

BILL PURCELL
MAYOR



METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

KARL F. DEAN
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DEPARTMENT OF LAW
204 COURTHOUSE
NASHVILLE, TENNESSEE 37201

Legal Opinion No. 2006-001

To: Mr. David Manning
Director of Finance
225 Polk Ave.
Suite 250
Nashville, Tennessee 37203

Date: May 10, 2006

You have requested a legal opinion from the Department of Law on the following question:

Would an ordinance that provides an exemption from the necessity of Council approval for contracts involving disadvantaged businesses violate the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution?

Short Answer

Yes, it is the opinion of the Department of Law that an ordinance of the Metropolitan Government is unconstitutional if that ordinance gives favorable treatment to contracts based on the race, national origin, or gender of the contractor or subcontractor.

Analysis

Ordinance No. BL2006-1013 would establish additional Council oversight of most procurement contracts in excess of specified dollar amounts. Amendment 1 to the proposed ordinance exempts contracts utilizing disadvantaged businesses from the proposed Council approval. Attachment A.¹

¹ The Department of Law notes that there is no severability clause in either the originally filed ordinance or the amendment adopted that expresses the intention of the Council for the ordinance to be enforced by eliding any unconstitutional provision.

Benefit for Disadvantaged Businesses

The proposed ordinance was amended to provide that “no contract awarded by the purchasing agent to a disadvantaged business as defined in [Metropolitan Code] section 4.44.010, or awarded to another contractor whose bid was higher as a result of the contractor’s proposal to subcontract twenty percent (20%) or more of the work to disadvantaged businesses, shall require council approval by resolution in order for such contract to be entered into by the metropolitan government.” BL2006-1013, Amt. 1. Metropolitan Code Section 4.44.010 provides that:

“(D)isadvantaged business” means a small business which is owned or controlled by a majority of persons, not limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages or disability.

The Procurement Standards Board has adopted a regulation that defines “disadvantaged business” as follows:

A small business which is owned or controlled by a majority of persons, not limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages or disability. Additionally, the business must be a continuing, independent, for profit business which performs a commercially useful function, and is at least fifty-one percent (51%) owned and controlled or, in the case of any publicly owned business, at least fifty-one percent (51%) of the stock is owned and controlled by one (1) or more individuals, and whose management and daily business operations are under the control of one (1) or more **women, minority or disabled individuals**.

R4.44.010.01 (Adopted April 19, 2006) (*emph. added*). “(M)inority’ means a person who is a citizen or lawful permanent resident of the United States and who is” African American, Asian American, Hispanic American, or Native American. *Id.* In sum, disadvantaged businesses are businesses associated with and inuring to the benefit of disabled persons, women, and certain groups defined by race or national origin. See *Western States Paving Co. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005) (“Although the term ‘socially and economically disadvantaged’ is race- and sex-neutral on its face, the . . . regulations presume that [certain racial minority groups] and women are socially and economically disadvantaged”).

The proposed ordinance, as amended, does not authorize the purchasing agent to preferentially award contracts to disadvantaged businesses, or create a system for implementing a quota for purchases from such businesses.² The ordinance’s benefit applies *after* the purchasing

² As set forth in the existing Code, the Council has legislatively established that “it shall be the policy of the metropolitan government to assist small and disadvantaged businesses in learning how to do business with the metropolitan government. It is further the policy of metropolitan government that a fair proportion of government purchases be made from small and disadvantaged businesses. The standards board shall annually determine the amount of the fair proportion to be purchased from *small businesses*.” M.C.L. § 4.44.020 (A) (*emph. added*). The “board may develop procedures for certification for eligibility for participation in this

agent has awarded a contract, at the stage when the Purchasing Agent would otherwise be required under the proposed ordinance to submit the contract to the Council for its approval. However, the proposed ordinance does provide a benefit to “disadvantaged businesses” that is not extended to other contractors - if a disadvantaged business is awarded a high-dollar contract despite having a bid or proposal cost that is higher than other entities, its contract becomes effective without the delay for consideration and possible rejection by the Council. The same benefit is extended to entities, whether or not those businesses themselves are disadvantaged, as long as the contract would provide for a subcontract of a specified portion of the contract work to disadvantaged businesses. In contrast, a business awarded a high-dollar contract despite carrying a higher cost than other proposers or bidders that is not a disadvantaged business and is without disadvantaged business subcontractors in the specified amount must obtain the additional review and approval of the Council.

Equal Protection Clause Analysis

Distinctions made by the Metropolitan Government based on race or national origin are evaluated for compliance with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by way of the “strict scrutiny” test. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 721 (1989). This is the strictest standard used by the Courts. This two-part test requires that the distinctions (1) serve a compelling governmental interest and (2) are narrowly tailored to serve that interest. *See, e.g., Jana-Rock Constr. v. New York State Dept. of Econ. Dev.*, 438 F.3d 195 (2nd Cir. 2006) (*citing Adarand Constructors v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)); *Northern Contracting v. State of Illinois*, 2005 WL 2230195 (N.D.Ill. Sept. 8, 2005) (*citations omitted*). *See also* 16B C.J.S. Constl. Law § 1127. Even if “set-asides” or “quotas” are not established for such groups, “strict scrutiny applies to *all* racial classifications, not just those creating binding racial preferences.” *Virdi v. Dekalb Cty. Sch. Dist.*, 135 Fed. Appx. 262 (11th Cir. 2005).

To the extent the criteria distinguish between males and females, the criteria will be subject to intermediate-level scrutiny, requiring “an exceedingly persuasive justification.” *U.S. v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 2274 (1996); *Northern Contracting v. State of Illinois*, 2005 WL 2230195 (N.D.Ill. Sept. 8, 2005) (*quoting Builders Ass’n of Greater Chicago v. Cty. of Cook*, 256 F.3d 642 (7th Cir. 2001)). The Supreme Court in *U.S. v. Virginia* stated:

Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is “exceedingly persuasive.” The burden of justification is demanding and it rests entirely on the State. *See Mississippi Univ. for Women*, 458 U.S., at 724, 102 S.Ct., at 3336. The State must show “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’ ” *Ibid.* (*quoting Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980)). The justification must be genuine, not hypothesized or invented *post hoc* in

program and procedures for decertification. The board may further develop procedures to assure that a fair proportion of purchases are made from *small businesses*, including but not limited to identification of types of purchases or contracts to be bid among certified *small businesses* and the establishment of preferences.” M.C.L. § 4.44.020 (B) (*emph. added*).

response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648, 95 S.Ct. 1225, 1230-1231, 1233, 43 L.Ed.2d 514 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 223-224, 97 S.Ct. 1021, 1035-1036, 51 L.Ed.2d 270 (1977) (STEVENS, J., concurring in judgment).

Compelling Governmental Interest

In order for the Metropolitan Government to rely on remedying past discrimination as its compelling governmental interest,³ it must specifically *identify* and have *evidence* of that discrimination. See *Northern Contracting v. State of Illinois*, 2005 WL 2230195 (N.D.Ill. Sept. 8, 2005); *Jana-Rock Constr. v. New York State Dept. of Econ. Dev.*, 438 F.3d 195 (2nd Cir. 2006).

First, the discrimination must be “identified discrimination.” “While the states and their subdivisions may take remedial action when they possess evidence” of past or present discrimination, “they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.” A generalized assertion of past discrimination in a particular industry or region is not adequate because it “provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.” Accordingly, an effort to alleviate the effects of societal discrimination is not a compelling interest. Second, the institution that makes the racial distinction must have had “a strong basis in evidence” to conclude that remedial action was necessary, *before* it embarks on an affirmative action program. *Shaw v. Hunt*, 517 U.S. 899, 909-10, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (emphasis in original) (internal citations omitted); *cf. Croson*, 488 U.S. at 500 (“Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.”) (citation omitted); *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir.2000) (“[T]he government must show real evidence of past discrimination and cannot rely on conjecture.”). If the government makes such a showing, the party challenging the affirmative action plan bears the “ultimate burden” of demonstrating that unconstitutionality of the program. *Wygant*, 476 U.S. at 277-78.

Northern Contracting v. State of Illinois, 2005 WL 2230195. The relevant evidence that a court reviewing the ordinance will consider is that evidence “considered [by the Council] in enacting” the ordinance. *Western States Paving Co. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005). While the Clerk’s minutes of the April 4 and April 18 council meetings (at which the ordinance was passed on first and second reading, respectively) do not reflect the Council’s discussion of evidence of past discrimination, videotapes of the April 18 meeting evidence a discussion of disparity studies conducted for the Metropolitan Government.

³ “Remedying past or present discrimination is widely accepted as a compelling governmental interest,” leaving the critical questions of “the sufficiency of the evidence of discrimination and the narrow tailoring of the remedy.” *Hershell Gill Consulting Eng’rs v. Miami-Dade Cty.*, 333 F.Supp.2d 1305 (S.D.Fla. 2004) (citations omitted).

Preferential treatment for minorities can be justified “by demonstrating ‘gross statistical disparities’ between the proportion of minorities awarded contracts and the proportion of minorities willing and able to do the work.” *Hershell Gill Consulting Eng’rs v. Miami-Dade Cty.*, 333 F.Supp.2d 1305 (S.D.Fla. 2004) (*citations omitted*). See also *Western States Paving Co. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005) (“to the extent that this small disparity has any probative value, it is insufficient, standing alone, to establish the existence of discrimination”). Even when such studies of disparity have been compiled, courts scrutinize each study’s data and methodologies - courts do not accept conclusory statements of the studies’ authors that disparity exists, the extent to which it exists, or the ways it can be remedied. See, e.g., *West Tennessee Chapter of Associated Builders and Contractors v. City of Memphis*, 302 F.Supp.2d 860 (W.D.Tenn. 2004); *Hershell Gill Consulting Eng’rs v. Miami-Dade Cty.*, 333 F.Supp.2d 1305 (S.D.Fla. 2004).

Importantly, the evidence must link the government to the purported discrimination, either directly or indirectly. See, e.g., *West Tennessee Chapter of Associated Builders and Contractors v. City of Memphis*, 302 F.Supp.2d 860 (W.D.Tenn. 2004) (“Defendant [City] has produced a study which concludes that the City discriminated in the award of construction contracts...the disparity study indicates that discrimination was persistent in the local construction industry; the City may prove at trial that it was an indirect participant in that discrimination”); *Hershell Gill Consulting Eng’rs v. Miami-Dade Cty.*, 333 F.Supp.2d 1305 (S.D.Fla. 2004) (finding that a study whose author concluded that “a large part of the gross statistical disparities observed in the annual volume of business levels of [certain minority firms] can be attributed to discrimination” did *not* provide a sufficient evidentiary basis, where “there is no disparity indicating any underutilization of [minorities] in the award of contracts by the County itself...nor is there any significant underutilization of [minorities] in the contracts they were awarded”); *Western States Paving Co. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005) (the “government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within” an industry)(*citations omitted*).

The “Conclusions” of the disparity study completed in 2004⁴ for the Metropolitan Government (“Study”) state that significant data “suggest” that disparities exist – the Study does not conclude that there are “gross statistical disparities.” The Study does not recommend any race-conscious remedies for the Purchasing Department of the Metropolitan Government. See Attachment B. Further, the remedies recommended in the Study to deal with the suggestion of disparity are race neutral remedies. Based on a review of the cases applicable to the institution of race conscious remedies and the Study, it is the opinion of the Department of Law that the Study is not sufficient evidence to support the institution of race-conscious preferential treatment in the purchasing process and the ordinance is therefore unconstitutional as lacking a compelling government interest under equal protection clause analysis.

⁴ In December, 2004, Griffin and Strong, P.C., pursuant to a contract with the Metropolitan Government, completed a study regarding women’s and racial and ethnic minorities’ success in contracting with the Metropolitan Government, and in receiving sub-contracts to perform work for the Metropolitan Government (“disparity study”). It concluded: “This study produced significant data that suggest that disparities in purchasing and contracting, as between white male owned firms and minority and women owned firms, continue to exist in each of the agencies analyzed.”

Narrowly Tailored

To be narrowly tailored, the Metropolitan Government's program must satisfy the following criteria: (1) be necessary, in light of alternate remedies; (2) be flexible and limited in duration; (3) minimally impact innocent third parties; and, (4) any quantified preferences must align with the relevant market. See *Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994); *Northern Contracting v. State of Illinois*, 2005 WL 2230195 (N.D.Ill. Sept. 8, 2005) (*citations omitted*); *Western States Paving Co. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005); *Hersbell Gill Consulting Eng'rs v. Miami-Dade Cty.*, 333 F.Supp.2d 1305 (S.D.Fla. 2004) (*citations omitted*).

First, the Metropolitan Government must have given " 'serious, good-faith consideration' of race-neutral measures," which measures were found to be ineffective. *Northern Contracting v. State of Illinois*, 2005 WL 2230195 (N.D.Ill. Sept. 8, 2005) (*citations omitted*). See also *Western States Paving Co. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005). Where there was "no evidence that the [government] considered race-neutral alternative means" prior to instituting race-conscious classifications, a court found that the program was not narrowly tailored, and therefore could not pass constitutional muster. *Virdi v. Dekalb Cty. Sch. Dist.*, 135 Fed. Appx. 262 (11th Cir. 2005). While the Metropolitan Government has adopted race neutral measures since the Study, no evidence has been presented to support a conclusion that these measures have failed.

The second and third elements require the remedy to be flexible and limited in duration, with minimal impact on innocent third parties. The proposed exemption does not have a sunset provision after which it will expire or be re-evaluated. "A narrowly tailored remedial program must also include adequate durational limitations." *Western States Paving Co. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005). See also *Virdi v. Dekalb Cty. Sch. Dist.*, 135 Fed. Appx. 262 (11th Cir. 2005) ("because the racial classifications in question are not temporally limited, the... racial goals cannot withstand strict scrutiny"). Neither does it provide flexibility by affording a case-by-case evaluation or waiver of its terms, or make an attempt to assure that the impact on innocent third parties is minimal.

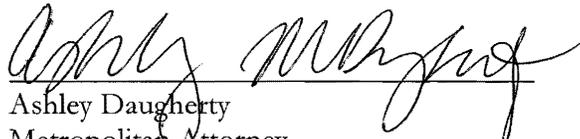
The fourth criteria - that the quantified preferences must align with the relevant market - must be supported with the government's underlying evidence. The data and methodology of the Study providing the evidence of discrimination are critical. See *Northern Contracting v. State of Illinois*, 2005 WL 2230195 (N.D.Ill. Sept. 8, 2005) (*citations omitted*). Assuming the Study had detected gross statistical disparities, a court would consider that the Study found over-utilization of African Americans in some market areas, such as goods and services. Study, p. 22. The ordinance does not align the favorable treatment with under-utilized market areas but would apply to all market areas, including all participants in the goods and services area. Additionally, a court would likely be dissatisfied with a program of providing a broad preference to all "disadvantaged businesses" in the same manner without making fact-based, targeted, distinctions between groups, and ensuring that "its application is limited to those minority groups that have actually suffered discrimination" within the Metropolitan Government's jurisdiction. *Western States Paving Co. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005). See also *Hersbell Gill Consulting Eng'rs v. Miami-Dade Cty.*, 333 F.Supp.2d 1305 (S.D.Fla. 2004) (evaluating the evidence pertaining to each minority classification within the realm of architectural and engineering contracts, and emphasizing the importance of geographic markets).

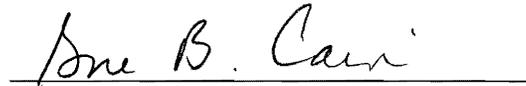
Based on this analysis, it is the opinion of the Department of Law that the preference given to disadvantaged businesses by the proposed ordinance is not narrowly tailored under the equal protection clause analysis and is unconstitutional.

Conclusion

The proposed amended ordinance provides preferential treatment for “disadvantaged businesses” - those associated with women, disabled persons, and members of minority groups. It is the opinion of the Department of Law that the amended ordinance is unconstitutional because it does not pass the strict scrutiny test established for race-conscious measures and, therefore, violates the Equal Protection Clause of the U.S. Constitution’s Fourteenth Amendment.

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY


Ashley Daugherty
Metropolitan Attorney


Sue B. Cain
Deputy Director

APPROVED BY:


KARL F. DEAN
Director of Law

cc: Mayor Bill Purcell
Vice Mayor Howard Gentry

ATTACHMENT A
ORDINANCE NO. BL2006-1013

An ordinance amending Chapter 4.12 of the Metropolitan Code of Laws to require that certain procurement contracts be approved by Resolution of the Metropolitan Council.

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

Section 1. That Chapter 4.12 of the Metropolitan Code of Laws be and the same is hereby amended by adding the following new Section 4.12.220:⁵

"4.12.230 Procurement contracts requiring council approval. Except as provided in Section 4.12.095 pertaining to privatization contracts, and in Section 4.12.220 pertaining to contracts for the collection, transportation and/or disposal of solid waste, no contract for the procurement of goods or services, other than for professional or consulting services, which provides for an annual payment exceeding five hundred thousand dollars (\$500,000) or an aggregate payment exceeding three million dollars (\$3,000,000), and which was awarded to a contractor or vendor other than the lowest bidder, may be entered into unless and until such contract has been approved by resolution duly adopted by the council by twenty-one affirmative votes."

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

Sponsored by: Charlie Tygard, Michael Craddock, Jim Gotto

**Amendment No. 1 To
Ordinance No. BL2006-1013**

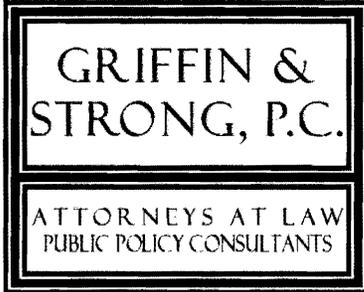
Mr. President:

I move to amend Ordinance No. BL2006-1013 by amending Section 1 by adding the following provision at the end thereof:

"Notwithstanding the foregoing provision to the contrary, no contract awarded by the purchasing agent to a disadvantaged business as defined in section 4.44.010, or awarded to another contractor whose bid was higher as a result of the contractor's proposal to subcontract twenty percent (20%) or more of the work to disadvantaged businesses, shall require council approval by resolution in order for such contract to be entered into by the metropolitan government."

Sponsored by: Charlie Tygard

⁵ It appears that this is a scrivener's error, and the ordinance is intended to create a new Code Section numbered 4.12.230.



ATTACHMENT B

**METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
DISPARITY STUDY**

EXECUTIVE SUMMARY

3. Metro Purchasing

The minorities listed in this chart for each business category were *under-utilized* without regard to statistical significance. For details regarding *statistically significant under-utilization* or *over utilization*, please refer to the summary charts.

<i>Construction Prime Contracting</i>	<i>Construction Subcontracting</i>	<i>Professional Services Prime Contracts</i>	<i>Professional Services Subcontracting</i>	<i>Goods and Services</i>
African American Asian American Native American White Female	Asian American Native American	African American Asian American Hispanic American Native American White Female	African American Asian American Hispanic American Native American White Female	Hispanic American Native American White Female

Note: No subcontracting activities were recorded for Goods & Services; therefore no analysis was conducted for this business category at the subcontracting level.

Summary of Metro Purchasing Prime Contracting Disparity Indices

Minorities & White Female	Construction	Professional Services	Goods & Services
African American	0.00*	0.00*	2.79**
Asian American	0.00	0.00	2.49**
Hispanic American	-	0.00	0.15*
Native American	0.00*	0.00*	0.26*
White Female	0.05*	0.00*	0.27*
All Groups	0.01*	0.00	0.60*

(*) Indicates statistically significant under-utilization
 (**) Indicates statistically significant over-utilization
 (-) Indicates no utilization and no availability

Summary of Metro Purchasing Subcontracting Disparity Indices

Minorities & White Female	Construction	Professional Services
African American	8.07**	0.09*
Asian American	0.00	0.00*
Hispanic American	18.24**	0.00
Native American	0.00	0.00*
White Female	1.67**	0.30*
All Groups	1.89**	0.14*

(*) Indicates statistically significant under-utilization
 (**) Indicates statistically significant over-utilization
 (-) Indicates no utilization and no availability

Note: No subcontracting activities were recorded for Goods & Services; therefore no analysis was conducted for this business category at the subcontracting level.

4. NES

The minorities listed in this chart for each business category were *under-utilized* without regard to statistical significance. For details regarding *statistically significant under-utilization* or *over utilization*, please refer to the summary chart. There were no subcontracting activities recorded for any of the business categories examined during the period under review; therefore, no analyses were conducted at the subcontracting level.

<i>Construction Prime Contracting</i>	<i>Professional Services Prime Contracts</i>	<i>Goods & Services Prime Contracts</i>
African American Native American White Female	Native American White Female	African American Native American White Female

Note: No subcontracting activities were recorded for Construction, Professional Services and Goods & Services; therefore no analyses were conducted for these business categories at the subcontracting level.

Summary of NES Prime Contracting Disparity Indices

Minorities & White Female	Construction	Professional Services	Goods & Services
African American	0.58	1.59**	0.01*
Asian American	-	-	-
Hispanic American	4.37**	-	-
Native American	0.61*	0.07	0.02*
White Female	0.15*	0.77	0.01*
All Groups	0.82*	1.06	0.02*

(*) Indicates statistically significant under-utilization

(**) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

- That data are maintained in a uniform manner and reported routinely to the Metro Division of Minority and Small Business Assistance
- That the Metro Division of Minority and Small Business Assistance be provided with adequate staff resources to perform the functions of the recommended nondiscrimination program and coordinate the efforts of the other agencies, since the programmatic success of the collective six agencies requires a strong central administrative staff.

Set forth below is the comprehensive program that is being recommended for Metro as a result of this Disparity Study. This program should be adopted by, or integrated into, all of the agencies along with the measures that are specifically recommended for each agency.

1. Metro Purchasing

- It is recommended that Metro adopt a comprehensive nondiscrimination in purchasing and contracting policy. This policy would require firms working with Metro Government to agree not to discriminate against subcontractors, vendors, or suppliers, and to cooperate in the investigation of any complaints.
- It is recommended that the aforementioned policy be effectuated by the development of a comprehensive nondiscrimination in purchasing and contracting program to be administered by the Division of Minority and Small Business Assistance. The program should contain, at a minimum, the following elements:

Mandatory Covenant of Nondiscrimination

As a mandatory element, each bid, offer, or proposal must describe, in a separate section and in detail, the Offeror's Covenant of Nondiscrimination, through which the Offeror has managed its commitment to nondiscrimination in the bidding or proposal process and through which it will manage its nondiscrimination

covenant in the performance of the contract. Demonstrating compliance with the nondiscrimination covenant in the bidding process will be a precondition to selection.

2) Good Faith Efforts

In its bid or proposal, and subsequently in performing under its resulting contract, an Offeror shall provide evidence of good faith, including a detailed description showing the techniques that it has used and will use to encourage and obtain the maximum practical participation of minority and women owned businesses. Such techniques shall include, but not be limited to segmenting the totality of the work into two or more smaller portions where feasible and can be accomplished in accordance with common and accepted industry practices relating to the utilization of subcontractors; attendance at pre-solicitation, pre-bid and other conferences and forums that allow interested minority and women owned firms to market their goods and services; letters and other direct personal contacts; advertising in publications in general circulation, as well as those directed to specific trades or marketed to small businesses, and those owned by racial minorities and women; reasonable solicitation follow-ups; reasonable assistance with supplies, bonding, insurance, or technical matters; adherence to equal opportunity provisions when replacing or adding subcontractors and suppliers; providing a nondiscriminatory work site; reporting improper conduct; and cooperating with Metro Government in administration and monitoring of compliance with its nondiscrimination policies.

3) Acceptable Methods of Utilization

(a) **Joint Venture Participation**, which must be real and legitimate, and clearly demonstrate the initial capital investment of each venture partner; proportional allocation of profits and losses; sharing of control over ownership and management; actual participation of each venture partner in the work on the project or contract; and defined methods of accounting, dispute resolution, and other factors deemed pertinent to Metro Government.

(b) **Subcontractor Participation**, where it can be clearly demonstrated that the minority and women owned subcontractors will perform commercially useful functions in the work of the project or contract.

(c) **Supplier Participation**, where an Offeror contracts with minority and women owned suppliers who will perform commercially useful functions as to the nature and amount of

supplies to be furnished, their management of the work involved in furnishing the supplies, and who do not act as pass-throughs or resellers for non-minority or large businesses.

(d) Mentor Protégé Agreement, which is acceptable to the extent that an Offeror has a pre-existing, written mentor/protégé agreement that has previously resulted in the Offeror working with a particular minority or woman owned business enterprise, and the Offeror is able to submit evidence of the existence of such agreement, documentation to support the protégé's inclusion on previous contracts, and a covenant for inclusion of the same protégé on work under the current RFP. The work assigned the protégé must be for commercially useful functions.

4) Evidence of Compliance

Without limitation of other evidence of compliance or noncompliance with the commitment to nondiscrimination, disparity between utilization of minority business enterprises and women business enterprises and their availability in the relevant supply market will justify further inquiry by Metro Government. Such disparity will impose on Offeror a burden of further explanation, in both the bid/proposal process and in the performance of the resultant contract.

5) Cures and Remedies for Noncompliance

In connection with the best and final offer phase of the RFP, an Offeror whose mandatory plan of compliance and related responses merit concern shall be afforded an opportunity to revise its plan to address identified deficiencies, and resubmit the plan before final selection is made. Metro Government may conditionally approve any Program, which is otherwise in substantial compliance by imposing requirements for cure that will then be carried out during contract performance.

6) Monitoring

An Offeror must, when requested by Metro Government, during the evaluation phase of the solicitation and during contract performance, allow interviews with specified officers and employees and provide specified records and other information relevant to the implementation of its Covenant and its compliance with its nondiscrimination covenant.

7) Investigatory Authority

Metro Government shall be authorized to investigate apparent discriminatory practices of an Offeror, successful Offeror or subcontractor, or supplier to either. Such investigation may be initiated by the Division of Minority and Small Business Assistance, on its own initiative, or by complaint from another, when information available to it provides a reasonable basis to believe that an individual contractor who seeks to contract with Metro may be engaging in private discriminatory conduct. Procedures shall be established for due process, including but not limited to, notice of the investigation, conduct of hearing, and sanctions, penalties, and appeals.

8) Sanctions and Penalties for Noncompliance

The Division of Minority and Small Business Assistance shall have the authority and power to enforce these provisions. Failure by an offeror or bidder to comply with the requirements of these nondiscrimination provisions shall subject the non-complying party to administrative sanctions. In addition, a violation of these provisions shall constitute a material breach of contract, enforceable at law, or in equity, as with all other contract provisions, including the imposition of penalties. Sanctions and penalties may include declaration of non-responsiveness, cancellation of contract, rejection of future bids, limited partial withholding of progress payments, partial withholding of payments commensurate with the portion of the contract not in compliance, total withholding of payments, limited suspension and debarment, or permanent debarment.

9) Appeal Process

Any bidder or offeror or other party aggrieved by the provisions of this Article may appeal said grievance to Metro Government whereby it is the intent of this provision to ensure all parties the basic guarantees of due process and the right to be heard by an impartial trier of fact, and the same are hereby so guaranteed.

10) Assistance to Minority and Women Owned Businesses

The Division of Small and Minority Business Assistance should work in cooperation with designated economic development agencies and the private sector, to develop or identity bonding, financial and technical assistance programs for small, minority, and women owned businesses, and maintain a database containing the full array of incentives that are available.

11) Certification Process

To ensure that the Nondiscrimination Program achieves its purpose, Metro Government must verify the minority or women owned business enterprise certification status of each firm claiming such designation. Only certified minority and women business enterprises and joint venture partners should be designated in reports as MBEs or WBEs, as defined within the Nondiscrimination Program. In addition to the basic information that would be required of all vendors, whether certified or not, the certification process should, at minimum, include an examination of the following for each applicant:

- (a) Type of ownership, such as corporation, limited liability company, partnership, etc.
- (b) For each individual owner, the name, race or ethnicity, gender, years of ownership, and percentage of ownership.
- (c) Information as to the level of control exercised by each owner over the entity's affairs, including but not limited to voting percentages, contributions of capital, real or personal property, expertise, work assignments, day-to-day operations, financial and other management decisions, etc.
- (d) Information as to each owner's background, experience, length of time with the company, responsibilities, etc.
- (e) Copies of agreements or other documentation concerning stock options, restrictions on ownership or control of the minority or female owners, changes in ownership prior to certification, relationships between other individuals or firms that hold an ownership interest in the company, including financing or loans, sharing of space, employees or other resources, etc.
- (f) Documentation of income or gross receipts for at least two years preceding the application, personal financial statements, credit and bonding references, job references, trade references, and proof of other certifications.
- (g) The certification application should be signed or acknowledged in the presence of a notary public, and include appropriate warnings against falsification of data, misrepresentations, or other fraudulent statements.
- (h) The application should contain language that clearly reserves Metro Government's right to request additional information in support of the claims

made on the application, to conduct site visits, and to request third party confirmation of the information provided.

- (h) The management and staff involved in the certification process should be trained extensively on the procedures involved in certification, and on how to detect indicators that ownership and/or control by the minority or female owners may be subject to challenge.

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- It is recommended that Metro Government take steps to ensure that all changes to procurement processes be consistently brought before the Procurement Standards Board, to the extent required by the Procurement Code.
 - It is recommended that Metro Government modify its prompt payment procedures to ensure conformity to guidelines by all employees and using departments, and to create a corresponding procedure to ensure timely payments by prime contractors to subcontractors.
 - It is recommended that Metro Government maintain an accurate and reliable small business database, which should be maintained by the Division of Minority and Small Business Assistance.
 - It is recommended that procedures be put in place to ensure that the Division of Minority and Small Business Assistance shall be provided with no less than two days' advance notice of upcoming solicitations in order to prepare a qualified list of small, minority and women businesses to be attached to outgoing solicitations, and that the Division of Purchases provide the Division of Minority and Small Business Assistance no less than five days' advance notice of upcoming pre-bid meetings and pre-proposal conferences.
 - It is recommended that adherence to the nondiscrimination policy be established as a required evaluation factor in Requests for Proposals.

- It is recommended that Requests for Proposals and Invitations to Bid include a standard provision requiring that contractors adhere to their committed levels of small and minority business participation when their contract amounts are increased due to change orders or other changes.
- It is recommended that the current tier contracting system be modified to establish specific criteria for inclusion in the program at various levels, to establish an annual schedule for the letting of contracts, and to include provisions for small business utilization across contract terms whenever possible.

2. Metropolitan Nashville Airport Authority

The Metropolitan Nashville Airport Authority has an effective Disadvantaged Business Enterprise Program that appears to be staffed adequately.

- It is recommended that MNAA adopt the nondiscrimination program developed by Metro and coordinate with Metro on its local program.

3. Metropolitan Nashville Public Schools

- We recommend that the Metropolitan Nashville Public Schools adopt the nondiscrimination program which has been recommended for Metro. Coordination with Metro should bolster the MNPS program in key areas where underutilization was noted in this report.

4. Metropolitan Development and Housing Authority

As with MNAA, the Metropolitan Development and Housing Authority has a federal DBE program requirement which appears to be effective.

- For all other purchasing and contracting requirements, it is recommended that MDHA adopt the nondiscrimination program that has been recommended for Metro.