



CONSTITUTIONAL PARAMETERS FOR REMEDIAL MEASURES

September 21, 2021

Zenita Wickham Hurley
Chief Counsel for Civil Rights

Cheryl A. C. Brown-Whitfield
Principal Counsel for MDOT



Not Advice of Office of Attorney General

Agenda

- ❑ Remedial Measures
- ❑ Constitutional Requirements
- ❑ Disparity Study/Analyses



Remedial Measures

- Race-conscious/Gender-conscious
- MBE Program for procurements
- Other applications of MBE Program
- Licensing remedies

Constitutional Law



City of Richmond v. J.A. Croson

Judicial Tests:

- ✓ Heightened Scrutiny
- ✓ Strict Scrutiny

Constitutional Law



Gender-conscious measures

“Heightened or Intermediate Scrutiny”

- “important government objectives”
- measures must be “substantially related” to achieving those objectives

Constitutional Law



Race-conscious measures
“Strict Scrutiny”

- “compelling government interest”
- must “narrowly tailor” the program to achieve that interest

Constitutional Law



Strict Scrutiny – First Prong

What is “compelling government interest”?

- need to remedy effects of discrimination
- generally documented in a disparity study

Constitutional Law

Strict Scrutiny – Second Prong



Narrow tailoring involves a variety of components, including:

- Measures must be targeted to remedy problem
- Consideration of race-neutral alternatives
- Elements to make the measures fair and flexible

Disparity Study

- MBE Program law is based on 2017 Disparity Study
- Other remedial measures generally require a separate or supplemental analysis

Disparity Study

2017 Disparity Study

- Contains statistical and qualitative evidence of discrimination against minority- and women-owned businesses
- Concludes that discrimination against minority and women business owners in Maryland's market area remains a significant problem.

Disparity Study/Analyses

Promoting diversity and inclusion in emerging industries – Need Industry Specific Analyses:

- ❑ An analysis of the pertinent industry to determine the types of work performed and the related costs for each item of work
- ❑ An analysis of the Disparity Study to determine whether and to what extent the types of work identified in the first analysis are in the Study

Disparity Study/Analyses

- ❑ Industry analysis completed in September 2020 by Keen Independent Research.
- ❑ NERA, the State's disparity study consultant, performed analysis of Keen Report to determine whether those industries were covered by the 2017 Disparity Study.

Disparity Study/Analyses

As provided in HB940/CH356 , the next step is for SWARC, GOSBA, MDOT & OAG to do a deep dive into the Keen and NERA analyses to determine:

- ❑ whether the State can implement remedial measures (the compelling interest prong)
- ❑ what types of remedial measures the State can implement (the narrow tailoring prong)

HB940/CH356

With respect to contracting activities, the Statute requires:

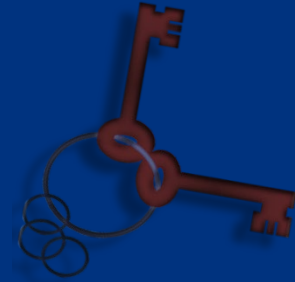
- To extent permitted by law, must apply MBE Program
- Application of MBE Program cannot be waived by SWARC
- GOSBA must develop plan for setting goals

HB940/CH356

With respect to licensing, the Statute requires:

- To extent permitted by law, SWARC must award licenses reflecting diversity
- Encourage MBEs to apply

HB940



Key Requirements for Considering Remedial Measures:

- Evaluate study
- Evaluate race neutral measures
- Consider other measures

THANK YOU!