



RESEARCH REPORT

Removing Barriers to Participation in Local and State Government Procurement and Contracting for Entrepreneurs of Color

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Removing Barriers to Participation in Local and State Government Procurement and Contracting for Entrepreneurs of Color

Spending approximately \$1.3 trillion annually through public procurement, state and local governments have incredible power of the purse (Baldus and Hatton 2020). However, public contracts historically have been awarded inequitably along racial lines. And because it is easier for firms to win government contracts after they have already done business with the contracting entity, these patterns can easily become entrenched over time (Harvard Kennedy School Government Performance Lab 2022).

This report is situated within the context of broad and persistent racial disparities in wealth and income and an evolving legal climate that has raised new challenges around how institutions can consider race and racial equity. This study sheds light on the generalized challenges inherent to public procurement and those facing minority-owned business enterprises (MBEs) specifically. We describe race-neutral and race-conscious strategies aimed at making state and local procurement processes more accessible for diverse firms, detailing solutions, learnings, and promising approaches that are moving the needle in various jurisdictions across the country.

For this research, we reviewed existing literature and interviewed more than three dozen leaders and staff in the procurement field, including training and technical assistance providers, disparity study consultants, legal experts, government officials across a wide range of departments, advocates, researchers, small-business owners, and others. The interviewees reflect experiences in and with state, city, and county governments, as well as other entities such as transit agencies, port authorities, finance agencies, and comptroller offices. Based on these interviews and the published literature, our high-level conclusions are as follows:

- Efforts to remove barriers to participation in public procurement for MBEs are not new; they have been an area of focus for several decades, though the legal environment is currently shifting.

- Despite decades of focus and attention on this issue, progress has been slow, and some municipalities have fewer contracting dollars going to MBEs than they did previously (Sklar 2020).
- Nevertheless, there remains considerable potential for procurement to be a transformative tool to help governments accomplish their work and bolster MBEs. Open and fair contracting processes can boost financial stability and wealth for these business owners and their communities.
- Promising steps we heard from interviewees include forecasting upcoming procurements to give firms more time to prepare; bolstering outreach and offering technical assistance and capacity building to small businesses navigating the contracting process; streamlining certification processes; creating smaller contracting opportunities (e.g., intentional unbundling); establishing small purchase methods; removing requirements that could present potential barriers (e.g., cumbersome insurance or bonding requirements); adopting best-value rather than lowest-bid award criteria; developing data systems and tracking vendors by type of firm and owner attribute; providing adequate support to firms after they win a contract, especially if they are new to public contracting; and paying vendors in a timely manner.

An Overview of Equity in Procurement and Contracting

Public procurement is governmental purchasing of goods, services, and works (e.g., roads, buildings, and bridges) for the purpose of accomplishing its mission on behalf of its constituents. Procurement takes place at all levels of government—federal, state, and local. After identifying a specific need, governments release solicitations for which organizations registered as vendors with purchasing authority can submit bids, quotes, or proposals. To hire businesses that will fulfill their needs, governments assess bids, quotes, and proposals across various criteria, including one or more of the following: the total cost of the bid as well as a firm’s financial resources, labor capacity, access to necessary equipment, skills and experience, and alignment with governmental priorities.¹ Sometimes, governments prefer to award contracts to the vendor that offers the lowest bid without considering other criteria.

Although governments at all levels engage in procurement and contracting, the structures and processes of procurement vary considerably. For example, some jurisdictions have a central procurement or purchasing department responsible for all formal solicitations, while other jurisdictions are decentralized in terms of how they draft, release, and evaluate bids and requests for proposal

(RFPs). Despite this variation, government contracting always plays a significant role in supporting business ecosystems by creating opportunities for businesses to provide governments with goods, services, and works and ultimately generate business revenue.

The process of understanding community needs and identifying what to purchase, how to purchase it, and who to purchase it from offers state and local governments the opportunity to support and strengthen MBEs. However, few jurisdictions have embraced this. Public procurement has instead perpetuated inequitable systems that produce barriers to MBE participation (Dangerfield and PolicyLink 2019). While the impacts of racism and discrimination have hindered the growth and success of MBEs in several ways,² our analysis focuses on how these challenges have affected the procurement landscape as well as the state of equity-oriented procurement practices across the US.

This report discusses several practices governments can engage in to build more open and accessible, and consequently equitable, procurement systems. These steps can help new and emerging firms win more awards and increase their revenues (Sklar 2020). Success might be demonstrated through higher shares of MBEs submitting bids, quotes, or proposals; a greater proportion of high-value contracts and/or subcontracts awarded to MBEs (especially those that have not previously done business with the purchasing entity); or overall percentage increases in spending with MBEs. Many strategies with the goal of increasing contracting accessibility and support for MBEs may also benefit other disadvantaged business enterprises (DBEs), including women-owned business enterprises (WBEs), micro or other small-business enterprises, or local business enterprises.

Some state and local governments have only recently taken action to address inequities faced by MBEs and other DBEs, but others have been doing so for a long time. Despite years of policies and programs, however, progress has been uneven, and government efforts to date have not been sufficient to meaningfully overcome barriers to access (Sklar 2020).

Legal Context

Programs that adopt explicitly race-based preferences or institute requirements to increase the number of contracts going to MBEs are held to strict standards and are frequently considered before the courts. One of the most significant cases relating to MBE contracting is the 1989 US Supreme Court case, *City of Richmond v. J.A. Croson Co.*, which found Richmond's MBE subcontracting requirement unconstitutional.³ The requirement stipulated that businesses contracting with the city must subcontract at least 30 percent of the total value of their contract to MBEs, which, under the city's

Minority Business Utilization Plan, aimed to serve as a “remedy for past discrimination.”⁴ Those calling the requirement unconstitutional argued that there “was no direct evidence” of discrimination against MBE subcontractors to support the requirement and cited the limited availability of MBE subcontractors in the marketplace. The city denied J.A. Croson a contract because the firm could not meet the subcontracting requirement, leading them to argue that the government was violating their constitutional right of equal protection under the 14th Amendment. The court ruled that, before governments can establish programs providing contracting preference to MBEs, they must produce a “strong basis of evidence” that discrimination is present, as well as pass a “strict scrutiny” test (Alphran 2003, 889). Assessing whether a program meets strict scrutiny means that in instances where discrimination is proven to exist, programs must be “narrowly tailored” to address the specific disparity identified and must demonstrate that race-neutral approaches have been attempted before employing race-conscious approaches (USCCR 2005; USCCR 2006). In response to the ruling, “disparity studies” emerged as a potential methodology and accepted source of evidence that would provide the legal basis for procurement preferences on the basis of race or ethnicity.⁵

Disparity studies use extensive quantitative and qualitative data and analysis to determine whether a disparity exists, and if so, for which groups and sectors. In the absence of a disparity study demonstrating a statistically significant disparity, courts generally find that there is no adequate legal basis for procurement programs to provide specific benefits or preferences to businesses based on race and gender. Analyzing disparities involves assessing the difference between the percentage of contracting dollars awarded to or spent with MBEs (or WBEs or other underrepresented groups of owners or types of firms) and the percentage of contracting dollars *expected* to be awarded to or spent with those businesses based on their availability in the marketplace, accounting for factors such as firm size and experience. If there is a statistically significant difference between these percentages, then MBEs (or WBEs or others) could be facing inequity in public procurement.⁶ When disparity studies demonstrate differences between expected and awarded contracting, state and local governments use the insights to determine the industries and types of firms that would justify targeted diversity- and equity-related interventions.

In addition to finding disparities, jurisdictions must have the authority to implement such a program pursuant to state law. Some states have preempted local authority in this context, forbidding jurisdictions from giving preferential treatment or making contracting decisions based on race and gender.⁷ Proposition 209 in California, for example, prevents jurisdictions from creating race-conscious procurement programs, limiting them to race-neutral policies and practices, even if a disparity is known to exist.

Recent cases have challenged race-based preferences more broadly. In 2023, the Supreme Court case *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* restricted the use of affirmative action in college admissions.⁸ While this ruling did not address public procurement, legally prohibiting race-based preferences in the context of higher education has made other systems and institutions throughout the US more cautious, including governments engaging in public procurement. And subsequent cases have had direct implications for procurement programs and regulations.

In 2023, a federal district court ruled in *Ultima Servs. Corp. v. US Department of Agriculture* that existing practices under the US Small Business Administration (SBA)'s 8(a) Business Development program were unconstitutional. The 8(a) program, which aims to assist historically disadvantaged groups in earning government contracting dollars, had qualified business owners as “historically disadvantaged” solely based on their identity as people of color.⁹ Following the court’s ruling, the SBA opened the program to white applicants and modified the process to include an essay component.

Also in 2023, *Landscape Consultants of Texas Inc., et al. v. City of Houston, et al.* challenged a four-decade-old local procurement race-based preference program, which was ruled unconstitutional. Salient elements of the case include that the city had numerical goals for MBE contracting, awarded points in the contracting process to firms for being MBEs (or WBEs or DBEs), and, the plaintiffs alleged, had not completed a disparity study since 2006.¹⁰

In 2024, a US district judge for the Northern District of Texas found that the race-conscious services offered by the Minority Business Development Agency—which presumed that certain races are socially and economically disadvantaged—were unconstitutional.¹¹ To be clear, such programs have not yet been disqualified, but these cases have led to shifting ground beneath the feet of public procurement departments.

Challenges and Barriers to Procurement

Despite the ubiquity of government contracting, procurement processes at all levels of government are plagued by complexity and inefficiency, and becoming a government contractor is no easy feat for businesses of all sizes and industries. Small businesses in particular experience barriers when starting to do business with government (as either a prime vendor or a subcontractor), as well as throughout the life cycle of a government contract, as they tend to have fewer resources and less capacity available to devote to the contracting process and struggle to compete against larger firms. For example, many contracts include insurance or bonding requirements, which are more difficult for small businesses to

meet than for large firms with stronger financial capacity.¹² Small MBEs can face challenges such as less access to financial support, less capacity due to lower incomes, less generational wealth than their white counterparts, and discriminatory lending practices (Bangs, Murrell, and Constance-Huggins 2007). This can prevent MBEs from raising sufficient capital to purchase supplies or meet other business needs that may be necessary to competitively bid on government contracts. Some aspects of these challenges are unique to MBEs, but many are also experienced by new or emerging businesses and other DBEs (Lee and Denslow 2004).

In addition to these structural economic challenges, the public procurement process has several barriers to entry. One of the most fundamental challenges is ineffective government communication and outreach networks, which limit firms' awareness of potential opportunities and therefore reduce their participation in public contracting. It can be difficult for small businesses—especially those that are not connected to existing contractors or procurement agencies—to even hear about current contracting opportunities (Johnson et al. 2019; SBN 2018; Theodos et al. 2024).

For firms that do learn about contracting opportunities and submit bids, quotes, or proposals, solicitation processes can be cumbersome, difficult to navigate, and require a very fast turnaround. For government staff, procurement can also be laborious due to poor or misaligned procurement management and tracking systems or processes across different departments and types of procurement (e.g., goods and services vs. works) (Johnson et al. 2019).

Another challenge is the process of becoming certified as a disadvantaged business enterprise (DBE), small-business enterprise (SBE), woman-owned business enterprise (WBE), local business enterprise (LBE), and minority-owned business enterprise (MBE). In any given jurisdiction, a business could qualify for several of these typologies, yet the process of receiving certification for even one can be onerous, confusing, or burdensome. In some cases, jurisdictions may have stringent requirements for businesses to demonstrate that they are disadvantaged. Further, there may be differences between state, county, city, transit agency, or other certifications, meaning businesses must possess several certifications to compete for work in multiple and potentially nearby jurisdictions. Additionally, if a business ever wants to bid on federal contracts, there are separate certifications and processes for doing so. The challenges of becoming certified can be a sufficient deterrent for many businesses, especially smaller firms with less capacity and resources.

The combination of economic challenges and cumbersome procurement processes poses particular barriers to emerging or small firms, as many contracting opportunities put forth by governments are not designed with these firms in mind (Harvard Kennedy School Government Performance Lab 2022).

These challenges are exacerbated for firms that are competing for or executing a contract for the first time. For example, governments often put out RFPs for very large, high-capacity, or low per unit cost projects that are inherently difficult for small firms to compete for, given that larger firms are generally better resourced to execute large projects at lower costs. These trends can be linked with race/ethnicity, as MBEs are, on average, smaller and have less procurement experience than white-owned firms (Theodos et al. 2024).

A key way that MBEs participate in government procurement is as subcontractors rather than prime contractors. Subcontracting certainly opens doors for MBEs but also poses its own challenges. For example, enforcement of contract-specific MBE utilization targets can vary from nonexistent to robust and is dependent on government capacity and willingness to do so (Harvard Kennedy School Government Performance Lab 2022; Johnson et al. 2019).

It is important to note that MBEs are diverse in many respects and do not all have the same experience in procuring government contracts. While some MBEs are highly successful in winning and performing on government contracts, local and state government utilization of MBEs often falls far below the share of contracts firms might be expected to perform, and disparity studies continue to reveal gaps between MBEs' availability and utilization. For example, Boston's most recent disparity study noted that while minority-owned firms are potentially available to receive almost 11.3 percent of Boston's subcontracting dollars, only 5.5 percent of local subcontracting dollars went to these firms between 2014 and 2019 (BBC Research and Consulting 2021). Similarly, in Hamilton County, Ohio, the most recent disparity study found that minority-owned firms are potentially available for close to 16 percent of the county's contracting dollars but received less than 4 percent of contracting dollars between 2016 and 2020 (BBC Research and Consulting 2022). Another study found significant evidence of discrimination on the basis of race and gender in Illinois's contracting (Holt et al. 2015). A study in Charlotte, North Carolina, found that progress made toward achieving parity within contracting was a direct result of the city's race-conscious measures, and "current effects of past discrimination and ongoing bias" would present barriers to MBEs without these programs in place (Holt et al. 2022, 22). Based on the challenges that MBEs continue to face today, it is clear there is still significant work to be done to create a supportive environment in public contracting.

This report focuses on state and local procurement, but it is important to note trends observed at the federal level as well. We discuss federal procurement at length in our recent report (Theodos et al. 2024), documenting some of the federal government's notable accomplishments in diverse procurement. In FY 2020, almost 40 percent of government small-business procurement dollars went to contractors of color.¹³ Some subcontracting goals fell short, including those for small, disadvantaged

businesses. However, even if diverse small businesses are making up a reasonable share of total federal small-business procurement, the overall number of small businesses contracting with the federal government has been declining over the past several years (Theodos et al. 2024). In addition, as introduced above and discussed further below, the courts have challenged the federal government's legal ability to run programs targeted to MBEs and, in some cases, have ruled them unconstitutional.

Race-Neutral Tools

Race-neutral tools seek to make contracts more accessible to small businesses, including many MBEs, without providing preferential treatment based on race. These practices focus on strengthening outreach and providing technical assistance to small businesses, making the bidding process easier for all businesses to navigate, and leveraging smaller and more accessible contracting opportunities. Race-neutral approaches have become a critical pathway to increase MBE utilization and participation in contracting opportunities. However, we heard from interviewees that these are not simply “fall back” approaches; addressing these core barriers and universal challenges to procurement can lead to considerable progress for MBEs and other firms alike. Multiple interviewees shared that jurisdictions may not see their desired results through race-conscious programming alone, and race-neutral procurement strategies that improve accessibility throughout the contracting process are also critical. Although we describe these race-neutral strategies individually, in practice, many of our interviewees implemented several of these strategies in tandem.

Another issue raised by interviewees is the importance of having key performance indicators for contracting so that jurisdictions can track their performance against them. As one industry expert interviewee described, “This is still very rare and difficult to [do] in many places. Few governments in the US can calculate how much they are spending with different sized companies or diverse-owned companies or local companies. Once you want to measure repeat winners, first-time winners, speed of payment, etc., all of it gets tricky, especially outside of construction and design.” We discuss various governance approaches and technology and data systems that address this need later in this report.

Outreach, Networking, and Providing Technical Assistance

One contributor to low MBE participation is lack of awareness of, lack of trust in, or limited ability to respond to contracting opportunities. As one interviewee shared, MBEs in their city are “missing out on those opportunities” either due to limited staff time and money to devote to RFP responses or because

they do not receive notifications about the RFPs. Further, unless an MBE is certified as such, they may not receive outreach letting them know about contracting opportunities or be overlooked if their lack of certification means their participation on a contract would not count toward the jurisdiction's utilization goals, regardless of their other qualifications.

There are numerous ways governments can improve external engagement to remove barriers for MBEs. Providing an easily accessible, up-to-date tender and contract register for all procurements is critical to provide transparency and increase trust in the system. Procurement forecasting—posting an annual or quarterly list of upcoming procurements—helps give firms ample time to prepare. Identifying procurement needs well in advance also allows jurisdictions to host information sessions, offer networking sessions, and conduct outreach to increase awareness of upcoming RFPs (Harvard Kennedy School Government Performance Lab 2022).

Mentor-protégé programs and other capacity-building efforts can also have a benefit (Harvard Kennedy School Government Performance Lab 2022). Indeed, several jurisdictions we spoke with were engaging in efforts to increase the capacity of contractors to apply for and implement government contracts. For example, one city operates a grant fund “to support businesses that are interested in contracting with [the city] and want to grow their capacity to do so.” Our interviewees also agreed on the importance of outreach, networking, and technical assistance, highlighting these as effective tools to make procurement processes more accessible and build trust between businesses and government. Outreach and external engagement efforts can take many forms, such as webinars on how to do business with the city, technical assistance programs, prime and subcontractor matchmaking nights, pre-bid informational sessions, or targeted outreach to firms or business associations. It is also important to note that jurisdictions can provide support to vendors after a procurement has been issued, especially if they are new to public contracting.

Taking outreach and technical assistance to a more personal or individualized level can lead to even greater benefits. One city's procurement department employs a staffer dedicated to conducting outreach and providing hands-on assistance to small businesses navigating the city's procurement process, which has led to increased MBE utilization. The outreach coordinator supports the city's overall objective of “humanizing” the procurement process.

"If [firms] need assistance registering in our system, [the outreach coordinator is] hands on, sitting there, walking them through that. If they need assistance in uploading their proposal, [the outreach coordinator is] providing a lot of assistance around that. That's a big part of this focus on making ourselves accessible and saying...there really is another human at the end of this thing, and we want to hear from you. We want to talk to you. We want to understand what's going on."

—City interviewee

Some of the outreach, engagement, mentoring, or capacity-building programs and efforts we learned about use race/ethnicity as a targeting criterion. Others target different types of businesses, either in addition to targeting MBEs or as stand-alone criteria. Examples of other eligibility criteria include firms owned by women, people with disabilities, or veterans. We also heard of programs explicitly for new or emerging contractors, locally based firms, and micro businesses, though some efforts were open to all potential contractors. It is worth noting that using race-based classifications to recruit business owners to participate in these opportunities is likely considered race-conscious programming, which we discuss later in this report. We also describe how recent case law is changing how some of these programs can function.

Streamlining the Contracting Process

Although increasing overall awareness of contracting opportunities is important, success also depends on making the process of bidding on and performing a contract more accessible. External-facing tools and processes are important elements of procurement access. These include websites with resources for vendors, bid submission portals, and payment and contract management processes. In interviews, many procurement leaders expressed that a key contributor to low MBE utilization is that these firms simply are not submitting bids in high numbers. Most participants attributed this to overly complicated bid processes, which can be exceedingly time sensitive, time intensive, and difficult to navigate, especially for firms that have never done business with a government entity.

Procurement staff are aware of these challenges. One interviewee criticized their procurement process as oriented "toward businesses that are more established and have the ability to more easily navigate complex proposal submission procedures." Challenges in navigating jurisdictions' bid

processes may stem from both lack of familiarity with bid submission platforms and convoluted and unnecessarily tedious processes.

“There are words that don’t mean anything. There are buttons to push that don’t mean anything. There are like 50 things that you have to do. If you don’t do one of them, you fail. There are 10 forms that you have to fill out if you’re [going to] work with the government. That’s keeping it short.”

—Interviewee

Addressing this issue is complex and, ideally, involves both internal and external engagement. While overhauling existing procurement processes and adopting more user-friendly processes and technology can take time, several jurisdictions we interviewed saw higher numbers of MBEs submitting bids, quotes, or proposals as a result.

Streamlining processes includes ensuring that bid processes are accessible and easy to navigate and avoid unnecessary burdens, especially for first-time bidders. This may involve, for example, fully digitizing the bid process, reducing the number of required steps for bid submission, eliminating instances where firms must reenter the same information, and having a person at the government’s end of the bid process who can answer any questions vendors may have. Being flexible in how bids are accepted can also make the bid process easier to navigate, such as accepting electronically submitted bids (a surprising amount of procurement is still paper based). Some jurisdictions we interviewed agree that notarizing contracting forms is no longer necessary and have removed that step as a small, but straightforward way to reduce barriers to procurement. Developing processes that ensure prompt payment once work is completed is another opportunity for streamlining and is especially important for smaller businesses that may face cash flow challenges or struggle with access to working capital.

Leveraging Smaller, More Accessible Contracting Opportunities

MBEs are, on average, smaller than white-owned firms (Theodos and Su 2023). One challenge that small businesses face in contracting is being able to absorb and deliver large bodies of work. Bigger firms are usually able to complete work at a lower price than small firms can offer because of their ability to reach economies of scale. In contracting, this means small firms often struggle to compete with large firms on

contracts, because many jurisdictions make contract selection decisions based on a track record of comparable work or having the lowest-price bid. To make contracts more accessible to smaller firms, jurisdictions can “unbundle” contracts, or break large contracts into smaller contracts that are easier for small businesses to bid on. Similarly, jurisdictions may have a “small purchase method” policy to lift some solicitation requirements for bids below a certain threshold, which we discuss in a subsequent section.

Jurisdictions have demonstrated different approaches to unbundling. In one instance, a jurisdiction was able to write an executive order that required unbundling contracts to reduce barriers to participation. When considering unbundling as a race-neutral strategy, another useful approach is to identify which services or industries are known to have high MBE availability in the market and are therefore more likely to attract bids from MBEs. For example, one participant noted, “Construction tends to be a really good industry where you may have larger projects that can break apart into different components that make it easier to have [minority- or woman-owned business] participation.”

However, not all contracts are equally well served by unbundling. One procurement leader cautioned that breaking larger contracts into “small \$150,000 chunks...might undermine the overall effectiveness of the project.” In addition, jurisdictions will have to provide adequate staff resources to oversee smaller contracts. Interviewees shared that while this approach can be effective in making contracts more accessible for MBEs, splitting up single contracts and awarding and managing several contracts and vendors requires more capacity and resources on the government’s end. As one interviewee shared, jurisdictions “need to acknowledge that unbundling may cost the taxpayers more.”

We also heard examples of race-neutral small purchase methods, such as requiring that quotes come from micro businesses or local businesses as a proxy for reaching MBEs, which are often smaller or locally based. However, proxy targets do not always work well across different markets or industries. Interviewees provided several examples of jurisdictions where a local preference in their small purchase method did not yield higher levels of MBE participation.

BOX 1

Institutionalizing Local Commitments

Regardless of whether a jurisdiction is operating under state preemption or has conducted a disparity study, establishing legal frameworks can be beneficial. For example, an interviewee in one city described how a previous mayor signed a local law that requires regularly conducted disparity studies and established aspirational goals for MBE utilization in procurement. That requirement has continued through subsequent administrations. These types of laws demonstrate the potential influence of executive leadership and how commitments to equity in procurement can be institutionalized. Additionally, a robust local small-business ecosystem can act as a support structure for increasing and supporting market availability of MBEs. Culture shifts and concrete commitments to removing barriers to participation can go a long way.

Source: Interviews with authors.

Race-Neutral Preferences and Accommodations for Small Businesses

Some jurisdictions use preferences on bids to accomplish goals related to increasing local economic benefits or leveling the contracting playing field for targeted firms or groups of owners. Preferences can apply to the cost of completing the work submitted in the bid, often in the form of a preference or a discount. A preference could be operationalized as a specified percentage of the net bid price of the lowest qualified bidder, or it may be limited to a certain dollar amount. For example, if a jurisdiction gives local firms a preference, then qualifying firms would have a calculated percentage or dollar amount subtracted from the local firms' bid price submissions. A bid discount operates slightly differently. In those cases, the targeted firms' bid prices would be discounted by a certain percentage to help make their bids more competitive. In addition, two jurisdictions we interviewed described using local preferences to break ties in bid selection.

Some jurisdictions use race-conscious bid preferences or discounts to directly increase the number of contracts awarded to MBEs. Other jurisdictions have programs in place to enhance the bids of small and/or local businesses or other groups. Such preferences can serve as race-neutral ways to support MBEs, which may be overrepresented among some types of firms.

In addition, some jurisdictions have implemented bond initiatives to address MBE challenges with insurance requirements or bonds. Jurisdictions may require businesses to obtain bonds or insurance to protect the contracting entity from claims of contract requirements not being met, such as through

claims of substandard work. Such bonds or insurance cover financial losses a vendor may incur due to unfulfilled contract requirements.

The bond or insurance initiatives we heard of were race neutral, meaning they were offered to all small businesses or for all small contracts. For example, one city offers a program that waives bond requirements and assumes the risk on all nontransportation construction-related contracts of \$100,000 to \$500,000. Another city operates a bonding initiative that, as its procurement officer put it, “meets firms where they are. You walk in the door, you got a [credit score of] 500, and all your financials are in a shoebox. They’ll assess you, triage you, give you [help].” Another jurisdiction allows prime and subcontractors to access a loan of up to \$75,000 if they have a contract with the government, which serves as collateral.

We also heard from interviewees about the importance of reviewing contracts on a best-value basis, given that decisions made purely on a lowest-cost basis can disadvantage smaller firms.

BOX 2

Working within State Preemption

Although some state preemptions prevent jurisdictions from establishing race-conscious procurement programs, we heard several examples of jurisdictions finding ways to work within this limitation. As noted previously, outreach, networking, and technical assistance are critical factors in removing barriers to participation in procurement but are especially important in jurisdictions with strict state preemptions. Providing opportunities for businesses to ask questions about the bid process or about specific contracts, providing early notifications of future bids, and making procurement staff easy to reach were examples of outreach approaches that led to increased participation by MBEs. However, interviewees reported that state preemptions do limit the transformative potential of a procurement system. For example, an analysis of the impact of California’s more binding Proposition 209 estimated a potential loss of \$1 billion in MBE contracting annually.^a

Source: Interviews with authors.

^a Tim Lohrentz, *The Impact of Proposition 209 on California’s MWBEs* (Oakland, CA: Equal Justice Society, 2015).

Race-Conscious Tools

Unless they are limited by state law or subject to changes in federal law, jurisdictions potentially have a legal basis to establish race-conscious procurement policies and practices if they have demonstrated that a disparity exists. These race-conscious methods can take various forms, and interviewees shared

that they can be highly effective. But we also heard that their success depends on whether jurisdictions have (and continually update) a robust database of certified MBEs and other DBEs. Beyond maintaining updated lists, some interviewees expressed skepticism about how effective preferential programs are in moving the needle absent process improvements.

“We tend to subscribe to this idea that many preference programs are not actually that effective because an entity’s procurement process is still highly burdensome, and limited outreach is being conducted to MBEs, WBEs, and SBEs. Not to say that these race-conscious tools are not valuable, but I think what we often see is these race-conscious tools being applied as a like, ‘Hey, we’ll just do this one fix, and we won’t actually change any other aspects of the process.’ And so, a preference program is not making much of an impact at all, because it’s still terrible for a firm to go through the bidding process with that jurisdiction, or you’re still taking nine months to pay your vendors. There are just all of these other issues that you haven’t fixed in any way.”

—Industry expert

Setting Contract-Level MBE Utilization Targets

One of the most common race-conscious tools is setting MBE utilization targets (i.e., percentage spending goals) at the individual contract level. For example, a jurisdiction may apply a 20 percent MBE utilization goal to a contract. A jurisdiction could meet this utilization goal by hiring an MBE as a prime contractor or hiring MBEs as subcontractors. States and localities may require prime contractors to submit a contract-level inclusion plan detailing exactly which subcontractors will be used. Sometimes, instead of (or in addition to) contract-level MBE utilization targets, jurisdictions implement departmentwide MBE utilization goals (e.g., a percentage of overall spending). Depending on the jurisdiction, MBE utilization targets may differ based on the industry or type of procurement—for example, goods and services contracts may have different MBE utilization targets than construction contracts.

Of the jurisdictions we studied that are not constrained by state preemption, most had programs that set contract-level MBE utilization targets. (Some jurisdictions that *are* constrained by state preemption also implement contract-level utilization goals, but those are more aspirational in nature,

without repercussions or penalties if the jurisdiction does not meet its targets.) Some interviewees expressed that contract-level MBE utilization goals may not be effective in helping MBEs participate as prime contractors, as these goals can be met through subcontractors. As such, some interviewees recommend separating prime and subcontractor utilization goals.

Whether implementing departmentwide or contract-level MBE utilization goals, enforcement varied across jurisdictions. Even where not preempted by state law, in some cases, utilization targets were strictly aspirational, while other jurisdictions had hard targets that required compliance. In jurisdictions with hard targets, there were sometimes no clear consequences or monitoring appeared weak; in others, targets seemed closely monitored and enforced. Compliance monitoring was somewhat dependent on whether the goals were set at the department or contract level and what consequences were established.

To spur progress, several interviewees shared that committed department leadership is necessary to articulate MBE utilization goals, create a plan for how the jurisdiction will reach those goals annually, and link that plan with budget allocations. Agencies may be considered out of compliance if plans are not submitted and approved. Departments may also have standardized bid language and documentation that they are required to use.

When an MBE utilization goal is put in place, vendors can be considered out of compliance if their targets are not proposed or met. As articulated in *City of Richmond v. J.A. Croson Co.*, contractors must be allowed to demonstrate that they made good-faith efforts to avoid some or all penalties for not meeting the goal. There are more or less robust ways to verify good-faith efforts, however. Before an award, jurisdictions can deem a bid “unresponsive” and disqualify it if a goal is not met during bid submission or the bid does not demonstrate sufficient good-faith efforts. After an award, if goals are not met (and the contractor fails to demonstrate a good-faith effort), states and localities may record poor performance on ratings used for future bids. Alternatively, they may withhold final payments. As one transportation agency interviewee put it, not meeting contract utilization goals “could impact a firm’s ability to get a contract, so they have to work hard to achieve or demonstrate they have gone out of their way to try to achieve utilization goals.” Of course, such compliance requires an MBE goal and plan in the first place. As one interviewee stated, “Without a plan, there is nothing to monitor for compliance.”

BOX 3

Good-Faith Efforts

One important element of race-conscious, contract-level MBE utilization targets—which is also a legal requirement per the 1989 Supreme Court case *City of Richmond v. J.A. Croson Co.*—is establishing parameters for how vendors must demonstrate that they have made “good-faith efforts” to meet targets. Good-faith efforts are defined as sufficient attempts to meet a goal that ultimately was not fully met. This is a constitutional requirement of narrow tailoring.

In interviews with procurement experts, we heard how various procurement processes assess good-faith efforts. In some jurisdictions, these processes have been standardized and require substantial documentation to be considered valid. Other jurisdictions mentioned less formal methods for documentation. One interviewee recommended against scoring good-faith efforts to avoid encouraging contractors to do the minimum required to get a passing score.

One county interviewee highlighted that requiring stringent good-faith efforts incentivizes prime vendors to build relationships with subcontractors. However, it is also important to carefully consider the relationship between setting ambitious goals and enforcing good-faith efforts. For example, we heard of one instance where a jurisdiction set a utilization target too high relative to availability, and all prospective vendors submitted good-faith efforts demonstrating that they could not meet the goal. In this instance, where adherence to good-faith efforts was structured as a pass-fail approach, procurement staff opted to cancel the solicitation altogether and ultimately contracted directly with a non-MBE. This example highlights the need for jurisdictions to set realistic utilization targets, sufficiently evaluate good-faith efforts, and have measures in place to be adaptive and flexible when it may not be possible for prime contractors to fully meet targets.

Source: Interviews with authors.

Less Stringent Purchasing Requirements or Preferences

Jurisdictions can take various steps to reduce purchasing requirements and make contracts more accessible to MBEs. They can construct these tools in a race-neutral way—for example, by using size or geographic criteria—or explicitly consider race/ethnicity where allowed.

Some jurisdictions have a “small purchase method” policy, which lifts solicitation requirements for bids below a certain threshold. For example, we heard of jurisdictions increasing dollar-amount thresholds for direct contracting if the vendor is an MBE or other DBE. We also heard of methods that allow departments to solicit fewer bids only from MBEs or other DBEs and then engage in an abridged competitive process among those entities. The thresholds varied, ranging from \$25,000 to upward of \$500,000. These strategies can significantly increase the number of contracts awarded to MBEs and

other DBEs. As one interviewee shared, “The time from the inception of the procurement to the contractor on the ground providing services can be very, very long. It can be a year or so. Providing an avenue for city departments to do that expedited process at larger contract values if they’re soliciting quotes only from MBEs and WBEs is what I would describe as an intervention that has one foot in the supplier diversity bucket and one foot in the procurement reform bucket.”

Although not particularly common, we also heard examples of race-conscious price preferences. These provide a specified percentage that is taken off a bidder’s total cost to make their bid more competitive. This preference is usually given to an MBE explicitly through its MBE certification.

However, multiple legal experts we interviewed believe these kinds of race-conscious programs are, in their words, “risky.” They anticipate that courts could constitute such a practice as an MBE set-aside and that such programs may not be upheld if challenged.

BOX 4

Implementation Assistance

Documenting a contracting disparity is only the beginning of a change management process rather than the culmination of it. Jurisdictions can face a new set of challenges, including navigating political pressure, developing programs and processes to address the disparity, and allocating expanded budget resources, which may require additional capacity and new skills.

We came across several entities that provide support and technical assistance to jurisdictions looking to operationalize a disparity study or simply improve their existing programs. Such advice is often provided individually to jurisdictions and customized to their contexts. In addition to guidance and technical assistance, implementation advisers can provide tools and resources to help embed new practices. For example, one tool we learned of offers tailored goals for contract-specific utilization targets based on MBE availability by industry. Jurisdictions can also receive help with establishing good-faith-effort procedures, such as standardized templates.

Other organizations work with jurisdictions through cohort-based programs that offer guidance, technical assistance, advice, and generalized resources and tools. Overall, for jurisdictions that want to establish new programs and processes and address challenges but are unsure of where to start, there is a strong ecosystem of support.

Source: Interviews with authors.

Governance Structures, Systems, and Capacity

Government structures, systems, and capacity are key to making progress toward overcoming barriers to procurement participation. As one industry expert interviewee described, “Organizations will implement one or two specific tools, but to really create movement, they have to change the minds of the organization in how they function in their day-to-day procurement activity. Rather than focusing on a single tool or set of tools, governments should be thinking about how they function as an organization.”

Effective Technology and Data Management Systems

A crucial element of governance is having effective technology and data systems that facilitate transparency, continuity, and efficiency in procurement processes. Simple, well-designed technology and data systems that improve the user experience can attract first-time vendors to submit bids, quotes, and proposals. Data and technology infrastructure includes processes for bid solicitation and submission, processes for tracking how bids and contracts move through the contracting system, and complete (end-to-end) contract data collection and management. Jurisdictions have a wide range of approaches to data collection and management as well as technology systems. Our interviews revealed several best-in-class features for removing barriers to procurement for small businesses in general, including MBEs.

Technology systems that allow for end-to-end monitoring throughout the entire lifespan of a contract (planning, submission, award, compliance, payment, and closeout) are considered the gold standard of equitable procurement systems. This type of system cultivates transparency in the process both internally and externally. Internally, whether procurement processes are centralized, decentralized, or hybrid, all departments have access to departmental spending, contract compliance tracking, and payment time frames. Many of these systems also have real-time reporting capabilities, which allows departments to generate reports on spending patterns, track progress on MBE utilization goals, or view databases of certified businesses. These systems are integrated with a client-facing interface, providing a level of visibility and transparency to businesses on the jurisdiction’s spending trends, payments, or prime contract compliance processes, including payments to subcontractors. This helps facilitate a user-centered bid submission process.

However, technology systems can also present barriers. For example, many jurisdictions are encumbered by legacy technology systems that were not built for end-to-end transparency or interoperability across departments. These systems are usually divided across departments, such that

different units manage certain phases of the contract process and only have access to the data necessary for a particular phase. While many of these legacy systems do include procurement modules, they can be inflexible and not well-customized to a government's structure.

"A lot of jurisdictions have a financial [enterprise resource planning system]. They have a vendor management tool. They have a contract management tool. They might have best-in-class tools for each of these functions. The challenge is they're spending all of their time integrating those systems, making users jump through multiple systems, or if they have a single sign-on, spending all of their resources figuring out how to maintain that system."

—City interviewee

Lack of sufficient technology systems also hinders the ability to collect data on spending. A surprising number of states or localities cannot say what share of prime and/or subcontracted procurement goes to MBEs or other DBEs. Sometimes—perhaps even often—jurisdictions have data systems that adequately track prime contractor spending but are unable to track subcontractor spending. Since MBEs are more often involved in government procurement as subcontractors, being unable to track subcontracting dollars can severely hinder progress toward increased spending with those businesses. One jurisdiction we spoke with described their lack of a dedicated procurement portal which, until recently, could not track overall spending. In another instance, a supplier diversity office lacked access to procurement data, preventing them from tracking spending disaggregated by race/ethnicity, gender, or other attributes. Without adequate data tracking and management systems, visibility, and transparency, it is challenging or impossible to hold departments accountable to a variety of procurement goals.

As highlighted earlier in this report, many jurisdictions are operating with legacy technology systems that are disconnected from other parts of the procurement process and extremely difficult to change. Despite the availability of new procurement-specific technology platforms that offer end-to-end monitoring and data management, some interviewees reported how buying technology systems and implementing improvements requires significant resources and political will, especially when other systems are already in place. Further, equitable procurement experts cautioned against relying too heavily on technology to solve inefficiencies, emphasizing that "technology is an enabler, but it cannot

fix the people...and the processes around it.” Investment in equitable procurement processes should be understood as an investment in people. Although technology plays an essential role in facilitating certain processes, it can be less effective or create other barriers and inefficiencies without equal investment in the people and processes around procurement.

Setting Equity as a Priority and Establishing a Culture Shift

At the core of equitable policymaking and implementation is the commitment to incorporating equity as a fundamental principle of an organization and developing the capacity to operationalize and deliver on that principle. The culture and values underpinning a local government play an important role, but government leadership must also show willingness to maintain equity as a guiding principle (Sklar 2020).

Throughout our interviews, we heard a resounding theme that having support from government leadership is a critical factor in being able to establish and effectively implement procurement strategies that lower barriers to participation. These supports ranged from executive orders and mandates to a general culture shift and prioritization of equity across different departments. When political leaders such as mayors or council members prioritize equity in procurement and can motivate all levels of local government behind these policies and programs, improving procurement systems becomes a “change management exercise,” as described by one industry expert interviewee.

Strong political will and commitment to equity priorities from elected leadership are critical for instituting significant and long-lasting change, with one interviewee calling it “the single most important factor.” Another interviewee said, “It takes there being somebody at the top who has both the will and desire, and it can’t just be external pressure...it has to be slightly intrinsic to really leverage the local power and local dollars to economic development and an attempt at economic equity. It takes personal will.”

Interviewees also emphasized the importance of chief procurement officers. One industry expert remarked, “They have to be positioned very strategically...What you get is a lot of CPOs [chief procurement officers] who are the top dog. They’re over everything. Unless that CPO themselves has a passion for compliance, then nothing is going to get pushed through.” The role of compliance directors is also important. As one interviewee shared, “Rarely in my experience do CPOs have primary control over administering race-conscious programs. But CPOs have a lot of bureaucratic power. Heads of compliance offices often do have those values—they are just not often positioned correctly and are sometimes shut out of the procurement process at crucial levels.”

In addition to governmentwide support for removing barriers to procurement programs, interviewees highlighted that these programs are most successful within government structures where equity-focused staff or offices are fully embedded throughout the procurement process. It also matters what authority these offices have. Interviewees spoke to the need to empower the staff accountable for overseeing procurement reform. As one expert said, “I must be a director to oversee procurement reform. I have to be sitting around the table with my peers, and this has to be a top priority for the county manager and the assistant county manager.”

Jurisdictions need to have internal systems in place to develop new procurement processes that better accommodate all businesses, such as establishing enforcement or compliance structures and granting sufficient authority to the operating department to monitor progress made on these goals. There must also be governmentwide willingness to change and adapt existing processes that no longer fulfill a need. Multiple interviewees mentioned the benefits of having staff focused on these process improvements with intentionality and accountability. For example, when a city’s equity-focused department works closely with the procurement and purchasing departments to both monitor all contract-specific MBE utilization goals and evaluate government staff on departmental inclusion goals, compliance increases. Further, governments must have tools and systems in place that allow procurement leadership and personnel to act when discrimination is potentially occurring. This can take the form of halting a contract from moving forward, acting on claims of discrimination by conducting investigations, and enforcing disciplinary action for prime vendors that do not allow MBEs that were originally on the contract to perform work. Oversight and accountability can also come from outside of the procurement process itself, such as from city comptrollers or external observers.

To this end, governments may benefit from having a separate equity-focused office that reports directly to the agency’s chief decisionmaker and plays a critical role throughout the entire purchasing and contracting process, including drafting RFPs; soliciting bids, quotes, and proposals; drafting contracts; and overseeing contract compliance. One interviewee from a city that only recently established this structure within procurement noted that, when this was not the case, “inclusion and diversity were always an afterthought in the whole purchasing process.” We also spoke with a leader from an equity-focused office at the state level, who attributed recent increases in the state’s spending with MBEs to top-down support from the state governor and other leadership that led to the creation of the equity-focused office. With this office in place, the state has increased capacity for outreach, trainings, and certification supports for MBEs and has already seen benefits. Or, as another city interviewee said:

“On the policy side, when you have a system change...if you don’t have...one organization responsible for it, you are not [going to] get any movement. You need that accountability. Having an organization responsible for that piece, whether it’s the technology, whether it’s the policy, whether it’s the legal advocacy...The oversight that I’m talking about...that is a key piece.”

—City interviewee

Conversely, we also heard of instances where support from executive leadership was not present and how this largely prevented reforms to procurement practices. For example, a leader from one city’s procurement department described how “the interim commissioner did not want a disparity study...He didn’t want to go down that road, so it all stopped.”

Operationalizing these priorities is a critical step. Local laws, measures, or codes that enforce practices like MBE utilization goals can help drive change. As one city agency representative described, “Sometimes, you need the heavy hand of legislation to legally make it happen...Prior to the city’s local laws, there was really nothing that forced the hand of agencies to both do this but also track it.” In places without codes and municipal law backing goals, they can easily become deprioritized over time or with changes in political leadership. In addition to implementing laws throughout a city, region, or state, commitment across government agencies and quasi-governmental agencies fosters more cohesive strategies between governments and partnering entities (e.g., transportation agencies), which will ultimately grow the opportunities available to MBEs. As leaders from one state procurement department shared, “We collaborate with executive agencies of cities and towns and other organizations by trying to identify and remove barriers for diverse and small businesses and increase spending with those businesses through contracting opportunities.”

Operational Structure and Staffing Capacity

Collaboration, openness, and simplifying and streamlining existing processes are critical values and cultural practices to cultivate equitable procurement processes (Sklar 2020). However, success requires more—a local government or a government department needs the capacity to operationalize equity as a guiding principle. Capacity includes having the right skills and appropriate positions within the team, the right platforms to facilitate efficient processes and collaboration, and the necessary

resources to support these operations. It also entails having technology and data infrastructure in place to hold departments accountable and monitor progress toward achieving equity goals.

Across our interviews, we observed a wide range of procurement department configurations, where they sit within broader city structures, and the implications for their overall role. Generally, interviewees referred to these structures as centralized, decentralized, or hybrid. In a centralized procurement system, virtually all purchasing is administered by a designated office, sometimes within the finance department or through a stand-alone purchasing department. For the most part, centralized procurement systems administer the contracting process as well as implement any programs to remove barriers to participation. Within the centralized office, there may be subdivisions or small teams with a specific focus on supplier diversity, economic inclusion, or compliance. Conversely, in decentralized structures, procurement and purchasing decisions are handled largely at the department level, granting individual departments more agency and authority over solicitation and purchasing processes.

Many of the jurisdictions we spoke with could be considered hybrid models, with different degrees of centralization and decentralization. For example, under a “hub and spoke” model, while there is a central purchasing department, departments have some authority over purchases under a specific threshold. Further, the central purchasing office may provide each department with a procurement officer or liaison who acts as a representative of the purchasing department and guides departments in following specific protocol or other requirements. Another feature of a hybrid model is that compliance monitoring can be decoupled from the procurement department, such as sitting within a comptroller. Interviewees shared different benefits and drawbacks to centralized, decentralized, and hybrid models (box 5).

In instances where a procurement department or procurement process is attempting to transition from one structure to another, having the appropriate people, power, and resources to operate is a critical factor. Participants expressed that staffing and having dedicated teams to manage new processes and/or monitor compliance is important but also a challenge. Most challenges centered on the bureaucratic hassle and stringent requirements needed to get budget approval for positions, especially new positions. However, sufficient staffing, especially when new processes are being introduced, is crucial to sustaining knowledge over time and withstanding staff turnover. As one participant put it, when a small number of people hold all the institutional knowledge, “Individual losses and individual attrition can have a major impact on the sustainability of the program.”

BOX 5

Where Should Procurement Sit in the Government Organizational Structure?

We heard the most support for more centralized rather than decentralized processes. This was especially true for jurisdictions that are actively in the process of establishing more equity-focused protocols and practices. The change management or process reengineering necessary to establish new equity-focused programs can be undermined when departments operate in decentralized ways. Challenges arise when, according to one city interviewee, “Individual city departments have an unbelievable amount of agency in when they procure things, who they select, and how they run the procurement from...an equity perspective...[there is a] ceiling to the efficacy of these programs when some other...procurement reforms haven’t taken place yet.”

Relatedly, where the procurement department sits within the broader government structure affects its level of command over existing procurement processes as well as its ability to establish new processes and systems. When procurement departments lack the agency and authority to enforce governmentwide procurement processes and policies, they struggle to hold other departments accountable. Positioning procurement departments as accountable to the highest executive levels of government was highlighted as a key element of enforcing a more equitable procurement system.

Source: Interviews with authors.

Summarizing Options for Action

Based on these findings, we offer the following options to jurisdictions aiming to adjust their policies and programs to accommodate a changing legal landscape while lowering barriers to procurement. Our interviews reveal that there is no one-size-fits-all intervention, but rather a wide range of tools and approaches that jurisdictions can employ. We also heard that, for jurisdictions to truly make contracting equitable, they should undertake these interventions in tandem and with the support of political leaders. It is also worth noting that procurement reforms can only achieve so much if other aspects of the business development support and finance ecosystems are functioning poorly. Finally, race-neutral strategies alone may not achieve all desired results, and removing race-conscious tools may lead to less contracting with MBEs (Lohrentz 2015).

Jurisdictions can bolster race-neutral and, where allowed, race-conscious tools to increase accessibility and efficiency in their contracting processes for all vendors, including those that historically have lacked access. Strategies to remove barriers to participation in public contracting include:

- forecasting upcoming procurements on a quarterly basis;
- establishing personalized outreach practices;
- offering hands-on, individualized technical assistance and capacity building to small businesses navigating the contracting process;
- organizing preproposal workshops in advance of solicitations;
- making the certification process more streamlined by incorporating practices such as allowing for reciprocal cross-jurisdictional certifications, offering support and guidance for businesses navigating the certification process, and simplifying the requirements to be less burdensome;
- leveraging tools that help create smaller, more feasible contracting opportunities (e.g., intentional unbundling) or establishing small purchase methods that require jurisdictions to solicit quotes from micro businesses or local businesses, which may help reach MBEs;
- developing an internal database of new vendors that departments can use when soliciting bids, quotes, or proposals for small-dollar purchases;
- removing requirements that could present potential barriers (e.g., cumbersome insurance or bonding requirements) or establishing supports related to accessing bonds (e.g., technical assistance or financial assistance), with the goal of making it easier for MBEs to obtain bonds when necessary;
- reviewing contracts on a “best-value” rather than purely lowest-cost basis;
- providing adequate support to firms after they win a contract, especially if they are new to public contracting; and
- paying vendors in a timely manner.

To maintain progress on lowering barriers to procurement amid changing legal requirements, and to respond to potential legal battles, jurisdictions should establish and maintain streamlined systems for the collection, tracking, and management of procurement spending data. Good-quality spending data will be critical to understanding the prevalence of procurement spending by owner demographics and other firm attributes, such as location and size. Establishing robust data systems and consistently tracking spending data would likely also facilitate benefits related to efficiency, including prompt payment and contract closeout. Both jurisdictions with hard contract utilization targets and those with more aspirational goals need quality insights into their performance and the tools to be able to reach their goals. This could involve incorporating utilization goals into departments’ annual performance

evaluations and establishing systems to track progress toward these goals. Jurisdictions could make data tracking progress and performance on these goals visible across departments to foster a culture of transparency and accountability. Specifically, success is more likely when governments can “define performance metrics in procurements and contracts and require data by subgroup so that it’s clear when services aren’t being delivered equitably” (Harvard Kennedy School Government Performance Lab 2022, 14). The success of such transitions and endeavors in change management will require government leadership’s commitment to and support for these practices.

Establish goals, even if aspirational ones, for MBE utilization—and create a plan to meet them.

Jurisdictions should continue to scan the local marketplace to establish sound MBE utilization goals, set separate prime and subcontractor goals, tailor their goals to the type of procurement and firm, create a plan for how they will reach those goals annually, and link that plan with budget allocations.

Strengthen mandates for and authority of procurement reform. In addition to procurement departments making internal changes to their programs and practices, jurisdictions should also think critically about their government structures and the relationship between the procurement department and other departments (such as finance or economic development). Specifically, jurisdictions should advocate for procurement departments to have strong positions within government, by both putting them at the same level as other departments and providing them with the necessary authority to set and monitor efforts to significantly broaden the pool of government contractors and subcontractors.

Conclusion

Several recent court cases have profoundly changed the landscape of public sector programs intended to help small-business owners of color. In the 2023 case *Ultima Servs. Corp. v. US Department of Agriculture*, a federal district court ruled that it was unconstitutional for the SBA’s 8(a) Business Development program—which aims to support historically disadvantaged groups in earning government contracting dollars—to equate race with social disadvantage. In other words, under SBA 8(a), small-business owners can no longer qualify as “historically disadvantaged” based on their racial or ethnic identity alone. More recently, a US District Court ruled in *Jeffrey Nuziard, et al. v. Minority Business Development Agency, et al.* that the MBDA’s race-conscious programming was unconstitutional, on the grounds that using racial/ethnic membership as a condition for government services violates the Constitution’s guarantee of equal protection. Other court cases, such as *Landscape Consultants of Texas Inc., et al. v. City of Houston, et al.*, have directly touched on MBEs in local public procurement policies and programs.¹⁴

Put together, these cases and others are shifting standards of proof from group status or aggregate quantitative disparities to documented, specific instances of discriminatory practices in government programs. This is a difficult standard to meet. While disparity studies have long provided the legal underpinning for race-conscious programming, they may no longer provide adequate legal justification for race-conscious MBE programs. As one industry expert interviewee said about recent court rulings, “They’re changing the test. If you need identified instances of intentional discrimination by the agency, and you have to somehow prove that any disparities that you find have ruled out any and all possible variables, that’s impossible. If that’s the test, then a disparity study will not get you there.”

In light of these changes in the legal landscape and remaining uncertainty about what programs and policies will have a legal basis going forward, interviewees recommended a variety of strategies. These recommendations are largely race neutral, meaning rather than exclusively benefiting racial minority groups, they aim to improve overall procurement processes for all vendors and strengthen departments’ practices against potential legal threats. But these reforms can be designed in ways that help reduce barriers to procurement and therefore advance equity goals. As described, these recommendations include establishing prompt payment and contract closeout practices, maintaining data and tracking systems, and devoting resources to capacity building. And there are several examples across the US and abroad of governments taking these steps. For example, one interviewee noted, “In several countries in Latin America—Chile, Colombia, Paraguay—procurement agencies are investing much more in having nearly constant live data about what their markets can and cannot do and how many MBEs there are in each sector.”

Despite the current legal climate, some interviewees offered hope and optimism about the future and potential of MBE contracting. This hope stemmed from both the power of constituents and procurement departments committed to advancing contracting opportunities for historically disadvantaged groups and the often “untapped power” of public procurement. One industry expert described how “governments are not going to stop getting calls from their growing minority constituencies, who are aware that their opportunities are not the same. They’re not going to stop getting pressure to do something to create opportunity.” As the nation enters a potentially new era of contracting, governments and leadership at all levels still have a significant role to play in determining success and leveling the playing field in procurement.

Notes

- ¹ Darren Rowles and Scott Cahalan, “Local Government Procurement Laws – Who the Heck is a ‘Responsible Bidder’?”, Smith Gambrell Russell Law, September 24, 2019, <https://www.sgrlaw.com/local-government-procurement-laws-who-the-heck-is-a-responsible-bidder/>.
- ² See Bates and Robb 2013; Gabriella Chiarenza, “Surveys Highlight Black-Owned Small Businesses’ Credit Access Challenges; Study Hints at a Fairer Approach,” Fed Communities, August 3, 2022, <https://fedcommunities.org/black-owned-small-businesses-credit-access-challenges/>; Theodos and Su 2023; and US Minority Business Development Agency 2010.
- ³ City of Richmond v. J.A. Croson Co., 488 US 469 (1989).
- ⁴ City of Richmond v. J.A. Croson Co., 488 US 469 (1989).
- ⁵ “DBE Final Rule - Section by Section Analysis,” US Department of Transportation, updated December 22, 2014, <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/dbe-final-rule-section-section-analysis>.
- ⁶ “Disparity Study: A Tool Towards Equitable Procurement,” City of Boston, updated March 21, 2022, <https://www.boston.gov/government/cabinets/economic-opportunity-and-inclusion/disparity-study-tool-towards-equitable-procurement>.
- ⁷ Bob Ferguson, “Use Of Race- Or Sex-Conscious Measures or Preferences to Remedy Discrimination in State Contracting,” Washington State Office of the Attorney General, March 20, 2017, <https://www.atg.wa.gov/ago-opinions/use-race-or-sex-conscious-measures-or-preferences-remedy-discrimination-state>; Tim Lohrentz, *The Impact of Proposition 209 on California’s MWBEs* (Oakland, CA: Equal Justice Society, 2015).
- ⁸ Amy Howe, “Supreme Court strikes down affirmative action programs in college admissions,” SCOTUS Blog, June 29, 2023, <https://www.scotusblog.com/2023/06/supreme-court-strikes-down-affirmative-action-programs-in-college-admissions/>.
- ⁹ Julian Mark, “SBA Program Upended in Wake of Supreme Court Affirmative Action Ruling,” *Washington Post*, September 7, 2023, <https://www.washingtonpost.com/business/2023/09/07/sba-8a-program-ruling-affirmative-action/>.
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- ¹¹ Nuziard et al. v. Minority Business Development Agency et al. (N.D. Tex. 2023).
- ¹² Bruce Katz, Domenika Lynch, Victoria Orozco, Milena Dovali, and Benjamin Weiser, “Unlocking the Procurement Economy: Lessons from San Antonio and El Paso,” Aspen Institute (blog), February 8, 2024, <https://www.aspeninstitute.org/blog-posts/unlocking-the-procurement-economy/>.
- ¹³ “SBA Releases FY 2020 Disaggregated Contracting Data,” US Small Business Administration, December 1, 2021, <https://proxy.www.sba.gov/blog/sba-releases-fy-2020-disaggregated-contracting-data>.
- ¹⁴ Wiessner, “Houston Sued over Program Setting Aside Public Contracts for Minorities”; Zuvanich, “Houston Companies Claim in Federal Lawsuit that City Program Awarding Contracts to Minority-Owned Businesses Is Unconstitutional.”

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