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2025 Update: MBE and SBE Programs and Fairness in Contracting

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marketplace that place certain groups of firms at a disadvantage when seeking public sector work. They sometimes operate minority business enterprise (MBE) or women business enterprise (WBE) programs to accomplish this objective.

Especially given the climate in 2025, some are asking whether small business enterprise (SBE) programs alone can be the answer.

Our answer: it's not an either/or question. Let us explain. We start by distinguishing sound objectives for small business programs from those that focus on minority- and woman-owned firms.

Small Businesses

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owned firms) creates opportunities for entrepreneurs and generates jobs, worker skill development and income for local residents;

- Small business start-up and growth generates additional spending that helps the overall local economy;
- Some types of public contracts may be best delivered by local small businesses; and
- Supporting small vendors today increases the supply of bidders on future public contracts.

Any of these reasons might be cause for a public entity to celebrate growth in small business participation in its contracts. A city, county or state might track overall share of contract dollars going to small

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be important for those businesses and the local economy as a whole. The public entity might enact procurement programs to promote small businesses such as giving preference points for small businesses, setting goals for the participation of small businesses in a project that has subcontract, or other measures. It would need to make sure these were allowable under state and local procurement law, but these programs do not typically trigger constitutional issues.

The public entity could do all this without first conducting what is known as a “disparity study.” Disparity studies rigorously examine whether there is underutilization of a group of businesses in an entity’s contracts and examine whether there is evidence of discrimination affecting those

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but not for legal reasons. Because a small business program does not apply racial or gender classifications or preferences, if challenged in court, it would typically be subject to what is called the “rational basis” standard of legal review, the most easily met threshold for defending public actions. (Keen Independent is not a law firm, so for more on this written by actual attorneys, please go to a source like Appendix N in [this recent report](#).) The same standard applies to the legal defense of programs that assist certain other groups of businesses, such as veteran-owned businesses or those owned by people living with a disability.

Bottom line: The purpose of a small business enterprise program is not to remedy the

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Even though most minority- and woman-owned firms are small businesses, a public entity must answer a different set of questions before it can consider actions that focus on those companies. (They sometimes retain Keen Independent to conduct a disparity study to research these questions.)

- Yes, the start-up and growth of minority- and woman-owned firms (MBE/WBEs) also create opportunities for entrepreneurs, generate jobs (especially for workers of color), enhance the supply of bidders and benefit the local economy (which cannot be working at full capacity if it is leaving up to one-half of its local businesses behind). However, those facts do not establish a legal basis for a public entity to aid some



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procurement system
has direct or indirect
discriminatory effects
on minority- and
woman-owned
companies or its public
contract dollars
perpetuate systemic
discrimination in the
local marketplace, and

- If so, whether a
remedial program not
based on race or gender
is sufficient to address
such discrimination.
- In sum, “preventing and
remedying discrimination”
are the concepts behind an
MBE/WBE program.

What can go into a contract
equity program that can be
defended in court? This is where
SBE programs enter the
conversation. If race- and

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(like MBE/WBE contract goals) should not be used.

In this framework, small business programs are neither good nor bad, they are evaluated as to whether they are sufficiently powerful and focused to make MBE/WBE program elements unnecessary. In some of Keen Independent's past disparity studies, the answer was "yes" and in some cases "no." Even if "no," enacting small business-friendly changes to procurement processes, providing technical assistance to small businesses and perhaps enacting an SBE program (with preferences and goals) might be part of an MBE/WBE program.

You probably won't know this answer without asking that specific question. And doing the research. We can help.

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that business owners can face discrimination based on their personal characteristics unrelated to race or gender. Keen Independent is currently conducting disparity studies that consider evidence of discrimination based on disability and sexual orientation, for example. Programs for certain groups of business owners might be subject to at least intermediate scrutiny and may require analyses similar to those used in MBE/WBE disparity studies.

- There is also evidence that some racial groups not typically included in an MBE program or in a disparity study may be affected by discrimination. Based on the marketplace in certain communities, Keen

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have considered Asian American business owners as a single group. While some of our research in other communities supports this approach (e.g., anti-Asian hate crimes appear to affect Asian Americans as a whole), we have also identified important differences in the experiences of South Asian American, Southeast Asian American and other Asian Pacific American business owners.

It is also important to state what contract equity programs are not. They are not, or at least should not be:

- Diversity programs (race and gender diversity is not a legally sound justification for programs).

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is sufficient.

- Operating in perpetuity.
- Solely about race and gender, or even presuming disadvantage for all members of a demographic group.
- Over- or under-inclusive in the firms that receive assistance.

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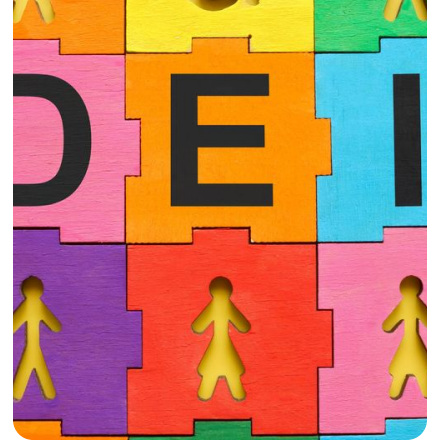
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