

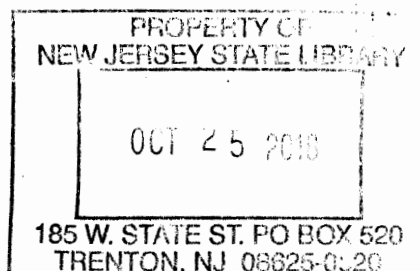


VOLUME XIV

POST-CROSON PROGRAMS: HISTORICAL RECORD OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN PUBLIC AND PRIVATE CONTRACTING IN NEW JERSEY

**A Report Submitted to
NJ TRANSIT
and the
Governor's Study Commission on Discrimination in
Public Works Procurement and Construction Contracts**

**by
The Afro-American Studies Program
University of Maryland at College Park**



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EXECUTIVE SUMMARY

Since early 1989, when the constitutionality of affirmative action programs was called into question as a result of the Supreme Court ruling in City of Richmond v. J.A. Croson Co., several programs have been suspended. It was found that they were in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States. To initiate a program again, they would have to be based on evidence of discriminatory activities and be narrowly tailored. Those programs receiving funding from the federal government are not subject to this scrutiny because of a congressional act, the Legislation Executive Order, Public Works Act of 1977, which requires that 10% of each federal dollar be awarded to minority businesses.

Contract Compliance, Inc. a consulting firm specializing in the analysis, management and development of preference and race neutral M/W/DBE programs, was selected to undertake the Post Croson Programs evaluation. Work began on January 21, 1992 with final draft due in four weeks.

The study examined the following information:

- o Set-aside programs in other states in the SMSA's which include New Jersey.
- o Set-aside programs in States or local governments.

Our primary instrument was a questionnaire. Our key finding is that the degree of effectiveness of a set aside program or a race neutral program is largely dependent on the commitment of the upper management to its implementation. With this commitment in place, one demonstrated result has been the selection of DBEs in the service area. If this commitment is not demonstrated or is not ongoing, and insurance of participation is desired, a series of internalized procedures will be needed to be institutionalized as implemented by AMTRAK.

In addition, for any Affirmative Action Program to be taken seriously by the contractors will need to include:

- o A structured monitoring program implemented before contract award.
- o Technical assistance is a cornerstones of this initiative, (the Toll Road program, Miami Airport program and the New York/New Jersey Port Authority's initiative are good examples of effective technical assistance programs).

In the area of construction, where the low bid determines the successful firm, bonding and loan programs at a competitive rate will be needed to grantee the DBEs a place as the prime or the subcontractors. Informing firms of the opportunities available is also essential. The Washington Airport Authority has recently received the recognition for the most effective outreach program in the state of Virginia. This outreach program has contributed significantly to the Authority's maintaining its M/W/DBE participation goals.

Ongoing review of the effectiveness of a program in place and tailoring it so it achieves the goals of a good program would be essential. An effective program evaluation would examine the following:

- o Actual participation of M/W/DBEs in the contracting process
- o Evaluation of the growth of that participation
- o Evaluation of contribution of the race neutral program components

The commitment of an agency or an owner must be visible and constant from the top administration. AMTRAK's use of the internalization of their program by association of performance review with successful utilization of M/WBEs is an effective motivating tool. Their strong participation in the DBE awards is another example.

Both race neutral and race preference programs have potential for success and failure. The race preference programs require all the basic components plus an adequate staff to implement the program or it will be perceived by the public as window dressing. The race neutral program requires a similar support as well as a strong visual and vocal commitment by upper management, because the "mandated rules" are not there.

The questions to be answered concerning these programs are what is the definition of a successful program? Is it success of awarding service contracts to a ethnic group of firms that have consistently found barriers at an agency? In the District of Columbia there is the largest concentration of minority architects and engineers in the country as a result of educational facilities like Howard University. Are they being utilized commensurate to their numbers? What monitoring program is in place to track the growth of their participation so it can be enhanced if necessary.

If a bonding ceiling has been lifted, what has the impact of that been? How many contracts with MBE participation have been let in this dollar area? Is this the right vehicle? How essential is a bonding program and access to it for the M/WBE firms. Is it possible to implement a bonding program using the same model as the

umbrella insurance program. Would such a bonding program be effective with the same level of scrutiny that the safety program receives? What is the impact of not enforcing an EEO program. What effect does enforcement have? Does it produce real results? Does the program contribute to the development of M/WBEs?

All these questions should be a part of a program whose goal is the inclusion of ethnic and race groups into the economic and opportunity mainstream.

POST-CROSON PREFERENCE PROGRAMS

This Task, according to the RFP No. #91-EL-1323, requires that we "examine, analyze and evaluate briefly post-Croson programs in other states in the SMSA's which include New Jersey; in other states or local governments which have implemented remedial programs." We will also "assess the effectiveness of programs other than set asides, as well as set asides." Because of the two constraints of budget and time associated with this project, we decided that the most efficient method to gather information was through a questionnaire. A sample of the questionnaire designed for this task is included in the appendix. The information in the questionnaires was collected by direct telephone contact with agency staff and if possible agency directors.

Section A examines, analyzes and evaluates briefly post-Croson programs in other states in the SMSA's which include New Jersey. Section B examines, analyzes and evaluates briefly the post-Croson programs in other states. The constraints limited the number of programs we could investigate.

Since early 1989, when the constitutionality of affirmative action programs was called into question as a result of the Supreme Court ruling in City of Richmond v. J.A. Croson Co. several programs have been suspended. It was found that their continued operation violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution. Other agencies have not suspended their programs, awaiting a legal challenge. We have included examples of both.

A. POST-CROSON PROGRAMS IN OTHER STATES IN THE SMSAs WHICH INCLUDE NEW JERSEY

NEW YORK STATE PROGRAMS:

We have examined three programs in the New York area. They are the State of New York, the City of New York and the New York/New Jersey Port Authority.

New York State

The State of New York, at present, has a race neutral program in place. The State has made one substantive change to its program since the Croson decision in February in 1989. This change was made within three months of the Croson decision. This program¹ removed any and all sanctions requiring the mandatory inclusion of M/WBE participation, altering the goal program to a zero mandatory goal program. The federally protected DBE Program is unchanged.

Before the Croson decision and the program change, individual goals were set by individual agencies. The Governor's Office of Minority and Women Business Development (OMWBD) reviewed these goals. The criteria used in determining the pre-Croson goals includes consideration of the availability and capability of the M/WBE firms. This goal setting practice continues in the voluntary post-Croson program.

The agencies that fall under the OMBDU are the New York State Department of Economic Development, New York State Office of General Services, New York

¹New York State's program was established pursuant to Governor Mario M. Cuomo's Executive Order No. 21 and in conjunction with Federal Regulations, 49 CFR Part 23, 40 CFR Part 33 and SBA Section 8(A).

State Department of Transportation, New York State Department of Environmental Conservation, Niagara Frontier Transportation Authority and the New York State Urban Development Corporation. The New York Department of Transportation and the New York Transit Authority are the only two agencies that implement the DBE program (along with the M/WBE Program) because they are protected under the federal program.

For a firm to participate in the state program, certification is required and the responsibility for the certification program has been centralized in the Governor's Office of Minority and Women Business Development.²

Although the FY91 M/WBE participation report has not been released, it was conveyed by a member of the Office for Business Services of OMWBD that the participation results of Minority and Women Business Enterprises for 1991 decreased under this voluntary program.³ A disparity study is presently being conducted. There is a bonding program in place which is conducted out of the Job Development Authority. The loan program is managed by the Economic Development Center.

New York City's Program

The City of New York's program is administered by the Division of Economic and Financial Opportunity of the Office of Business Services. Their program is similar

²Since September 1, 1988, certification has been centralized in the Governor's Office of Minority and Women Business Development.

³Information was obtained from Assistant Director for Business Services in the Governor's Office of Minority and Women Business Development.

to the State of New Jersey's program in that it incorporates race-neutral classifications for the inclusion of minority and women owned firms. Those classifications are SBE (Small Business Enterprise) and LBE (Local Business Enterprise).⁴

To qualify for the SBE classification, there is a size restriction and a requirement that the principal place of business be in New York City. The LBE classification applies to local construction contracts. The goals in both these classifications range from 10 to 20 percent depending on the service or goods supplied. Seven agencies participate in this program including the Board of Education, Health and Hospital Corporation, Metro Transit, Transit Authority and the School Construction Authority. Forty other city agencies, over which the mayor has jurisdiction, also participate. This program was initiated before Croson. The City has never had a program that designated M/WBE goals other than the federally required DBE goals on the transportation funds received by MTA and the Transit Authority.⁵

Within this voluntary program, the past director of the School Construction Authority was able to achieve MBE participation of more than 40% in awarding of architectural and engineering contracts. The selection criteria included the awarding of points to those firms with strong M/WBE participation.

⁴Information obtained from management staff of the Office of New York City Department of Economic Development.

⁵The New York City disparity study was published and Mayor Dinkins has issued a policy initiative February 10, 1992 to award more than 20 percent of City contracts to businesses owned by minorities or women.

New York/New Jersey Port Authority

The New York/New Jersey Port Authority initiated affirmative action policies over the past two decades.⁶ The pre-Croson MBE/WBE goal program was 12% MBE and 5% WBE. The New York/New Jersey Port Authority was one of the first agencies to suspend their MBE/WBE mandatory program. This action also propelled them into one of the most innovative race-neutral programs in place today. With a combination of private/public sector initiatives, they have been able to maintain their goal objectives. It was expressed by one of their staff, however, that, seeing the success of the program without set-asides, they could have accomplished a great deal more with this program in place under the goal program.

The present program is a race-neutral SBE program, based on a "number of awards" goal program rather than "dollars". A SBE is defined as a firm with less than five million dollars in gross revenues and headquartered in New York and New Jersey, having operated their business for three years.

⁶March 4, 1968, Port Authority issued 1968 Management Objectives, including Affirmative Action; August 27, 1980, Board of Commissioners Construction Committee of P.A. - Titled: "Policy Statement U.S. Department of Transportation Assisted Contracts - Other Contracts" - adopt policy for P.A. contracts under DOT establishing percentage goals for the dollar value of work awarded to MBEs; September 1980, Port Authority Minority Business Enterprise Affirmative Action Program for P.A. airports is approved by U.S. DOT - Program calls for 10% MBE and 1% WBE goals on construction contracts and 1% for MBE leases and 5.7% of total consumer services revenues; March 10, 1988, Board of Commissioners -Port Authority Policy for Minority and Women's Business Enterprise Programs - reaffirms 10% and 1% goals and calls for use of innovative techniques aimed at overcoming barriers for formation and growth of business, including obtaining needed financing from various public and private sources; 1989, M/WBE goals are set at 12% MBE and 5% WBE; July 12, 1990, Board - Port Authority Policy for Small Business Enterprise Programs.

Participation of M/WBEs is tracked on a quarterly basis. The Authority achieved an average of 12 to 15 percent M/WBE participation since the implementation of a race neutral program. Set-aside opportunities are identified for SBEs. The set-asides are projects under \$250k in scope and only recently have they also set goals for SBE subcontracting participation as well. The Authority has found that the M/WBEs are more likely to compete successfully in this restricted arena.

The Authority has a certification program with 1,396 SBE firms. Of these, approximately 210 are WBEs, 400 are MBEs and 700 or more are non-MBEs.

The technical assistance aspect of the Port Authority's program represents a marriage of public/private sector. This program is called the New York Regional Alliance for Small Contractors and has been in place since December, 1989. Among the members of the Alliance are the New York/New Jersey Port Authority, the New York Transit Authority, the New York Department of Economic Development, the New York Dormitory Authority and the New York School Construction Authority in association with construction related firms like Tishman, Leher, McGovern, Bovis and EBASCO and several others.

This Alliance Program is comprised of four components:

1. Managing Growth Program--a teaching classroom series staffed by private/public partners;
2. Financial Assistance Program--an invoice generated lending program developed in cooperation with local area banks;
3. The Loaned Executive Assistance Program (LEAP) a one-on-one mentor program with engineers and other professionals; and

4. The Data Center--a database of information of upcoming opportunities accessed by telephone or letter, all focused on construction-type contracts.

The loan program was started by the Authority before the other agencies joined. It is based on an invoice generated guarantee reimbursement, similar to the U.S. Department of Transportation's Loan Program. The bonding program, utilized by the Authority, is discretionary. Because the Authority does not come under the Municipal Act, mandating bonding at a certain threshold, they have a no bonding restrictions. They can and do waive bonds at any level and have waived them up to \$5.2M and \$5.6M, based on the firm's financial condition and reliability. All contracts under \$250K do not require bid or performance bonds. The effect of waiving the bonds is twofold: it enables the M/WBEs to participate in the contracting process with the Authority as primes or subcontractors. Conversely it restricts them from building their bonding history so they are able to participate in other contracting opportunities that require bonds.

The payment schedule for the short term contracts of the Authority is based on a fourteen day turn around.

Insurance needs are also addressed in the implementation of a wraparound or "umbrella" insurance coverage. This provides any firm working on the project with the necessary coverage at the most cost effective rates for the owner. As long as the Authority implements a Quality Assurance and Quality Control program in conjunction with an effective Safety Program to keep the safety record at an acceptable level, this

approach will not only benefit the owner, it will also benefit the contractor to obtain favorable insurance rates on the next project.

PENNSYLVANIA PROGRAMS:

We have also looked at three programs in Pennsylvania; the City of Philadelphia, the Commonwealth of Pennsylvania and the Pennsylvania Department of Transportation.

City of Philadelphia

The City of Philadelphia established a 15% MBE, 10% WBE goal program under Executive Order 17-500 in 1982. This program covered all procurement and service contracts. The Office of Minority Business Enterprise Programs administers this program. The Program replaced M/WBE with the DOT classification of DBE and a 25% goal.⁷ A court challenge was issued by the General Contractors Association and Judge Louis C. Bechtie found in their favor.⁸ The City of Philadelphia's M/WBE program became inactive soon thereafter. Subsequently, Judge Bechtie's decision

⁷Information obtained from Mr. Dennis Waller of the Minority Business Enterprise Council. The Department of Transportation Program referred to is the 49CFR, Subset A (10-1-89 edition) Office of the Secretary of Transportation, Part 23.

⁸General Contractors Association v. City of Philadelphia, Civil Action No. 89-2737, April 1990.

was overturned⁹ and the program has since been reactivated. During that April, 1990 to September, 1991 period, the M/WBE participation dropped to a single digit number.

The City also administers the Airport DBE Program, which, because it receives federal funding,¹⁰ has DBE requirements that are not subject to the Croson decision. The goals set by the Airport, and which have been consistently achieved, are 25% DBE.

Philadelphia's School District M/WBE Program was suspended as well.¹¹ The program's M/WBE participation, under the voluntary program, dropped to a level similar to the City's (the 25% participation dropped below 5%). In one reporting period¹² there was no incidence of any MBE subcontracting on bid submittal. The M/WBE goals achieved were possible through the availability of small contracts that the M/WBEs were competing successfully as primes with the lowest bid. The privatized bonding program, discussed later, managed by CSSI, played a significant role in this instance. There is no prompt payment program in place in the City to

⁹Third Circuit Court of Appeals struck down Judge Bechtel's decision September 30, 1991 suggesting that time should be given to complete a disparity study in an attempt to show that Executive Order 17-500 is needed to remedy past discrimination.

¹⁰49 CFR, Subtitle A (10-1-89 edition) Office of the Secretary of Transportation, Part 23, pg. 168-170.

¹¹Main Line Paving Co., Inc. Bernard Faggioli v. Board Of Education, School District Of Philadelphia. C.A. No. 89-0821, United States District Court For The Eastern District of Pennsylvania, 1989 U.S. Dist. Lexis 14187, November 29, 1989.

¹²Interview with the MBE Program manager of the School District.

facilitate the receipt of earned revenues. The normal pay cycle is sixty to ninety days. This is a burden on the DBEs as well as any small firm.

There are several bonding and loan programs that are in place that have been initiated both within and with out the city government. The Hispanic Chamber of Commerce has secured a loan resource of over \$1M from the local banking community. The Philadelphia Commercial Development Corporation (PCDC) had administered a loan and bonding program. Neither of PCDC's programs were able to provide the resources in a timely manner. The reason for this may be that a public sector program inherently is less flexible than the private sector, and this lack of flexibility tends to create roadblocks to the accommodation of the unusual criteria associated with the small and emerging firms. PCDC's bonding program was underwritten by the city for 80% of its value and backed by CIGNA. The bonds were for \$100K or less. No bonds were placed in FY91.

A pilot program placed in the private sector for bonding the small and emerging firms developed through a private/public sector initiative. It was initiated in 1988 and in place by 1989. With a newly formed surety bonding agency (CSSI) taking the lead, seed funding of \$200,000 was provided from a quasi-public agency (Philadelphia Industrial Development Center), joined by a major insurance company (CIGNA) who was a source of guidance. CSSI is a minority owned firm. The result of this pilot program, which focuses on the securing of bonds for minority, women and small and emerging firms, has been the successful placement of over \$10M in surety bonds for small and emerging companies in the first year of operation. During the second year

of operation, insurance services have been added while exceeding the previous bonding placement.

The technical assistance programs in place are the federally funded Minority Business Development Center (MBDC), presently administered by a CPA firm. Small Business Development Centers (SBDC), located at the area universities, provide information and assistance on the management of businesses. CSSI has initiated a technical assistance program with the SBDC of Temple University to implement a year long construction management course for M/W/DBEs. The success of the private/public initiatives has made a significant impact on the minority population, in particular in their successfully bidding for and the obtaining of contracts.

Commonwealth of Pennsylvania

The Minority and Women Business Enterprise Office (MWBEO) under the Department of General Services, administers the Minority Participation Level Program (MPL.)¹³ This program is not now nor has been, a set-aside program. It is defined as a "suggested participation program"¹⁴ based on a minimum M/WBE participation levels identified for each contract. This figure is set as a threshold. The bidder can not be rejected for not meeting the MPL goals. However, when a firm asks for a waiver for minority participation, an investigation is undertaken to ensure that

¹³the Minority and Woman Business Enterprise Program was established in 1987 through Executive Order 1987-18.

¹⁴Information from a telephone interview with the director of the Office of the Minority and Women Business Enterprise.

the firm requesting the waiver has implemented all the necessary outreach activities and is acting in good faith.

Another aspect of the program was initiated July, 1991 by the Minority Business Enterprise Office. This program, called Small Economically Restricted Businesses (SERB), is targeted to include socially and economically restricted businesses. For a firm to participate it must meet certain criteria such as: the firm must be a certified M/WBE with the Minority Business Enterprise Office; the business' last tax return must have been filed from one of the State's designated enterprise zones; the firm is required to have gross revenues of not more than \$4M a year; they not dominate the market more than 50%.

The advantage of obtaining SERB status for a particular project is that the fulfillment of the SERB participation as a prime or a subcontractor will garner additional points towards final selection. SERB participation goals are applied contract by contract. The SERB program is so new that there is no data available to evaluate its impact on minority and women owned firm's utilization.

There are no loan or bonding programs in place to assist the M/WBEs other than the Department of Transportation's Bonding and Loan Program. This is a program that provides bid, payment and performance bonds, administered by the Office of Small and Disadvantaged Business Utilization Minority Business Resource Center. In order to qualify for this program, a firm must be certified with a DOT agency as a Disadvantaged Business Enterprise (DBE) and have a signed contract with a contractor or an agency receiving federal DOT funds on a transportation related project. The loan

program is a short term lending program administered under a cooperative agreement between the U.S. Department of Transportation and the Capital Bank, N.A.¹⁵ It is a one year loan, extendable to two years, at prime rate, with the contract acting as the primary source of collateral and repayment. This is an accounts receivable financing program. All loans require a two payee check system. Disbursement of the loan cannot take place without a bond, if one is required. The shortcomings of this program are two: there is demonstrated lack of success in securing bonding for the DBE firms under the DOT program and firms require a different type of funding in addition to the accounts receivable vehicle, such as a line of credit. Often this access to a line of credit is the difference in a firm being able to accept a contract even after successful award.

The DOT Bonding Program is also administered by the Office of Small and Disadvantaged Business Utilization Minority Business Resource Center. The Center has access to a bonding pool of \$12M. In 1990, one in three DBE applicants was rejected because the bond readiness officers of OSDBU or the surety agents did not consider them bondable¹⁶ even though 80 to 90% of these bonds are guaranteed by the SBA. An average of \$1.5m in bonds are placed annually. Minority Small Business Development Centers staff are also available to assist in the preparing of the bond readiness package. Many of the same information requirements that apply to the Loan

¹⁵This program is authorized under Subchapter II of the Department of Transportation Act, 49 U.S.C. 332, Pub. L. 97-449.

¹⁶ Discussion held with one of the bonding administrators.

Program apply to the Bonding Program, such as financial information, project information, track record and credit record. For the Commonwealth, technical assistance is provided by the Minority Business Development Center. No prompt payment legislation exists. The Minority Business Enterprise Office has achieved an 11% overall DBE participation in FY91, with a substantial increase in the participation of WBEs (from 3/4% to over 3%) over a three year period.¹⁷ This increase is seen as substantial by this agency and was a direct result of a targeted outreach effort.

Pennsylvania Department of Transportation

The Pennsylvania Department of Transportation's DBE program was initiated before the passage of U.S. Department of Transportation Title 49 CFR, Part 23. The present DBE program follows that PENDOT regulations that are derived from Subpart D, the implementation of Section 105 of the Surface Transportation Act requiring "not less than ten percent of the funds authorized under the Act...is expended with small business concerns owned and controlled by socially and economically disadvantaged firms"¹⁸.

They implement a supportive services program, SBDCs, funded by federal dollars, the SBDC. They also use the Minority Business Development Centers.

¹⁷Information obtained from staff of the Office of Minority and Women Business Enterprise.

¹⁸49CFR Subtitle A (10-1-89 Edition) Office of the Secretary of Transportation, Subpart D., Implementation of the Section 105 (F) of the Surface Transportation Assistance Act of 1982.

The bonding program and the loan program in place is the DOT sponsored program referred to earlier. This agency stated that they have exceeded their DBE goals of 10% for 1991.¹⁹ This can be attributed to the fact that unless the contractors can substantiate that DBEs are unavailable for that 10% participation, their submittal will be considered unresponsive and then disqualified.

DELEWARE STATE PROGRAMS:

We have reviewed three programs in the State of Delaware: the City of Wilmington, the County of New Castle, and the State of Delaware.

The City of Wilmington

The City of Wilmington eliminated its MBE preference program within a few months of the ruling of Croson²⁰. That program addressed the minority population only and had set a construction goal of 15%, which had been exceeded by 11% in 1988. In its place, in 1991,²¹ a voluntary Disadvantaged Business Enterprise (DBE) program was implemented. While the new program was being designed in 1990, the MBE participation dropped to 4%. The goals for this new DBE program are 20% for construction, 10% for professional services and 5% for goods and services. The

¹⁹Information obtained from staff of the Office of Disadvantaged Business Enterprise.

²⁰Chapter 20 of the City Code, 1985, initiated the Equal Opportunity Contract Compliance Office and a MBE program with a 20% construction goal.

²¹Revisions to Chapter 20 of the City Code, September 1990.

definition of a disadvantaged business is minority, woman owned firm or non minority whose net worth is less than \$100k.²² With a minority population of 57% in Wilmington, the participation under the voluntary DBE program has moved up to an average of 9-10% in 1991 from 4%. This is a 50% increase over last year. The "teeth" in the program are the three criteria by which a bid is considered to be the best offer: lowest price, DBE participation and technical capability. Bids have been rejected when found nonresponsive in the DBE area. The DBE firms must be certified by the City.

The bonding requirements have been raised from a ceiling of \$10K to \$60K. This has helped firms who have difficulty obtaining bonding for projects under \$60K. It has not solved the problems for DBE firms who wish to bid as primes on projects over \$60K. A line of credit access to capital program is administered by the Wilmington Economic Development Program.

New Castle County

New Castle County, Delaware had a M/WBE goal program which was established by Executive Order in 1984, comprised of 15% MBE and 5% WBE for construction contracts only. The program was expanded in November, 1989 to include professional services and commodities. Whereas the goals identified had been met pre-Croson, this has not been the case post-Croson. Presently there is no

²²Information obtained from Tony Grandberry, Contract Compliance Officer of the Equal Opportunity Contract Compliance Office. The net worth figure of the qualifying DBE excludes \$50K of the value of the residence.

bonding or loan program in place. The specific goals for professional services and commodities have not yet been identified.²³

Delaware State

There is no M/WBE program for the State of Delaware. Any DBE program in place is the result of DOT federal requirements. The bonding and loan programs available are the DOT programs.

B. POST-CROSON PROGRAMS IN OTHER STATES

The Metropolitan Washington Airports Authority (The Authority) and AMTRAK, both run by quasi-public agencies, have been innovative in the development of programs as has the City of Baltimore.

Metropolitan Washington Airports Authority

Metropolitan Washington Airports Authority implemented a M/WBE program prior to 1989.²⁴ From April, 1988 through May, 1989, the Authority set specific M/WBE goals in contracts.²⁵ The Authority suspended its M/WBE program in May

²³Information provided by Rick Evans, Equal Opportunities Officer for New Castle, Delaware.

²⁴Executive Order 11458 encouraged the use of businesses operated by socially and economically disadvantaged individuals, including minorities.

²⁵MWAA's program set goals for: (1) MBE/WBE participation in the Early Development Program in April 1988; (2) Operations and Maintenance projects in September 1988; and (3) Capital Development, Repair and Rehabilitation in fiscal year 1989.

1989 and implemented a SBE program.²⁶ It later changed this program to a LDBE program²⁷ requiring the location of the firm to be within a 100 mile radius of the District of Columbia's zero mile marker and to be within a certain size standard, similar to the SBA.

In addition, several race neutral elements were added. Bonding requirements on contracts of \$100,000 and under were waived. M/WBE certification has been discontinued and an LDBE certification program implemented. The bonding and loan program offered is the DOT Program. The Outreach Program has been very aggressive and effective in informing M/W/DBEs of up-coming business opportunities. It consists of a newsletter, an 800# with updated procurement information, a yearly information seminar, and a ongoing Opportunity Alert mailing to targeted M/WBE of

²⁶Resolution No. 89-19, adopted July 10, 1989, states: "The General Manager shall establish as soon as possible, subject to the approval of the Operations Committee, and interim Small Business Enterprise program, establishing levels of small business enterprise participation in Authority contracts, with voluntary M/WBE participation; that such program shall include a preference for local enterprises; that such program shall include appropriate size standards; and that such program shall include an aggressive outreach effort to assure that M/WBE firms participate in the contracting opportunities of the Authority."

²⁷Resolution No. 90-18, adopted by the Board of Directors on June 6, 1990 to include the following elements: "(a) Incorporation of the preference for local enterprises, size standards, outreach efforts, and other elements of the Local Small Business Enterprise (LSBE) Program for local small businesses, (b) Statement in solicitations and other communications of the required level of participation by local small businesses and the voluntary level of M/WBE participation in individual Authority contracts, based on an analysis of the availability of MBEs and WBEs, (c) Bonding and insurance initiatives to reduce barriers to participation by MBEs, WBEs and small businesses. (d) Pre- and post-award monitoring procedures, (e) Expanded outreach efforts to maximize participation by LSBEs, MBEs and WBEs in the Authority's contracting opportunities;"

upcoming procurement opportunities. Technical assistance programs available are the Minority Business Development Centers and the Small Business Development Centers. The participation achieved before the LDBE program was implemented was 32% M/WBE and 25% DBE. Because the DBE goals on federally funded projects has not been threatened by Croson, they remain intact at a 25% goal. Through December 1991, the LDBE participation amount equaled 22%, and DBE participation equaled 13%. With over 80% of the construction firms, minority and non minority falling into the LDBE category, it is a challenge to bring M/WBEs into the LDBE participation.

AMTRAK

AMTRAK, a quasi-public agency receiving public funds, implement a race-neutral preference program. This program is strongly supported by upper management. An example of this support is the DBE awards that the AMTRAK president and senior management fully support and participate in annually. Another example of commitment was the strong DBE participation that took place on the \$1B North East Corridor Project in the 80s.

There are basically two vehicles that AMTRAK's Office of Civil Rights has been using to enforce an effective DBE program:²⁸

1. If the voluntary annual DBE goal is at risk of not being met, the manager of this program may place goals on identified projects to meet its overall goals. For the last three years, these goals have been at risk and this option has been implemented; and

²⁸Information obtained from the Director of the AMTRAK DBE Program.

2. The second vehicle is that during the performance review of procurement personnel, an evaluation criteria is the ability of the staff to meet the DBE contracting goals. This approach has helped to internalize the voluntary implementation of this program.

The bonding and loan programs used by AMTRAK are those made available by DOT.

Toll Road Corporation

This is the first privatized toll road to be built in America in Virginia in recent history. It is being funded by the private sector. The Toll Road Corporation (TRC) has elected to implement a voluntary race preference program. The prime contractor which historically has been known to be indifferent to DBE participation, has been challenged to produce participation goals commensurate with the population of the region. There will be a Technical Assistant on site at all times, funded jointly by the owner and the prime contractor for the sole utilization of the DBEs. In addition, a firm may be hired to perform site and invoice monitoring, to monitor the actual participation of the DBE firms.

There is no loan program or bonding program in place and because there are no federal funds in place, the DOT bonding and loan programs are not available for this project.²⁹

City of Baltimore

²⁹Information obtained from the Chief Operating Officer.

The City of Baltimore has made a few alterations to its program after the Croson decision. It removed the term Aleutians from the MBE category. In addition, it changed the time frame in which it required the receipt of the M/WBE participation submittal form. In the new changes, the bids are noted as being received on time. Then they are then held in a vault unopened for a seven day period. During that time frame, the M/WBE participation schedules must be received. If they were not in place at the end of the time period when the bids are to be opened, the bid would be deemed unresponsive and the unopened bid returned to the offerer. The only exemption is in the case of a bid under \$25K and only if that value is so noted on the outside of the bid envelope.

Another change is the reduction of the goals for goods for MBEs 20% to 5% and WBEs 3%-3% respectively. The services goals remained at 20%-3%. There have been no legal challenges. There is a waiver of bonding requirements for contracts under \$200K.³⁰

OTHER EXAMPLES OF PROGRAMS

Miami International Airport, Boston's Massachusetts Water Resources Authority and Seattle, Washington all have interesting aspects to their program and only a brief review will be undertaken here.

Miami Airport is using the break up of all of the small contracts into multiple contracts to enable the BBEs (Black Business Enterprise) to participate as primes. This

³⁰Information obtained from staff of the Equal Opportunity Compliance Office.

opportunity to operate as a prime is essential if these firms are to experience project control and develop good business practices. This approach is enhanced by a review, after identification of the low bid, of the bids that were non competitive. This practice has resulted in an effective learning of good estimating and bidding practices. This is coupled with monthly technical training sessions. The result of this program is that several of these firms will be ready to participate as experienced contractors in the \$2B airport project that will be starting in 1993. The bonding program for these contracts is an airport umbrella bonding program. There is no specific loan program available.

In Seattle, Washington, the Ninth Circuit reviewed one of the first efforts by a local government to restructure a set-aside program after Croson. In this case, Coral Construction v. King County, the MBE program remains in place because the Ninth Circuit found that a post-adoption disparity study may be used to defend a program that was adopted with the belief that private discrimination is being perpetuated in the jurisdiction. In addition, when this evidence of perpetuating systematic discrimination is identified, then the jurisdiction "risks constitutional culpability" if it is allowed to continue without remedial action. To implement remedial action, antidotal evidence be collected and it should be limited to those firms that actively do business with the county. A challenge to this program is pending.

The Massachusetts Water Resources Authority has had a disparity study performed and the implementation of the results of that study while reinforcing the legality of the DBE program, has hampered the Authority in its efforts to run a

reasonable program. The statistical methods recommended by this study of allocating certain percentages to different categories and race and sex categories, has hampered the ability of the Authority to be creative and flexible in the assigning goals to certain projects. Each project receives the same goals whether there are DBEs available in the construction categories of those contracts or not. In addition, the goals do not take into consideration the degree of difficulty certain contracts contain. This type of program is the result of a lack of understanding of and experience in construction on the part of the economist firm managing the study. The recommendations are in concert with the law but they are not realistic in practice.

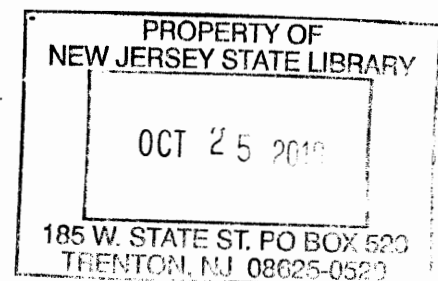
Federally Funded Programs

Of the federally funded programs, there has been little or no change as a result of Richmond v. Croson. However, there may be changes as these programs come up for reauthorization. The programs that face reauthorization are:

Department of Defense Program

Section 1207 which requires the inclusion of 5% SDBs will come up for reauthorization in 1992. Congressman Andy Ireland (R-Fla) has sought to have the 5% SDB goal repealed, while Congresswoman Cardiss Collins (D-III) has proposed legislation to increase the participation to 10%.

Airport's Grant in Aid Program



Federal funds generated from an airline tax creating the Airport Improvement Program (AIP funds) requires the recipients of these funds be subjected to the same Disadvantaged Business Enterprise (DBE) regulations that apply to the Department of Transportation's transit and road programs. These regulations, 49 CFR, Part 23, require not less than 10% DBE participation. In 1993, the AIP program will come up for reauthorization. The type of changes that should be included in the AIP reauthorization would address the use of funding for the management of DBE programs. Because the new funding resource, Passenger Facility Charges (PFC), a passenger tax on travelers moving from hub to hub, will decrease the AIP funds by 50% when applied for, the participation of DBEs on large airport projects will decrease significantly. The positive side of this reduction though, is that small airports will receive a larger share of the AIP funds. However, because these small airports do not have the skills, budget or resources to implement a DBE program, if past participation is a forecast, most of these AIP funds will be spent without the inclusion of DBEs.

C. EFFECTIVENESS OF PROGRAMS OTHER THAN SET-ASIDE AS WELL AS SET-ASIDE

Demonstrated in the previous examples are various degrees of success in programs with set-asides versus programs without set-asides. There are common denominators in each. One major issue that contributes greatly to the success of a preference or race-neutral program is the commitment of the head of the agency, authority, city or state.

In addition, for any program to be taken seriously and to determine the effectiveness of it, a structured monitoring program is also an essential ingredient. It is an ongoing audit and must be implemented before contract award.

To improve the effectiveness of the M/WBEs in the service and construction industry, technical assistance is one of cornerstones of this initiative. The Toll Road program, Miami Airport program and the New York/New Jersey Port Authority's initiative are good examples of effective technical assistance programs.

Ongoing review of the effectiveness of a program in place and tailoring it so it achieves the goals of a good program: participation of M/W/DBE in the economic mainstream, opportunity to grow and compete on a level playing field and interaction with administration that may have been isolated in the "Old Boys Network" and are not aware of the other resources available.

Informing firms of the opportunities available is also essential. The Washington Airport Authority has recently received the recognition for the most effective outreach program in the state of Virginia. This outreach program has contributed significantly to the Authority's maintaining its M/W/DBE participation goals.

A lack of commitment to a program supporting the inclusion of M/WBEs can be a result of upper management's feeling that the office enforcing it has all the responsibility. The commitment must be visible and constant from the top administration. AMTRAKs use of the internalization of their program by association of performance review with successful utilization of M/WBEs is an effective motivating tool. Their strong participation in the DBE awards is another example.

Both race neutral and race preference programs have potential for success and failure. The race preference programs require all the basic components plus an adequate staff to implement the program or it will be perceived by the public as window dressing. The race neutral program requires a similar support as well as a strong visual and vocal commitment by upper management, because the "mandated rules" are not there.

QUESTIONNAIRE

CITY/AGENCY:

DATE:

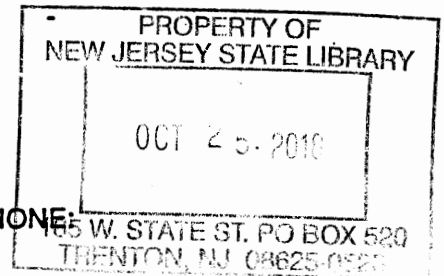
CONTACT:

SUGGESTED CONTACT:

TITLE:

ADDRESS:

TELEPHONE:



I. Pre Croson Programs--

A. Began: _____

B. Ended: _____

C. Remedies After Croson (Jan., 89) Included: _____

D. Law that enacted the program

1. Who did it affect: _____

2. What were the goals: _____

E. Actual goals achieved

1. Budget _____

QUESTIONNAIRE

CITY / AGENCY:

2. MBE participation _____

3. Other participation _____

II. Specifics to Post Croson program

A. Were there any changes in the program after Croson? (Goal changes) _____

1. What were goals achieved in

a. 1990?

b. 1991?

2. Does program include DBE or other groups that were not included before?

Please Describe _____

a. Is it a volunteer program?

b. Is there a graduation program in place?

c. Is there a technical assistance program?

d. What programs are in place to assist firms to obtain bonding?

QUESTIONNAIRE

CITY / AGENCY:

e. What programs are in place to assist firms obtain a line of credit or working capital loans?

f. What is the status of firms functioning as primes?

III. Evaluate Program Changes

Is program more effective or more constrictive?

IV. Assess effectiveness of race-neutral programs compared to race-preference programs

1. Which is working best?

2. What are the elements that are needed?