

Documenting Disparity in Minority Contracting: Legal Requirements and Recommendations for Policy Makers

Essays on Service Delivery and Privatization

The challenge of advancing policy goals and public administration is compounded when legal compliance rests on data and complex analysis. This is true of disparity studies that support local government-sponsored minority contracting programs. How can local governments prepare to work with such programs in this complex environment? The authors analyze several court cases challenging minority contracting programs and illustrate the difficulty of administering public programs at the juncture of public policy goals, subtle changes in law, and demands for quality statistical analysis. Many public agencies, especially at the local level, are not prepared to address the data requirements demanded by these programs. To help with this challenge, the authors develop a set of guiding principles to help practitioners satisfy the legal requirements and meet the policy goals of minority contracting and similar programs. This includes a new emphasis on continuous gathering of valid, local-level data.

Public administration and policy decisions are guided and constrained by law. The relationship between the rule of law and policy administration is not always a happy one. And though adherence to the rule of law might inhibit innovation or efficiency in policy development and administration, the reality is that “an administrator’s first responsibility is to carry out the law” (Cooper 1996). It isn’t always easy, however, for public officials to know what the law is, especially when it is found in case law rather than enabling or preemptive statutes. The challenge of governing is compounded when legal compliance rests on data and complex analysis. This article illustrates the difficulty of administering public programs at the juncture of public policy goals, subtle changes in law, and demands for quality statistical analysis. Minority contracting programs provide fertile ground for examining the interplay among these sometimes competing priorities.

In an effort to address past discrimination in contracting, public agencies at the federal, state, and local levels have established programs to promote the use of minority-owned businesses in public contracting. The federal government has had some form of minority contracting program for nearly three decades (*Fullilove v. Klutznick*, 448 U.S. 448 [1980]). The main policy goal of these programs is to overcome the continuing effects of past discrimination by increasing the share of contracts awarded to minority- or woman-owned businesses (Rice 1992; see also Rice 1991 for an excellent history of minority set-aside programs). The programs may be based on one or more of the following assumptions: First, past discrimination in contracting may have decreased the ability of these firms to obtain government contracts. Second, as subcontractors participating in these programs, they may gain business experience and contacts that lead to more work, assisting in their long-run productive potential (Haworth 1985). Finally, these contracts may promote economic development and discourage discrimination (Addabbo 1985; Bates 1985).

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The courts have had a strong impact on how these programs have been implemented. In particular, the landmark *Richmond v. J. A. Croson Co.* (488 U.S. 469) decision in 1989 required that agencies meet a rigorous set of standards when adopting a minority preference contracting program. Estimates of the number of programs initially affected by that single decision run from 200 to well over 1,000 (Nay and Jones 1989; Rice 1991). There does not appear to be a database describing the total number of programs that remain in effect. For those that persist, however, litigation or the threat of litigation to challenge the constitutionality of such programs has become commonplace. Public agencies involved in this arena are affected by the evolving legal standard, whether as parties to lawsuits

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or merely as consumers of the latest court pronouncement about what is required to meet constitutional standards. For example, in Houston, Texas, in 1996, a proposed antidiscrimination measure forced the city to widely communicate the measure's potential impact on its affirmative action contracting program. Though the city was successful in preserving its program, the lawsuit resulted in program changes to fight off future litigation (Klineberg and Kravitz 2003). The changing legal requirements affecting these programs have spawned an industry of consultants churning out disparity studies that even a decade ago cost local governments between \$60,000 and \$800,000 (Rice 1992).

This analysis focuses on local governments' attempts to keep minority contracting programs current with the changing law. Cases challenging the constitutionality of these programs have focused on the statistical analysis used to provide evidence of past discrimination in the relevant market area. As the legal interpretation of what is required changes, so do the type and quality of data and analysis demanded to support the programs. Local governments must be prepared to deal with this changing environment. Based on our analysis, many government programs fail to meet the required minimum standards. An analysis of anecdotal evidence, also used to support these programs, shows similar weaknesses (Hanson 2003). We believe local governments that wish to maintain minority contracting programs can better position themselves to meet the legal requirements by addressing the deficiencies that the courts have identified.

We first present some background on minority contracting programs, including the current legal climate surrounding them, and our methodology. We then outline the changing nature of the data and analysis required by the courts for disparity studies that support the need for these programs. By analyzing the relevant court decisions, we identify weaknesses in local government practices in developing the evidentiary basis for these programs. Based on this analysis, we provide specific guidelines for data gathering and organization. Public agencies can use these recommendations to improve their chances of surviving a legal challenge, as well as to consider alternative programs for more effectively improving minority business participation in public contracting. Finally, we present a set of general guiding principles to better prepare practitioners for possible legal challenges.

Frameworks for Evaluating Minority Preference Programs

Policies can be evaluated using a variety of frameworks, including managerial, political, analytical, and intergovernmental perspectives. This study limits itself to understanding the basic criteria on which the

implementation of these programs can be evaluated from a legal perspective. The legal approach to the evaluation of public administration focuses on constitutional integrity, equal protection, fairness (procedural due process), and the protection of the rights of individuals involved in public administration operations (Rosenbloom and Kravchuk 2005). We discuss these criteria on the basis of constitutionality and argue that the standards are difficult to reconcile with day-to-day administrative practice.

Other models may be applicable in understanding the political climate surrounding minority preference programs. One might be the client politics model, in which the benefits of a particular policy are narrowly concentrated but the costs are widely distributed, or interest group politics, in which both costs and benefits are narrowly concentrated. Perhaps most likely, the entrepreneurial model is applicable, in which benefits to society as a whole (in the case of minority preference programs, the reduction in discrimination) results in a cost borne chiefly by a small segment of society (in this case, by the contractors disadvantaged by the existence of such a program) (Wilson 1980). Beyond the legal perspective, we do not try to apply a particular policy framework to minority preference programs. All of the frameworks rely on different perceptions of the distribution and degree of costs and benefits—a discussion that is worthy of investigation but beyond the scope of this work.

The Constitutionality of Minority Preference Programs

Beginning with the landmark case *Richmond v. Croson* and continuing in numerous decisions of state and federal appellate and trial courts across the country, judges have ruled on whether particular programs designed to promote the use of minority businesses are supported by sufficient evidence to meet constitutional standards. Public agencies have attempted to modify and improve their programs in response to each new court decision. A key focus of this effort has been the documentation of past discrimination, which has been recognized as a compelling governmental interest, as required under the strict scrutiny standard of constitutional review.

The U.S. Supreme Court has consistently applied the highest level of scrutiny to race-based programs, even when they are characterized as remedial. In two recent decisions on this subject, the Court approved the University of Michigan Law School's race-conscious admissions policy, finding that racial diversity constitutes a compelling governmental interest in the education context (*Grutter v. Bollinger*, 539 U.S. 306 [2003]), but struck down a companion case involving undergraduate admissions because the system in question employed a quota and did not provide for individualized consideration of applicants (*Gratz v.*

Bollinger, 539 U.S. 244 [2003]). Although the impact of these cases is limited to higher education, the decisions illustrate the Court's continued emphasis on applying strict scrutiny. They also highlight the difficulty that public agencies face in developing programs that can survive subtle and constantly changing declarations from the Court about specific justifications for programs that meet the strict scrutiny standard and the challenge of collecting the evidence required to support those justifications.

The strict scrutiny standard that the courts use to review race-based programs requires both a compelling governmental interest and a narrowly tailored remedy. The *Croson* decision held that evidence of past discrimination in contracting by a government agency or ongoing discrimination in the construction industry constitutes a compelling interest sufficient to justify a remedial program. We will discuss how the documentation to meet strict scrutiny applies to minority contracting programs in more detail later.

Once a local government decides to adopt a minority preference program, the administrative challenge is to understand the legal requirements that shape the program and to prepare to defend it in the event of a legal challenge. Courts addressing the question of whether a particular program is supported by adequate documentation of past discrimination have often been critical of the data provided by the public agency, but they have fallen short of setting out a clear standard for what is required. In many cases, judges review the statistical analysis produced by consultants, as presented and critiqued by competing expert witnesses on behalf of the parties at trial. The legal system in general, and judges in particular, become the audience for local government data gathering and analysis.

The Legal Requirements for Minority Contracting Programs and Their Impact

In *Richmond v. Croson*, the Supreme Court held that a local government program designed to increase participation by minority-owned businesses creates a classification based on race, and as such, it is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment. Strict scrutiny in this context is best understood in terms of the burden that it places on the public agency to justify the challenged program. Under strict scrutiny, a program may survive only if it is narrowly tailored to serve a compelling governmental interest. In *Croson*, the Court ruled that it may be a compelling interest for a public agency to "rectify the

effects of identified discrimination within its jurisdiction." In particular, the Court noted that "where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." The opinion states that in these cases, the public agency could take direct action, or "in the extreme case, some form of narrowly tailored racial preference might be necessary." Although the court specifically rejected the notion that racial discrimination by society in general could provide a compelling basis for a minority contracting program, it noted that if the agency could show that it had become a "passive participant" in a discriminatory construction industry, it might have a compelling interest in "assuring that public dollars . . . do not serve to finance the evil of private prejudice."

Though some might argue that the decision has had limited impact on the programs themselves (Goodman and Tuchfarber 1995), the Court's statements spawned a market for consultants to assist with the documentation of minority contractor availability compared with the government agency's patterns in awarding contracts to minority businesses (Rice 1993).

Primarily taking the form of "disparity studies," described more fully later, these statistical analyses, combined with anecdotal and other evidence of

discrimination, have been used almost universally as the legal support for minority contracting programs at the state and local levels. The legal justification for the programs focuses on data (Halligan 1991).

This reliance on data is clearly shown by the reported cases challenging minority contracting programs. The cases show that public agencies defending against legal challenges to their programs have relied on statistics to meet the burden of demonstrating a compelling interest and a narrowly tailored approach. Disappointed bidders or general contractor associations as plaintiffs in lawsuits often make their cases by demonstrating weaknesses in the statistics and methods that public agencies use to justify the need and extent of their programs. This places judges in the position of evaluating the sufficiency of the statistical methods in order to rule on the ultimate legal question. Though the formulation in *Croson* suggests that the proof need only be sufficient to support an *inference* of discriminatory exclusion, the exacting nature of strict scrutiny has prompted courts across the country to engage in close

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review of the validity of both the data collected and the statistical analysis employed by the public agency in developing or supporting its program.

A recent development in case law on this point involves a subtle shift in the legal analysis and suggests an expansion of the type of evidence that may be used to support minority contracting programs. In *Concrete Works of Colorado, Inc. v City and County of Denver* (321 F.3d 950 [10th Cir. 2003]), the federal appeals court emphasized that the plaintiff has the ultimate burden of proving that the program is unconstitutional. According to the court, this means that the public agency need not prove with certainty that discrimination is present. Instead, according to this court, the appropriate legal standard requires the agency to demonstrate “strong evidence” of discrimination, not “irrefutable or definitive proof,” as some courts previously required. The ultimate burden remains with the party challenging the program “to prove by a preponderance of evidence” that the public agency’s evidence does not support an *inference* of prior discrimination, which would support the need for a program. In reaching its conclusion that the government had provided sufficient evidence of discrimination, the court in the Colorado case accepted evidence that the local government provided of disparity in current minority contractor utilization in the private sector, as well as data on minority firm formation, in addition to the typical disparity study data.

The overall impact of the court’s ruling in the Colorado case is difficult to gauge. Although the ruling of the Tenth Circuit Court of Appeals is binding only in jurisdictions within that circuit, the Supreme Court refused to review the decision, notwithstanding a strong dissenting opinion by Justice Anthony Scalia (*Concrete Works of Colorado, Inc. v City and County of Denver*, 124 S. Ct. 556 [2003]). In another recent case reviewing a Chicago ordinance, the court found sufficient proof of discrimination but invalidated the program because it was not narrowly tailored to remedy the discrimination that was documented (*Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 [2003]). The court’s approach in the Chicago case was different from those used by courts in earlier cases. Instead of focusing on the validity of the statistical analysis, the court accepted evidence based on more traditional social science research demonstrating historical patterns of discrimination in the construction industry. These two recent cases, together with the Supreme Court’s acceptance of diversity as a compelling interest in the University of Michigan case, may signal a trend away from pure statistical validity in judicial review of race-conscious programs, though it remains to be seen whether the Supreme Court will condone the approaches of the lower courts in the contracting context.

It is clear, however, that despite subtle changes in the judicial treatment of these programs, public agencies still must have a valid factual basis to support the need for and elements of a minority-contracting program. Though the public agency in the Colorado case used several different types of evidence—including documentation of discrimination in the private sector and anecdotal evidence from contractors—specific evidence of disparity in the use of minority contractors continues to be a key component of the material used to develop narrowly tailored and legally justifiable programs. The next section discusses the methodology and key data used in disparity analyses.

Documenting Disparity

The Supreme Court’s recognition that public agencies have a compelling interest in creating programs to remedy the lingering effects of past discrimination in contracting created a need to document the existence and extent of those effects. The central tool developed for this purpose is the “disparity study,” which, simply stated, evaluates whether a particular jurisdiction has a documentable pattern of underutilizing minority contractors, and if so, what level of effort is justified to remedy the imbalance. Disparity studies focus on four main questions: (1) Is there substantial evidence of discrimination against the targeted group? (2) If so, is there evidence of government participation, active or passive? (3) Have race-neutral alternatives been ineffective? If so, why? (4) Can the proposed remedy be narrowly targeted to benefit the group that is a victim of discrimination while minimizing the adverse effects? (Rice 1993). The focus of most disparity studies, and this article, is the documentation of discrimination.

It is important to note that nothing in *Croson* or subsequent decisions suggests that strict scrutiny requires proof of intentional discrimination to justify a program. At the same time, the *Croson* decision is clear that general societal discrimination is insufficient as a justification for a contracting preference or other program favoring minority contractors. Many consultants and public officials, therefore, focus on developing data to show whether there has been disparity in contracts awarded compared to contractors available in the relevant market area.

The main statistical part of the disparity study centers on an index that measures the relative percentage of total revenues received by minority-owned enterprises as a share of all enterprises to the percentage of total available minority-owned enterprises versus the number of total enterprises. The formula presented in figure 1 shows the utilization percentage ratio, or disparity index, and indicates whether certain types of firms are being over- or underutilized.

$\frac{\text{Total dollars received by particular minority-owned business group}}{\text{Total dollars received by all businesses in a given area}} \quad \text{(Utilization)}$	= Disparity Index
$\frac{\text{Total number of minority-owned businesses in a particular group}}{\text{Total number of all businesses in a given area}} \quad \text{(Availability)}$	

Figure 1 Minority Contracting Disparity Index Formula

The number derived from the formula is usually multiplied by 100 to give a number ranging from 1 to 100, where 100 represents parity (full participation by minority businesses based on the number of available firms in that area).

The validity of these studies—and in particular, of the disparity index analysis—has been called into question by experts and judges (La Noue 1994b; see also *Webster v. Fulton County*, 51 F.Supp.2d 1354 [1999]). The most significant critiques focus on the validity of the data used, especially the database of available contractors, as well as the presence of variables other than discrimination that might explain disparity.

Of course, it is difficult to document actual discrimination directly using statistics. According to Boyle and Rhodes (1996), by the mid-1990s, though the courts were clearly calling for multivariate regression analysis, most disparity studies used a univariate comparison between the expected and observed shares of contracts going to minority-owned firms. Boyle and Rhodes examined four more sophisticated statistical methods—ordinary least squares multiple regression, logit and tobit models, and a multivariate procedure for comparing expected and observed outcomes—to assess the extent to which each method removes spurious relationships and detects valid estimates of racial disparity when relevant control variables are added. They found all four methods were an improvement, but at the time, their findings were limited because data did not exist at the level required by *Croson*. They supported their findings only with a synthetic data set. This type of disconnect between court requirements and practical application is a theme that we will discuss in greater detail later.

Currently, efforts to comply with court requirements are typically made by evaluating the disparity index number through different forms of multivariate regression analysis to determine which factors have an effect. If all logical factors are included in the regression analysis and a significant amount of variation in the disparity index remains unexplained, it is assumed that this is attributable, at least in part, to discrimination.

Methodology

The recommendations in this article were developed by (1) reviewing court decisions addressing the legal sufficiency of data in support of minority contracting programs, (2) identifying consistent themes and directives in those opinions regarding data that are acceptable to meet the applicable legal standard, and (3) analyzing appropriate data-collection approaches in light of established statistical methods. More than 23 cases were initially examined, and five cases covering the period 1989–2003 are included here. The cases mentioned are those that focus on statistical studies. We identify general themes across the cases, and we present specific recommendations for public agencies adopting minority preference programs regarding the type of data that should be collected and maintained. We also make broad recommendations about how local governments can gather and use data to better support and protect policy making in the future.

We are aware that the data for this study very narrowly focus on information available from court decisions. Although it would be useful to document how many programs exist, how many have been challenged, and how many have won or lost, we are not aware of a database containing this information, and developing one is a project that far exceeds our resources. In addition, as indicated in the only recent attempt at program evaluation we could find (GAO 2001), a report on the magnitude of the problem is almost impossible because of the lack of data maintained by government agencies that have such programs. We believe, however, that if a primary goal of program administration is to maximize the chances that the program will survive a legal challenge, these judicial statements about the level of statistical proof required provide the most directly relevant information on which to base our recommendations. As we note in the conclusion, the legal requirement of narrow tailoring may help policy makers focus on the purpose and possible effects of different types of programs.

Findings

Though guidance in various forms has been provided to local governments (see, e.g., Cole 1990; La Noue 1994a), there is no definitive court ruling that identifies

a coherent set of approved practices for documenting disparity in support of minority contracting programs. Instead, the courts have critiqued individual disparity studies and other evidence offered in support of particular challenged programs. From multiple cases, we have identified consistent weaknesses in current local government data gathering and analysis methods in support of these efforts. Refer to table 1 for a summary of these results.

Appropriate data are not tracked. Every court decision has restated the language used in *Croson*, stressing the importance of using availability figures based on the number of *qualified* minority firms; in this context, “qualified” means firms that are ready, willing, and able to compete for contracts (*Richmond v. Croson*). Despite this caveat, some local governments do not use qualified firms as the basis for the availability portion of their disparity indices, making it nearly impossible for them to survive strict judicial scrutiny.

For example, in a case involving the city and county of Denver, a telephone survey was conducted to compile the availability numbers used for its 1995 study. Some of the questions asked in the survey involved revenues reported; length of time in business; ethnic, racial, and gender classifications of owners; work history with the city; and interest in doing future work for the city. Though this information might seem sufficient, the court noted that questions should have also asked whether the firms were prequalified, bonded, licensed, insured, or certified. In addition, key information was missing about contractor size and the number of paid employees for each firm. Without that information, Denver was unable to construct a database that reflected qualified, available firms.

The question of whether a minority firm is willing to work with government entities is particularly difficult to document. MacManus (1991) notes that many minority firms choose to avoid government work because of the perceived bureaucracy and fear of the inability to compete against larger firms. MacManus (1990) has also documented that minority business participation in government contracting is related to

economic and social assimilation of the group, the size of the group, and the degree to which a minority group is incorporated into the political system.

Local information is not used. When looking for data, many localities mistakenly rely on economic census data culled from the Survey of Minority and Women Owned Businesses, which is released once every five years. These data are not timely or comprehensive enough. In Denver, census data were cited as being too old and inappropriate for use in such a high-growth area, where the city had seen explosive growth between the time the survey was conducted and the time it was used as an availability indicator (*Concrete Works of Colorado v. City and County of Denver*). Census data also do not reflect the necessary level of detail about firms to determine whether they are qualified or even if they are being used for local public construction contracts.

The data gathered are too general. Both availability and utilization databases should contain as many specific categories as possible. One of the most important distinctions is between prime contractors and subcontractors. In Jackson, Mississippi, for example, the city made the mistake of relying on a study that contained figures only for prime contractors (*Scott Construction v. City of Jackson*, 199 F.3d 206 [1999]). Because the relevant pool of construction firms included both prime and subcontractors, both of those needed to be included and analyzed separately. In Columbus, Ohio, the city used vendor payment files to compile its utilization data. Instead of breaking out payments by prime and subcontractors, the city listed only payments to prime contractors, with a minimum of information about each firm (*Associated General Contractors of America v. City of Columbus*, 936 F.Supp. 1363 [1996]).

Using census sales and receipts figures as an indicator of a minority group’s utilization is also suspect because the data do not delineate between revenues from public versus private sources or prime versus subcontracts. Both of these distinctions are critical for a locality when documenting discriminatory practices. Also, the lowest census unit of analysis is the county, not the firm, making it nearly impossible to discern if

Table 1 Problems Cited with Cases Relying on Statistical Analysis

Findings	<i>Webster v. Fulton County</i>	<i>Denver v. Concrete Works (2000)</i>	<i>W. H. Scott Construction v. City of Jackson</i>	<i>Associated General Contractors v. Columbus</i>	<i>Engineering Contractors Assoc. v. Dade County (1997)</i>
Appropriate data not tracked	X	X		X	
Local info not used		X			
Data too general		X	X	X	X
Inconsistent data sources	X	X		X	
Minority not defined consistently		X			
Disparity not linked to discrimination	X	X	X	X	X

one firm is receiving a disproportionate amount of revenue.

Avoiding a combination of minority groups in databases is also vital because all of the targeted groups in a locality's ordinance or program need to be evaluated separately. When groups are aggregated, it is hard to determine where discrimination is occurring or which groups are benefiting from a jurisdiction's policies. In Denver, for example, study consultants combined minorities and women into one group to form an availability database. Merging these two groups created availability numbers that the court deemed insufficient (*Concrete Works of Colorado v. City and County of Denver*).

Inconsistent sources of information are used. In Atlanta, consultants made the mistake of combining numbers from the city of Atlanta and the Atlanta School System to serve as availability figures for Fulton County, Georgia (*Webster v. Fulton County*, 51 F.Supp.2d 1354 [1999]). Because these numbers came from two different areas with dissimilar methods of data collection and levels of analysis, the court deemed the information inadequate. In another example, Denver erred when using utilization figures from their own database along with census availability figures; these two databases were not comparable, as the revenues reported were not necessarily from the identified available firms, and the two entities had differing definitions of what constituted a minority firm (*Concrete Works of Colorado v. City and County of Denver*).

The term "minority" is not defined consistently. Localities also make the mistake of using data for which the definition of the term "minority" is different from that of their programs' authorizing legislation or programmatic documents. Courts have invalidated programs when jurisdictions have used data based on a definition of minority that differs from the definition contained in local legislation. Denver's information was flawed because it defined minority firms as those with more than 51 percent ownership by minorities, whereas the census data used to defend the city's program defined minority firms as those with 50 percent ownership by minorities (*Concrete Works of Colorado v. City and County of Denver*).

Disparity is not always linked to discrimination. Even when a region has proven through a disparity index that differences exist between the number of contracts or dollar amounts awarded to minorities versus nonminority firms, courts have required more information to demonstrate discrimination. To pinpoint the exact reason for disparity, a regression analysis should be conducted (*Webster v. Fulton County*). A regression analysis will test all possible disparity-causing factors; only after all

other factors are ruled out can discrimination be cited as an explanation for a disparity.

Atlanta's 1990 Fulton County Study did not include a regression analysis to establish factors that might affect minority utilization or availability, such as firm size or the capacity of a firm to attain financing and bonding (*Webster v. Fulton County*). Fulton County's program was intended to remedy discrimination, but with no real proof that discrimination was the cause of disparities, the county was unable to support its program. This proved to be a fatal flaw and was one of the two main reasons the study was invalidated. As noted earlier, the most recent Colorado case seems to move away from the insistence on statistical proof seen in the Fulton County case. Nonetheless, local governments should be prepared to eliminate as many nondiscriminatory causes as possible with the data they are able to obtain.

Recommendations for Local Governments with Minority Contracting Programs

We have specific recommendations for local governments seeking to support the validity of minority contracting programs. By following some of these guidelines and familiarizing themselves with the basics of disparity studies, localities will be better prepared to develop appropriate legal programs to address discrimination in the construction industry and, when necessary, to be informed consumers of consultant services in this area.

If a locality needs to conduct a disparity study, the costs of doing so will be reduced if the data are available, clean, and as detailed as possible. For example, when developing relevant databases, detailed information on qualified and available firms should be included so that the locality can make distinctions between firms that are qualified and regularly competing for contracts and those that might operate in the area but are unqualified to bid on certain projects. The information in an availability database should be based on consistent criteria and collection methods.

If utilization data are gathered from vendor files, a firm-by-firm breakdown should be used. This will enable localities to distinguish between firms that receive a majority of the contract dollars awarded in a particular minority category and other firms that might be qualified but have not received a proportionate share of contract dollars. If one firm has received almost all of the contract dollars awarded in a county and compares favorably with all of the available firms' utilization in the county, the disparity index would not reflect the discrimination that still might be occurring in that area.¹

Instead of relying on census data, localities should keep their own vendor payment files recording all

public contracting costs, as well as data on contractors that bid on or are available to bid on public work. They can continue to pay prime contractors with one lump sum, but they should require those contractors to provide a detailed summary of all costs so that subcontracting firms and other vendors can be identified. Characteristics of firms that receive public contracting dollars should also be identified as specifically as possible, such as the number of employees, the type of firm, and the category of construction.

General Comments and Suggested Guidelines for Local Governments

Public policy is often driven by constitutional requirements that limit the role of government in addressing societal problems. With race-based programs, the legal standard is a high one, and when the courts rely on data as a justification for policy, they impose high standards of data quality and reliability. Our research, based on this one area of public policy—addressing discrimination through minority business preference programs—indicates that many public agencies, especially at the local level, are not prepared to address these requirements.²

Based on our analysis, we offer the following general recommendations for local governments seeking to justify any public program that requires documentary proof for its legal validity.

First, there must be an increased focus on using valid data. Local governments should clearly tie program need, theory, and objectives to data that are directly relevant. Valid data are those that measure what they are meant to measure. For public programs, the definitions used in the locality's authorizing ordinance or legislation should be the same as those used when collecting or analyzing data. Data that are too general, aggregated, or ill-defined may make the program vulnerable to criticism from opponents and may not provide sufficient support to withstand legal challenges, particularly if the strict scrutiny standard applies.

Second, data must be focused on the local level. This requires public agencies to be self-reliant. Though resources are limited, local governments will save time and money by gathering their own data that clearly cover the jurisdiction in question. Local governments must ensure data quality and consistency, take internal responsibility for gathering and maintaining data, and apply high quality-control standards.

Third, data collection needs to be constant, consistent, and supported. For example, by keeping

comprehensive files in electronic form and updating them regularly, local governments will have more reliable data that can be easily evaluated. Local governments can share information to support similar programs, though they should exercise caution when using numbers from other local governments, and should confirm that data-collection methods are consistent.

Conclusion

Public agencies' desire to promote the use of minority contractors in public work, together with the pressure of litigation regarding the constitutional limits of minority contracting programs, seems to have inextricably linked public policy choices to legal standards. When the application of judicial standards depends on statistical analysis, the courts establish a unique relationship between policy, administration, law, and

statistical analysis. We believe this requires an increased reliance on information technology and data, as well as employees with the skills to make use of these tools in a consistent fashion. The need for documentation could deter local governments with minority contracting programs from continuing them in the face of potential litigation. It is important, however, for those in public administration to track the legal

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developments in this area and to structure programs and data-collection systems that can meet the standards established by the courts. Perhaps more important, however, is the fact that maintaining valid statistical information about minority contracting patterns can serve a broader goal than just maintaining legal compliance.

Although our research has focused on the justification of a controversial public policy, missing from this field of discussion is a comprehensive look at the purposes of these programs and their overall effectiveness. In the case of minority contracting programs, in response to the Supreme Court decision in *Croson*, public policy makers have focused on the documentation of disparity and the utilization of existing minority firms. Studies of minority firm development and success exist (Bates 2001) but have been less prevalent in the legal or policy arenas, which influence the establishment of specific programs. Though some agencies have programs for assistance with capital or bonding needs, technical assistance, and majority–minority firm partnering, there is a dearth of analysis comparing the impact of these types of programs with the traditional goals of utilization programs or otherwise analyzing their impact. Indeed, one way to interpret the outcome in the Chicago case (*Builders Association of Greater Chicago v. City of Chicago*) is that although

the city provided ample evidence of discriminatory barriers to minority success in the construction industry, it lost because its program did not adequately address those barriers. Research analyzing programs in terms of their effectiveness in addressing the specific, documented problems for minority firms would go a long way toward helping public agencies address the kinds of legal defects that were fatal in the Chicago case. Perhaps more important than legal compliance is the degree to which evaluative analysis helps direct policy makers to the choices that are most likely to advance the program's intended purposes.

Though limited in number, a few examples of this type of research exist. One is a case study of a minority business set-aside program in New Jersey (Myers and Chan 1996). The authors found that although the program was justified on the basis of evidence of prior discrimination, minority business rates actually fell after the introduction of the program, and discriminatory outcomes persisted. Another study, an econometric analysis of economic impacts within the minority business sector, made recommendations for better program tailoring to target emerging lines of minority enterprise (Theodore 1995). The policy objective was business development, and the study found that *Crosby*-type mandates run counter to business development principles. This study provides a good example of the need to understand the specific policy goal and develop an appropriately targeted program, as well as an appropriately targeted evaluation.

On the other hand, other attempts to evaluate these types of programs are limited by data problems. A 2001 report of the U.S. General Accounting Office (now the Government Accountability Office) concluded that the effectiveness of the existing Department of Transportation Disadvantaged Business Enterprise program could not be assessed because of a lack of critical data (GAO 2001). The report made clear that until public agencies begin to regularly maintain data (the same type of data described in this article), evaluative studies will not be possible.

Additional information about minority firm formation and utilization in the private sector, examples of which can be found in the Colorado case, can help us to develop a more complete picture of the barriers minority firms face. Indeed, this type of evidence was instrumental in the Chicago court's conclusion that the city had demonstrated a compelling interest in support of its minority-contracting program. By implementing systems to obtain and track appropriate data, public agencies will be better equipped to defend programs against legal challenges. Perhaps more important, however, maintaining valid information will help public agencies evaluate their programs and develop tailored and effective programs for the future.

Notes

1. For example, one county's data might reflect sales and receipts of \$1 million for African American-owned firms versus \$2 million for all firms. In looking at the utilization, it would appear that African American-owned firms received 50 percent of the total revenues in the county (\$1 million/\$2 million). If there were five African American-owned firms in that county out of 10 firms total, it would appear that 50 percent of the available firms were African American owned. If this were converted to a disparity index, it would equal 100 (50 percent/50 percent \times 100) or parity for African American-owned firms. However, suppose that one firm out of those five received a \$900,000 contract, meaning that the other four firms were barely used at all. This simple hypothetical example illustrates the point that a disparity index using sales and receipts data can give an inaccurate picture of what is truly going on in the area.
2. The authors acknowledge that there is no way to document incidents in which local government programs were not challenged or challenges were settled or dismissed based on the legal validity of the program. The conclusion that many local governments do not have sufficient legal documentation to support programs is based on the observations of the authors. It is also supported by a 2001 General Accounting Office report, which concluded that it could not evaluate a federal Department of Transportation program because of a lack of critical data at the local level (GAO 2001).

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