

Information Item

Date: December 12, 2017

To: The City Manager

From: Evan Raleigh, Director of Business Inclusion and Advancement

Subject:
M/WBE Disparity Study

Strategic Focus Area: Economic Vitality and Diversity

Strategic Objective: N/A

Strategic Plan Action Item: No

Key Work Item: No



For the last several months, the M/WBE Citizen's Advisory Committee (CAC) has discussed making a recommendation to the Mayor and City Council that the City of Winston-Salem commission a disparity study. During their November meeting, the CAC voted 7-1 to recommend that the Mayor and City Council consider commissioning a disparity study. As part of the deliberation, the CAC reviewed several documents that were previously presented to the Mayor and City Council when the subject of commissioning a disparity study was last introduced in committee in 2014.

A disparity study is an analysis of the presence of inequality, or disparity, for a given program or organization. Municipalities and other segments of government utilize disparity studies to analyze their contracting and procurement activities respective to their inclusion of minority- and women-owned businesses. These studies provide a snapshot of the contracting environment over a period of time, often over five to ten years. Data is compiled to quantify the size of the market area, the overall availability of companies to perform particular scopes of work and the portion of those firms that are minority- and women-owned businesses that are "ready, willing and able." Spending is broken down by type of work and by individual race and gender groups. The study is tasked with providing evidence of discrimination and statistically depicting disparity among these groups that may not have received their fair share of contracts through the organization's procurement practices.

The findings of the disparity study describe the business climate for minority- and women-owned businesses and identify barriers to entry in the marketplace, should they exist. Recommendations may be provided to strengthen the program and to promote inclusion and awareness. If the results of the study find that minority- and women-owned businesses have gotten their fair share of business or that discrimination does not persist as a barrier to entry, it may be recommended to the municipality to instate a race- and gender-neutral program.

For example, in response to a lawsuit challenging its Minority and Woman Business Development (MWBD) Program, the City of Charlotte suspended its race- and gender-conscious M/WBE goals in 2002 for a race- and gender-neutral Small Business Opportunity (SBO) program. Backed by its 2011 disparity study, the City of Charlotte found that although disparity existed, the SBO program saw more availability of M/WBEs and increased utilization of M/WBE subcontractors presenting a “strong basis in evidence” to maintain the race- and gender-neutral program.

To protect the viability of a program, it is important that the study provide cumulative evidence to support a legally defensible program. This stresses the need to retain a consultant/vendor that has a proven record in performing such studies and defending the results. National consulting companies with extensive legal and research teams, such as MGT of America and BBC Research and Consulting, have been contracted to perform disparity studies for municipalities across the country. Should the Mayor and City Council elect to pursue a disparity study, a consultant would be retained for a disparity study through a Request for Proposal process to assess their capability to meet the needs of the study. It is common for disparity studies to cost, on average, upwards of \$300,000 and to require twelve to eighteen months of preparation.

For your review, the legal framework for devising and implementing race-conscious measures are detailed in the 1989 United States Supreme Court case of *City of Richmond v. J.A. Croson* 488 U.S. 469. While the Croson court recognized the government’s compelling interest in making sure that public dollars do not serve to finance the “...evil of private prejudice...,” it also stated that a governmental entity seeking to remedy discrimination through race-conscious measures must identify with “some specificity” the racial discrimination it seeks to remedy and present a “strong basis in evidence for its conclusion that remedial action is necessary.” This burden may be met by relying on “a significant statistical disparity” between the availability of qualified, willing and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.

Those wishing to challenge race-based remedial measures must “introduce credible, particularizes evidence to rebut” the government’s showing of a strong basis in evidence for such measures. Challengers may also offer a neutral explanation for the government’s evidence, present contrasting data, or demonstrate that the government’s evidence is flawed, insignificant or not actionable. Finally, the governmental entity, for race-based remedial measures, must show that the program is narrowly tailored to serve the compelling governmental interest in not financing private discrimination. For race-based remedial measures, the level of review is “strict scrutiny.” For gender-based remedial measures, the level of review is “intermediate scrutiny.” Intermediate scrutiny requires less of a showing by the governmental entity than the more exacting standard of strict scrutiny.

While a disparity study is not legally required, if the Mayor and City Council decide to commission a disparity study, the need to retain a consultant/vendor with a proven track record in conducting legally defensible studies is of critical importance. While a legally defensible disparity study is useful to better define the business climate, the need to adhere to the results of that study and the failure to do so might jeopardize the value of the City’s M/WBE Program.