ORGANIZING THE MINORITY / WOMEN / DISADVANTAGED BUSINESS

Presenter: Denise E. Farris, Esq.
Farris Legal Services, LLC
20355 Nall Avenue
Stilwell, KS 66085
Telephone: 913-278-9421
Email: denise@farrislegal.net

INTRODUCTION

In 1988, as a first year law student in Constitutional Law classes, I was randomly picked from my class to brief a pivotal and recent Supreme Court decision impacting affirmative action programs at the local and state levels. At that time, little did I know that this random briefing would set my initial legal career in construction law, with an emphasis in affirmative action in government contracts.

Nearly thirty years later, I've had the privilege of serving on numerous local, state and federal boards created to either implement, review, defend, or challenge these programs. I've additionally been able to view from the sidelines the many legal fiascos created by excellent corporate lawyers who have endeavored to "set up" M/W/DBE companies without understanding the many nuances of the certification process, only to do it incorrectly.

I. Understanding the Constitutional Parameters

A. Constitutional Underpinnings for Minority, Women and Disadvantaged Business Programs[i]

All programs based on race or gender are subject to equal protection and due process review under the Constitution's Fifth and Fourteenth Amendments.[ii] Thee include the following federal and state-flow down programs identified as: Minority Business Enterprise (MBE),[iii] Women Business Enterprise (WBE),[iv] Disadvantaged Business Enterprise (DBE),[v] 8a Business Development (BD) Program,[vi] and the recently enacted 8m Women's Equity in Contracting or Women Owned Small Business (WOSB) Programs.[vii] Each of these programs are reviewed for constitutional validity on specific legalgrounds.[viii] [ix] Programs based on race and gender definitions require strict and intermediate scrutiny as defined below. [x] Alternatively, race and gender neutral programs, such as Service Disabled Veteran Owned Small Business[xi] [xii] and HubZone Programs,[xiii] are subject only to a legal "rational basis" review with substantial deference provided to their justification, passage and administration.

A comprehensive history of the affirmative action program development has been provided in various educational programs provided by the American Bar Association's Forum on

the Construction Industry. [xiv] For this program, the two primary U.S. Supreme Court decisions impacting this arena will be discussed.

1. City of Richmond v. J. A. Croson – Local and State "Strict Scrutiny"

The 1989 decision in *City of Richmond vs. J. A. Croson Construction Company*,[xv] outlines the applicable parameters for local and state race based remedial programs. Finding Richmond, Virginia's 30% mandatory minority business goals unconstitutional under a "strict scrutiny" review, the *Croson* decision declared the program unconstitutional for, among other things: (a) lacking statistics justifying the 30% mandatory MBE goal, (b) failing to identify M/WBE companies available and capable to do the work, (c) including goals for minority groups not statistically present in Richmond; (d) failing to address non-race or gender specific barriers applicable to utilization data; (e) lacking race neutral measures in the program; and (f) lacking flexibility through a 30% "quota" instead of a goal program based on waivers, specific facts and flexibility per circumstances.[xvi] The *Croson* holdings, applicable to local, county and state programs, are summarized as follows:

1. Remedial programs based on race must be analyzed under "strict scrutiny";[xvii]

2. Under "strict scrutiny," racial classification – even for remedial purposes – is constitutional only when justified by a "compelling government interest," accompanied by an affirmative action program "narrowly tailored" to accomplish that interest.[xviii]

3. Whether the remedial affirmative action program is "narrowly tailored" requires proof that the program is:
   - (a) based on the number of qualified minorities in the area capable of performing the scope of work identified in the set-aside or goal plan;
   - (b) not over-inclusive by presuming discrimination against certain minorities,
   - (c) contains race-neutral alternatives, such as small business development programs, to the set-aside or goal programs, and
   - (d) does not contain numerical quotas but permits waivers and flexibility on a case by case basis.[xix]

Croson's focus on the statistical underpinnings justifying creation of such programs spawned the creation of companies specializing in the performance of "*Croson Studies,"* i.e. the detailed statistical studies now legally required to justify not only the existence of an MW/DBE program, but also the various utilization goals identified within that program.[xx] Such studies continue to be key to the ongoing success of any program at both the local, state and federal levels.

2. Adarand Constructors v. Pena – Federal "Strict Scrutiny"

Croson was limited to local, county and state M/WBE programs, with a concurring opinion suggesting a "more lenient standard" would be applicable to federal programs given Congress' mandate to address issues on a national basis.[xxi] One year later, the Supreme Court in the 1990 case of *Metro Broadcasting, Inc. v. FCC*,[xxii] accepted this suggestion and created confusion by applying this more lenient "intermediate scrutiny" review of a challenged federal

FCC program.[xxiii] Thus between 1989 and 1995, local and state MBE programs were reviewed under strict scrutiny while federal MBE programs received more lenient treatment under "intermediate scrutiny" review.

Recognizing the inherent conflict, the Supreme Court in 1995 accepted the case of *Adarand Constructors, Inc. v. Pena*.[xxiv] The case involved a federal Department of Transportation (DOT) program which provided financial incentives to prime contractors subcontracting to "socially and economically disadvantaged" companies. The program was challenged on equal protection and due process grounds by Adarand Constructors, a firm owned by a white male.

Over a six year period, the case made its way to the Supreme Court three times, thus tagged *Adarand I, II and III*.[xxv] From 1995 to the final 2001 decision in *Adarand III*, the DOT scrambled to bring the program into compliance by various amendments to the program which largely contributed to its multiple trips up to the Supreme Court. In *Adarand I*, the Court did not address the merits of the particular program, but remanded for further proceedings based on a specific clarification that overruled *Metro Broadcasting* and held all programs based on race, regardless of whether at the state or federal level, are subject to "strict scrutiny" review, and deemed valid only with proof of a "compelling government interest" coupled with a program "narrowly tailored" to address that interest. The case was remanded to determine whether this statistical proof justifying the program was present.[xxvi]

In its final review in *Adarand III*, the Court again confirmed that any racial preference programs at the local, state or federal levels are to be considered remedies of "last resort," subject to strict scrutiny review, based upon a proven compelling interest supported by reliable evidence of past discrimination, and coupled with a "narrowly tailored" remedial program.[xxvii] *Adarand* essentially applied all of the *Croson* factors to federal programs as well as state.

Both *Croson* and *Adarand* remain the applicable law of the land regarding the fundamental viability of these programs.

B. Legal Requirements for Race Based Programs (MBE, DBE, 8a) – "Strict *Scrutiny"*

Race based programs include local, state and federal MBE, DBE, and the federal 8a programs. Where the programs focus on race, they are subject to "strict scrutiny" review by the courts. To survive a legal challenge, the programs must be supported by proof of a compelling governmental interest, with a program "narrowly tailored" to address that specific governmental interest.[xxviii]

1. Proving the "Compelling Interest"

Remedying a governmental entity's own past discrimination constitutes a recognized "compelling government interest."[xxix] However, governments must present a "strong basis in evidence for its conclusion that remedial action [is] necessary."[xxx] This requires programs to be supported by current and reliable *Croson* statistical studies which address availability, capability

and past discrimination against minorities in the relevant locale. To be complete, these studies must additionally identify and address barrier impact from non-racial factors such as competitive limitations related solely to "small size" versus "racial factors."[xxxi]

A continuing issue is the extent, sufficiency, and reliability of the supporting data. Justice O'Connor, writing for the Court's majority, suggested that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination under Title VII."[xxxii] Courts typically rely upon a combination of statistical and testimonial or anecdotal evidence establishing prejudicial disparities.[xxxiii] In cases in which testimonial evidence is given, that evidence must be reliable and relate to specific instances of discrimination, rather than the kinds of generalized allegations of discrimination rejected in *Croson.*[xxxiv]

Since *Croson*, legal challenges focus primarily on the reliability as well as the timing and currency of the data relied upon to establish the "compelling government interest."[xxxv] Summarized, these cases suggest the majority of courts: (a) will not accept conclusory or anecdotal allegations of discrimination; (b) require studies that are relatively current, probative, regionally relevant, and which address non-discriminatory factors such as company size, versus discriminatory factors such as race or gender of owners.[xxxvi]

The underlying study must additionally be "current," with at least one case suggesting that the data be generated within a three to five year period to avoid issues of "staleness."[xxxvii] This legal approach implies that programs based on disparity studies more than five years old are constitutionally exposed. This approach additionally creates an affirmative duty upon governmental entities wishing to maintain legitimate programs to budget for, and regularly update the statistical studies identifying regional M/W/DBE availability and performance of government contracts.[xxxviii] In addressing the budget constraints, some states, including Missouri, have created interesting "public/private contribution" initiatives in an effort to fund and update disparity data on an ongoing basis.[xxxix]

Inadequate or outdated supporting *Croson* disparity studies typically result in successful challenges to local and state M/W/DBE programs. Successful challenges have been raised in California, Colorado, District of Columbia, Florida, Georgia, Illinois, Maryland, Michigan, Missouri, Minnesota, Mississippi, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Tennessee and Texas.[xl] In many of those states, the execution of proper *Croson* studies following the legal injunctions led to the creation of valid and sustainable programs based on adequate data and narrowly tailored programs.

Alternatively, many programs have enjoyed success, with governments routinely hitting or exceeding their stated goals. Ironically, the success of those programs sometimes spelled their demise. Courts have concluded that, where years of detailed record-keeping show achievement of affirmative action goals, this "proves" that past discrimination has been "remedied" and future goals are thus no longer justified as a "remedial program."[xli] These same studies also ironically show that programs disbanded after consistently hitting goals are typically reactivated after a short interval, where statistics prove that when the goal programs disappear, M/W/DBE

utilization either disappears or drops off to a negligible amount and again justifies the program's rebirth.[xlii]

2. "Narrowly Tailored"

To survive legal attack, M/DBE programs must also be "narrowly tailored" to address and remedy that specific discrimination. *Croson* and *Adarand* hold that a "narrowly tailored" analysis must examine whether the program is:

(a) More than a mere promotion of racial balancing;
(b) Based on the number of qualified minorities in the area capable of performing the scope of work identified in the set-aside plan;
(c) Not overinclusive by presuming discrimination against certain minorities;
(d) Complete with race-neutral alternatives to set-aside programs; and
(e) Not based upon numerical quotas.[xliii]

Croson and *Adarand* also agree that constitutionally sustainable M/WBE programs must include an assortment of race and gender neutral measures. These include:

a. advertising contracting opportunities in publications and media targeted to minorities, women and small businesses;

b. providing written notice to small companies in sufficient time to allow them to bid;

c. educating small businesses on how to do business with the governmental entity;

d. encouraging joint ventures between majority/minority and/or small business firms;

e. assisting small contractors in obtaining bonds, lines of credit and insurance;

f. segmenting larger contracts into smaller jobs capable of performance by small contractors; and

g. utilizing the resources of business development organizations to assist small contractors to grow their businesses.[xliv]

Croson noted that programs creating small business goals would, by their nature, favorably include not only minority and women owned businesses, but also small non-minority businesses as well, thus making them more palatable.[xlv] Because such programs are race and gender neutral, and thus viewed under a "rational basis" standard of review, they are also granted broad deference and are difficult to legally challenge.[xlvi] In response to this approach, Ohio's EDGE program, and Minnesota's Targeted Group and Economically Disadvantaged Business programs, exemplify programs implementing mandatory procurement goals for <u>all</u> small businesses, including those owned by white-males.[xlvii]

The detailed factors in *Croson* and *Adarand* primarily govern all legal challenges to local, state and federal M/W/DBE programs to date.

II. REPRESENTING THE MINORITY OR WOMAN-OWNED BUSINESS

a. Getting Started

Its important that the legal practitioner recognize M/W/DBE companies are horses of a different color. They do not resemble or operate like that of the normal corporation. Standard governance routinely applicable to limited liability companies or corporations may in fact invalidate the "ownership and control" criteria of the certification ordinances. M/W/DBE formations are highly sensitive to the details of the corporate formation, and a well meaning corporate lawyer unfamiliar with the requirements may unintentionally disqualify his or her client before they get started. Creative attempts to "bypass" the ordinance requirements can expose the owners to stringent and onerous governmental false claims act actions.

The following highlights key requirements but also addresses potential pitfalls relative to ownership, capitalization, voting/management/control rights which might compromise the integrity of the M/W/DBE certification if found to be in violation.

1. Structuring the Corporate Entity

For certification purposes, structure of the corporate entity regarding ownership acquisition, proof of independent capitalization, voting rights and inter-company director, officer and key employee inter-dependence are the key elements focused upon by the certifying agency reviewers to identify, and eliminate, front companies. Unfortunately, these elements can also occasionally appear in legitimately run businesses unaware of the specific ownership/control regulations applicable to certification.

2. Threshold Determinations for Certification

Threshold determinations in the certification process are whether the qualifying individual is: (1) a woman or minority or otherwise "socially and economically disadvantaged," and (2) whether the business size qualifies as "small" under applicable SBA, agency and/or local regulations.

A. Race and Gender

Proof of gender or minority status may be provided through a driver's license; proof as to whether the person has held himself or herself out to be a member of the designated group over a long period of time prior to application for certification; and whether the person is regarded as such by the relevant community.[xlviii] Proof must be by a "preponderance of the evidence."[xlix] Evidence of active participation in relevant community organizations will be considered in such determinations.[l] The Agency may require the applicant to produce appropriate documentation where status is subject to question. For example, Native American applicants may be required to provide proof of tribal membership and/or ancestry documentation tracking back to established tribal membership.[li]

B. "Small" per Applicable Size Standards

The qualifying business must additionally qualify as "small" per applicable SBA criteria.[lii] The Agency typically applies current SBA business size standard(s) found in 13 CFR part 121.201 appropriate to the type(s) of work the firm seeks to perform; however, the size standards are occasionally modified by particular states or local governments so this needs to be verified for each certification.[liii] Where "size" representations are self certifying under the Central Contractor Registry system,[liv] these representations may be challenged through size protests lodged with the Small Business Administration.[lv] Representative protest cases identify a broad deference to agency discretion regarding how size protests are handled. Key factors include the good faith intent and timing of representations made, the status and factors at the time of the award, negative impact on the contracting agency if termination occurs; impact of pre-award notices; and timing requirements.[lvi]

C. Disadvantaged Business Entity

To additionally qualify for Disadvantaged Business Entity status, the qualifying individual must establish personal net worth limits. Each DBE applicant must prove a personal net worth below $1.32 million, excluding pro-rata shares of business interests and/or the equity in the primary residence.[lvii] The DBE certification is available at the local and state levels, and to various agencies at the federal level. It is the primary certification program utilized by the Department of Transportation. In addition to the net worth limits noted above for the general DBE program, DOT additionally requires that the annual gross receipts not exceed $22.4 million in the prior three fiscal years.[lviii] Separate limits are applicable to airport concessionaires, with all limits adjusted annually for inflation by the Department Secretary.[lix]

D. Certification within Specific NAICS Codes

Finally, the business must be certified within limited and applicable NAICS industry codes representing its past work experience and/or the ability of the qualifying minority or woman to control and supervise that particular type of work.[lx] Applicable NAICS codes may be located through the SBA's website by industry description.[lxi] Where a company works in various NAICS categories, size will typically be determined in that category representing the largest proportion of the company's business.[lxii] The agency typically grants certification to a firm only for specific types of work in which they are currently functioning and in which the minority or women owners have the ability to control the firm.[lxiii] To become certified in an additional type of work, the firm needs to demonstrate to the agency that its minority or women owners are able to control the firm with respect to that type of work.[lxiv]

E. Ownership

The primary ownership factors identified by regulations, first at the federal level and then substantially incorporated by definition into state and local programs, include: (i) minimum percent ownership of 51%; (ii) independent capitalization typically for fair market value; (iii) gifting disfavored; and (iv) trusts disfavored. Each of the above carry significant evidentiary weight in the certification review process.

1. ***Minimum 51 percent ownership: At minimum, the ownership percents are listed below:***

Corporation: the qualifying entity for a corporation must own at least 51 percent of each class of voting stock outstanding; 51 percent of the aggregate of all stock outstanding;

Partnership: the qualifying entity must own 51 percent of each class of partnership interest as reflected in the partnership agreement;

Limited Liability Company: the qualifying entity must own at least 51 percent of each class of member interest.[lxv]

While theoretically a company could qualify through two minorities each owning 50% of the company, or a similar type of structure, these situations typically engender problematic issues related to: (a) impact of future ownership interest sales to a non-minority and/or rights of first refusal to remaining minority partner; (b) requirement of unanimous votes by the qualifying entities for any major corporate decisions in order to reach a 51% corporate vote decision where each holds only 50%.[lxvi] As these represent potentially messy current and future issues which cannot be guaranteed with any certainty, such ownership arrangements are more likely to be denied certification and should be avoided where possible. If not avoidable, then documents should require, at a minimum, that: (a) all major corporate decisions require a super majority vote or unanimous vote by the minority or female owners; and (b) that should any minority or female owner desire to sell his or her interest, the remaining minority or female owner possesses rights of first refusal.

2. Independent Capitalization or Expertise for Fair Market Value

The contributions of capital or expertise by minority or women owners to acquire their ownership interests must also be real and substantial.[lxvii] Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee.[lxviii] Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.[lxix]

In situations where expertise is relied upon as part of a minority or woman owner's contribution to acquire ownership, the owner's expertise must be:

a. In a specialized field;
b. In areas critical to the firm's operations;
c. Indispensable to the firm's potential success;
d. Specific to the type of work the firm performs; and
e. Documented in the records of the firm.

The records of the firm must clearly show the contribution of expertise and its value to the firm.[lxx] In addition, the individual whose expertise is relied upon must have a significant financial investment in the firm.[lxxi]

3. Ownership Transfers Solely for M/W/DBE Certification are Prohibited

Sometimes a former non-minority or male owner relinquishes ownership and control to make a minority or woman the majority owner of a company, but still remains involved in the company. Such transactions, or any similar transaction in which changes appear to be made for certification eligibility only, are prohibited if the minority or woman does not truly own and control the company.[lxxii] Thus, any corporate restructuring which reflects through corporate minutes or other documents that the ownership and control transfer is made to secure M/W/DBE certification is automatically denied, lacking identification of other reasons for the change. Many skilled corporate attorneys not familiar with certification are not aware of this prohibition and incorrectly structure transfer minutes expressly noting the purpose to be solely for securing M/W/DBE certification. Where denials involve a certain reputational harm and also prevent the company from reapplying for a period of one to three years, the practitioner could potentially be exposed to malpractice claims by the client if there are other business factors driving the change which went unmentioned in the corporate minutes.

4. Gifting Disfavored

Gifting of ownership interests is problematic and typically triggers unfavorable statutory presumptions that the "ownership" acquisition is illusory. The regulations presume all ownership interests in a business obtained through gift or transfer without adequate consideration from any non-minority or male individual, or from a non-MBE/WBE firm are suspect and thus treated as not being truly "owned" by that individual, IF: (a) the transferred interests came from another individual involved in the same firm or an affiliate of the firm seeking certification, or (b) involved in the same or similar line of business, or (c) engaged in an ongoing substantial business relationship with that firm or an affiliate of the firm seeking certification.[lxxiii]

This is a rebuttable presumption, but to overcome it the minority or woman applicant must demonstrate by "clear and convincing evidence" that: (a) the gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a MBE/WBE; and (b) the minority or woman individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of non-minority or male individual or non-MBE/WBE firm who provided the gift or transfer.[lxxiv] It is recommended that all acquisition of ownership interests be obtained through an arms length transaction, with ownership interests independently evaluated and priced and then financed through either a bank loan to that qualifying individual, or alternatively through assets of that individual which can clearly be tracked as independently owned by that individual. That said, acquisition interests do not necessarily have to be acquired at current book value, but within closely held corporations or LLCs, the value of the interest may be set by agreement of the shareholders based on factors establishing either higher or lower values than typical fair market.[lxxv] It is also recommended that these values be independently reviewed and verified by a neutral third party, and for stock sales in any closely held company which are made for less than fair market value, said value is approved by the board and commemorated in minutes per applicable state corporation statutes.

5. Trusts Disfavored

Like gifts, capitalizations through trust assets are typically restricted. Most agencies require that all securities constituting ownership of a firm shall be held directly by the minorities or women; and that except for limited exceptions, no securities or assets held in trust, or by any guardian for a minor, are considered as held by minority or women individuals in determining the ownership of a firm.[lxxvi] However, securities or assets held in trust are regarded as held by a minority or woman for purposes of determining ownership of the firm, if: (i) the beneficial owner of securities or assets held in trust is a minority or woman, and the trustee is the same or another such individual; or (ii) the beneficial owner of a trust is a minority or woman who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm.[lxxvii] Assets held in a revocable living trust may be counted only in the situation where the same minority or woman is the sole grantor, beneficiary, and trustee.[lxxviii]

6. Key Family Members in Business are Suspect

If the M/WBE company has other key family members involved who are not minorities or women, and those members play a key role appearing to exercise undue control or authority within the company, the ownership aspect becomes suspect. While family members are not expressly prohibited from working in the company, the reviewing agency must make a judgment about the control the minority or woman owner exercises vis-a-vis other persons involved in the business, without regard to whether or not the other persons are immediate family members.[lxxix] If the agency cannot determine the minority or woman owners—as distinct from the family as a whole—control the firm, then the minority or woman owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.[lxxx]

7. Transfer of Ownership Where Prior Owner Remains in Business

Where a firm was formerly owned and/or controlled by a non-minority or non-woman individual (whether or not an immediate family member), and ownership and/or control are transferred to a minority or woman individual, and the non-minority or non-woman individual remains involved with the firm in any capacity, the minority or woman individual now owning the firm must typically demonstrate to the agency, by clear and convincing evidence, that: (a) the transfer of ownership and/or control to the minority or woman individual was made for reasons other than obtaining certification as a MBE/WBE; and (b) the minority or woman individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-minority or non-woman individual who formerly owned and/or controlled the firm.[lxxxi]

G. Control

The primary control factors identified by regulations, first at the federal level and then substantially incorporated by definition into state and local programs, include: (a) Voting Rights via Directors, Officers and/or Members of the company; (b) Contracting Authority; (c) Check writing and procurement authority; (d) Key Management Authority and Expertise; and (e) Intra-company and Inter-company dependence. Each of the above carry significant evidentiary weight in the certification review process.

1. Voting Rights via Directors, Officer, Members or Partners of the company

The minority and women owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations. In addition, typically the qualifying minority or women owner must hold the highest officer position in the company (e.g., chief executive officer or president).[lxxxii]

For any entity with a multiple director or officer group, a major trip-up in corporate documentation usually occurs in designation of voting rights within the bylaws or operating agreement. Most corporate attorneys not familiar with certification regulations recommend a multi-member board and officer group per standard corporate business practices. Typically each director and each officer hold one vote. However, in the certification world, this means that the vote carried by the minority or female owner can be nullified if outvoted by the remainder of the board or officers. This is prohibited by all of the regulations, which require that the minority or female owner be capable of controlling all corporate decisions. Specifically the regulations require:

a. The minority or woman owner to hold the highest officer position in the company (e.g., CEO or President);
b. In a corporation, to control the board of directors; or
c. In a LLC or partnership, to serve as the managing member or general partner with control over all business decisions.[lxxxiii]

For this reason, its recommended that directors and officers hold ownership interests in the company, with voting rights restricted pro-rata to the percent ownership or number of shares or interest held by each. In that manner, the minority or female owner retains a 51% or more control over all business decisions in line with regulations. Similarly, for a Limited Liability Company it is recommended that the company be Member Managed with the minority or woman as the Manager, and additionally note in the Operating Agreement that any other voting rights by other Members are based on their pro-rate ownership interest in the LLC.

Some local regulations also require restrictions to limit the contractual authority of any minority owner within the company.[lxxxiv] As a standard practice, similar restrictions should be placed on the check-writing authority of any key employees other than the minority or female owner as well.

2. Non-minorities/men as minority shareholders, members, or directors/officers

Individuals who are not minorities or women may be involved in a MBE/WBE firm as owners, managers, employees, stockholders, officers, and/or directors, but typically they may not possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.[lxxxv] Similarly, the minority and women owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other

participants in the firm, regardless of whether these participants are minority or women.[lxxxvi] However, such delegations of authority must be revocable, and the minority and women owners must retain the power to hire and fire any person to whom such authority is delegated.[lxxxvii] The managerial role of the minority and women owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the minority and women owners actually exercise control over the firm's operations, management, and policy.[lxxxviii]

To meet this threshold, the minority and women owners must demonstrate an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations.[lxxxix] The minority and women owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees.[xc] The minority and women owners must have the expertise, technical competence, and ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking.[xci]

*3. **Owners Bringing Office Management Skills Only***

Generally, expertise limited to prior office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.[xcii] The minority or woman owner must demonstrate the "overall understanding of, and technical competence and experience factors, noted above.

*4. **Special Licenses***

If state or local law requires the persons to hold a particular license or other credential in order to own and/or control a certain type of firm, then the minority or women persons who own and control a potential MBE/WBE firm of that type must possess the required license or credential.[xciii] If state or local law does not require such a person to have such a license or credential to own and/or control a firm, the Agency cannot deny certification solely on the ground that the person lacks the license or credential.[xciv] However, the Agency may take into account the absence of the license or credential as one factor in determining whether the minority or women owners actually control the firm.[xcv]

Recent changes in numerous state laws have impacted ownership / licensing requirements for engineering, architectural and landscape design firms. The practitioner should review applicable state law and board regulations for owner licensing requirements when faced with certification involving professional licensure regulations.

*5. **Compensation***

The regulations also require that the minority or women owners enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, and not merely the form, of arrangements.[xcvi] In reviewing this factor, most regulations permit the Agency to consider differences in

remuneration between the minority and women owners and other participants in the firm in determining whether to certify a firm as a MBE/WBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm.[xcvii]

Again, its important for the practitioner to argue in certain cases that with small businesses, owners may in fact pull less salary and benefits than the company's paid employees, particularly in times of recession. Corporate documentation such as minutes or internal promissory notes, which reflect deferred draws, salaries or benefits, are key in establishing just cause for remuneration differences.[xcviii] If the evidence is sufficient, the agency may determine that a firm is controlled by its minority or woman owner although that owner's remuneration is lower than other participants in the firm.[xcix]

6. Control Shifts in Voting or Management

Where a non-minority or non-woman individual formerly controlled the firm, and a minority or women individual now controls it, the agency may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-minority or non-woman individual remains involved.[c]

7. Outside Employment Prohibited

In order to be viewed as controlling a firm, a minority or woman owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities.[ci] For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings, weekends, or seasonally, if the individual controls it all the time it is operating.

8. Equipment Ownership

In determining whether a firm is controlled by its minority or women owners, the Agency may also consider whether the firm owns equipment necessary to perform its work.[cii] However, the agency must not determine that a firm is not controlled by minority or women individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.[ciii]

9. Affiliate Relationships Generate Additional Scrutiny

Affiliate relationship analysis will impact certification review both from a "size" and a "control" basis. "Affiliation" relationships are typically found where:

> "… one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. … SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. … Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders. … Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party."[civ]

In determining whether an affiliation exists, the SBA, or the local agency, will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation. If an affiliation is found, the SBA or local agency will count the total receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.[cv]

Thus from a size basis, if gross revenues of all companies are added together to determine size, such treatment may render the entity disqualified based on being too large per NAICS codes.[cvi] Affiliation is primarily litigated in the form of size protests filed by disgruntled competitors under local regulations or, at the federal level, under 13 CFR §121.1001, *et. seq.* If it is determined that an entity knowingly misrepresented its "small business" status, the criminal provisions of section 16(d) of the Small Business Act, 15 U.S.C. 645(d), including fines up to $500,000 and prison time up to ten years, may apply as well as civil penalties under the federal and state false claims acts and contract provisions.[cvii]

In addition to the express ownership factors identified above, a minority or woman owned firm can also experience "affiliate" issues where its book of business lies unevenly in the hands of a majority owned company. While there is no hard and fast rule on this topic, typically any M/WBE doing more than 30 to 40 percent of its business with another company will be suspect under definitions (a)(2) and (a)(5) above. While the relationship is not *per se* prohibited, this scenario will generate more detailed scrutiny to verify the certifying company is, in fact, independent from its major customer. If the MBE or WBE's extent of business with the other company compromises the MBE/WBE's independence, certification will be denied on the basis the MBE/WBE is a front for its major customer. This is specifically defined as where:

(i) One concern controls or has the power to control the other; or
(ii) A third party or parties controls or has the power to control both; or
(iii) An identity of interest between or among parties exists such that affiliation may be found.[cviii]

Most state regulations contain additional review criteria applicable to "affiliate" situations. For example, the Missouri Department of Transportation (hereinafter MoDOT) Regulations, Part 26.71 itemizes specific control factors in determining whether company

relationships rise to the level of "affiliate," either requiring combination of gross revenues or alternatively, compromised independence of the certifying company. The Missouri regulations read:

> "(a) In determining whether socially or economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.
>
> 10. Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.
>
> (1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
>
> (2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.
>
> (3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.
>
> (4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice. . . .
>
> (f) Individuals who are not socially or economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm."[cix]

Various cases addressed through SBA protests also analyze the "affiliate" relationship. The SBA web site contains a list of companies previously certified "small" who were later determined otherwise through affiliate analysis.[cx] Other reported protests provide further examples of the affiliate analysis. In *O'Donnell*,[cxi] the court found that when two corporations shared contracts that amounted to only 22% of total revenues of the bidding corporation, but there was no other evidence of financial, bonding or bidding assistance, there was no evidence that the bidder relied upon the other corporation to such a degree that "it's economic viability would be in jeopardy without that contacts business." No affiliate relationship was found.

In *Defense Logistics Agency*,[cxii] the court analyzed the relationship between the certifying company (PPC) and a related entity (EOTT), which supplied PPC's crude oil. The record indicated that PPC could secure its crude oil from other sources besides EOTT, which it

occasionally did. The court held that "counsel has failed to show that PPC is dependent upon EOTT to such a degree that in the words of the ...regulation, its economic viability would be in jeopardy without such contacts business."[cxiii] No affiliate relationship was found.

In *Marinette Marine Corporation v. Department of Navy*,[cxiv] a decision by the SBA's Size Appeals Board was upheld on the grounds that the SBA correctly treated two companies as non-affiliated for size determination despite there being related individuals and employees in each company. While it was true that both companies shared relatives in its management at the time the contract was awarded, the SBA correctly determined that post-award changes in the internal management structure of the companies, which removed the relatives from stockholder or management roles each in the other, proved lack of control and thus defeated the regulations "affiliate control" test for purposes of the size determination. The case additionally identified that while certain factors might imply "affiliation," such determination was a rebuttable presumption provable via evidence of lack of control between the companies. The inverse of this confirms that a different result would have been reached had the related individuals each maintained a key management position respectively in the two companies.

SUMMARY

In conclusion, the above reflects the variety of discrete factors relevant to successful MBE/WBE certification. For companies 100% owned and controlled by minorities or women, the certification application is typically straightforward. For companies in which non-minorities or white males are involved in key roles or minority ownership positions, or which enjoy a substantial business relationship with a non-MBE/WBE company, the practitioner must give detailed attention to the criteria factors noted above. While not necessarily prohibited, these arrangements are subject to a more intense review to ensure that the certifying agency does not unintentionally certify a front company not truly owned and controlled by the qualifying minority or female. If the practitioner is uncertain about any of the factors noted above, he or she is encouraged to work with experienced legal counsel to avoid potential malpractice exposures in the structuring of the MBE/WBE entity.

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[i] Summary of U.S. Supreme Court cases drawn from presenter's prior presentation for Forum on the Construction Industry as follows: Farris, Denise E.; Meagher, Patricia A., and Harris, Larry D., "Diversity in Government Contracting", (ABA Forum on the Construction Industry's 2012 Annual meeting, Advanced Project Delivery: Improving the Odds of Success) (Las Vegas, NV 4/26/2012).

[ii] The M/W/DBE programs are typically referred to as "affirmative action in government contracting." Affirmative action is typically defined as those programs that "attempt to equalize

the opportunity for women and racial minorities by explicitly taking into account their defining characteristics – sex or race – which have been the basis for discrimination." T. Mullen, Affirmative Action in the Legal Relevance of Gender, 244-266 (S. McLean & N. Burrows 1988). Thus, "affirmative action" is expressly based upon those race- and gender-specific classifications that are "inherently suspect" under the concept of a gender-neutral and color-blind Constitution. Regents of the University of *California v. Bakke,* 438 U.S. 265, 318-20 (1978); U.S. Const., Amend. V (1791); U.S. Const. Amend. XIV (1868). Early cases developing the constitutional review standards of these programs include Bakke, one of the first cases identifying the appropriate level of review for equal protection challenges to non-federal affirmative action programs); *Fullilove v. Klutznick,* 448 U.S. 448 (1980) (developing an "intermediate" or middle level of scrutiny to review the constitutionality of a federal minority set-aside program included in The Public Works and Employment Act of 1977); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (applying "strict scrutiny" to invalidate a local board of education's minority hiring preference set out in its collective bargaining agreement).

[iii] MBE programs typically exist at the local and state level. At the federal level, refer to the DBE and/or 8a program for further details. ***See http://www.ncsl.org/research/labor-and-employment/state-department-of-transportation-dbe-programs.asp***; for link to 50 states MBE program sites.

[iv] *See* http://www.ethnicmajority.com/Government_MBE_programs.htm; for link to 50 states M/WBE program sites. At the federal level, refer to the 8m or WOSB program for further details. In limited instances, women owned businesses may also qualify for certification under the 8a or DBE programs.

[v] 49 C.F.R. §§ 23 and 26. *See also,* 49 CFR § 23, App. A. 49 CFR § 26, App. A

[vi] 13 C.F.R. Part 124 *et. Seq.*

[vii] Public Law 106-554 (2000); 15 U.S.C. §§637, 811. This certification is separate from 8a and/or DBE certification.

[viii] For a detailed discussion of the various federal socio-economic programs, *See* Denise Farris, *Socio-Economic Issues,* FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS 13-48 (American Bar Association 2003); *See also,* Denise Farris, *Socio-Economic Issues,* FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS, Rev. 1 (American Bar Association 2010);

[ix] *See* http://www.ethnicmajority.com/Government_MBE_programs.htm; for link to 50 states M/WBE program sites.

[x] For a summary of state Croson challenges of affirmative action programs from 1989 through 2004, *see http://www.farrislawfirm.com/Default.aspx?PageID=56*.

[xi] P.L. 108-183; 15 U.S.C. §657(f).

[xii] 13 CFR §125.6(b).

[xiii] 15 U.S.C. §631; FAR 19.1301.

[xiv] Denise E. Farris, "Socio-Economic Issues," FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS (ABA 2004); Denise E. Farris, "Socio-Economic Issues in Government

Contracting," FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS 2d ed. (ABA 2010).

[xv] 488 U.S. 469 (1989).

[xvi] *Id.*

[xvii] 488 U.S. at 493-94.

[xviii] 488 U.S. at 491-92.

[xix] 488 U.S. at 507-08.

[xx] For a summary of state Croson challenges of affirmative action programs from 1989 through 2004, *see* http://www.farrislawfirm.com/Default.aspx?PageID=56, Appendix A.

[xxi] *Id.*

[xxii] 497 U.S. 597 (1990).

[xxiii] In *Metro Broadcasting*, the Court was asked to review the constitutionality of an FCC program that (1) awarded extra credit to minority-owned businesses in comparative proceedings for new licenses, and (2) provided station owners in danger of losing their FCC licenses the means to transfer those licenses to approved minority enterprises under a "distress sale." Justice Brennan noted the Court's deference to Congress, and its decision to utilize intermediate scrutiny where the FCC's minority ownership programs had not only been specifically approved, but also mandated by Congress. Moreover, the court noted that both Congress and the President ratified the program through appropriation bills that specifically barred the FCC from using federal funds to re-examine that policy. The Court thus found the program constitutional, noting the difference between the standard of review used for local and state programs on the one hand, and federal programs on the other. 497 U.S. at 564-568.

[xxiv] 515 U.S. 200 (1995).

[xxv] ADARAND I includes: *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 241 (D. Colo. 1992), *aff'd sub nom. Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994), vacated, 115 S. Ct. 297 (1995); *Adarand Constructors, Inc. v. Pena* 16 F.3d 1537, 1539 (10th Cir. 1994), vacated, 115 S. Ct. 2097 (1995); *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995). ADARAND II includes *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556(D. Colo. 1997). ADARAND III includes *Adarand Constructors, Inc. v. Mineta*, 122 S.Ct. 511 (2001).

[xxvi] *Id.*

[xxvii] Dale, Charles, "Affirmative Action Revisited: A Legal History and Prospectus," CRS Report for Congress, Order No. RL30470, pp. 6-8 (October 12, 2000).

[xxviii] See FN xiv, xxiv, supra.

[xxix] *Croson*, 488 U.S. at 492.

[xxx] *Id.* at 500 (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)). In *Wygant*, the Court stated that a local or state public employer need not "convinc[e] the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on [the Government's] proof before the [the Government's] affirmative action plan will be upheld." 476 U.S. 267, 292-93 (O'Connor, J., concurring). In *Croson,* the Court stated that courts should follow a flexible approach in determining whether there exists a "firm basis" for determining that affirmative action is warranted. 488 U.S. at 501 (quoting *Hazelwood Sch. Dist. -v. United States,* 433 U.S. 299, 307-08 (1977)). The Government's burden of establishing a compelling governmental interest is thus satisfied by establishing reliable statistical proof of past discrimination against specifically identified minority or gender-based groups. *Id*.

[xxxi] Most disparity studies address not only the presence of minority firms, but also women owned firms. This has resulted in MBE/WBE studies being lumped together in legal challenges and reviewed under the same legal standard. The legal conflict this presents is addressed in this publication.

[xxxii] *Croson,* 488 U.S. at 501 (quoting *Hazelwood Sch. Dist*., 433 U.S. at 307-08).

[xxxiii] *Coral Constr. Co. v. King County*, 941 F.2d 910, 929 (9th Cir. 1991), *cert. denied* 112 S.Ct. 875 (1992).

[xxxiv] *Id.* At 919.

[xxxv] *See Associated General Contractors of America v. City of Columbus*, 936 F. Supp. 1363 (S.D. Ohio 1996) (challenging the validity of the city's statistical study), *vacated by* 172 F.3d 411 (6th Cir. 1999).

[xxxvi] See *Monterey Mechanical Co v. Wilson*, 125 F.3d 702 (9th Cir. 1997); *L. Tarango Trucking v. County of Contra Costa*, 181 F. Supp. 2d 1017 (N.D. Cal. 2001); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 86 F. Supp. 2d 1042 (D. Colo. 2000); *Cortez III Serv. Corp. v. National Aeronautics & Space Administration*, 950 F. Supp. 357 (D.D.C. 1996); *Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997).; *Rothe Development Corporation v. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), *rev'd in part and remanded*, 606 F.Supp.2d 648 (2009).

[xxxvii] Rothe

[xxxviii] *Id.*; see also note 9.

[xxxix] http://oeo.mo.gov/disparity/what-is-a-disparity-study/.

[xl] Programs successfully challenged on the basis of outdated or inadequate statistical studies include: *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997); *Barlow v. Davis*, 85 Cal. Rptr. 2d 752 (Cal. App. 1999); *Concrete Works of Colorado, Inc. v. City of Denver*, 36 F.3d 1513 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995); *Cortez III Serv. Corp. v. National Aeronautics & Space Admin.*, 950 F. Supp. 357 (D.D.C. 1996); *Eng'g. Contractors Ass'n. of S. Florida, Inc. v. Metro Dade County*, 122 F.3d 895 (11th Cir. 1997); *Phillips Eng'g. Contractors Ass'n. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *American Subcontractors Ass'n. Georgia Chapter, Inc. v. City of Atlanta*, 376 S.E. 2d 662 (Ga. 1989); *Webster v. Fulton County*,

51 F. Supp. 2d (N.D. Ga. 1999); *Builders Ass'n. of Greater Chicago v. County of Cook,* 123 F.Supp. 2d 1087 (N.D. Ill. 2000); *Associated Utility Contractors of Maryland, Inc. v. Mayor of Baltimore,* 83 F.Supp. 2d 613 (D. Md. 2000); *Arrow Office Supply Co. v. City of Detroit,* 826 F. Supp. 1p72 (E.D. Mich. 1993); *In Re Sherbrooke Sodding Co.*, 17 F. Supp.2d 1026 (D. Minn. 1998); *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999); *L. Feriozzie Concrete Co. v. Casino Reinvestment Dev. Auth.,* 776 A.2d 254 (N.J. Super. 2001); *Harrison & Burrows Bridge Constructors v. Cuomo,* 743 F. Supp. 977 (N.D. N.Y. 1990); *Associated General Contractors of Ohio, Inc. v. Arabic*, 214 F.3d 730 (6th Cir. 2000); *Kormas Constr., Inc. v. State of Oklahoma*, 140 F. Supp. 2d 1232 (W.D. Okla. 2001); *Main Line Paving Co. v. Board of Educ.,* 725 F.Supp. 1349 (E.D. Pa. 1989); *Contractors Ass'n. of Eastern Pennsylvania v. City of Philadelphia*, 735 F. Supp. 1274 (E.D. Pa. 1990); *West Tenn. Chapter of Associated Builders & Contractors, Inc. v. Board of Education*, 64 F. Supp. 2d 714 (W.D. Tenn. 1999); *United States v. Rothe Dev. Corp., 49 F.Supp. 2d 937 (W.D. Tex. 1999); revs & remanded* 262 F.3d 1306 (Fed. Cir. 2001)

[xli] CRS Report for Congress, Order No. RL30470, pp. 6-8 (October 12, 2000).

[xlii] Following *Adarand,* the Department of Commerce implemented annual goal benchmarking for procurements. In years when those goals were hit, the goals were reduced or eliminated for the following year. Statistics revealed an up and down bell curve on M/WBE utilization directly related to whether goals were in place or not. *See:* Dale, Charles, "Affirmative Action Revisited: A Legal History and Prospectus," CRS Report for Congress, Order No. RL30470, pp. 6-8 (October 12, 2000).

[xliii] *Croson,* 488 U.S. at 507-08.

[xliv] *See generally*, City of Kansas City, Missouri Disparity Study, pp. E15, E40 (1994).

[xlv] "…to adopt a preference for small businesses, or even for new businesses – which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have a racially disproportionate impact, but they are not based on race." *Id.* at 526 (Scalia, J., concurring); see State of Kansas Executive Order 08-08 (implementing Small Business, Minority and Women Business Program) (June 2008); *see also,* State of Illinois Small Business Procurement Program at *http://www.sell2.illinois.gov/FAQ_SBSP.cfm*.

[xlvi] *Croson,* 488 U.S. at 507-08.

[xlvii] Insight Center for Community Economic Development, "The Evolution of Affirmative Action An Executive Sumary of the Research Series: Best Practices, Imperfections, and Challenges in State Inclusive Business Programs," pp. 5 (November 2007).

[xlviii] Kansas City Ordinance 130041 §6 (3/21/13), §3-421(a)(28), (39); 3-461 (h); 49 CFR §26.63(a); 13 CFR §124.103(b). For federal programs, those definitions set forth under Chapter 49 Code of Federal Regulations pertain to the Disadvantaged Business Enterprise Program, and those under Chapter 13 to the 8a federal program. The majority of local and state regulations track the definitions set forth under 49 CFR Part 26.

[xlix] Kansas City Ordinance 130041 §6 (3/21/13), §3-461(h); 49 CFR §26.61(b); 13 CFR §124.103(d)(4).

[l] *Supra,* FN xli.

[li] Kansas City Ordinance 130041 §6 (3/21/13) §3-461 (i).

[lii] Kansas City Ordinance 130041 §6 (3/21/13)§3-461(h); 49 CFR §26.65; 13 CFR §124.102.

[liii] In addition to meeting SBA size standards, DOT additionally requires that a firm "must not have annual gross receipts over $22,410,000 in the previous three fiscal years ($52,470,000 for airport concessionaires in general with some exceptions). Under SAFETEA-LU, this threshold will be adjusted annually for inflation by the Secretary." 49 CFR Part 26.

[liv] https://uscontractorregistration.com/

[lv] 13 C.F.R. § 121.1001.

[lvi] *See e.g. eTouch Federal Systems LLC,* B-404894.3 (8/15/2011)(EFS proposal properly rejected where EFS not a small business and also failed to submit Small Business Subcontracting Plan required in solicitation); *ALATEC, Inc.,* B298730 (12/4/2006)(termination of otherwise properly awarded contract was appropriate where timely size protest filed; SBA ruled awardee was not "small" and ruling was not appealed, and there were no countervailing circumstances weighing in favor of allowing the business to continue performance). *But see, e.g., Synergetics, Inc.,* B2-99904 (9/14/2007)(Protest against agency providing Vistronix an SDV evaluation credit where Vistronix was no longer SDB rejected, where: (1) original SDB status was verified on multi-year option contract, (2) company was in SDB program at time of contract award; (3) RFQ did not require additional recertification information on option years; *ONS21 Security Services,* B-403067 (9/16/2010)(Agency acted lawfully in not terminating contract after receiving SBA decision that Trinity was not a "small business," where (1) award had already been made; (2) the size determination was appealed to SBA but contracting officer had discretion whether to apply decision to procurement; (3) agency contract had a presumption of "validity"; and (4) no other regulatory requirement for award to be terminated.

[lvii] Personal net worth requirements and guidelines are set forth in 49 CFR Part 23. The value of "less than $1.32 million" does not include the value of the business or the applicant's interest in the primary residence. Additional exclusions are available for owners of airport concessionaires. 49 CFR Part 23.

[lviii] *Id.*

[lix] *Id.,* 49 C.F.R. Part 23.

[lx] Kansas City Ordinance 130041 §6 (3/21/13), §3-461(e)

[lxi] https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf

[lxii] *Id.*

[lxiii] *Id.* §3-461 (e), (f) and (l)(6). *See also,* 49 CFR §26.69(f)(1)(i); §26.7((d), (g); 13 CFR §106.

[lxiv] *Id.*

[lxv] Kansas City Ordinance 130041 §6 (3/21/13) §3-461(l)(a)-(c); 49 CFR §26.69(b)(1)-(3); 13 CFR §124.105(a)-(d).

[lxvi] 13 CFR 124.105(2)(i), stating: "(i) Change of ownership. A Participant may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change. *Id.* (Emphasis added)(indicating that 51% ownership may result from the combined interest of more than one minority or female owner).

[lxvii] Kansas City Ordinance 130041 §6 (3/21/13)§3-461(k)(4); 49 CFR §26.69(e); 13 CFR §124.105

[lxviii] Kansas City Ordinance 130041 §6 (3/21/13) §3-461(k)(4); 49 CFR §26.69(e).

[lxix] *Id.*

[lxx] Kansas City Ordinance 130041 §6 (3/21/13) §3-461(l)(5)(a)-(v); 49 CFR §26.69 (f)(1)-(2).

[lxxi] *Id.*

[lxxii] Kansas City Ordinance 130041 §6 (3/21/13) §3-461(l)(11)(a)-(b); 49 CFR 26.71(l)(1)-(2); 13 CFR 124.106(f).

[lxxiii] Kansas City Ordinance 130041 §6 (3/21/13) §3-461(k)(7); 49 CFR 26.69(h).

[lxxiv] *Id.*

[lxxv] IRS Revenue Ruling 59-60.

[lxxvi] Kansas City Ordinance 130041 §6 (3/21/13), §3-461(l)(3); 49 CFR (d)(1)-(2).

[lxxvii] *Id.*

[lxxviii] *Id.*

[lxxix] Kansas City Ordinance 130041 §6 (3/21/13), §3-461(l)(10)(1)(10)(a)-(b); 49 CFR §26.71 (k)(1)-(2).

[lxxx] *Id.*

[lxxxi] Supra, FN lix.

[lxxxii] Kansas City Ordinance 130041 §6 (3/21/13), §3-461(l)(2) – (3); 49 CFR 26.71(c) .

[lxxxiii] Kansas City Ordinance 130041 §6 (3/21/13), §3-461(l)(2) and (3)(a)-(c); 49 CFR 26.71(c) and (d)(1)-(3).

[lxxxiv] Kansas City Ordinance 130041 §6 (3/21/13), §3-461(l)(15).

[lxxxv] Kansas City Ordinance 130041 §6 (3/21/13), §3-461(l)(4)-(6); 49 CFR 26.71((e)-(g).

[lxxxvi] *Id.*

[lxxxvii] *Id.*

[lxxxviii] *Id.*

[lxxxix] *Id.*

[xc] *Id.*

[xci] *Id.*

[xcii] Kansas City Ordinance 130041, Division 2, §6 (3/21/13); §3-461(l)(6); 49 CFR §26.71(g).

[xciii] Kansas City Ordinance130041, Division 2, §6 (3/21/13); §3-461(l)(7); 49 CFR §26.71(h).

[xciv] *Id.*

[xcv] *Id.*

[xcvi] Kansas City Ordinance 130041 §6 (3/21/13), §3-421(k)(2); 49 CFR §26.69(c).

[xcvii] Kansas City Ordinance 130041 §6 (3/21/13), §3-421(l)(8)(a)-(b); 49 CFR §26.71((i)(1)-(2).

[xcviii] *Id.*, permitting evidence justifying lower remuneration conditioned as follows: "Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its … owner although that owner's remuneration is lower than that of some other participants in the firm."

[xcix] *Id.*

[c] *Id.*

[ci] Kansas City Ordinance 130041 §6 (3/21/13), §3-421(l)(9); 49 CFR 26.71(j).

[cii] Kansas City Ordinance 130041 §6 (3/21/13), §3-421(l)(12); 49 CFR 26.71(m).

[ciii] *Id.*

[civ] 13 CFR §121.103(a).(1)-(4)

[cv] *Id.*

[cvi] 13 CFR §121.103(a)(6).

[cvii] 13 CFR §121.108; *see also* Kansas City Ordinance 130041 §6 (3/21/13), §3-465 including suspension, revocation, sanction, debarment, and any other applicable criminal or civil penalties.

[cviii] *Id.*

[cix] MoDot Regulations, 49 CFR Part 26.71(a)-(f)(emphasis added).

[cx] www.sbaonline.sba.gov/contractingopportunities/officials/size/bds/index.html

[cxi] 1995 SBA Lexis 175

[cxii] 1995 SBA Lexis 1

[cxiii] *Id.*

[cxiv] 527 F. Supp. 587 (1991).