Sustainable Society 2020:The Case Of Ethnic "Preferences"

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Do state and local governments have to justify preferences in procurement? The U.S. Supreme Court in its landmark 1989 decision, City of Richmond v. Croson said yes. The federal system has a different system of founding, reporting and justification. Federal government rules do not equal state/local government rules. State/local agencies must do disparity study prior to establishing preferences.

For those working in federal procurement since the Competition in Contracting Act (CICA), circa 1984; the existence of preference programs, particularly around ethnicity, have been a "given." Let's consider a different environment, namely the context of state and local governments. Should these entities follow the same rules as the federal mandates? This question has been tried, challenged and appealed up to the Supreme Court for judicial ruling.

At the basis of the policy-making foundation theory is the concept of "founding theory". This suggests that the origins of the establishment of the organization bear primary interpretation of what is legitimate and what is not. (In social science terms, the concept of "framing" is similar in terms of setting an environment or tone for introducing a person or idea) As it turns out, ethnic preferences in the federal system are legislated by U.S. Congress, and thereby legitimized. However, state and local governments make policies for their jurisdiction unique to their governing body officials. Thereby, the Supreme Court has ruled that something called "a disparity study" must be conducted (and updated periodically) to justify the imposition of ethnic preferences in each unique jurisdiction.

According the FAR Part 19, Socio-economic programs, the regulation spells out the various ethnic groups, and the 8(a) programs for minority disadvantaged groups. This includes preferences in "full and open competitions" and set-asides for competition only among the 8(a) programs. There is also a requirement that 8(a) groups be certified through the U.S. Small Business Program. Moreover, there are requirements for ownership that the business must be owned by 51% or more by a person in the minority ethnic category. Also, there are certain requirements about the amount that can be subcontracted when a contract award has been made. However, there are no requirements for ethnic composition of the workforce that is employed to actually conduct the business. (It is not unusual to see Caucasians or other nationalities that one meets at contractor meetings to be employed by an 8(a) business. Moreover, there are monetary thresholds that may prohibit a small disadvantaged business owner from being certified by the

This abstract is partially presented at the International Conference on Sustainable Society during March 17-18, 2020 in Berlin, Germany

U.S. S.B.A. These rules restrict the amount of savings that a prospective 8(a) client may have in savings in advance of applying for the designation.

The FAR updates are written by the FAR Council composed of members from NASA, DOD and GSA. Prior to policy issues, the notices may be placed in the Federal Register. Policy initiatives for changes stem from the Office of Federal Procurement Policy (OFPP), an executive branch office affiliated with the New Executive Office Building located directly across from the Old Executive Office Building next to the White House in Washington, D.C. By publishing notices in the Federal Register, the public is allowed to comment upon proposed policy changes before policies are implemented by the OFPP which then feeds into the FAR Council writing of "Updates" issued frequently to the FAR. The origin of OFPP initiative may come from legislative input, executive input or study groups assigned by industry/governmental committees. An example of this would be the "Performance Based Contracting Pilot Studies of the early 1990's." As a result of analyzing the results of the pilot studies, policies were initiated that found their way into the FAR for government wide compliance.

The U.S. Congress is a major player in the federal procurement system: for example, when the U.S. legislature undertook the "Contract with America" in the 1990's under then Speaker Newt Gingrich, a concurrent program - the "National Performance Review" managed by Vice-President Al Gore was also underway. Procurement in the federal government was one of main targets of the legislative reform. As a result, a slew of legislation followed. There was the Federal Acquisition Reform Act I and II, Federal Acquisition Streamlining Act I and II, the Clinger Cohen Act (aka Information Technology Management Reform Act (ITMRA)), and the FAIR Act (Federal Activities Inventory Reform Act). While a paper could be written just on the legislation that came out of the 1990's as a result of the partnership between the first ever Republican Congress and President William Clinton, that will not be the focus of this paper. (Note 1) (Note 2).

Moreover, every year, the Executive Branch prepares reports from each Agency about the expenditure of taxpayer monies in terms of contracts awards. These reports are aggregated data from the Federal Procurement Data System (aka FPDS). After each and every contract award, a form must be recorded for the FPDS. The form requires information about several aspects of the contract award, including dollar value spent, small or large business, 8(a) or other preference program (such as service disabled veterans owned small business (SDVOSB) or veteran owned small business (VOSB) or woman owned small business (WOSB). There is other information recorded on the FPDS form such as technology or service, branch, amount of dollars saved, green procurements awarded, and so on. Every year, Congress receives the reports on procurement dollars expended and the categories it includes, broken down for key variables. In summary, Congress can legislate changes to the federal procurement system or changes to procurement can originate in the executive branch from the Office of Federal Procurement Policy (OFPP).

CONCLUSION/SUMMARY

After the landmark Richmond v. Croson decision by the Supreme Court, state and local governments are adhering to the practice of performing “disparity studies” in their jurisdiction to justify any ethnic preferences in contracting or subcontracting requirements. These must be updated periodically and are performed by consultants for a significant cost to the government agency. Anecdotally, the WSSC paid $200,000 for a contractor to perform a disparity study of their jurisdiction which includes Montgomery County. While founding theory explains the different rules and compliances that state and local governments must follow with regards to ethnic preferences, organizational development theory explains how the changes in policy at the state and local government came about.

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