

From Legal Restraint to Community Potential: How Community Development Corporations Can Assist MWBEs in Securing Government Procurement Contracts

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I. Introduction

Attempts to expand the roles of minority and women-owned business enterprises (“MWBEs”) in government procurement processes have been a key community economic development strategy aimed at creating more equitable, broadly participatory and, therefore, sustainable economies. But, these efforts have had to overcome many barriers. In *City of Richmond v. J.A. Croson Co.*, the United States Supreme Court not only struck down Richmond’s minority set-aside program for violating the Equal Protection Clause, but it also applied a strict scrutiny analysis to race-based remedial programs.ⁱ As Richmond sought to institute legislative solutions to eradicate systemic racial discrimination in its construction sector, the Court’s ruling erected major impediments to state and local governments seeking to provide race-based redress in their respective jurisdictions. As a result of the legal restraints *Croson* imposed on government-sector support of MWBEs, community development corporations (“CDCs”) can serve as critical intermediaries in fostering the inclusion of MWBEs in government procurement processes by providing systemic, structural and perception-based solutions consistent with the strict confines of the law. In so doing, CDCs have the potential to foster sustainable community development by creating more equitable economic opportunities.

II. Post-*Croson* Barriers and Potential Solutions

Post-*Croson*, MWBEs still face significant barriers to their ability to secure government procurement contracts. However, CDCs can play a critical role in minimizing or wholly removing these barriers through targeted outreach, advocacy and programmatic support. In fact, CDCs in their ability to advocate and implement programs directly targeting racial minorities and women in the government procurement arena, are able to overcome some of the seemingly impenetrable legal barriers erected after *Croson* that hinder government actors from targeting and remedying racial and gender discrimination in the contracting sector. CDCs may offer a promising set of potential solutions in the post-*Croson* era for creating sustainable community development and equality for MWBEs.

a. Systemic Barriers:

Racial discrimination remains one of the chief barriers preventing equality in the government-contracting arena.ⁱⁱ One of the pitfalls of the Court’s analysis in *Croson* is that the majority opinion discounted the pervasiveness of systemic racism.ⁱⁱⁱ In fact, Justice Marshall in his dissent warned of the effects of this discounting and that the Court’s decision would discourage localities “from acting to rectify the scourge of past discrimination.”^{iv} In creating legal

restrictions on the local government's ability to proactively seek to rectify the ways in which racial discrimination fuels exclusionary contracting practices, the Court created an implicit loophole for racism to persist in government contracting – formally and informally.

Majority^v contractors maintain professional and personal networks that, either intentionally or unintentionally, resist minority inclusion. Continued discrimination could stem partly from the historical exclusion of minority business enterprises (“MBEs”) from gaining membership into formal trade associations.^{vi} While no longer express, current practices demonstrate informal exclusion is a problem still facing MBEs.^{vii} In a practical sense, these closed networks help majority contractors maintain their competitive advantage, sustain their contracting “territory” and enhance their own wealth – often to the detriment of MBEs. In so doing majority contractors are able, perhaps intentionally and unintentionally, to carve out a sizable piece of the economic pie for themselves, which leaves mere crumbs for MBEs. In sum, MBEs face racism primarily due to the existence and perpetuation of the “good old boy” network.^{viii}

Several academics and MBE practitioners note that, although discrimination continues to serve as a barrier for MBEs in receiving subcontracting bids, discrimination in the financial lending industry creates additional impediments to the equal participation of MBEs as well.^{ix} Historically, minorities have endured significant challenges related to obtaining loans and accessing capital from financial institutions.^x In the contracting realm, MBEs' inability to access financing capital and their inability to finance their own projects without external financial

assistance hinders them from placing their businesses in a position to be considered capable of securing bids when presented.

b. Systemic Solutions:

Despite the systemic nature of racial discrimination in contracting and access to capital, CDCs can serve as critical intermediaries and advocates in terms of mitigating or dismantling these systemic realities. First, CDCs have had historical success assisting communities with race-based and gender-based discrimination in the 1960s and 1970s. Therefore, community organizing around systemic concerns facing MWBEs represents a core competency of CDCs and should be utilized in the contracting arena.

Second, even if government contracting is not directly within the expertise of the organization, CDCs can still play a role in shaping the political discourse to arrive at more holistic legislative remedies. CDCs can help bring critical awareness to the fact that in the total monetary pie of government contracting, MBEs are relegated to feast on mere morsels. In some respects, set-aside programs can be characterized as “mere tokenism – a limited attempt at inclusion to give the illusion of broader inclusionary practices – and seen by the White majority as an acquiescence to minimum standards of incorporating American Blacks into the business community.”^{xi} Therefore a categorical shift in consciousness needs to occur, whereby the constraints placed on the inclusion of MBEs should be challenged so that MBEs can be seen as equal partners, equal business owners and having equal capacity as compared to their majority counterparts. As one

practitioner poignantly highlighted, “In the end [MBEs] are fighting for crumbs when there is a whole pie out there.” For example, many state and local minority contracting programs only require 30% of the total value of the contract to go to MBEs, which leaves 70% of the monetary gain in the hands of majority contractors.^{xii} In order to change this tide, CDCs can help raise consciousness, influence the nature of the debate, and shift the onus from the prime contractor to seek out MBEs and instead equip MBEs in creating and sustaining their own opportunities. Notwithstanding the critical role that CDCs can play in creating this change, the need for the legislative incorporation of these ideals is critically necessary as well.

Third, in the face of traditional “good old boy” networks, CDCs can work to enhance networks among MBEs. Austin Dickson of Georgia Institute of Technology highlighted the fact that many minority businesses noted a sense of isolation from their majority colleagues, as well as from other MBEs.^{xiii} Therefore CDCs, in their ability to connect key community stakeholders, can also help facilitate the establishment of minority business associations. Through associations, these businesses can potentially support one another through the complex bidding process and create mentoring programs between more established contractors and new market entrants.^{xiv}

Lastly, CDCs can facilitate MBEs access to capital. According to Dickson, “Access to capital is the chief component in building minority-owned business enterprises’ capacity, so if lack of resources is preventing market entry, then access to capital might be a viable solution.”^{xv} In addition, since MBEs typically have lower startup costs

compared to their non-minority counterparts on account of their smaller size, “[a]n obvious non-race based remedy would be to subsidize all firms with low startup capital,” which would necessarily benefit MWBEs as well.^{xvi} CDCs are experienced in financing and can assist MWBEs in obtaining funding sources and can provide technical assistance and counseling regarding the financial obligations and processes necessary to secure contracting bids.

c. Structural Barriers:

MWBEs face key structural barriers in securing government subcontracts. Several MWBE contractors have noted an inherent unfairness and lack of transparency with government agencies in securing contracts.^{xvii} For example, they highlighted the problem that government officials within procurement divisions provided preferential treatment to certain minority vendors, which reduced the likelihood of success for other qualified MWBEs to secure subcontracts.^{xviii} In addition, they felt as though the lack of government transparency regarding the procurement decision-making process fueled their sense of distrust.^{xix}

In addition, because MWBEs are typically smaller businesses they face the burden of sustaining themselves after they have secured a subcontract based on the long payment timelines of many of these contracts. This financial burden is exaggerated by the fact that MWBEs often face issues related to accessing capital from external sources and are deterred based on the costs associated with submitting a competitive bid. In addition, the prime contractor often does not pay subcontractors until the entire project is completed.^{xx} For example, a

MWBE that provides a good or service to a project in its nascent stages may be unable to cover its business costs in enough time to meet its operational and debt obligations if it is required to wait several months in order to recoup the full payment for its work.

d. Structural Solutions:

Notwithstanding these complex structural concerns, CDCs can help shift the burden from MWBEs by targeting issues of transparency, legitimacy and accountability in the government procurement space. First, given the trepidation of MWBEs to seek out government contracts on account of the lack of transparency and the sense of unfairness, Myers and Chan suggest reimbursing MWBEs for costs associated with bidding.^{xxi} By incentivizing their participation in the bidding process, MWBEs could gain a better sense of how government procurement contracts actually work and could reduce some of the skepticism they feel towards, what seems like, an opaque and unfair bidding process. To be sure, one down side would be that firms could submit bids solely for the financial benefit of reimbursement. Despite these inherent perverse incentives, if structured properly Myers and Chan's recommendation could increase the number of MWBE market entrants.

Second, in the United Kingdom government actors and community-based intermediaries have partnered together to promote sustainable diversity in contracting. In fact, "because local governments are also entrusted with promoting economic development and they have considerable spending power, local authorities can potentially have a major influence on local economic and

social development, with considerably greater total expenditure available from core budget purchases."^{xxii} As a result, one low-cost measure used is the "development of brokerage agencies, which would have advanced notice of contracts from local authorities, which would then be matched against a database of [MBEs], brokering between supply and demand for contracts."^{xxiii} In the U.S. context, CDCs could incorporate this brokerage-related work to serve as critical intermediaries in the community for MWBEs to foster technical assistance, legislative and policy advocacy and sustainable networks for MWBEs.

Third, CDCs can work with MWBEs to plan for the reality that government contracts alone are unlikely to sustain their businesses. MWBEs should have diversified business strategies to be most successful. Based on the infrequency of government contracts that potentially align with the goods and services offered by a particular business, it would be disadvantageous for a business to rely solely on these contracts to sustain itself in the market.

e. Perception-Based Barriers:

One practitioner noted that misperceptions among government procurement officials, prime contractors and MWBEs make creating sustainable business relationships untenable at times. On the one hand, government officials and majority contractors may carry the perception that MWBEs are not professionally prepared and lack the necessary capacity. On the other hand, MWBEs who face hostility from government procurement officers, majority contactors and financial

institutions become frustrated by the system and may not, in turn, market their businesses and contracting capacity in the best light. These perceptions undoubtedly reinforce the hesitancy to partner across governmental, racial, and gender lines.

f. Perception-Based Solutions:

In light of these misperceptions, CDCs can play several important roles mitigating these perception-based barriers. CDCs can capitalize on their preexisting relationships with government officials to encourage inter-governmental solutions to the pervasive barriers previously outlined. First, given the utility of workshops and programs targeted to MWBEs regarding how to obtain contracts, and the nuts and bolts of the procurement process, CDCs can both encourage government procurement officials to have these programs with greater frequency as well as offer these programs themselves.^{xxiv}

Second, CDCs are leaders in influencing government agencies. They have a unique ability to advocate for legislative and policy changes throughout government. Therefore, subject to fundamental limitations as tax-exempt organizations, CDCs can urge government officials of the centrality of this issue and the need to create legislation and internal policies that treat MWBE procurement as a substantial priority. In addition, this strategy may create the potential for the erasure of the misperceptions between government procurement officials and MWBEs and help enhance opportunities.

Third, CDCs can either push for their government localities to hire a MWBE coordinator to serve as an institutionally recognized liaison between

MWBEs and government or to help enhance the visibility and effectiveness of the current coordinator to foster desired change in the procurement realm. Because MWBE government coordinators understand the inner-workings of government and the concerns of MWBEs, they can serve as critical allies and advocates.

Lastly, CDCs need to collaborate in order to achieve the desired outcomes in the field. Often, pockets of organizations work in isolation, but they would have greater impact and a greater ability to push this critical agenda forward if they partnered together. In coordinating efforts, the greater CDC community could create a wider advocacy platform, identify key governmental and majority allies and thus create greater equity in government procurement contacting for MWBEs.

III. Conclusion

MWBEs have struggled in the shadows of post-*Croson* jurisprudence and legislative policies. In fact, the systemic, structural and perception-based barriers that MWBEs face in government procurement contracting demonstrates a poignant intersection between race, gender and wealth creation. If welcomed, CDCs could play a critical role in lowering and seeking to erase many of the barriers that MWBEs face. In fact, CDCs could rely on their competency in advocacy, social agitation and creating sustainable partnerships to enhance opportunities for MWBEs. In addition, if CDCs continue to equip themselves with financial and business expertise, they could provide substantial technical support and counseling services and serve as key intermediaries among MWBEs, government procurement

officials and majority contractors. Although CDCs cannot realistically provide a panacea for all of the enumerated pervasive barriers, CDCs nonetheless could play an important role in creating opportunities for MWBEs to excel in the realm of government procurement contracting and fostering sustainable community development.

ⁱCity of Richmond v. J.A. Croson Co., 488 U.S. 469, 485-6 (1989).

ⁱⁱ Austin Dickson, MBE Policy As Economic Development: An Examination of Public Contracting in Georgia, 9 (Aug. 2010). https://smartech.gatech.edu/bitstream/handle/1853/34714/dickson_austin_c_201008_mast.pdf.

ⁱⁱⁱ Croson, 488 U.S. at 499.

^{iv} Croson, 488 U.S. at 529 (Marshall, J., dissenting).

^v Majority, in this context, is used to describe White male contractors. This term stands in contradistinction to minority.

^{vi} There is an intentional switch between the use of the acronyms MWBE and MBE. The former includes individuals classified as minorities due to their racial and gender status. The latter refers primarily to racial minorities and particularly highlights African Americans.

^{vii} Measuring Business Opportunity: A Disparity Study of NCDOT's State and Federal Programs, 156 (Aug. 1, 2009). <http://www.ncindian.com/docs/2009%20NCDOT%20Disparity%20Study.pdf>.

^{viii} Measuring Business Opportunity: A Disparity Study of NCDOT's State and Federal Programs, 155.

^{ix} Michael Bonds, Looking Beyond the Numbers: The Struggles of Black Businesses to Survive: A Qualitative Approach, Journal of Black Studies, Vol. 37, No. 5, 595 (May 2007).

^x Dickson, *supra* note 2, at 8.

^{xi} Id. at 14.

^{xii} Prince George's County Office of Central Services, Minority Business Enterprise. <http://www.princegeorgescountymd.gov/sdd/d/>.

^{xiii} Dickson, *supra* note 2, at 9.

^{xiv} Id at 9-11.

^{xv} Id at 8.

^{xvi} Samuel L. Myers and Tsze Chan, Who Benefits from Minority Business Set-Asides? The Case of New Jersey, Journal of Policy Analysis and Management, Vol. 15, No. 2, 218 (1996).

^{xvii} Measuring Business Opportunity: A Disparity Study of NCDOT's State and Federal Programs, 155

^{xviii} Id.

^{xix} Id.

^{xx} Id. at 155.

^{xxi} Myers and Chan, *supra* note 16, at 217.

^{xxii} Monder Ram and David Smallbone, Supplier Diversity Initiatives and the Diversification of Ethnic Minority Businesses in the UK, Policy Studies, Vol. 24, No. 4, 189 (2003).

^{xxiii} Id. at 202.

^{xxiv} Dickson, *supra* note 2, at 6. (“[P]ublic contracting guidelines that help minority-owned businesses – have been heralded [as] a strong tool for minority economic development.”).