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AGC of Minnesota

November 4, 2016

Alison Canty
Star of the North Fellowship Policy and Equity Analyst
Department of Administration, Materials Management Division
112 Administration Building
50 Sherburne Ave.
St. Paul, MN 55155

Dear Ms. Canty,

Please find attached the comments and recommendations of AGC of Minnesota regarding the Keen Independent Research Technical Proposal to perform the Minnesota Disparity Study and the Keen Independent Survey of Minnesota Construction Businesses.

We look forward to continuing our discussions and working collaboratively on this important project with all stakeholders.

Sincerely,

David C. Semerad
CEO

Attachment

AGC OF MINNESOTA

COMMENTS AND RECOMMENDATIONS

REGARDING

KEEN INDEPENDENT RESEARCH

TECHNICAL PROPOSAL

TO PERFORM THE MINNESOTA DISPARITY STUDY

AND

THE KEEN INDEPENDENT SURVEY OF MINNESOTA CONSTRUCTION BUSINESSES

NOVEMBER 4, 2016

These comments and recommendations pertain to two related topics: 1) the November 2015 Technical Proposal by Keen Independent Research, produced in response to the Minnesota Department of Administration's RFP to perform a disparity study; and 2) the Keen Independent Survey of Minnesota Construction Businesses, which is part of the October 2016 Phase 1 Draft of the state disparity study.

THE KEEN TECHNICAL PROPOSAL

In its Technical Proposal response to the RFP, Keen Independent Research detailed the methodology for the disparity study, which the Denver-based company is undertaking for the state. This paper reviews the proposed methodology of the Technical Proposal. The intention of this paper is to make comments and recommendations about the study's methodology while changes to the disparity study can still be made.

The Department of Administration has commissioned a multi-jurisdictional disparity study. The Technical Proposal lists the nine agencies and government units to be covered by the study: the state; Metropolitan Council; Metropolitan Airports Commission; Mosquito Control District; Minnesota Sports Facility Authority; Minnesota State Colleges and Universities; the City of St. Paul; Minneapolis; and Hennepin County. (Technical Proposal, section 1- page 3) Ramsey County will not be part of the disparity study. Per the RFP, the study will only cover state and locally funded contracts; federally funded contracts, such as Disadvantaged Business

Enterprise contracts awarded by the Minnesota Department of Transportation, will not be part of the study. (1-4; 3-26)

In its Technical Proposal, Keen Independent Research promises to include three distinct types of information in the upcoming disparity study: 1) quantitative analyses; 2) qualitative information, and 3) comparisons with other local disparity studies. (3-2) The study's information will cover the four categories of contracts specified in the study RFP: construction; professional and technical services; products, goods, and services; and miscellaneous. (3-3) This paper focuses on construction.

A disparity study is, at its core, the analysis of whether minority and women-owned firms have received a smaller percentage of government contracting dollars than expected in light of their marketplace availability. As the Technical Proposal correctly observes, this analysis is necessary because, "A government agency *must* establish and thoroughly examine evidence to determine whether" discrimination-justifying racial, gender, and ethnic preferences in public contracting are justified. (emphasis added; 1-2) Can the disparity study methodology outlined in the Keen Technical Proposal establish discrimination-justifying preferences?

Here are the five areas of the study's methodology of greatest concern:

1. Target Group Program

As is required by the RFP, the disparity study consultant lists the four Targeted Group businesses which are part of the disparity study team. (2-4) The Technical Proposal, however, is not clear on how much, if any, of the study will be devoted to the Targeted Group program. This program should be included.

Under the Targeted Group program, MWBE firms can enjoy as much as a 6% price preference of up to \$60,000 on both prime contract and subcontract bids. The MWBE groups eligible for this price preference are based on the 2009 state disparity study. The Technical Proposal is critical of the 2009 study, stating that, “We consider the proposed Keen Independent definition and approach to the utilization and disparity analyses to be an enhancement over that of the 2009 State Disparity Study.” (3-4)

A recent article in *MPR News* highlighted many of the flaws of the Targeted Group program. One business owner interviewed complained that, “Lucrative, long term projects tend to go to incumbent contractors,” rather than the newer firms signed up for the Targeted Group program. (“Minn. Minority firms call program meant to help them maddening, broken,” by Emma Spong, August 9, 2016) If that is, in fact, a problem, the race neutral approach of rotating those firms awarded government contracts is one key solution.

2. Sources of Availability Data

At the heart of any effectively done disparity study is its availability analysis -- and an availability analysis is only as good as its data sources. The Technical Proposal explains that, “Keen Independent’s proposed approach for the Minnesota Disparity Study is to develop initial lists from public agency lists and Dun & Bradstreet.” (3-7) Additional availability sources specified in the Proposal are “bidders lists, prequalification lists, and other databases of firms that have expressed an interest in an agency’s work.” (3-17)

A. Dun & Bradstreet

It is a bit incongruous that the Technical Proposal lists Dun & Bradstreet data as an availability source, since that very same proposal criticizes another, local disparity study for

using D&B: “When Keen Independent interviews the owners of firms on a Dun & Bradstreet list, many indicate that they are not qualified and interested in a public agency’s work. And, those who are qualified and interested, are not equally qualified for all the work in their subindustry.” (3-7)

The admitted inability of Dun & Bradstreet data to capture those firms that are truly qualified and interested is crippling. The United States Supreme Court decision in *Richmond v. Croson* (discussed on page 1-2 of the Technical Proposal) mandates that the relevant statistical pool of firms deemed available should include only those MWBEs that are truly qualified, willing, and able to complete government contracts. That pool is then compared to those non-MWBE who are similarly qualified, willing, and able.

Of these three requirements, “qualified” may be the most crucial. Qualifications are a matter of great significance in public contracting. Otherwise, awarding contracts solely on the basis of low bid might result in shoddy work, safety issues, or cost overruns. The nine jurisdictions to be covered by the disparity study -- and the people of Minnesota -- do not want the work on a bridge, highway or tunnel done by an unqualified construction company. Dun & Bradstreet data do not satisfy *Croson*’s “qualified” requirement.

B. Other Databases of Available Firms

What are the other sources of availability that the disparity study will use? One identified source, prequalified firms, (3-17) is fine. Prequalified firms are “qualified, willing and able.” Another listed source of available firms is “bidders lists.” Does this mean firms which have actually bid on contracts? If so, this is a good source of availability data. But, if the term “bidders list” means those firms which have simply signed up for a list expressing interest in contracting with the government, the list does not necessarily establish “qualified” and “able.”

Nor would lists of certified Minority and Women owned Business Enterprises meet *Croson's* “qualified, willing and able” standard. Certification is not a measure of firms which are actually capable of completing public construction contracts. Certification merely means these firms are bona fide MWBEs.

3. Weaknesses of Utilization Data

The Technical Proposal makes the correct decision to determine “the relative utilization of minority-and women-owned businesses based on contract dollars, not number of firms receiving work or number of contract awards.” (3-4) However, the utilization data is far from complete.

A. Insufficient Subcontractor Data

Minnesota State Colleges and Universities – There are 54 campuses across the state, and the agency issues more than 200,000 procurements each year, but “MnSCU reports that it does not maintain data for subcontractors.” (3-20) This is not merely a data collection problem. WBEs and MBEs do a large amount of their work on subcontracts. As a result, it may well be true that MBE and WBE utilization has been understated. This may create a disparity where perhaps one does not exist, or exists to a lesser degree.

Hennepin County – The County has some subcontractor data, but apparently the data is incomplete: “It may be that subcontract data are only complete for contracts with SBE subcontracting goals.” (3-20) If so, it will not be possible to accurately track contract award dollars, especially for MWBEs, who do so much of their work as subcontractors.

It is unfair to blame a disparity study consultant for the inability of local governments and agencies to supply complete subcontracting data. Nevertheless, the *Croson* decision criticized Richmond for its failure to have sufficient subcontracting information, and *Croson* was handed down more than 25 years ago. What will Keen Independent Research do to remedy a similar deficiency in Minnesota?

B. Insufficient Retention of Records

The Technical Proposal proposes a five-year time period to be covered by the disparity study, “when such [prime and sub] contract data are available for an agency.” (3-4) Often the data are not.

Mosquito Control District – “Contract data are available for the past one to three years, depending on industry.” (3-20) This means that, at most, only three years of construction data can be analyzed. Because public contracting can fluctuate wildly due to changes in the economy or the political landscape, it is much preferable to have the five years proposed in the Technical Proposal.

City of St. Paul -- “The RFP indicates that these [prime and subcontract] data are available for two years.” (3-20) Again, it is unfair to blame the disparity study consultant for the government’s failure to keep proper records. But these flaws do certainly impact the persuasiveness of the disparity study underway.

And, it is ironic that the government imposes a higher standard for record retention on the contractors than the government expects of itself. Minnesota Statutes 16C.05, subdivision 5 mandates contractors retain contracting records for “a minimum of six years.”

4. Combining Prime Contractors and Subcontractors

The most problematic issue in the Technical Proposal is the combining of prime and subcontractor data in its disparity ratios. The proposal is not committed to doing so. The proposal states that in the disparity study, Keen Independent Research could “separately examine prime versus sub work if appropriate.” (3-4) Separating prime contractors and subcontractors is appropriate, and should be done in the upcoming study.

Prime contracts are between the government and a contractor. Prime construction contracts are usually, though not always, awarded to the low bidder. Subcontracts, on the other hand, are between the prime and sub, without the government’s direct involvement. While price is typically part of the prime’s decision making in determining which sub gets the work, there are other considerations, including meeting MWBE goals.

It is vital for a disparity study to include disparity ratios separately for prime contracting and subcontracting. What if the study’s disparity ratios suggest discrimination in public construction contracts? Unless it can be determined where in the contracting process discrimination, if any, is occurring, no effective remedy is possible. If MWBE primes are being discriminated against – for instance, by procurement officials working in the local government units in the study – the remedy would be within the procurement bureaucracy. If MWBE subcontractors are being discriminated against by primes, the most effective remedy would be directed at primes. Combining primes and subs makes it far more difficult, and perhaps impossible, for the government to create effective remedies for discrimination found in the public contracting process.

The United States Commission on Civil Rights agrees. Recommendation 11 states that disparity studies should “separate analyses for prime and subcontractor data. Because minority and women owned enterprises are more likely to receive subcontracts, analysts should compile disparity ratios comparing only prime awards for each group to the total prime awards. Similarly, they should compare subcontract awards for each group to the total subcontract awards.” (“Disparity Studies as Evidence of Discrimination,” pages 77-78)

5. Qualitative Analysis

Anecdotal allegations of discrimination are part of virtually all disparity studies and they will be part of the Minnesota study. The anecdotes – what Keen Independent Research termed the “qualitative analysis portion of the study” (3-10) – will be obtained through five public hearings; focus groups with representatives of the business community and government procurement staff; 80 personal interviews; written public comments; telephone and online interviews; and review of complaints received by agencies. (3-10)

Of these, by far the most effective source of qualitative information is the last, the review of complaints made to agencies.

It is vital to first note that the Technical Proposal promises no attempt at verifying the claims of discrimination that will result from the interviews, focus groups and the rest. It seems a matter of basic fairness that any preferential program which disadvantages some Minnesotans according to their race, ethnicity, and gender while advantaging others – as the MWBE programs of the various government agencies in the study do -- should only be permitted where discrimination has been shown to be real, and not simply perceived. Unless they are investigated, these anecdotal accounts remain mere perceptions of discrimination.

What makes the complaints received by the local government units so potentially

effective is that these complaints may well have already been investigated. If, for instance, there are complaints of discrimination in loan denials by banks, then the lending practices of banks may have been investigated. If not, the complaints certainly should be investigated. The banks should be given the opportunity to explain their decisions. As should prime contractors, in the event primes are accused of turning down MWBE subs for racist reasons. Documentation – maybe the explanation for hiring the non-MWBE was a lower price quoted – is the best defense. And this documentation is vastly more likely to be found in the complaints filed with the government than in the complaints that no doubt will be aired in interviews and focus groups.

KEEN INDEPENDENT SURVEY OF MINNESOTA CONSTRUCTION BUSINESSES

As part of the process of determining availability, the Technical Proposal promises that, “The study team will conduct availability interviews through a combination of online and telephone” surveys. (3-24) The actual text of the telephone survey is part of the October 2016 Phase 1 Draft. (Appendix D, pages 13-31) Toward the top of the first page of the survey appears this language: “First draft subject to substantial revision.” It is the purpose of this second part of the paper to offer the “substantial revision” anticipated by the survey authors. At this time, it is not clear whether the online survey will be similar to the telephone survey, so this paper examines the telephone survey only.

1. Role of the Telephone Survey

The telephone survey interviews will be performed by Customer Research International of Texas. (November 19, 2015 letter from Keen Independent Research) The survey is extensive, about 50 questions, many of which have ten or more possible answers. The firms to be given the

survey will be selected from the list of firms in Dun & Bradstreet, and firms from agencies' lists without email addresses. Firms with valid email addresses will receive the online survey.

(Technical Proposal, 3-24)

The telephone survey results will be used as part of the study's complex "data analysis to determine M/WBE availability, by group, for each industry." (Technical Proposal, 3-25) Because the BBC availability approach is indeed complex, it is worthwhile to present the Technical Proposal's example (3-25) illustrating how availability is computed.

The contract in the example is from "a recent [unidentified] Keen Independent disparity study." In order "to determine the overall availability" for a particular subcontract, "Keen Independent identified businesses in the availability database" from a subcontract awarded in 2010 worth \$22,000 to do electrical work. The study identified those firms from the survey which: were in business in 2010; performed electrical work; bid or performed contracts of at least that size; worked in the region; and claimed the firm was qualified and willing to work as a sub on the agency's projects. The resulting availability figure was then weighted by dollars awarded in that "contract element."

2. Problems with Relying on a Telephone Survey

Clearly the telephone survey is central to the study's approach to availability. There are many problems with relying on a telephone survey in this way.

A. Low Response Rate

The first problem with relying on a survey is the traditionally low response rate to surveys conducted as part of a disparity study. The Research Manual on Scientific Evidence, produced by the Federal Judicial Center in 2000, states that, "If the response rate drops below 50%, the survey should be regarded with significant caution as a basis for precise quantitative

statements about the population from which the sample was drawn.” What will Keen Independent Research do if the response rate to their online and telephone surveys is well under 50%, as is distinctly possible?

B. Is a Firm Claiming it is Qualified and Interested actually Qualified and Interested?

Survey recipients were asked whether their firm was qualified and interested, the first two requirements of *Crososon's* “qualified, willing and able”: “Is your company qualified and interested in working with public agencies in Minnesota as a prime contractor?” and “Is your company qualified and interested in working with public agencies in Minnesota as a subcontractor?” (questions C3 and C4, Appendix D, p. 19)

One problem with basing availability on the answers given to this telephone survey is that whoever answered the survey was free to interpret the term “qualified” however that person desired. As has been stated, qualifications are a matter of enormous significance in public construction contracting. But a firm calling itself qualified does not make that firm qualified.

Asking about a firm’s willingness to contract with Minnesota public agencies yields a similarly uncertain result. What would it hurt a firm to reply, “Sure we’d be interested in working” on a Minnesota project? Claiming willingness is seen as sufficient, which is not necessarily accurate.

A related problem arises in the questions about “Geographic areas your company serves in Minnesota.” (Appendix D, p. 20) What does it hurt a company to answer “yes” to the questions, “Can your company do work in the Northwest region (such as Brainerd or Moorhead)?” or “Can your company do work in the Southwest region (such as Mankato or

Worthington)?)” (questions D4 and D6, Appendix D, pages 20, 21) An affirmative answer might well be more optimistic than accurate.

C. Who Answers the Survey?

The survey asks the respondent to identify his or her position at the firm. The varied choices include CEOs and receptionists, sales managers and presidents. (question I.12, Appendix D, p. 30) This illustrates another problem with a telephone survey.

Would a receptionist necessarily know accurate answers to questions like, “What was the largest contract or subcontract that your company bid on or submitted quotes for in Minnesota during the past six years?” (question E3, Appendix D, p. 22) It is true that the survey contains the instructions to the giver of the survey, “After reaching the owner or an appropriately senior staff member...” However, the very fact that the survey includes the question above reflects a realistic appraisal that the owner or senior staff member might well not be available to complete the lengthy survey.

Another concern is that whoever answered the phone might not necessarily want to reply with accurate information to a question like, “Roughly, what was the average gross revenue of your company, just considering your location, from 2012 through 2016?” (question G5, Appendix D, p. 25)

3. Verification of Survey Answers is Possible

Survey answers will apparently be accepted as accurate. The Technical Proposal details no effort at external verification of the survey answers given. Verification of some survey questions is possible.

The local government units to be covered by the disparity study may already have the precise answer to questions such as, “In rough dollar terms, what was the largest contract or

subcontract your company was awarded within Minnesota, during the past six years?” (question E1, Appendix D, p. 21) and “What was the largest contract or subcontract that your company bid on or submitted quotes for in Minnesota during the past six years?” (question E3, Appendix D, p. 22) Whether a firm was actually awarded or bid on a public construction contract is a matter of public record. If these largest awards and bids were on public construction contracts, a distinct possibility, there should already be an objective record within the procurement bureaucracies. It should not be necessary to rely on unverified, possibly uninformed survey answers.

4. Suggested Changes

The survey commendably includes a question which does make an effort to verify the response. “Dun & Bradstreet lists the annual gross revenue of your company, just considering your location, to be [dollar amount]. Is this an accurate estimate...” (question G4, Appendix D, p. 25)

Something similar could be done for questions about bids and contract awards. For example, question E3 could be revised along the lines of “Hennepin County records the largest contract you performed for the County as being \$6 million. Is this the largest contract or subcontract your company bid on or submitted quotes for in Minnesota during the past six years?”

Many of the fifteen questions in Section H (Appendix D, pages 26-30) could also be favorably revised. For instance, “Has your company experienced any difficulties receiving payment from state agencies or local governments in Minnesota?” could be improved with a follow up choice, “Do you have suggestions for correcting the problem?” The problem lies within the government, meaning the solution should as well.

CONCLUSION

It is worth repeating that the purpose of this paper is not to attack Keen Independent Research, their Technical Proposal, or the Keen Independent Survey of Minnesota Construction Businesses. The purpose is to make comments and suggestions about the upcoming disparity study that are of importance to the Minnesota construction community – and to do so while there is still time to address these issues and concerns.