.

“Conduit” means a business which purchases goods or services that are not normally purchased or sold as part of its daily business from another business(es) for the sole purpose of resale to the Metropolitan Government or a contractor doing business with the Metropolitan Government.

“Contract” means any mutually binding legal obligation of the Metropolitan Government created to acquire some good and/or service from one or more Participants, which is paid or which is to be paid for, in whole or in part, with monetary appropriations of the Metropolitan Government. In this context, the terms “contracting”, “purchasing”, and “procurement” are synonymous and refer to the process or processes under which the Metropolitan Government undertakes such acquisitions.

“DSMBA” means the Metropolitan Finance Department Division of Minority and Small Business Assistance, which is a part of the office of the Metropolitan Purchasing Agent.

“Goal” means the race/gender-conscious measures established in the event that the scheduled periodic review of LSBE Benchmarks reveal continuing underutilization of LSBEs. Race/gender-conscious measures will not be established unless the Metropolitan Government discovers a compelling interest to do so and only if race-neutral efforts have been exhausted.

“Good Faith Efforts” means the voluntary actions of a Participant undertaken in good faith to ensure that it does not discriminate in its contracting practices.

“Independent” means, with respect to the ownership, control and activity of a LSBE, that the business shall operate separate and apart from the ownership, control or undue influence of another business owned and controlled by one or more non-LSBEs.

“Joint Venture” means an association of two or more independent persons, partnerships, corporations (or any combination of them) formed, consistent with the laws of the State of Tennessee, to perform one or more specific contracts limited in scope and duration.

“Local Small Business Enterprise” (“LSBE”) refers to a business enterprise maintaining a significant business presence in the MSA and performing a commercially useful function which is owned by the one or more of the following: (1) African Americans (persons having origins in any of the Black racial groups of Africa), (2) Native Americans, (3) Hispanic Americans, (4) Asian Americans, (5) White Americans, (6) Women, and (7) Men. LSBE also includes Small Business Enterprises as defined herein. All LSBEs, regardless of race or gender, must maintain gross annual revenues and/or total number of employees in the previous year consistent with the Small Business Administration’s primary industry classification or NAICS code. Racial and gender categories are separated for monitoring and tracking purposes only.

“Metropolitan Government” means the Metropolitan Government of Nashville and Davidson County, including any of its operating elements, officers, and/or employees acting with authority.

“MSA” means the Nashville-Davidson-Murfreesboro Metropolitan Statistical Area.

“Non-Compliance” means the condition existing when a Participant has failed to meet the requirements of this Program.

“Purchasing Agent” means the Purchasing Agent of the Metropolitan Government of Nashville and Davidson County.

“Owned”: For purposes of determining whether a business is Local Small Business Enterprise, “owned” shall mean that the African American, Native American, Hispanic American, Asian American or female owner(s) possess an ownership interest of at least fifty-one percent (51%) of the business. The majority owner of the business enterprise must be a citizen or a permanent resident of the United States. For the purposes of this Program, one or more of the identified groups collectively owning at least 51% of an independent business and meeting the small business requirements may be considered a LSBE.

“Participant” means any contractor, vendor, supplier, or other person, partnership, joint venture, corporation or other business entity that submits a bid or proposal to the Metropolitan Government or expressed interest in submitting a bid or proposal in response to competitive solicitation issued by the Metropolitan Government.

“Program” means the Metropolitan Government Commercial Nondiscrimination Program.

“Promise of Non-Discrimination”: shall mean, collectively, one or more contractual affirmative promises (1) to adopt the policies of Metropolitan Government relating to the participation of LSBEs in the procurement process; (2) to undertake certain good faith efforts to solicit LSBE participation; and (3) not to otherwise engage in discriminatory conduct against LSBEs.

“Proposal” means a quotation, proposal, bid or offer by a Participant to perform or provide labor, materials, supplies, or services to the Metropolitan Government in response to competitive solicitation issued by the Metropolitan Government.

“Race/Gender-Conscious” means any governmental or legislative policy or programmatic action that uses race or gender as criteria for participation.

“Race/Gender-Neutral” means any governmental or legislative policy or a programmatic action in which race or gender is not among the criteria for participation.

“Significant Business Presence” means that a business enterprise with an established place of business in the MSA at which one or more of its employees is regularly based and that such place of

business has a substantial role in the business' performance of a commercially useful function as herein defined. A location utilized solely as a post office box, mail drop or telephone message center or any combination thereof, with no other substantial work function, shall not constitute a significant business presence.

"Small Business Enterprise" (SBE) means a locally-owned business which, together with its affiliates, has gross annual revenues and/or total number of employees in the previous year consistent with the U.S. Small Business Administration's definition of small business according to the business' primary industry classification of NAISC Code. Current regulations may be obtained from www.sba.gov or the local Small Business Administration office. Annual receipts shall be calculated in accord with the standards established under 13 CFR §121.104. Number of employees shall be calculated in accord with the standards established under 13 CFR §121.106. Affiliates shall be determined in accord with the standards set forth under 13 CFR § 121.103.

"Underutilization" means the percentage of dollars spent by the Metropolitan Government with LSBE which is less than would be expected based on LSBE availability in the MSA.

4.46.030 Program Scope and Applicability.

The following categories identify the natures and types of Metropolitan Government contracting:

Category A -- Construction: Includes any and all contracting relating to buildings, facilities and other erected structures on real estate owned by the Metropolitan Government such as new construction, rehabilitations, remodeling and repairs.

Category B -- Non-professional Services: Encompasses the procurement of advertising, printing, non-construction repairs, janitorial services, training seminars and workshops, computer and information systems, security, shipping and mailing, microfiche and microfilm, courier, storage, travel, consulting and other non-professional services.

Category C -- Professional Services: Includes the purchase of any or all services for which applicable selection criteria may require a Participant to possess a license or other certificate of competency such as accounting, auditing, architectural, engineering, and legal.

4.46.040 LSBE Designation.

A. Certification. Certification is the qualifying process that ensures that a particular business is a LSBE which performs a commercially useful function. The screening mechanism for certification assures that interested LSBEs have the proper ownership, size, control and management as defined in the Program. Current contact information about the certifying agency shall be maintained by the DSMBA and provided to all interested persons upon request.

B. Affidavit of Certification. A LSBE shall not be precluded from the Program for lack of certification. A LSBE may sign an approved form under notary oath claiming LSBE status. An approved affidavit form is outlined in the Resources Section of this Program. Any LSBE submitting such a statement must submit proper certification from an appropriate certifying agency within thirty (30) days after submitting a Proposal.

C. Reciprocal Certification. The Metropolitan Government may accept certification of a LSBE if the LSBE contemporaneously possesses certification from another public and/or private entity. The certification standards utilized by the public and/or private entity must sufficiently ensure that only

legitimate LSBEs are certified. Acceptance of another entity's certification shall be within the sound discretion of the DSMBA.

4.46.050 Benchmarks.

A. Definition and Purpose. The Metropolitan Government maintains a compelling interest in providing equal business opportunities for all persons wishing to do business with it. Therefore, the Metropolitan Government will continue to monitor and track LSBE participation in the procurement process through Benchmarks. Benchmarks are determined by comparing the percentage level of actual procurement to the measure of LSBE availability in the MSA. Benchmarks are not quotas, but rather a method enabling the Metropolitan Government to track the inclusion of LSBEs in the procurement process. The DSMBA shall establish annual Benchmark ranges for LSBEs.

B. Procedure for Establishing Benchmarks. To establish Benchmarks, the DSMBA shall conduct an annual review. First, the DSMBA shall evaluate the levels of LSBE participation for the Metropolitan Government overall procurement program. As part of the review, the DSMBA may consider data regarding LSBE participation for the past three fiscal years for a more accurate portrayal of LSBE participation. Secondly, the DSMBA shall review available LSBE totals and percentages for the MSA.

An independent consultant may be hired to calculate proposed availability estimates per current legal, economic, statistical, and social science standards and to make a recommendation to the Board regarding the Benchmark ranges.

C. Comment Period. After the independent consultant presents its report to the DSMBA, there will be a ten (10) day public comment period. During this time frame, the DSMBA may receive written comments from any interested individual or entity regarding the consultant's findings and recommendations.

D. Review of Benchmarks. The Benchmarks shall be in effect for a period of one (1) year and shall be reviewed by the Purchasing Agent on a semiannual basis. All total contract dollars awarded to LSBEs, whether payments are made to non-certified LSBEs or certified LSBEs, shall count towards Benchmark percentages.

4.46.060 Requirements of Prime Contractors.

In consideration of, and as condition precedent to, the right and privilege to submit a Proposal on construction projects and other procurement contracts with the Metropolitan Government, at the time of submitting a Proposal each Participant shall be required to present appropriate documentation. The documents described below must be completed and signed by each Participant before a Proposal can be considered responsive.

A. Promise of Non-Discrimination. Each Participant must submit a duly executed and attested Promise of Non-Discrimination. This written instrument shall contain promises, averments and/or affirmations made by the Participant:

- (1) to adopt the policies of the Metropolitan Government relating to equal opportunity in contracting on projects and contracts funded, in whole or in part, with monetary appropriations of the Metropolitan Government;
- (2) to attempt certain good faith efforts to solicit LSBE participation on projects and contracts in addition to regular and customary solicitation efforts;

- (3) not to otherwise engage in discriminatory conduct;
- (4) that this Promise of Non-Discrimination shall be continuing in nature and shall remain in full force and effect without interruption;
- (5) to provide a discrimination-free working environment;
- (6) that the purpose of the Promise of Non-Discrimination shall be incorporated by reference into any contract or portion thereof which the Participant may hereafter obtain; and
- (7) that the failure of the Participant to satisfactorily discharge any of the promises of non-discrimination as made and set forth herein shall constitute a material breach of contract permitting the Metropolitan Purchasing Agent to declare the contract in default and to exercise any and all applicable rights and remedies, including but not limited to, cancellation of the contract, termination of the contract, suspension and debarment from future contracting opportunities, and withholding and/or forfeiture of compensation due and owing on a contract.

B. Statement of Successful Subcontractors. Each Participant shall submit a Statement of Subcontractors. The Statement must be filed on company letterhead and shall include each successful subcontractor's name, NAISC Code, race, gender, national origin, approximate business size, business location, work to be performed, dollar value of the project, and percentage attributable to each subcontractor. In addition, copies of each successful subcontractor's price quotes must be submitted by the close of business on the second business day following submission of a Proposal.

C. Statement of Interested Subcontractors/Vendors. Each Participant shall submit a Statement of Interested Subcontractors/Vendors on company letterhead which shall include each individual or entity requesting information about the project or solicited for participation on the project. The list of subcontractors shall include those persons who did not actually submit a price quotation or a bid, rather just requested information. The statement shall include the individual's or entity's name, NAISC Code, race, gender, national origin, approximate business size, business location, and information requested.

D. Statement of Bid Proposals/Price Quotations. Each Participant shall submit a Statement of Bid Proposals/Price Quotations. The Statement must be filed on company letterhead and shall include each potential subcontractor's vendor's name, NAISC Code, race, gender, national origin, approximate business size, business location, work requested to be performed, and price quotation and/or bid. The statement shall include only those persons or entities who actually submitted a bid or proposal for the project and were not selected.

E. Letter of Intent to Perform as a Subcontractor/Joint Venture. In the event that subcontractor or joint ventures are utilized on a project, each Participant shall be required to submit to the DSMBA a letter of intent signed by both the subcontractor/joint venturer and Participant. This form is to be completed and submitted by the apparent successful Participant by the end of the second business day following notice of award of contract.

Failure on the part of a Participant to submit the Promise of Non-discrimination, Statement of Successful Subcontractors, the Letter of Intent to Perform as a Subcontractor/Joint Venturer, the Statement of Interested Subcontractors/Vendors and the Statement of Bid Proposals/Price Quotations shall render the proposal non-responsive.

The DSMBA shall have the authority to create sample forms for the above required documentation so long as they remain consistent with the purpose and requirements of this Chapter.

F. Other Information and Data. The DSMBA may request additional information and data prior to a contract award. This information may include, but is not limited to, information regarding business ownership of all subcontractors to be utilized on the project, all of which shall reflect the race, gender, ethnic origins, location, size and structure of the identified businesses, in order to be eligible for contract award.

A Contractor's failure or refusal to provide information and data required by this Program and requested by the DSMBA shall subject the contractor to having a proposal deemed non-responsive.

G. Reporting Subcontractor Substitution or Replacement. The prime contractor shall report any replacements or substitutions of the use of subcontractors. For reporting purposes, the prime contractor shall report to the DSMBA statistical data pertaining to the new subcontractor, including race, gender, national origin, business size and business location.

H. Use of Sub-subcontractors. In the event that a subcontractor portions out work and utilizes the services of a sub-subcontractor or sub-vendor, the prime contractor shall be required to report this use to the DSMBA. For reporting purposes, the prime contractor shall report statistical data for the sub-subcontractor or sub-vendor, including race, national origin, gender, business size and business location.

4.46.070 Good Faith Efforts.

A. Good Faith Efforts to include LSBEs in the procurement process are requested of all Participants. These Good Faith Efforts should be in addition to the Participant's regular and customary solicitation process of contact with potential subcontractors and/or vendors.

B. Written Notice to LSBEs. To demonstrate good faith efforts, a Participant shall deliver written notice to at least three (3) available certified LSBEs. Names, addresses, and telephone numbers for available LSBEs shall be provided by the DSMBA to all Participants for each potential subcontracting or supply category in the Contract. In addition, a Participant must deliver written notice to all individuals or entities requesting information on the Contract.

The written notice sent to potential subcontractors or vendors shall contain the following:

- (1) Sufficient information about the plans, specifications, and relevant terms and conditions of the Contract. This may include information about the work which will be subcontracted or the goods which will be obtained from subcontractors and suppliers;
- (2) A contact person knowledgeable of the project documents within the Participant's office to answer questions about the conditions of the contract;
- (3) Information as to the Participant's bonding requirements, the procedure for obtaining any needed bond and the name and telephone number of one or more acceptable surety companies; and
- (4) The deadline for price quotations.

C. Additional Good Faith Efforts. In addition to the Participant's regular and customary solicitation process, the Participant may also demonstrate good faith efforts by:

- (1) Attending informational meetings to update potential subcontractors or vendors of subcontracting or supply opportunities;

- (2) Dividing the contract, in accordance with normal industry practice, into small, economically feasible segments that could be performed by a LSBE. Under no circumstances, however, shall a Participant segment work solely for the purpose of utilizing LSBEs as subcontractors where such segmentation is not in accordance with common and accepted industry practices relating to the utilization of other firms as subcontractors;
- (3) Providing a written explanation for rejection of any potential subcontractor or vendor to the DSMBA, including the name of the firm awarded the subcontract or supply agreement. The DSMBA will maintain these records and make same available to any subcontractor or vendor rejected on the project;
- (4) Providing a non-discriminatory work site. Participant shall ensure and maintain a work environment free of harassment, intimidation and coercion at all construction sites, offices and other facilities at which the Participant's employees are assigned to work. The Participant shall specifically ensure that all labor supervisors, superintendents, and other on-site supervisory personnel are aware of and carry out the Participant's obligation to maintain a non-discriminatory work environment; or
- (5) Reporting improper conduct. Participants shall report all known improper activity and all known violations of this Program.

D. Optional Good Faith Efforts. In addition to, but not in lieu of the above-mentioned good faith efforts and in addition to a Participant's regular and customary solicitation process, a Participant may, at its option, also make a showing of good faith by providing evidence that it performed the following tasks:

- (1) Soliciting specific individual LSBEs whose availability as potential sources of goods or services can be reasonably ascertained. This measure includes sending letters or making other personal contacts with specific certified LSBEs including those that the Participant has contracted with in the past as well as other LSBEs that the Participant may be unfamiliar, but whose identities can be ascertained from a directory of certified LSBEs maintained by the DSMBA.
- (2) Sending letters or making other personal contacts with other programs as well as private trade associations in the MSA which are known to publicize contracting and procurement opportunities for the benefit of their respective associates and/or members.
- (3) Advertising in trade publications of general circulation in the MSA. The advertisement shall identify and describe the specific subcontracting or other opportunity in reasonable detail.
- (4) Following up on initial solicitations by contacting potential subcontractors or vendors to determine, with certainty, whether these firms are interested in participating on the contract.
- (5) Thoroughly investigating the potential subcontractor or vendor's capabilities in good faith.
- (6) Providing reasonable assistance to a LSBE in need of equipment, supplies, bonding, letters of credit and/or insurance.
- (7) Providing reasonable technical assistance to LSBEs to ameliorate any deficiencies of technical knowledge or advance skill, where such assistance is undertaken by the Participant to facilitate the LSBE's successful participation on a project or contract.

E. Evaluation of Good Faith Efforts. In order to assure that Participants comply with the Program, all Participants must demonstrate good faith efforts. In evaluating good faith efforts, the DSMBA will determine whether the apparent low Participant has made reasonable good faith efforts to obtain

LSBE participation as part of its proposal. The DSMBA may evaluate not only the different kinds of efforts made by a Participant, but also the quantity and intensity of those efforts.

F. Required Documentation. To demonstrate good faith efforts, Participants shall keep detailed records of all correspondence and responses thereto, logs of all telephone calls made and received regarding the project or contract, copies of advertisements in publications and other media, and other relevant papers required by this Program. Such documents shall be maintained for a minimum of five (5) years.

G. Contractors' Post-Award Reporting. Successful Participants who are awarded contracts must submit reports at the end of the project if requested by the DSMBA. These reports shall summarize the number and dollar amounts of payments made during the term of the contract to all subcontractors and shall reflect the LSBE designation of the subcontractor if any.

4.46.080 Division of Minority Business Assistance.

A. The Purchasing Agent, by and through the Division of Minority Business Assistance ("DSMBA"), shall administer and enforce the Program.

B. The DSMBA shall continue to encourage equal business opportunities and to achieve the policies and objectives of the Program by:

- (1) Establishing written rules, regulations and procedures consistent with this Program;
- (2) Publishing and making public said rules, regulations and procedures at least thirty (30) days prior to their effective date;
- (3) Verifying certification of LSBEs;
- (4) Maintaining outreach and assistance programs to promote equal contracting opportunities for small businesses that wish to do business with the Metropolitan Government;
- (5) Maintaining a current database of certified and available LSBEs and making this database accessible to interested parties;
- (6) Monitoring, for data gathering and informational purposes, utilization of LSBE participation on projects;
- (7) Assessing the reasonableness of LSBE Benchmark ranges (and/or goals, if established), and make recommendations to the Metropolitan Council regarding the same;
- (8) Investigating written complaints;
- (9) Notifying affected parties in writing as to the right to review an adverse decision of the DSMBA;
- (10) Preparing semiannual and annual reports; and
- (11) Performing other tasks as may be required to fulfill the above-stated duties of the DSMBA.

C. DSMBA Authorization to Monitor. The DSMBA shall be authorized to collect from all Participants such data and information as is necessary to monitor this Program. This information may include

information as to business ownership, supplier information, subcontractor information, all of which shall reflect the race, gender, ethnic origin, business location and business size of the identified businesses.

The DSMBA shall continuously monitor the participation of LSBEs in the procurement of goods and services for Metropolitan Government. Such monitoring shall include, but is not necessarily limited to, a statistical analysis of each construction trade, non-professional service, professional service and commodity to determine whether there is utilization of LSBEs in a manner that is proportionate to the identified availability range.

D. Duty to Report. The DSMBA shall submit an annual report to the Metropolitan Council regarding the effectiveness of the Program. Such report shall include, but not be limited to, a summary of the purchases and contracts placed with LSBEs for the period and the relative percentage to the total of purchases and contracts for that period. The reports shall also emphasize quantity and quality of LSBE involvement by dollar volume. The report shall specify the race, gender, national origin, size, and NAICS with each category reported separately. Payments made to non-certified LSBEs shall be included as a separate set of figures for purposes of tabulating the total contract dollars going to LSBEs.

E. Contractors' Closeout Activity Reports: To further monitor LSBE participation, closeout activity reports will be required from project prime contractors and prime consultants identifying activities of all subcontractors and sub-consultants. Interim reports will not be required unless requested by the DSMBA.

F. Authority to Investigate Discriminatory Practices. Should a Participant submit a written complaint of discrimination, the DSMBA shall be authorized to investigate the complain. An investigation cannot be initiated solely based on a finding of a statistical disparity in the Participant's utilization of LSBEs. Further, such investigations may be initiated when the DSMBA receives information which provides a reasonable basis to believe that an individual contractor seeking to contract or contracting with Metropolitan Government may be engaging in public or private discriminatory conduct.

4.46.090 Written Complaint and Post-Award Review.

A. Any Participant or other party allegedly aggrieved by the provisions of this Program may submit a written complaint to the Metropolitan Government Procurement Standards Board ("the Board").

B. Consideration of Proposals. The DSMBA shall evaluate the apparent low Participant's good faith efforts to determine non-discrimination as described in the Program. Upon a determination of compliance by the apparent low Participant, the DSMBA shall forward the Proposal to the Purchasing Agent as the recommended low Proposal. If there is an issue of non-compliance within the meaning of this Program, or for any other written complaint alleging any violations or non-compliance with this Program, the DSMBA shall notify the affected party in writing and by registered mail ("Notice of Non-Compliance Review"). The Notice shall set forth with particularity the reasons for the review and shall schedule a Post-Award Review Conference.

(1) Post-Award Review Conference: A Post-Award Review Conference shall be held with the DSMBA, the apparent low Participant, and if applicable, the project manager.

(2) Declaration of Non-Responsiveness: Upon a Declaration of Non-Responsiveness, the DSMBA shall forward a Notice of Determination to the allegedly aggrieved party and the Board.

C. Time for Filing Notice of Request for Review. Any party may seek review of an DSMBA determination by filing a written Notice of Request for Review with the DSMBA within seven (7) days of receipt of the Notice of Determination.

D. Notice of Hearing. Upon receipt of the Notice of Request for Review from the allegedly aggrieved party, the DSMBA shall forward the Notice to the Board within three (3) business days of receipt.

(i) Within ten (10) days of the date of receipt of the Notice of Request for Review from the DSMBA, the Board shall set the matter for hearing, which shall be held not more than twenty (20) days from the date the Board received the Notice of Request for Review.

(ii) The Board shall issue a written Notice of Hearing to be served upon all parties by registered mail, which shall state the date, time and place of hearing.

E. Hearing and Decision. Hearings before the Board shall be informal. Participants shall include a representative from the DSMBA and the allegedly aggrieved person or a representative of the allegedly aggrieved person. Said hearing shall comply with State of Tennessee law relative to the Open Meetings Act. The Board shall have authority to approve or disapprove the Declaration of Non-Responsiveness. If the Board affirms the Declaration of Non-Responsiveness, the DSMBA shall then recognize the second low Participant as the recommended low Participant for the contract, provided the second low Participant has complied with this Program and submitted a responsive Proposal.

4.46.100 Sanctions and Penalties for Non-Compliance.

A. The Purchasing Agent shall have the authority and power to enforce the provisions of this Program. Failure of a Participant to comply with the requirements shall subject it to administrative sanctions. In addition, a violation of this Program shall constitute a material breach of contract enforceable at law or in equity as will all other contract provisions, including the imposition of penalties.

B. The following sanctions and penalties are established for the enforcement of this Program:

(1) Declaration of Non-Responsiveness: In addition to standard factors in its evaluation, the Metropolitan Government may declare a Proposal non-responsive where it is determined that a Participant has not filed with Metropolitan Government a duly executed "Promise of Non-Discrimination."

(2) Cancellation of Contract: The Metropolitan Government may declare a contract null and void where, after such contract has been awarded, an investigation determines that the Participant's documents contain false, fictitious, or fraudulent information.

(3) Rejection of Future Proposals: The Metropolitan Government may reject any or all future Proposals of a Participant until such time as the Participant demonstrates that it is or shall come into compliance.

(4) Limited Suspension: For falsifications, misrepresentations, or deception to obtain a contract, the Metropolitan Government may remove a Participant from its list of pre-qualified or otherwise eligible firms entitled to do business with the Metropolitan Government for a period not to exceed one (1) year.

(5) The Metropolitan Government may withhold payment, if the Participant receives notice and opportunity for a due process hearing.

(6) Permanent Debarment: For repeated violations, the Metropolitan Government may remove a Participant from its list of firms entitled to do business with the Metropolitan Government.

C. Sanctions shall not be imposed unless there is evidence of specific conduct on the part of Participant that is inconsistent with or in direct contravention of the applicable provisions of this Program. Furthermore, the imposition and enforcement of sanctions shall be consistent with applicable state and federal law.

D. Severity of Sanctions. In determining the length of any suspension, the Purchasing Agent shall consider the following factors:

(1) whether the failure to comply with applicable requirements involved intentional conduct or, alternatively, may be reasonably concluded to have resulted from a misunderstanding on the part of the Participant of the duties imposed on them by this Program;

(2) the number of specific incidences of failure by the Participant to comply;

(3) whether the Participant has been previously suspended;

(4) whether the Participant has failed or refused to provide the DSMBA with any information required or requested by this Program;

(5) whether the Participant has materially misrepresented any applicable facts in any filing or communication to the DSMBA; and

(6) whether any subsequent restructuring of the subject business or other action has been undertaken to cure the deficiencies in meeting applicable requirements.

E. Length of Suspension. Suspensions may be for any length of time not to exceed one (1) year. Suspensions in excess of one year may be imposed only in cases involving intentional or fraudulent misrepresentation or concealment of material facts, multiple acts in breach of the Program, cases where the Participant has been previously suspended, or other similarly egregious conduct.

4.46.110 Goals.

A. Definition and Purpose. Goals are race/gender-conscious measures established in the event that the periodic review of the Metropolitan Government procurement practices reveal a continuing pattern of underutilization of and discrimination against LSBEs by the Metropolitan Government. Goals shall only be implemented in the event that the Metropolitan Government has exhausted all race/gender-neutral remedies and continues to fall below the identified benchmarks in contracting.

In the event the DSMBA semiannual review shows continuing underutilization of LSBEs, the DSMBA may implement goals for selected contracts in identified subcategories if it can demonstrate a compelling interest to support such an imposition. Prior to adoption of any goals, the DSMBA will hold a ten (10) day comment period to receive written comments from any interested individual or entity regarding implementation of a race/gender-conscious program.

B. Goals in Bids/Proposals. Should the DSMBA determine that goals need to be imposed, the inclusion or underutilization of LSBEs in specific industry subcategory may be considered as an additional factor in the evaluation of a Proposal.

The DSMBA may consider the following types of participation toward achievement of a goal:

- 1) The total dollar value of the contract may be counted toward the specified goal. This includes the fees and commissions charged for professional services, legal counsel, manufacturers, financial consultants, and insurance agents.
- 2) Participation by LSBE females may be counted only toward the accomplishment of the specified goals for women-owned businesses.
- 3) The actual portion of LSBE participation in a joint venture is counted toward the goal.

C. LSBE Participation in Meeting Goals. In the event that goals are established, all Participants, including LSBE Participants, shall make good faith efforts to attain goals through all subcontractor work.

(1) Prime Contractors: A Participant may subcontract portions of its contract consistent with industry standards. However, should a prime contractor subcontract greater portions of the project than are consistent with industry standards, then the LSBE will not have performed a commercially useful function as defined herein. Therefore, such participation by a LSBE will not be counted towards any goal.

(2) Subcontractor Participation: Where a Participant utilizes one or more subcontractors or sub-subcontractors to attain any goal(s) for an underutilized subcategory, the prime contractor may count said subcontractor or sub-subcontractor work toward goals. In no way shall subcontractors' or sub-subcontractors' work or dollar amount be construed to count toward said goal more than once. Only expenditures to LSBE subcontractors that perform a commercially useful function in the work of the project or contract may be counted.

(3) Supplier Participation: Where a Participant utilizes suppliers to satisfy the goal(s) in whole or in part, the LSBE suppliers must perform a commercially useful function. Supplier participation may be approved upon review of the following factors:

- i) the nature and amount of supplies to be furnished;
- ii) whether the LSBE is a manufacturer, wholesaler or distributor of the supplies and has the capabilities to deliver same in accordance with its certification;
- iii) whether the LSBE actually performs, manages and supervises the work to furnish the supplies; and
- iv) whether the LSBE intends to purchase supplies from a non-LSBE and simply resell same to the general or prime contractor for allowing those supplies to be counted towards fulfillment of the goal(s).

(4) Joint Venture Participation: Where Participants engage in a joint venture to meet a goal, the prime contractor shall demonstrate that the LSBE joint venturer's participation meets the standards for a commercially useful function. The DSMBA shall review and approve all contractual agreements and other supporting documentation to determine the percentage of LSBE participation resulting from the joint venture which may be credited towards any applicable goals of the project; and shall determine same based on the following factors:

- i) the initial capital investment of each venture partner;
- ii) the proportional allocation of profits and losses to each venture partner;

- iii) the sharing of the right to control the ownership and management of the joint venture;
- iv) actual participation of the venture partners in the performance of work under the project or contract; and
- v) other pertinent factors of the joint venture.

The degree to which any goals have been attained by joint ventures between LSBE firms, and between LSBE and non-LSBE firms, shall be calculated as follows:

- i) A joint venture consisting of a LSBE and non-LSBE firm functioning as a prime contractor will be credited with LSBE participation based on the percentage of the dollar amount of the work to be performed by the LSBE.
- ii) In joint venture Proposals in which all joint venture Participants are LSBEs, the joint venture will be credited with LSBE participation for that portion of the dollar amount of the contract which LSBEs perform and that portion subcontracted to LSBE firms.
- iii) In joint venture Proposals, Participants will receive credit toward the goal for the dollar amount purchased from LSBE suppliers. However, where the supplier is the manufacturer of the product supplied, Participants will receive credit for 100% of the dollar amount of the supply contract.

D. Program Graduation. Graduation from the Program applies only to goals should they be implemented. A participating LSBE shall graduate from this Program upon achieving certain levels of average annual receipts or other indicia of growth in its respective industry as specified below and shall be presumed to have reached a competitive status in the marketplace:

- (1) Where federal or state income tax returns evidence that the firm has earned average annual receipts for two consecutive years that are in excess of the average annual receipts of a Small Business Enterprise; or
- (2) Where, by virtue of its size, a firm exceeds the definition and standards of a "small business enterprise" as herein defined; or
- (3) Where a firm's primary industry classification falls within an industry subcategory in which the Benchmarks for that subcategory have been achieved consistently for the past three (3) fiscal years, and that firm has meaningfully participated in Metropolitan Government contracting and procurement, as determined by a designated amount of purchasing dollars going to that firm during that period.

If a LSBE is engaged in more than one industry, then its graduation levels shall be determined by a weighted average of sales for all industries in which the LSBE is engaged.

E. Re-entry After Graduation. Upon achieving of the above-described status, said firms shall be deemed to have graduated from the Program and shall thereafter be ineligible for LSBE status. Generally, a graduated LSBE may not subsequently re-enter the Program. However, after graduation, a LSBE may re-enter the Program after two (2) years if the firm demonstrates:

- i) That its average annual receipts have declined to levels below those as identified above, and
- ii) That during said two (2) calendar years, it was unable to meaningfully participate in Metropolitan Government contracting/procurement and/or in the public and private sectors of the largest local economy despite its good faith efforts to do so.

F. Prompt Payment Program. All Participants are required to pay subcontractors a minimum of their pro-rata share of progress payments made by Metropolitan Government to the prime contractor. The pro-rata share will be based on all work completed and materials furnished by the subcontractor in the period for which the progress payment was made. The contracts will also require the prime contractor certify that the previous progress payments have been paid to all subcontractors, unless the contractor demonstrates good cause, as determined by the DSMBA, for not making any such payments and furnishes written notification of this cause to the DSMBA and the subcontractor involved.

Any payment not made in accordance with this provision shall accrue interest, from the date due until the date paid, at the rate of interest identified in a written agreement. If no interest rate is specified, the interest rate shall be set in accordance with the Tennessee Prompt Pay Act, Tennessee Code Annotated §66-34-101. Any vendor not receiving prompt payment should notify the DSMBA for resolution. This section is not applicable if failure to promptly pay the subcontractor is the result of a dispute between the contractor and the subcontractor over the amount due or compliance with the contract.

G. Mobilization Fee. For good cause shown, the Purchasing Agent may evaluate, on an individual basis, a mobilization fee to assist LSBEs in financing. The purpose of this fee is to assist LSBEs with initial project costs, such as personnel, supplies and equipment.

For consideration under this provision, each LSBE must apply for the Program, be certified, meet the requirements outlined in the Program, and indicate a financial need for such assistance.

The amount of the fee received by the contractors and professional service providers would be based on the list of documented needs in the contract. The mobilization fee would not affect the pay application procedures between Metropolitan Government and the prime contractor until the final pay application where credit would be given for the mobilization fee. The prime contractor would not be financially responsible or liable for mobilization fees advanced to its subcontractors by Metropolitan Government. The subcontractor would credit the mobilization fee on its final application for payment to the prime contractor. The awarding of any mobilization fee would be considered payment for services rendered and would be deducted from the final payment of the contract as a payment for services. The award of any mobilization fee shall not have any impact on the terms and conditions of the project contract documents except as provided herein.

H. Outreach Program. To ensure that opportunities to participate in Metropolitan Government contract are available to the widest feasible universe of willing, available and qualified businesses, the DSMBA shall develop and engage in outreach designed to increase public awareness of the Program. This outreach may consist of any of the following:

1. Public Awareness of the Program. To increase the visibility of the DSMBA and to increase the awareness of the Program, the DSMBA shall disseminate at community events, trade shows, and other appropriate business functions, and publish at regular intervals information describing the Program. This information shall also identify ongoing contracting opportunities.
2. Outreach to LSBEs. The DSMBA shall assist LSBEs in obtaining certification by disseminating information, providing individualized counseling, and/or conducting seminars regarding the certification process.

4.46.120 Mentor-Protégé Program.

The DSMBA shall encourage all contractors and subcontractors to participate in a Mentor/Protégé program on a voluntary basis. As such, any interested contractor or subcontractor may submit with their Proposals a completed Mentor/Protégé Promise demonstrating that such a relationship has been formed. The DSMBA shall make available a database of potential Mentor and Protégé firms. Participation in this program is strictly voluntary. No contractor or vendor shall be penalized or preferred based upon participation or non-participation in the program.

The objective of this voluntary program is to enhance the potential of all LSBEs by building business capability to expand contracting opportunities within an agreed framework of conditions. The Program is designed to integrate on-the-job training for all emerging businesses and would allow a prime contractor to offer assistance on a limited term agreement, generally one project.

All administrative functions should be performed by the Protégé personnel. The Protégé is expected to maintain final decision-making responsibilities regarding the scope of its work.

4.46.130 Severability.

If any of the provisions set forth in this Program or any section, subsection, paragraph, sentence, clause, phrase, or word thereof shall be found to be invalid, illegal or unenforceable for any reason, the application of the remainder of this Program shall not be affected by such invalidity.

Section 2. This Ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

APPROVED AS TO AVAILABILITY
OF FUNDS:

INTRODUCED BY:

David Manning
Director of Finance

Ludye N. Wallace
Member of Council

News & Publications

2006

August 1, 2006

"Economic Inclusion: Municipalities Still Mean Business"

By Franklin M. Lee | Originally published in the July/August issue of *MBE Magazine*

Even as traditional government "set-aside" programs mandating minority subcontract participation have fallen out of favor in the courts and in legislatures around the country, a new movement to leverage public dollars to change corporate procurement behavior is gaining unprecedented momentum.

This new paradigm is referred to as "commercial nondiscrimination policy." In February, the City of Baltimore became the latest municipality, after San Diego, Charlotte, and Columbia, South Carolina, to get on board this train with its enactment of a commercial nondiscrimination ordinance. With Governor Robert Ehrlich's May 2 signing of a similar measure, Maryland has become the first state in the nation to embrace this new paradigm for economic inclusion.

Ever since the U.S. Supreme Court's 1989 decision in *City of Richmond v. J.A. Croson* curtailed the use of affirmative action in public contracting, state and local governments have been threatened with lawsuits challenging the constitutionality of racial "set-aside" policies. In many cases, the government response has been to undertake expensive economic "disparity" studies to determine the existence and extent of marketplace discrimination detrimental to minority business participation. Often these studies have documented not only statistical disparities in minority business participation in government contracts, but also patterns of exclusion at work in the private sector. Unequal access to capital, 'good old boy' networks, stereotypical attitudes by customers, price discrimination by suppliers, and unfair denials of opportunities to bid all combine to create a thicket of obstacles between qualified minority businesses and commercial success in the marketplace.

Yet barriers to private sector business have gone unaddressed by governmental set-aside programs. As a result, disparities in the commercial participation of qualified minority businesses have persisted and the cost to local economies has been enormously high.

In a recent "Bridging the Gap" study commissioned by the Greater Baltimore Committee, local economist Anirban Basu estimates that the Baltimore region has some 13,700 fewer minority-owned businesses than it should given its market demographics. Dr. Basu further concludes that these missing minority firms account for approximately 32,800 lost jobs and about \$5 billion in lost sales from the region's economy. In other words, the failure of minority businesses to fully realize their potential represents a huge drain on the economic vitality of the entire region.

In an ironic twist of fate, the blueprint for the new commercial nondiscrimination policy approach was born out of a combination of the South African anti-apartheid divestiture movement of the 1980s, and the Supreme Court's suggestion for an alternative to affirmative action remedies. The City of Baltimore was among the leaders in adopting anti-apartheid measures in that earlier era. Divestiture policies typically precluded local governments from doing business with corporations that engaged in business in South Africa. The massive withdrawal of commercial activity that resulted caused the South African business community to pressure the government to abolish apartheid. This approach was so effective that when Nelson Mandela was released from prison he credited the divestiture movement for turning the tide against apartheid in his country.

In the landmark *Croson* decision, even as the Supreme Court struck down the constitutionality of Richmond's set-aside program, the court suggested that the city could rely on the power of its purse to correct the effects of discrimination. The decision stated: "It is beyond dispute that any

public entity, state, or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”

Like the anti-apartheid policies and in accordance with the Supreme Court’s suggestion in Croson, the commercial non-discrimination policies adopted by the State of Maryland and other governments seek to leverage public tax dollars to remedy the acknowledged evil of racial discrimination.

The policies provide for the filing of administrative complaints against government contractors and bidders that have allegedly discriminated in their solicitation, selection, or treatment of other businesses. Such complaints are then to be investigated by the government, and will ultimately be resolved through an administrative hearing process. Violations of the policy may result in termination of existing contracts, debarment from receiving government contracts for a period of time, or in voluntary settlements designed to remedy the discrimination and to prevent its reoccurrence. Such strong sanctions offer a significant deterrent to private sector exclusion of minority-owned businesses.

The intent behind the policies is not widespread punishment, but promotion of a healthy change in corporate mindsets. The policies will encourage companies to become more conscious of the manner in which they conduct business such that no segment of the business community is excluded and discriminated against in the solicitation, selection, or treatment of suppliers, vendors, and customers.

The self-examination that will surely result may help to break down decades of “business-as-usual” practices that have led to the unthinking exclusion of minority firms based on a reflexive “use-who-you-know” approach. Time will tell whether enforcement of such policies can finally begin to erode the persistent economic disparities that have so long plagued minority-owned businesses in the American marketplace.

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Franklin M. Lee

Over the last twenty years, Mr. Lee has concentrated in litigation and policy development related to minority and small businesses, and has also been the primary author of commercial nondiscrimination policies for the State of Maryland, the City of Baltimore, and other municipalities. Mr. Lee can be reached at fml@shapirosher.com.

News & Publications

2006

May 2, 2006

Maryland Becomes First State in Nation to Enact "Commercial Nondiscrimination Policy"

On May 2, 2006, Maryland Governor Robert L. Ehrlich, Jr., signed into law legislation that will make Maryland the first state in the nation to enact a Commercial Nondiscrimination Policy aimed at breaking down barriers faced by minority and women-owned businesses seeking private sector contracts. The policy will use the power of the state's purse to encourage Maryland companies to avoid discriminating on the basis of race, gender, and other factors in the hiring of contractors and vendors.

The bill marks a major advance in governmental efforts to foster minority participation in private-sector contracting. Shapiro Sher Guinot & Sandler partner Franklin M. Lee, the lead author of the legislation and of similar laws enacted by municipalities around the country, is available for comment and can be reached at fml@shapirosher.com.

The new policy provides for the filing of administrative complaints against government contractors and bidders that have allegedly discriminated in their solicitation, selection, or treatment of other businesses. Such complaints are then to be investigated by the state government and will ultimately be resolved through an administrative hearing process. Violations of the policy may result in termination of existing contracts, debarment from receiving government contracts for a period of time, or in voluntary settlements designed to remedy the discrimination and to prevent its reoccurrence. Such strong sanctions offer a significant deterrent to private sector exclusion of minority and women-owned businesses.

Similar measures, also drafted by Mr. Lee, have been enacted by the cities of San Diego; Baltimore; Charlotte, North Carolina; and Columbia, South Carolina.

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News & Publications

2006

February 17, 2006

"Keeping the Devil Out of the Details: How Baltimore Will Enforce a New Ban on Private Bias by Public Contractors"

The Daily Record

Love of money may be the root of all evil — but the clout that money carries can be the root of much good.

That was the principle behind the divestiture movement that helped topple apartheid in South Africa, and it's the principle behind Baltimore's new commercial nondiscrimination policy, which is designed to penalize city contractors for discriminating against minority-owned subcontractors or vendors in their private-sector dealings.

It's a principle that's embraced even by the contractors the ordinance will regulate.

"Our concerns are with the mechanics of the bill rather than with the overall policy of the bill," said Champe C. McCulloch, executive director of the Maryland chapter of the Associated General Contractors of America. "But the devil's in the details."

The policy declares that the city will not engage in business with any entity that discriminates on the basis of race, gender, religion and more. As enforcement, it sets up an investigative and disciplinary process to deal with wayward companies. (See "Key provisions of the new ordinance," below.)

Amendments to the bill — many proposed by the business community — ranged from narrowing the geographical scope of its reach, to making it prospective rather than retroactive, to incorporating alternative remedies such as mediation.

Most of the contractors' concerns were addressed through amendments before the bill was passed Feb. 6, and Mayor Martin O'Malley's office has said he will sign it.

Now comes the hard part: making it work. That job falls to Thomas B. Corey, chief of the Minority and Women's Business Opportunities Office in the city's law department.

"I suspect if [businesses] are good corporate citizens, if they're trying to include everybody in their solicitation process, regardless of their race, sex, ethnicity — as long as they keep that up, then there's really no problem," Corey said.

Some in the business world remain unsure, however.

McCulloch notes that under the ordinance, anyone can file a complaint — even the contractor's competitors — and this raises the possibility of false or frivolous claims being used as corporate blackmail or to tarnish reputations.

"Our concern is that if you put a sword out there for somebody to grab, they're going to grab it," said McCulloch. Even if an accused company is ultimately vindicated, the damage to its reputation will have been done, he said.

The bill even anticipates false claims, allowing the city to ignore future claims by a party that knowingly filed one. The Board of Estimates also can require the complainant to reimburse the city for the costs of investigating the false claim.

McCulloch is unconvinced the penalties are severe enough to provide a deterrent, but Corey

sought to reassure business owners he will go after such abuse:

"In my position, as chief, if I found someone knowingly filed a false complaint that would be one of the first things I'd want to do, is to make sure it's out there that we will prosecute those types of complaints," Corey said. "Because we don't want folks coming in trying to taint somebody's name for some personal vendetta. ... This office will be very vigorous on that. For that reason and also to cut down the amount of work we have to do."

Changing behavior

Bryan R. Holmes, executive director of the Maryland Highway Contractors Association, also raised the possibility that companies might be caught up in an investigation without knowing they did anything wrong.

"This is very difficult to talk about without somebody getting somebody angry and upset with you," Holmes said. "[But] I don't think the minority and the majority community are necessarily on the same page about what discrimination is."

Addressing that very point is a key reason for implementing such a policy, said Franklin M. Lee, a partner at Shapiro Sher Guinot & Sandler in Baltimore and former chief counsel for the Washington, D.C.-based Minority Business Enterprise Legal Defense and Education Fund Inc.

"Discrimination is not necessarily limited to overt, hostile, racist types of attitudes," Lee

said. "It can result from unthinking decisions ... or patterns that don't allow MBEs to compete.

"The intended outcome of all this is to change the behavior of the business community to be conscious of the manner in which it conducts business," he added.

The city hired

Lee in 2001 to recommend ways to use its financial power to improve the outlook for minority-owned businesses.

One of his suggestions was a commercial nondiscrimination policy. He drafted it for the city — as he had done in the past for San Diego; Charlotte, N.C.; and Columbia, S.C. — but the effort to enact it languished until black business leaders resurrected it last year, he said.

The President's RoundTable Inc., a regional organization of black CEOs, approached Councilwoman Helen Holton about sponsoring the bill almost a year ago, Holton said.

Right from the start, she was "elated and very excited" about the impact this policy could have.

"It's time has come ...," Holton said. "This moves us one step closer to being a truly just society that honors and values individuals for who they are and what they are."

Holton is planning education initiatives for this spring along with the Small Business Resource Center in order explain what the policy could mean for those affected.
But is it legal?

Both the Maryland chapter of the Associated General Contractors and the Maryland Highway Contractors Association supported the amended bill, as did the Maryland Bankers Association and the Greater Baltimore Committee.

"We think it's a policy that is appropriate, it's a policy that ensures that there's a fair and level playing field for all companies involved and it ensures that there's no discrimination that takes

place," said Greater Baltimore Committee President Donald C. Fry. "We think that those are all very worthy goals and intentions."

A similar policy has been adopted by at least five other jurisdictions in the country, including the three Lee drafted. (The others are Dade County, Fla., and the Memphis, Tenn. school board.)

In Corey's research of those jurisdictions, he discovered few if any complaints filed, and Lee said none of them have been challenged in court.

Regardless, the Supreme Court has pointed to its legality. In a 1989 opinion, *Richmond v. J.A. Croson Co.*, the court struck down Richmond's minority subcontractor quota as unconstitutional, but noted the right of a local government to use its spending powers to remedy private-sector discrimination.

"These are race-neutral policies,"

Lee explained. "So the courts, even in these conservative times, have looked at individual inquiry as being preferable to affirmative action goals being applied to contracts."

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