



Promoting Equal Opportunity in Public Contracting

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Presented By: Doug Smith & Laura Schulkind

Agenda



- Legal Backdrop
- Operational Challenges
- Top 5 Lawful Strategies in Practice

Legal Backdrop

Legal Backdrop



- Overview:
 - Prohibition against discrimination isn't new
 - What constitutes unlawful discrimination has changed

Legal Backdrop



- Proposition 209*
 - Prohibits “preferential treatment” on basis of:
 - Race
 - Sex
 - Color
 - Ethnicity
 - National Origin
 - In Public:
 - Employment
 - Education
 - Contracting

**Cal. Const. Art. 1, Sec. 31*

Legal Backdrop



- Cal. Supreme Court interprets Prop. 209's prohibition against "preferential treatment" to include targeted outreach to potential contractors based on race, gender and other identified characteristics.
 - *Hi-Voltage v. City of San Jose Connerly v. State Personnel Board*

Legal Backdrop



- Unlawful preferences include protected classifications as a trigger for:
 - Bid preferences (e.g. additional points for MWBEs)
 - Bid discounts or reduced financial/insurance requirements for MWBEs
 - Set-asides (for a % of contract awards to MWBEs)
 - Subcontracting percentages (requirements that prime contractors subcontract a certain % of work to MWBEs, or show good faith efforts)
 - Outreach percentages (requirements that prime contractors perform outreach to MWBEs (without a requirement to perform outreach to all))

Legal Backdrop



- Lawful Strategies Overview
 - Clear Policy – visible leadership
 - Written outreach plan that communicates values and expectations
 - Data collection, review and utilization
 - Comprehensive Outreach Plans
 - Bid criteria and procedures
 - Outreach

Operational Challenges

Operational Challenges



- Diversity in contracting still matters to our boards and communities
 - Express commitments to women and minorities often a Board value
 - Expectations often not aligned with legal restrictions
 - Expectations may not be aligned with practical realities

Operational Challenges



- Imbedding lawful strategies to promote diversity into contracting practices involves
 - Time
 - Staffing & resources
 - Staff training & reorientation
 - Rethinking how efficiency is valued and defined

Legal Strategies in Practice

Clear Policy: Legal Components



- Express commitment to improving participation of underrepresented groups (women, minorities, etc.) is permissible...but link to district mission and/or strategic initiatives.
- Non-race/gender strategies to increase vendor diversity are permissible...but link to district mission and/or strategic initiatives.
 - how does this commitment improve services to students and/or the stability and viability of the district?

Clear Policy in Practice



- What we did
 - Updated policy
- How we did it
 - Board engagement
 - Board training/education on legal parameters
 - Board Ad-hoc Outreach Committee
 - Dedicated resources and staffing

Outreach Plans: Legal Components



- Inclusive outreach plans:
 - Take race/gender into account, but don't constitute "preferential treatment" because *all* contractors receive the benefit of outreach.
 - "Focused" v. "Targeted" outreach

Outreach Plans in Practice



- Key SJECCD Outreach Plan Components:
 - Clear metrics for outreach
 - Defines outreach activities
 - At least 2 annual “How To Do Business With the District” seminars.
 - Classes to help interested businesses understand how to obtain work from the district.
 - One-on-One meetings with promising small/local businesses.
 - Strategic Outreach before issuing each RFQ/RFP, including outreach to private organizations that support small, local, WMBEs.
 - Focused Advertising in publications that support WMBEs *in addition to* advertising designed to reach all likely interested and qualified businesses.”

Access Strategies: Legal Components



- Access strategies:
 - Procedures & criteria that make the process more accessible
 - Clear, easy to follow/access and service-oriented bidding process
 - Outreach to encourage local/small bidders
 - Services for all prospective bidders that address common needs and concerns of MWBEs
 - Training screening committees

Access Strategies in Practice



- Access strategies:
 - A modified requirement for demonstrating adequate experience with a similar size/scope of project
 - A modified insurance requirement, to the extent current requirement exceeds prudent business practice
 - Breaking large contracts into separate smaller contracts
 - Co-vendor opportunities for small or local business, or those whose workforce has a specified percentage that is local

Scoring Strategies: Legal Components



- *No* special consideration may be given on the basis of protected status.
- Link “point factors” to district mission or plans to avoid a claim that the point factors are “proxies” for race/gender.
- May value

Scoring Strategies in Practice



- RFQ Scoring Strategies:
 - Location: Reasonable proximate to the district and/or within district's service area
 - Demonstrated sensitivity to and understanding of the diverse backgrounds of community college students
 - Level of professional employment opportunities created within district's service area
 - Level of professional employment opportunities created for individuals from underrepresented groups
 - Require that prime contractors subcontract with small and/or local businesses
 - Preference for businesses that, themselves, have internal (lawful) EEO policies and practices

Training and Education: Legal Components



- Two themes
 - Prop. 209 & prohibition against preferential treatment
 - Why/how vendor diversity promotes institutional goals
- Who?
 - Screening committees
 - Boards
 - Business office

Training and Education in Practice



- Key elements
 - Confidentiality
 - Unconscious bias
 - Crafting effective questions
- Operational challenges
 - Committee selection
 - Identifying role/authority of committee
 - Role of members without subject matter expertise

Questions?



Doug Smith

Vice Chancellor of Administrative Services | San Jose Evergreen
Community College District

Douglas.Smith@sjeccd.edu

<http://www.sjeccd.edu/district-services/administrative-services>

Laura Schulkind

Partner | Liebert Cassidy Whitmore, San Francisco Office
415.512.3000 | lschulkind@lcwlegal.com

<https://www.lcwlegal.com/our-people/laura-schulkind>