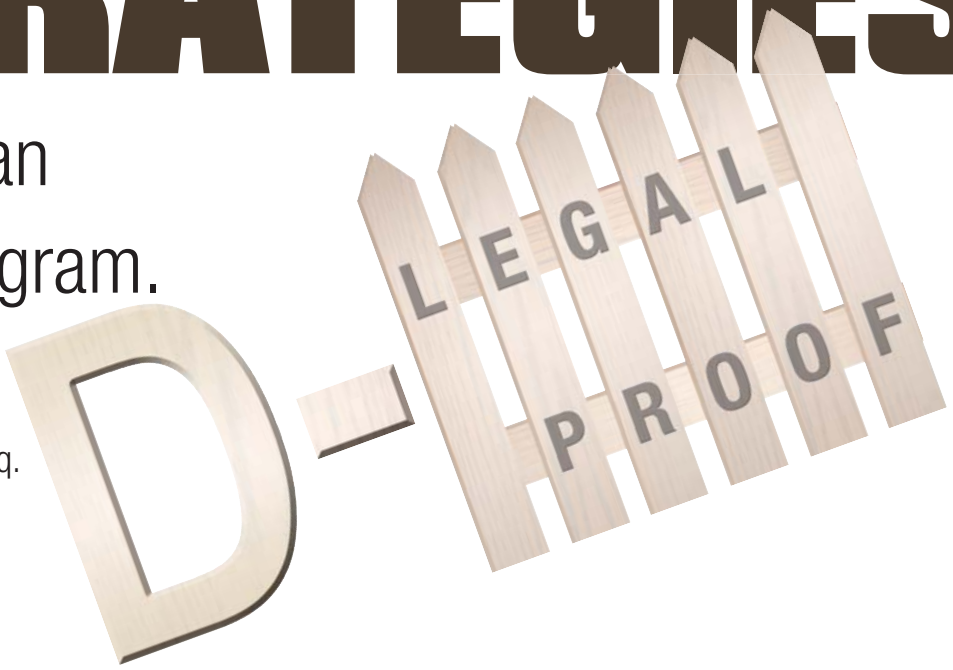
LITIGATION STRATEGIES

Defending an M/WBE program.



By Sherry J. Williams, Esq.

In the last few years, there has been increasing support for the notion that the litigation of M/WBE programs must be dispassionate and cordial in order to be considered "objective and fair." How many dispassionate and cordial litigators do you know? This is a cop-out. There is also the misconception that disparity studies alone can "carry the day" in defending M/WBE programs. Wrong again!

Although an important component of the defense, disparity studies are just one piece of evidence in the overall strategy for defending an M/WBE program. I've even heard it said that judges will view disparity studies conducted by white firms as more "objective and independent." How insulting!

Because of these misperceptions, public entities are going to court to defend their M/WBE programs without an appropriate litigation strategy. The opponents of M/WBE programs, on the other hand, have very clear-cut, well-developed strategies. When determining which public entities to sue, they look well beyond whether a public entity has a disparity study. In fact, quite often, the disparity study has little to do with their choice.

So what makes a public entity's M/WBE program vulnerable? Here's a partial list of what challengers look for:

•Leaders and procurement agents who are not supportive of the M/WBE program.

•Procurement agents, engineers, and inspectors who are too close in their relationships with large contractors and contractor associations.

•Public entities that, despite strong minority or female leadership and strong rhetoric supporting M/WBE programs, still have M/WBE programs that are inflexible, archaic, and on autopilot (meaning that they depend on the stated goal to do all of the work).

•M/WBE program staffs with limited procurement background or business development knowledge, which are not empowered to resolve individual contract disputes in a manner that does not jeopardize the entire M/WBE program.

•M/WBE program leaders who do not seek or integrate input from the community for the benefit of the M/WBE program.

•M/WBE programs with goals that are very high in comparison to the number of available minority- and woman-owned businesses that are able to perform commercially viable work.

•Public entities that have not worked to ensure that their M/WBE program does not pit small, white male-owned firms against M/WBEs, to the detriment of both and to the benefit of large contractors.

•Public entities that do not have a strong working relationship with contractor associations and potential challengers.

•Absence of or a poorly performed disparity study.

•A judicial circuit where the position of the district court and the court of appeals regarding M/WBE programs and other affirmative action initiatives is, at worst, hostile and, at best, indifferent.

Disparity Studies

The disparity study is only one element on a long list of items that determine whether an organization is susceptible to lawsuit. It is far better, and far cheaper, in terms of a litigation strategy, to conduct the above self-assessment to determine whether your organization is vulnerable to a legal challenge. Still not convinced? In the recent *Rothe Development Corp. v. Department of Defense (No. 2008-101, Fed. Ct., Nov. 4, 2008)*, we learned that it takes far more than throwing a bunch of disparity studies on the table to defend an M/WBE program. (In that case, the U.S. Court of Appeals for the Federal Circuit, a Washington, D.C.-based panel with limited jurisdiction, found that the Section 1207 program that the DoD once used to help it meet its contracting goals for small, minority-, and woman-owned businesses is unconstitutional. The court ruled that "because Congress did not have a 'strong basis in evidence' upon which to conclude that [the] DoD was a passive participant in pervasive, national racial discrimination…the statute fails strict scrutiny." (For more on the *Rothe* case, see page 36.)

If anything, *Rothe* showed that *any* disparity study performed by *any* consultant can be critiqued and challenged. Business is like a chess game played at 100 miles per hour. As a business measure, a disparity study seeks to study a moving target, and any researcher asserting that a study perfectly captures that moving target is not being forthright.

Defense Strategies

Even when public entities take the proper steps to make their M/WBE programs "litigation-proof," challenges still arise. When a challenge is received, the following steps should be taken:

1) First, determine if the individual challenge to the program can be resolved through procurement administrative procedures. Often, the challenger has violated procurement rules and is seeking relief by questioning the M/WBE program. One should avoid 14th Amendment challenges as much as possible.

2) If the challenge cannot be resolved in this manner, it should be asked if one-on-one discussions led by the procurement director with the challenger could result in a resolution. It should also be determined if the public entity is willing to conduct a complete self-assessment (like the one outlined above).

3) If litigation cannot be avoided, what is the strategy for settlement? What can the public entity live with and what cannot be sacrificed?

4) If settlement is not possible, one needs to prepare for trial.

Here's an important side note. In many disparity study RFPs, disparity study consultants are now evaluated on the number of times they have been to court and won. The objective of the disparity study consultant, however, should be to *never* make it to the stand!

In my first deposition, defending

Shelby County Government, I had the honor and privilege to work with one of Memphis' most venerable litigators, Leo Bearnum, who had a perfect win record. He quickly taught this young whippersnapper that the settlement agreement was a litigator's best friend. A litigator could never have a perfect win record without mastering the art of settlement negotiations. In that litigation, I learned that my job was to keep my client out of the courtroom. Once settlement discussions were under way, it was then up to the public entity and its lawyers to negotiate a settlement agreement in its favor.

What it comes down to is that *every* M/WBE program must have a full litigation strategy, although disparity studies continue to be very important in protecting the M/WBE program. The disparity study can provide the baseline and fundamentals upon which to build a full strategy, but it is only a tool, not a panacea. To be utilized effectively, public entities must appreciate what these studies can and cannot do. Strong litigation, like other anticipated litigation, requires a complete and expansive strategy. ◆

Sherry Williams, Esq. *is president and CEO of* ***Miller³ Consulting, Inc.*** *She has more than 17 years of consulting experience in the areas of procurement, S/M/W/DBE programs, disparity studies, human resources, and EEO consulting. Some of her projects have led to changes in legislation, policies and procedures, and organization structures at the national and local levels for a variety of organizations, including hospitals, airports, schools systems, corporations, municipal governments, and federal agencies.*

In 2007 she combined her life-long passion for writing and her professional experience in her first published novel, "Black Brass."

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