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Minneapolis Municipal Construction Contracts: Awarding Methodologies and Affirmative Action

Jon Schoenwetter[†]

Introduction

In 2016, the State of Minnesota issued nearly seven billion dollars of construction permits at the state and local level.¹ As most cities do not maintain a staff of construction laborers, architects, and engineers, cities must look to private construction companies to realize these projects. In doing so, government officials must choose which private contractor receives a given construction project through the contract awarding process.

During this process, government officials owe a duty to expend public funds wisely.² Traditionally, this entailed advertising a project proposal, soliciting bids from private contractors, comparing the bids, and then awarding the contract to the lowest bidder.³ In general, the final award will be beyond reproach where the process allows for open, competitive bidding of a contract.⁴

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1. UNITED STATES CENSUS BUREAU, ANNUAL VALUE OF STATE AND LOCAL CONSTRUCTION PUT IN PLACE BY STATE: 2006–2016 (2016), <https://www.census.gov/construction/c30/pdf/slstate.pdf>.

2. While the exact process government units use to award contracts varies, all processes attempt to balance protecting the public from potential graft and favoritism while empowering officials to select proposals which, from a holistic perspective, provide the best value to the public. See MINN. STAT. § 16C.28 (2007) (offering municipalities the option to use a less mechanical bidding process known as “best value alternative” along with the more traditional “lowest responsible bidder” process).

3. See *Elliot v. City of Minneapolis*, 60 N.W. 1081, 1083 (Minn. 1894) (holding that municipal corporations hold funds in “public trust”); 10 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS, § 29:33 (3d ed. 2017) (stating that even in the absence of statutory requirements concerning the bidding process, public officials must act in good faith and for the best interest of the municipality in awarding contracts).

4. *Coller v. City of Saint Paul*, 26 N.W.2d 835, 841–42 (Minn. 1947) (“In the area of discretion is precisely where such abuses as fraud, favoritism, extravagance, and improvidence in connection with the letting of contracts are prevalent. . . . [T]he purposes of requirements for competitive bidding are to prevent such abuses by eliminating opportunities for committing them and to promote honesty, economy, and aboveboard dealing.”).

The awarding process becomes more complex where state and local governments incorporate affirmative action policies into the awarding process in an effort to redress the effects of discrimination upon classes of persons.⁵ While the concept of affirmative action may be “common and well understood,”⁶ its implementation has proven to be an enduring and contentious element of our national discourse⁷ in both the courts⁸ and the headlines.⁹ While higher education may be the most frequent backdrop for discussing affirmative action, the effect of these policies on the public contract awarding process deserves similar applause and attention.

Within the construction industry, these initiatives have become known as “set-aside programs” because they commonly aim to set aside a certain portion of government projects to historically disadvantaged groups.¹⁰ Typically, these set-aside programs augment the traditional, “lowest bidder” methodology by requiring bidders to demonstrate that they have a plan to meet participation

5. See generally, UNITED STATES COMM’N ON CIVIL RIGHTS, STATEMENT ON AFFIRMATIVE ACTION, CLEARINGHOUSE PUB. 54, at 102 (Oct. 1977) (“[A]ffirmative action . . . encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or prevent discrimination from recurring in the future.”); Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 926 (1995) (“Affirmative action is essentially the use of race consciousness in a preferential manner intended not to stigmatize, but to provide a modicum of equality to members of those groups that historically have been the victims of discrimination and subordination.”).

6. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

7. The issue of affirmative action reached the highest office in 2003, when then-President George W. Bush commented on its role in higher education: “At the law school, some minority students are admitted to percentage targets while other applicants with higher grades and better scores are passed over. This means that students are being selected or rejected based primarily on the color of their skin. The motivation for such an admissions policy may be very good. But it’s [sic] result is discrimination and that discrimination is wrong.” George W. Bush, President, United States, Address Concerning Affirmative Action in *Grutter v. Bollinger* (Jan. 15, 2003), <http://www.nytimes.com/2003/01/15/politics/bushs-statement-on-affirmative-action.html>.

8. See *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198, 2202 (2016) (upholding University of Texas admissions criteria that considered race as a factor within the applicant’s “Personal Achievement Index”); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that the use of race as a “plus” factor, but not as a predominant factor, in admissions decisions in order to obtain the benefits of a diverse student body is permissible).

9. Melissa Korn & Nicole Hong, *Harvard Faces Probe over Admissions Policy*, WALL ST. J., Nov. 22, 2017, at A1.

10. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980), *abrogated by Adarand Constructors*, 515 U.S. at 245 (recognizing a provision of the Public Works Employment Act of 1977 that required recipients of federal funds to disburse 10% of the funds to minority business enterprises as a “set-aside program”).

targets for minority- or women-owned business participation.¹¹ Typically, a bidder unable to meet targets will not be considered for bidding purposes, regardless of the financial competitiveness of the bid.

This Note presupposes that the way the bidding system operates both affects, and is affected by, set-aside program requirements. This Note argues that the Minneapolis set-aside program, known as the Small and Underutilized Business Program (“SUBP”), has developed in a disjointed manner from the broader Minnesota municipal contracting law, and suggests that harmonizing these two systems will allow SUBP to more effectively achieve its policy goals. Section I will outline the statutory requirements of SUBP, Minnesota contract awarding law, and formative constitutional challenges to set-aside programs in state and federal courts. In Section II, this Note proposes a potential SUBP reform, namely incorporating participation goals as qualitative factors during the bidding process. The Author believes this reform will further the effectiveness of SUBP while according with Fourteenth Amendment limitations on set-aside programs established by the Supreme Court in *City of Richmond v. J.A. Croson Construction*.¹²

I. Background

A. Purpose and Process of the Minneapolis Small and Underutilized Business Program

Recognizing the existence of unequal access to the competitive bidding process, municipalities across the country have incorporated substantive bidding requirements relating to Women and Minority-owned Business Enterprises (“WMBEs”).¹³ Minnesota is no exception. The State legislature has explicitly provided municipalities the opportunity to set aside government contracting work for “targeted small group business.”¹⁴ The most immediate

11. See *Eng’g Contractors Ass’n of S. Florida Inc. v. Metro. Dade Cty.*, 122 F.3d 895, 900–02 (11th Cir. 1997) (summarizing this type of set-aside program).

12. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989).

13. U.S. COMM’N ON CIVIL RIGHTS, MINORITY AND WOMEN AS GOV’T CONTRACTORS i (1975) (“[M]inority and female-owned firms encounter problems of staggering proportions in obtaining information on Federal, State, and local government contracting opportunities in time to submit timely bids, and in obtaining the working capital necessary for effective marketing and bidding.”).

14. MINN. STAT. § 471.345(8) (2018) (providing that set-aside programs must not cause anticipated contracting expenses to exceed a five percent premium over open market rates).

beneficiaries of SUBP are construction subcontractors that qualify for the set-aside amounts. Principally, these are small construction businesses—skilled in a certain trade—and owned by ethnic minorities and women. When applying to become a WMBE, the primary threshold for these businesses is to show that they are “majority owned and operated by women, persons with a substantial physical disability, or specific minorities.”¹⁵

Since 1976, the City of Minneapolis has maintained a set-aside program for city construction and other contracts.¹⁶ In 1999, the Minneapolis City Council enacted the current set-aside program, SUBP, to combat discriminatory outcomes persisting under the prior set-aside system.¹⁷ Chapter 423 of the Minneapolis Code of Ordinances (“Code”) establishes the requirements, process, and procedures of the current set-aside program.¹⁸ In 2017, SUBP aimed to provide twelve and thirteen percent of every government contract dollar to women- and minority-owned businesses, respectively.¹⁹

Bidders must comply with SUBP targets for any municipal contract valued in excess of \$175,000.²⁰ Given the cost of construction projects, this value threshold means that SUBP will likely apply in every construction project larger in scope than simple maintenance, repairs, or light renovations. If a project exceeds the value threshold, the Contract Compliance Department of the

15. Matter of Ultraflex Enterprises’ Appeal from Decertification in Minnesota Small Bus. Procurement Program, 497 N.W.2d 641, 643 (Minn. Ct. App. 1993) (citing MINN. STAT. § 16B.19 (2)(b) (1992)) (internal quotation marks omitted); see MINNEAPOLIS, MINN. CODE OF ORDINANCES tit. 16, ch. 423.30 (2011) (defining “minority” as “a citizen of the United States or lawfully admitted permanent resident who is African American, Hispanic, Native American or Asian/Pacific Islander . . . [or] who is determined, through a certification process, to be a socially and economically disadvantaged individual.”); CITY OF MINNEAPOLIS, DEPT OF CIVIL RIGHTS, MINNESOTA UNIFIED CERTIFICATION PROGRAM (2017), <http://www.ci.minneapolis.mn.us/civilrights/contractcompliance/subp/WCMS1P-124728>.

16. NERA ECONOMIC CONSULTING, THE STATE OF MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MINNEAPOLIS 255 (Oct. 21, 2010), <http://www.minneapolismn.gov/www/groups/public/@civilrights/documents/webcontent/wcms1p-084807.pdf>.

17. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 16, ch. 423 (2011).

18. *Id.*

19. KEEN INDEPENDENT RESEARCH, 2017 MINNESOTA JOINT DISPARITY STUDY: CITY OF MINNEAPOLIS 2 (Mar. 2018), https://mn.gov/admin/assets/KeenIndependentMinneapolisDisparityStudyFullReport03122018_tcm36-331971.pdf.

20. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 16, ch. 423.30 (2011) (requiring small businesses to meet the criteria set forth by the United States Small Business Association and have their principal place of business within Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, or Wright County); NERA, *supra* note 16, at 258 (requiring that businesses be certified as WMBEs by the Minnesota Unified Certification Program to take advantage of the benefits of SUBP participation).

Minneapolis Department of Civil Rights (“CCD”) will review the project and assess whether it presents work opportunities for WMBEs.²¹ Here, the CCD will consider (a) whether there are WMBEs capable of doing the work and (b) whether there are subcontracting positions on the project.²² If the CCD answers both in the affirmative, then the CCD is required to establish WMBE participation goals for the project.²³ While the CCD has the discretion to set WMBE goals at whatever level it deems appropriate for an individual project, the City of Minneapolis maintains aggregate goals for various types of work on construction contracts in addition to the city-wide targets mentioned previously. For example, the city maintains a goal for women- and minority-owned businesses to contribute six percent and thirty-two percent of on-site construction labor, respectively.²⁴

SUBP does not, however, require private contractors to hire WMBEs. Instead, SUBP requires that contractors only make “good faith efforts” to hire WMBEs for the project.²⁵ Accordingly, a contractor unable to meet WMBE targets may nonetheless receive a contract award, provided that they have received a good faith efforts waiver from the CCD. In order to receive a waiver, the CCD must find that the contractor made “every necessary and reasonable effort to subcontract work to MBEs/WBEs.”²⁶ In 2016, the CCD

21. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 16, ch. 423.40.

22. CITY OF MINNEAPOLIS, DEP’T OF CIVIL RIGHTS, MEMORANDUM CONCERNING SMALL AND UNDERUTILIZED BUSINESS PROGRAM 1 (July 2017), <http://www.ci.minneapolis.mn.us/civilrights/contractcompliance/subp/WCMS1P-124726>.

23. *Id.* at 2.

24. *See* CITY OF MINNEAPOLIS, PURCHASING DEP’T, BIDS FOR 501 4TH AVENUE SOUTH PARKING RAMP DEMOLITION PROJECT (Oct. 25, 2017), <http://www.ci.minneapolis.mn.us/www/groups/public/@finance/documents/webcontent/wcmssp-205377.pdf>.

25. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 16, ch. 423.90.

26. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 16, ch. 423.90(a) (providing explicitly that the CCD, when determining whether the contractor made “every necessary and reasonable effort” to hire WMBEs, may consider:

(1) Soliciting through all reasonable and available means (attendance at pre-bid meetings, advertising and/or written notices) the interest of all MBEs/WBEs certified in the scopes of work of the contract. The bidder or proposer must solicit MBEs/WBEs in sufficient time prior to bid opening or the proposal deadline to allow MBEs/WBEs to respond to solicitations. The bidder or proposer must determine with certainty if the MBEs/WBEs are interested by taking appropriate steps to follow up on initial solicitations.

(2) Selecting portions of the work to be performed by MBEs/WBEs in order to increase the likelihood that the project goals will be achieved. This includes, where appropriate, breaking out contract work into smaller units to facilitate MBE/WBE participation, even when a contractor might otherwise prefer to perform these work items with its own forces.

(3) Providing interested MBEs/WBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them

granted approximately two out of every three waiver applications it received.²⁷ While the Author was unable to locate contract-by-contract data to determine how often an entire contract bidding pool was excused from WMBE targets, it requires no stretch of the imagination to understand that Minneapolis may have difficulty meeting SUBP targets where waivers are so commonly available.

To support compliance with WMBE targets, Minneapolis has provided fines by reference to mandatory City of Minneapolis contract provisions.²⁸ Accordingly, if the CCD has probable cause to believe a contractor violated any of the mandatory contract provisions, including provisions requiring SUBP compliance, the City of Minneapolis is entitled to withhold up to fifteen percent of the contract price or assess five hundred dollars per day as liquidated damages until the CCD, the City Council, or a court of competent jurisdiction, finds the contractor in compliance.²⁹ Additionally, SUBP provides a program-specific fine of up to \$10,000 if the contractor substitutes, reduces, or eliminates a WMBE's involvement without prior approval from the city.³⁰ Finally, SUBP provides the city with the option—but not

in responding to a solicitation.

(4) The bidder or proposer must negotiate in good faith with interested MBEs/WBEs and provide written documentation of such negotiation with each such business.

(5) A bidder or proposer should consider a number of factors in negotiating with potential MBE/WME subcontractors, and should take into consideration an eligible MBE or WBE's price and capabilities and scheduling as well as established contract goals. However, the fact that there may be some additional costs involved in finding and using eligible MBE's/WBE's is not in itself a sufficient reason for a bidder or proposer's failure to meet the established MBE/WBE goals, as long as such costs are reasonable. The ability or desire to perform the work of a contract with its own organization does not relieve the bidder or proposer of the responsibility to make good faith efforts. Bidders or proposers are not, however, required to accept higher quotes from eligible MBEs/WBEs if the price difference is excessive or unreasonable.

(6) The bidder or proposer must make reasonable efforts to assist solicited eligible MBEs/WBEs in obtaining bonding, lines of credit or insurance as required by the city or by the bidder or proposer; provided that the bidder or proposer need not provide financial assistance toward this effort.

(7) Effectively using the services of minority/woman community organizations; minority/woman contractors' groups; local, state and federal business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the solicitation and placement of MBEs/WBEs.

27. 2017 MINNESOTA JOINT DISPARITY STUDY, *supra* note 19, at 2.

28. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139.50 (requiring, among other things, that the contractor furnish books and records to the CCD upon request and for the purpose of investigating compliance with SUBP).

29. *Id.* at (a)(7).

30. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 16, ch. 423.100.

obligation—to penalize a non-conforming contractor with a suspension, debarment, or “at risk” designation.³¹

The withholding and liquidated damages provisions present the most immediate consequence of violating SUBP requirements. However, a noncomplying contractor’s greatest consequence is likely ineligibility to bid for future contracts if the CCD discovers that the contractor has failed to meet participation goals or has otherwise been “[ir]responsible”³² or “unresponsive.”³³ While any of these results could prevent the contractor from securing future contracts, the decision to disqualify is in the discretion of the government unit awarding the contract. Indeed, the awarding body is not required to find a contractor ineligible unless, within the last three years, the Minnesota Department of Administration or Transportation rendered monetary sanctions against the contractor following two final determinations of SUBP violations.³⁴ As the timeline for large city construction projects is often measured in years, contractors seem unlikely to be deterred by the “twice in three years” threshold triggering mandatory disqualification.

*B. The Process of Awarding a City Construction Contract:
Lowest Responsible Bidder*

The participation goals, good faith waiver process, and violation consequences set by SUBP overviewed above function within the broader contract awarding law. The process required for offering public contracts began to develop at the close of the nineteenth century when the Minnesota Supreme Court decided *Elliot v. City of Minneapolis*.³⁵ In *Elliot*, the City of Minneapolis solicited bids from contractors to provide fuel oil to various city departments.³⁶ Three contractors responded to the proposal and

31. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 16, ch. 423.120.

32. MINN. STAT. § 16C.285 (establishing the minimum criteria for a bidder to be considered “responsible”).

33. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 16, ch. 423.40 (“Any bid or proposal, where there is or has been a material lack of compliance with the requirements of this chapter, shall be deemed to be an unresponsive bid or proposal by the department and such lack of compliance shall be a sufficient basis for the rejection of that bid or proposal by the City.”); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 16, ch. 139.50 (providing that the CCD, when conducting pre-award compliance review, may consider: “The record of the entity under review regarding observance of the City of Minneapolis contract compliance rules and regulations . . . documentary evidence of the implementation of each of the affirmative action standards set forth in the specifications” and past evidence of affirmative action plan compliance).

34. See MINN. STAT. § 16C.285(3)(5).

35. *Elliot*, 60 N.W. 1081.

36. *Id.* at 1082.

provided bids that listed the price for each department individually.³⁷ While the city had the right to award separate departments to each bidder, it ultimately selected one contractor for nearly every department, which resulted in a higher overall cost to the city.³⁸ The court upheld the contract on the grounds that the city charter had left the decision-making process, “in a great measure, to the honesty, discretion, and good judgment of the city council” where differences between the bids were not large enough to suggest fraud or abuse.³⁹

While ultimately upholding the City of Minneapolis fuel oil contract, the court cautioned against the broad discretion inherent in an awarding process constrained only by a requirement to advertise any proposal valued at more than \$100.⁴⁰ Aware of the potential for abuse under a system that left all but the manner of advertising in the hands of the awarding officials, the court concluded that, “[p]ossibly, public interest might be better subserved [sic] by . . . requiring contracts to be let to the lowest responsible bidder, but that is a matter for the legislature to deal with.”⁴¹

Listening to *Elliot*, municipalities began to promulgate competitive bidding practices in order to curb the potential abuse of public funds.⁴² Indeed, the twentieth century case law contains many examples of contract invalidations because of a failure in the competitive bidding process. For example, the courts invalidated contract awards for (a) awardees who were not the lowest responsible bidder,⁴³ (b) substantial variances between the bid and the proposal specifications,⁴⁴ and (c) significant post-award

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1083.

41. *Id.*

42. *Griswold v. Ramsey Cty.*, 65 N.W.2d 647, 651–52 (1954) (“The public welfare is ordinarily best served . . . by letting construction contracts to the lowest qualified bidder whereby all competitive contractors are given an equal opportunity and the taxpayers are assured of the best bargain for the least money . . . [otherwise it would] open the door to fraud in a manner which, if permitted, would emasculate the whole system of competitive bidding.”).

43. *Electronics Unlimited v. Vill. of Burnsville*, 182 N.W.2d 679, 683 (Minn. 1971) (holding that awarding a radio equipment contract to the highest bidder was an abuse of discretion by the awarding body).

44. *See Collier*, 26 N.W.2d at 840 (providing that a variance may be grounds for invalidating the award where the variance gave the “bidder a substantial advantage or benefit not enjoyed by other bidders.”); *City of Bemidji v. Ervin*, 282 N.W. 683 (Minn. 1938) (affirming invalidation of contract award for the construction of a power plant on the grounds that the final contract varied the payment terms in the

modifications.⁴⁵ In recognizing the preeminence of the competitive bidding process at this time, the Minnesota Supreme Court aptly stated that “the only function of the public authority with respect to bids after they have been received shall be to determine who is the lowest responsible bidder.”⁴⁶ These twentieth century decisions indicated that municipalities must strictly adhere to an aboveboard competitive bidding process or have their awards overturned.

In addition to a stringent competitive bidding process, cities also include substantive bidding requirements. Municipalities may frame these requirements as either prerequisites for bidding eligibility or as an element for officials to consider when comparing bids.⁴⁷ For example, one substantive prerequisite to every competitively-bid contract is that the bidder’s proposal be “responsive” to the government’s solicitation—namely, that the bidder offer the product or service under the terms and specifications detailed in the proposal.⁴⁸ In addition to the technical specifications of the project, many of today’s proposals require bidders to meet labor standards or post bonds.⁴⁹ As the Minnesota Supreme Court indicated in *Carl Bolander & Sons Co. v. City of Minneapolis*, it is within this general scheme that set-aside programs must operate.⁵⁰

In *Bolander*, Bolander and another contractor, McCrossan, were two of several bidders on a construction project to improve a road.⁵¹ In its proposal, the City of Minneapolis specified that each bidder must demonstrate a plan to subcontract ten percent of the contract value to minority-owned businesses and five percent to

solicitation).

45. *Griswold*, 65 N.W.2d at 648.

46. Additionally, the court found that public officials letting contracts had a duty to “adopt definite plans and specifications . . . framed as to permit free and open bidding by all interested parties.” *Coller*, 26 N.W.2d 835 at 840.

47. The exact manner in which these requirements are considered depends on whether the contract is offered within the “lowest responsible bid” or “best value alternative” framework. See *infra* subsection C for a discussion of “best value alternative” proposals.

48. *Sutton v. City of Saint Paul*, 48 N.W.2d 436, 440 (Minn. 1951) (citing 10 MCQUILLIN, MUN. CORPS., § 29.78 (3d ed.) (“Unless the bid responds to the proposal in all material respects it is not a bid at all, but a new proposition.”)).

49. MINN. STAT. § 471.345(7) (permitting municipalities to establish “minimum labor standards”); MINN. STAT. § 574.26(2) (requiring the posting of performance bonds for contracts valued over \$175,000).

50. *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204 (Minn. 1990) (noting the importance of subcontracting requirements to the City of Minneapolis’ goal).

51. *Id.*

women-owned businesses.⁵² The proposal expressly stated that failure to comply with this requirement would render the bid nonresponsive and thereby disqualify the bid.⁵³ In its bid, McCrossan listed one minority-owned business that it would use best efforts to subcontract fifteen percent of the project to, but failed to list any women-owned businesses. After receipt of bids, the city awarded the contract to the lowest bidder, McCrossan.⁵⁴

Bolander sued to enjoin the award for noncompliance with the women-owned business requirement.⁵⁵ The trial court upheld the award because it found that McCrossan's failure to specifically list a women-owned business did not prejudice the other bidders, and so did not amount to material unresponsiveness. In reaching this result, the court gave credence to McCrossan's testimony that he intended to hire a women-owned business.⁵⁶ A divided court of appeals reversed, holding that McCrossan's failure to list a specific women-owned business was materially unresponsive because it granted McCrossan an advantage: it could approach prospective WMBEs with the contract already in its pocket.⁵⁷ The Minnesota Supreme Court affirmed the court of appeals, holding that while McCrossan's failure would have been immaterial, the explicitness of the proposal on the matter elevated the failure to material unresponsiveness.⁵⁸ Indeed, following *Elliot*, the *Bolander* court rigidly interpreted bidding requirements and invalidated an award for slight deviation from the proposal requirements.⁵⁹

*C. The Process of Awarding a City Construction Contract:
Shift to Best Value Alternative*

At the opening of the twenty first century, the disapproval of discretion promulgated by the post-*Elliot* line of cases seemed to have climaxed and, starting in 2001, the Minnesota legislature began to permit the Department of Transportation ("DOT") to

52. *Id.* at 205 (stating that the proposal required the bidder to list the minority and women owned businesses that they would use "best efforts" to subcontract with).

53. *Id.*

54. *Id.* at 206.

55. *Id.*

56. *Bolander*, 451 N.W.2d at 206.

57. *Id.*

58. *Id.* at 207.

59. *Id.* at 208 ("The purpose of [the women and minority owned subcontracting requirements] was to assure that businesses owned and controlled by women or minorities receive maximum feasible opportunity to be included in City procurements and capital activities.") (internal quotation marks omitted).

award contracts within a “best value alternative” framework.⁶⁰ Under this new system, the DOT was permitted to consider the qualitative merits of a bid, in addition to the price, when selecting an awardee.⁶¹ Unlike quantitative metrics—i.e., contract price—qualitative metrics concern more intangible aspects to a bid—i.e., the bidder’s work history and the aesthetic appeal of the bid.

Under this new selection methodology, the DOT was required to find that the public interest would be best served by letting the project under the best value alternative.⁶² If answered affirmatively, it then had to issue a Request for Qualifications (“RFQ”) identifying the additional criteria it would use to evaluate the bidders on the project.⁶³ After receiving the potential bidders’ response to the RFQ, the DOT would then select two to five contractors to a “short list” and supply each with a Request for Proposals (“RFP”) that included further detail regarding the project.⁶⁴ The contractors would then submit revised proposals for scoring by a Technical Review Committee to establish a Technical Score for each bid.⁶⁵ Finally, the Technical Review Committee would divide each bid’s price by the Technical Score, with the awarding body required to accept the lowest “adjusted” bid.⁶⁶ As the

60. MINN. STAT. § 161.3412(1) (2006); Act of July 1, 2001, ch. 8, art. 3, sec. 2(1), 2001 Minn. Laws.

61. This has been described as “a selection process in which proposals contain both price and qualitative components, and award is based upon a combination of price and qualitative considerations. Qualitative considerations may include technical design, technical approach, quality of proposed personnel, and/or management plan. The award selection is based upon consideration of a combination of technical and price factors to determine (or derive) the offer deemed most advantageous and of the greatest value to the procuring agency.” *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 658 (Minn. 2015).

62. See MINN. STAT. § 161.3412(3)(b) (2014).

63. MINN. STAT. § 16C.28(1)(b) (2014) (providing a non-exhaustive list of factors including: “(1) the quality of the vendor’s or contractor’s performance on previous projects; (2) the timeliness of the vendor’s or contractor’s performance on previous projects; (3) the level of customer satisfaction with the vendor’s or contractor’s performance on previous projects; (4) the vendor’s or contractor’s record of performing previous projects on budget and ability to minimize cost overruns; (5) the vendor’s or contractor’s ability to minimize change orders; (6) the vendor’s or contractor’s ability to prepare appropriate project plans; (7) the vendor’s or contractor’s technical capabilities; (8) the individual qualifications of the contractor’s key personnel; or (9) the vendor’s or contractor’s ability to assess and minimize risks.”).

64. MINN. STAT. § 161.3420(2) (2001).

65. *Id.*

66. MINN. STAT. § 161.3420 (2001). For example, the Technical Review committee would take the number of points assigned to a qualitative factor, assign the bid a percentage of the points based on the bid’s ability to meet that criterion, and then divide the points scored by the total points possible.

DOT was the first governmental body permitted to consider the qualitative merits of each proposal, the guidelines it operated under shaped best value contracting in Minnesota.⁶⁷ In 2005, the State legislature expanded best value alternative to the Department of Administration, the University of Minnesota, and the Minnesota State Colleges and Universities systems.⁶⁸ Today, any municipality may use best value alternative.⁶⁹

Clearly, best value alternative differs substantially from the traditional lowest responsible bidder system because it allows the non-pecuniary merits of each bid to modify the bid price and create an “adjusted” low cost provider ranking.⁷⁰ The result is that a bidder who would not have received a contract under the lowest responsible bidder system may be able to receive a contract under best value alternative. This is especially true as awarding officials have much discretion: they are free to establish any number of bid criteria—so long as price is among them—and there is no clear guidance on how much price, or any other criterion, must contribute to the final “adjusted” score vis-à-vis other criteria.⁷¹

Today, every Minnesota municipality must use either the lowest responsible bidder or best value alternative system for contracts valued in excess of \$175,000.⁷² While the exact contours of what these systems entail is still unclear,⁷³ the Minneapolis set-

67. MINN. STAT. § 161.3412(1) (2014).

68. MINN. STAT. §§ 16C.32–35 (2006); Act of May 25, 2005, ch. 78, 2005 Minn. Sess. Law. 417.

69. Since first enacted in 2007, MINN. STAT. § 471.345(3)(a) has provided municipalities with a choice between “best value” and “lowest responsible bidder” methodologies.

70. See *Rochester City Lines*, 868 N.W.2d at 657 (defining “best value” alternative as “a method by which a government contractor is selected by weighing various quantitative and qualitative factors.”); *Sayer v. Minn. Dep’t of Transp.*, 790 N.W.2d 151, 156 (Minn. 2010) (recognizing that the “best-value process differs from the lowest responsible bid process in that it allows public agencies to consider factors other than cost when awarding contracts.”); Dean B. Thomson, Mark Becker & Jeffrey Wieland, *A Critique of Best Value Contracting in Minnesota*, 34 WM. MITCHELL L. REV. 25, 26 (2007) (noting how the Minnesota legislature “radically changed” the contract award process by permitting the best value alternative process).

71. MINN. STAT. § 16C.02(4) (permitting municipalities to consider other factors including, but not limited to, “environmental considerations, quality, and vendor performance”); *Rochester City Lines*, 868 N.W.2d at 667 (Gildea, Chief J., dissenting) (noting how the court took no objection to a best value RFP that weighed 40% to technical factors, 20% to past performance, 10% to financial ability, and 30% to key staff interviews).

72. MINN. STAT. § 471.345(3)(a).

73. See Jocelyn Knoll & Lauren Roso, *Do Minnesota Municipalities Have the Authority to Source Public Works Contracts Using the Construction Manager at Risk Delivery Method?*, JDSUPRA (June 21, 2017), <https://www.jdsupra.com/legalnews/do->

aside program operates in the same manner regardless of which system is employed.⁷⁴ Accordingly, a contractor's ability to meet the participation goals—or receive a waiver—is a prerequisite to bidding.

D. *Judicial Constraints on Set-Aside Programs*

One year prior to *Bolander*, the Supreme Court of the United States issued the foundational decision regarding set-aside programs: *City of Richmond v. J.A. Corson Construction*. There, the City of Richmond had adopted a municipal ordinance requiring thirty percent of city spending to flow to Minority-owned Business Enterprises (“MBEs”).⁷⁵ The city could grant good faith effort waivers, but only when the contractor demonstrated that it made “every feasible attempt” to comply and that MBEs were “unavailable or unwilling to participate” in the project.⁷⁶ The city justified this rigid quota system on five pieces of evidence: (1) the population of Richmond was fifty percent Black, (2) less than one percent of prime construction contracts had been awarded to MBEs from 1978–1983, (3) the local construction association was nearly all White, (4) the city attorney believed the quota system was constitutional, and (5) anecdotal allegations of general discrimination at the local and national levels of the construction industry.⁷⁷ Proponents of the set-aside program provided no evidence of specific instances of discrimination by the awarding body or the local prime contractors. Croson, a local non-MBE

minnesota-municipalities-have-the-48718/ (arguing that a cost-plus contract is impliedly permitted under MINN. STAT. § 471.345 and capable of being competitively bid); Dean B. Thompson, *New Minnesota Statutes Allow Design-Build, CM at Risk and Purchase Order Contracting for Public Projects*, THE CONSTRUCTION LAW BRIEFING PAPER (FABYANSKE, WESTRA, HART & THOMPSON) (Sept. 2005), http://fwhtlaw.com/wpcontent/uploads/2014/03/New_MN_Statutes_Allow_Design_Build.pdf (arguing that municipalities may award contracts to an applicant other than the “lowest responsible bidder”). *But see* Bob Huber, *If It Walks Like a Duck: Construction Management at Risk Contracts, a Risky Move for Cities*, MINNESOTA CONCRETE & MASONRY CONTRACTORS ASSOCIATION, <http://www.mcmca.com/news-and-events/industry-news/construction-management-at-risk-contracts-a-risky-move-for-cities> (last visited Oct. 7, 2017) (arguing that certain cost-plus contracting methods violate competitive bidding requirements and need express authorization by statute).

74. *See, e.g.*, MINNEAPOLIS, MINN., CODE OF ORDINANCE tit. 16, ch. 423.90(g) (2018) (providing a single standard requiring the contractor to make “every necessary and reasonable effort” to subcontract work to diversity businesses).

75. *Croson*, 488 U.S. at 477.

76. *Id.* at 478.

77. *Id.* at 480.

contractor who was denied a waiver, brought action challenging the constitutionality of the set-aside program.⁷⁸

The trial court upheld the set-aside program and the court of appeals reversed on the grounds that there was no evidence that the city was engaged in discriminatory practices itself. Specifically, the court of appeals reversed because it found the set-aside program was based on “broad-brush assumptions of historical discrimination” and the thirty percent quota was “chosen arbitrarily,” without relation to the number of local MBEs.⁷⁹

The Supreme Court affirmed the court of appeals decision, but indicated that governing bodies may adopt race-based set-aside programs even when the municipality is not actively engaged in discriminatory practices.⁸⁰ As to the City of Richmond, the Court concluded that the city’s justifications for the set-aside program did not provide “a strong basis for its conclusion that remedial action was necessary.”⁸¹ Specifically, the Court found the statements of discrimination conclusory and the disparity between the general minority population and MBE awardees of “little probative value” because the skills required in the construction trade made comparison to the general population unwarranted.⁸² Further, the Court held that objectively observable underrepresentation of Blacks in the local construction association could not, without more, justify remedial action.⁸³

Additionally, the Court stated that it would still have struck down the system, even if the evidence demonstrated substantial discrimination, because it was not narrowly tailored.⁸⁴ First, the Court found the definition of MBEs, which included several minorities, to be over-inclusive when the city’s evidence only

78. *Id.* at 483.

79. *Croson*, 488 U.S. at 485 (quoting *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1357 (4th Cir. 1987)); *Croson*, 488 U.S. at 486 (quoting *J.A. Croson*, 822 F.2d at 1360).

80. *Croson*, 499 U.S. at 492 (“[I]f the city could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.”).

81. *Id.* at 500 (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion)).

82. *Croson* at 501 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977)).

83. *Croson* at 503 (suggesting that for statistical underrepresentation to support remedial action, the city would need to link it to a disparity between the number of local MBEs eligible for association membership and the actual membership).

84. *Id.* at 506.

concerned Blacks.⁸⁵ Second, the City had not investigated the use of race-neutral remedial actions before instituting the quota.⁸⁶ Finally, the Court found that the thirty percent figure was arbitrary and held no relation to the effect of the discrimination alleged or the number or capacity of MBEs.⁸⁷

The *Croson* decision indicates that any set-aside program based on “an amorphous claim that there has been past discrimination in a particular industry” will likely be struck down.⁸⁸ *Croson* also provides significant guidelines for any municipality desiring to encourage WMBE participation in the contracting award process. Most importantly, *Croson* indicates that cities must have substantial evidence of discrimination in order to have a compelling interest in establishing a set-aside program.⁸⁹ Second, that strict quota systems will not be considered narrowly tailored because they lack flexibility, a relationship to the present labor market and particularities of a given project. Lastly, the Court indicated that WMBE targets must be based on industry specific data and take into consideration the capacity of the local WMBEs.

II. Analysis and Proposed Reform

As the existing SUBP program is set to expire December 31, 2025,⁹⁰ it is an appropriate time to engage in critical discussion of the Minneapolis set-aside program. Part A of this Section will consider the program’s effectiveness, Part B will suggest that SUBP can be more effective if it is revised to reflect the particularities of best value alternative contracting, and Part C will discuss the equal protection difficulties that may accompany the proposed reform.

A. SUBP Has Been Ineffective at Meeting Its Goals

Like its State-level peer, SUBP aims to “remedy the effects of past discrimination against members of targeted groups.”⁹¹ To reach this end, the City of Minneapolis has developed a system wherein construction businesses owned by women, minorities, or other disadvantaged groups can register for WMBE status and

85. *Id.*

86. *Id.* at 507.

87. *Id.* at 507–08.

88. *Croson* at 499.

89. Likely, this showing must elucidate a statistical disparity between the disadvantaged group working within the challenged industry and that WMBEs are qualified and available to work.

90. MINNEAPOLIS, MINN., CODE OF ORDINANCE tit. 16, ch. 423.160 (2019).

91. MINNEAPOLIS, MINN., CODE OF ORDINANCE tit. 16, ch. 423.10 (2019); MINN. STAT. § 16C.16(4) (2019).

participate, on a preferred basis, in city construction projects.⁹² However, an examination of recent trends shows that the existing program's performance is less than effective.

For example, the City of Minneapolis has required private contractors engaged in public contracts to maintain construction labor targets for women- and minority-owned businesses at six and ten percent respectively since 2012.⁹³ However, during the third quarter of fiscal year 2014, women- and minority-owned businesses secured less than four percent and eighteen percent of total onsite labor participation, respectively.⁹⁴ As labor expenses are significant in construction, this disparity indicates that funding for WMBEs is below the city-wide goals. Indeed, during the fourth quarter of 2016 only half of all Minneapolis projects met their SUBP participation goals.⁹⁵

At the state level, less than one percent of Minnesota's two billion dollars in contract awards for fiscal year 2014 went to prime contractor WMBEs.⁹⁶ And, of the twenty-nine vendors currently suspended or disbarred by the Minnesota Department of Administration, none suffer the label for failure to comply with set-aside program requirements.⁹⁷ Further, the 2017 Joint Disparity Study, which analyzed the evidence of discrimination in city contracting, found that "SUBP has not eliminated disparities for minority- and women-owned firms in [c]ity procurement."⁹⁸ These

92. MINNEAPOLIS, MINN., CODE OF ORDINANCE tit. 16, ch. 423 (2019).

93. CITY OF MINNEAPOLIS, PURCHASING DEP'T, BIDS FOR 34TH AVENUE SOUTH STREET RECONSTRUCTION PROJECT, Sept. 7, 2018, <http://www.ci.minneapolis.mn.us/www/groups/public/@finance/documents/webcontent/wcmsp-213866.pdf>.

94. MINNEAPOLIS DEP'T OF CIVIL RIGHTS., CONT COMPLIANCE DIVISION, 3rd Q. Rep. 7, (2014) <http://www.ci.minneapolis.mn.us/www/groups/public/@civilrights/documents/webcontent/wcms1p-135001.pdf>.

95. Emma Nelson, *Diversity in Hiring Falls Short of Goals for Public Construction Projects*, STAR TRIB. (Mar. 29, 2017), <http://www.startribune.com/diversity-in-hiring-falls-short-of-goals-for-public-construction-projects/417348223/>.

96. Assoc. Press, *Minnesota's Minority-Owned Companies Get a Fraction of State Business*, PIONEER PRESS (Aug. 10, 2016), <http://www.twincities.com/2016/08/10/minnesotas-minority-owned-companies-get-fraction-of-state-business/> (attributing the disparity to a lack of governmental compliance monitoring).

97. MINN. STAT. § 16C.285(3)(5) (2018) (requiring that a "responsible contractor" have not more than one final determination assessing a monetary sanction for failure to meet targeted group goals due to a lack of good faith effort from the Department of Administration or Transportation for three years prior to the bid); MINN, DEP'T OF ADMIN., OFFICE OF STATE PROCUREMENT, SUSPENDED/DEBARRED VENDOR REP. (last visited Nov. 11, 2017), <http://www.mmd.admin.state.mn.us/debarredreport.asp>.

98. KEEN INDEP. RES., 2017 MINN. JOINT DISPARITY STUDY: CITY OF MINNEAPOLIS (2018) at 4–5, https://mn.gov/admin/assets/Keen%20Independent%20Minneapolis%20Disparity%20Study%20draft%20full%20report%2001292018_tcm36-325262.pdf, ("[T]here are fewer, minority- and women-owned firms in certain industries than there would be if there were a level playing field for people of color

numbers show that SUBP has been unable to redress the effects of past discrimination in the local construction industry and suggests reform prior to its reauthorization in 2025.⁹⁹ In taking this step, the legislature should tailor application of the SUBP goals to whichever awarding system the city implements for each contract.

B. Proposed Reform: Integrating SUBP with Best Value Alternative

The expansion of best value alternative contracting in Minnesota during the twenty-first century is a significant change for cities and contractors alike. While the broader contract award law underwent this change, SUBP has failed to address the options municipalities now have when choosing how to award contracts.¹⁰⁰ Today, SUBP is applied in best value alternative settings in the exact same way it is applied for lowest responsible bidder.¹⁰¹ This dissonance is unsurprising given that SUBP is promulgated by the City of Minneapolis while the Minnesota Municipal Contracting Law was created at the state level. The vast distinctions between the two contracting systems indicate that a wise set-aside program should apply differently in order to avail itself of the potential benefits offered by best value alternative.¹⁰²

The principal benefit of developing a set-aside program that responds to best value alternative is that the WMBE targets for a project could be included in the proposal as a qualitative factor.¹⁰³ As a qualitative factor, the awarding body could assign a Technical Point Score to meeting the WMBE targets established for the project by the CCD. A contractor meeting the target would then receive all the available points and a contractor meeting only half of the requirements would receive half the available points. As such, a contractor's ability to meet participation goals would do more than

and women in the Twin Cities marketplace. Business outcomes also differed for MBE/WBEs compared with majority-owned companies. . . Utilization of minority- and women-owned firms in City procurement (11.17%) was below the 17.60% that might be expected from the availability analysis.”)

99. *Id.* at 8–11 (suggesting new incentive programs, reforming existing programs, working to reduce barriers to entry, and greater compliance monitoring).

100. The Small and Underutilized Business Program was last revised March 10, 2011.

101. MINNEAPOLIS, MINN., CODE OF ORDINANCE tit. 16, ch. 423.40 (2019).

102. A. Peter Hilger, BEST VALUE PROCUREMENT: LESSONS LEARNED (Regents of the University of Minnesota, 2009), <https://ccaps.umn.edu/documents/DCP/BAS-in-CMGT-BVP-Paper.pdf> (“The majority opinion from those interviewed . . . thought [best value alternative] is an excellent way to . . . check for/include [WMBEs] . . .”).

103. MINN. STAT. § 16C.28(1)(b) (2018) (establishing a non-exhaustive list of factors for the awarding body to consider including “price and other criteria”).

simply assure it of a seat at the table, it would directly impact the competitiveness of its bid.

In addition to measuring the contractor's plan to meet WMBE targets on the instant project, the awarding body could also incorporate, as another qualitative factor, the contractor's success—or failure—at meeting WMBE targets in past projects. Instead of relying solely on CCD's approval for the instant project, the awarding body could utilize the discretion afforded to them under best value alternative and wield a more precise tool.¹⁰⁴ Including WMBE targets as qualitative factors would grant the awarding body an *ex post* and *ex ante* perspective supplying a finer differentiation between bids.

Additionally, integrating SUBP with best value alternative would address the scenario where contractors are permitted to bid even though they failed to meet the WMBE targets yet exercised “good faith efforts.”¹⁰⁵ While the “good faith effort” provision of SUBP provides equitable recognition of the difficulties a contractor faces in hiring WMBEs in a local construction labor market that is more than 95% White and 86% male,¹⁰⁶ the current underperformance of SUBP, when read in conjunction with the skepticism surrounding the “good faith effort” provision, indicates, at a minimum, that some may be gaming the system. Indeed, according to one WMBE owner, contractors “know they have to reach out to [minority] businesses with solicitations, but that's all they do because the state doesn't follow up after that . . . That whole good faith effort thing is a joke.”¹⁰⁷ If this is the case, incorporating participation goals as qualitative factors would help reduce abuse

104. The awarding body is not completely devoid of information concerning a bidder's past compliance under the existing system: it would be aware of whether the bidder had violated SUBP requirements. However, this information is only assistive for separating bidders that have violated SUBP requirements from those who have not. As a qualitative factor, the awarding body would also be able to distinguish between a pool of complying bidders based on the degree of success in their past SUBP performance.

105. See MINNEAPOLIS DEP'T OF CIVIL RIGHTS, CONTRACT COMPLIANCE DIVISION, 3RD Q. REP. (2015), <http://www.minneapolismn.gov/www/groups/public/@civilrights/documents/webcontent/wcms1p-152605.pdf>; MINNEAPOLIS DEP'T OF CIVIL RIGHTS., CONTRACT COMPLIANCE DIVISION, SMALL AND UNDERUTILIZED BUS. ENTERPRISE PROGRAM: SPECIAL PROVISIONS—CITY CONSTRUCTION PROJECTS (2015), <http://minneapolismn.gov/www/groups/public/@civilrights/documents/webcontent/wcms1p-144465.docx> (providing the process requirements for auditing the good faith efforts of a contractor that is unable to meet the WMBE targets, or whose efforts cannot be verified) (last visited Jan. 11, 2017).

106. Nelson, *supra* note 95.

107. Assoc. Press, *supra* note 96; see also Nelson, *supra* note 95 (concluding that “[c]ontractors don't have to meet the goals to win bids—there's wiggle room.”).

by presenting “good faith effort” in a measurable format fit for comparison against other contractors. Indeed, if WMBE targets are presented as a qualitative factor, SUBP could eliminate the “good faith waiver.” In doing so, SUBP compliance would no longer present the possibility of having an entire pool of bidders who have waived out. The resultant ability to numerically compare the ability of every bidder on every qualifying contract to meet WMBE targets should increase the validity of the program in the eyes of contractors, WMBEs, and the general public.¹⁰⁸

For example, under the current system, a contractor who misses WMBE targets by a substantial margin will be treated the same as a contractor who only slightly misses the targets if they both receive a “good faith effort” waiver. This system encourages contractors to make just enough effort to be considered in “good faith,” but does not provide any incentive to do more than that. If WMBE targets operate as a qualitative factor, municipalities would be able to incentivize contractors in direct proportion to the intensiveness of their plan for meeting participation goals. Indeed, a contractor unable to meet targets would receive a lower “adjusted” score on its bid than if it had met the targets. As it is unlikely that all contractors would fail to reach targets by the exact same amount, the contractor that secured more work for disadvantaged groups than its competitors would be more likely to receive the contract award.¹⁰⁹ If, however, contractors are not “gaming the system” and the labor market is actually responsible for the target shortfall, the difficulties of hiring WMBE will be shared across the industry and contractors will enter the bidding process on an equal footing with each other.

In changing the current treatment of participation goals from a “pass/fail” binary into the more graduated assessment inherent in

108. Removing the good faith waiver may be imperative for this reform to be successful as the main benefits of using participation goals as qualitative factors—increased measurability of effectiveness and greater alignment of economic incentives to meet goals—would be substantially undermined if a contractor could opt out of the qualitative factor by securing a waiver. Failure to remove the waiver may also provide a basis for award invalidation under the proposed reform. See *Rochester City Lines*, 868 N.W.2d at 661 (finding that if an awarding body did permit a contractor to opt-out of a qualitative factor, the final award would likely be overturned for “unreasonable, arbitrary, or capricious” action).

109. Consider: if a contract has 1,000 qualitative points, and contractor A bid \$1,000 and scored 70% of the qualitative points because it was unable to fully meet WMBE targets, its bid would have a technical score of 0.7. If, for the same award, contractor B bid \$1,200 and scored 90% of the qualitative points because it did a better job at hiring WMBEs, its bid would have a technical score of 0.75. Contractor B would receive the contract—notwithstanding a higher contract price—because of its superior efforts in incorporating WMBEs.

a qualitative factor analysis, the city would promote further competition between contractors. Instead of proposing just enough WMBE participation to bid, or merely engaging in enough “good faith effort” to receive a waiver, bidders will have an incentive to secure more WMBEs because doing so will provide a selection advantage over their competitors.¹¹⁰

C. SUBP Reform: Equal Protection Challenge

The Fourteenth Amendment provides that “[n]o State shall. . . deny to any person within its jurisdiction the equal protection of the laws.”¹¹¹ In *Adarand Constructors*, the Supreme Court left no doubt that a set-aside program classifying benefits based on race would be subject to strict scrutiny under the Fourteenth Amendment.¹¹² Therefore, SUBP, as it exists currently and under the reform proposed by this Note, will survive a Fourteenth Amendment challenge only if it forwards a compelling state interest and is narrowly tailored to accomplish that interest.¹¹³

SUBP likely forwards a compelling state interest. As its stated goal, SUBP aims to “remedy the effects of past discrimination against members of targeted groups.”¹¹⁴ However, a benign purpose is not sufficient; the city must have “a strong basis in evidence for its conclusion that remedial action was necessary.”¹¹⁵ The Minneapolis SUBP program likely meets this threshold because it rests on much more than the City of Richmond’s “amorphous claim” of past discrimination.¹¹⁶ Under the direction of the City of Minneapolis, independent researchers have conducted periodic Joint Disparity Studies to document, with great detail, the effects of discrimination on the greater Minneapolis area.¹¹⁷ Indeed, the Joint Disparity Studies appear to be a direct response to the *Croson* decision, as the stated purpose of the studies directly mirror strict scrutiny language.¹¹⁸

110. Or, conversely, to secure at least as many WMBEs as their competitors.

111. U.S. CONST. amend. XIV § 1.

112. *Adarand Constructors*, 515 U.S. at 227.

113. *Wygant*, 476 U.S. at 274.

114. MINN. STAT. § 16C.16(4) (2018).

115. *Wygant*, 476 U.S. at 277; see *Croson*, 488 U.S. at 507 (providing that a set-aside plan must be “linked to identified discrimination.”); *Id.* at 490 (“The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1.”).

116. *Croson*, 488 U.S. at 499.

117. See JOINT DISPARITY STUDY, *supra* note 29; NERA, *supra* note 16, at 1.

118. NERA, *supra* note 16, at 1 (“[T]he purpose of this Study is to assist the City

NERA Economic Counseling evaluated SUBP in the 2010 Joint Disparity Study and found that over 80% of construction businesses serving the Minneapolis area were non-WMBEs.¹¹⁹ Even though nearly 20% construction businesses serving Minneapolis were WMBEs, they received less than 8% of the City's contract award spending.¹²⁰ Non-WMBE construction businesses received over 92% of contract award spending.¹²¹ Certainly, this is the type of industry specific evidence the Court found wanting in *Croson*. Ultimately, the Disparity Study found that the statistical disparities were (a) greater than could be expected in a race- and gender-neutral marketplace and (b) stifled WMBE participation such that there was "a strong inference of the presence of discrimination."¹²²

With the first prong likely satisfied, the reformed SUBP must demonstrate that it is narrowly tailored to its end. The chief contention with the proposed reform will be whether removing good faith efforts waivers conforms with narrow tailoring. In considering whether a set-aside program is narrowly tailored, the courts will look to several features of the program, specifically: (1) the availability of race-neutral alternatives, (2) "the flexibility and duration of the relief, including the availability of waiver provisions," (3) the relationship between participation goals and labor market realities, and (4) the impact the set-aside program has on third parties.¹²³ In *Croson*, the court found Richmond's set-aside program unconstitutional on all points above because (1) there was no evidence that the city considered any race neutral alternatives, (2) the city rarely granted good faith waivers,¹²⁴ (3) the thirty

in evaluating whether its current Small Underutilized Business Program to assist small, minority-owned, and women-owned business enterprises is *still necessary to remedy discrimination*, and to *narrowly tailor* existing and any new measures that may be adopted.") (emphasis added).

119. *Id.* at 3.

120. *Id.* at 7.

121. *Id.*

122. *Id.* at 12; *id.* at 3–4 ("[M]inorities and women are substantially and significantly less likely to own their own businesses as the result of marketplace discrimination than would be expected based upon their observable characteristics, including age, education, geographic location, and industry."); *id.* at 4–5 (finding that Black Americans were paid 33% less than non-minority males when controlled for other characteristics).

123. *Geyer Signal v. Minnesota Dep't of Transportation*, Civil No. 11–321 (JRT/LIB), 2014 WL 1309092, at *15 (D. Minn. Mar. 31, 2014) (quoting *United States v. Paradise* 480 U.S. 149, 171 (1987)).

124. *See Croson*, 488 U.S. at 478 (providing that Richmond's set-aside program only allowed waivers for "exceptional circumstances" where "every feasible attempt has been made to comply [with the targets]" and "[the WMBEs] are unavailable or unwilling to participate").

percent threshold shared no basis to the number of minorities working in the construction industry, and (4) the program worked a great hardship on third parties.¹²⁵ In light of the reform proposed by this Note, which suggests eliminating waivers, the “flexibility” prong will be the most difficult to meet because the absence of waivers cuts against the flexibility of the program. It may be argued, for instance, that if WMBE targets exceed the number of able and willing WMBEs available at a given time, the reformed SUBP would not be able to give the kind of individualized consideration offered by waivers and present “quota system” concerns.¹²⁶

Resultantly, the reformed SUBP would require constant and precise monitoring of WMBE targets to ensure that the program continues to maintain a relationship to the underlying disparities and availability of WMBEs.¹²⁷ This, however, presents little additional burden to the CCD, as it is already required to set project specific participation goals based on the availability of WMBEs and scope of work.¹²⁸ Indeed, if the CCD determined that a particular best value alternative contract provided no opportunity for WMBEs, then it would not solicit WMBE targets in the proposal.¹²⁹

Furthermore, unlike the system in *Croson*, the proposed SUBP reform would not render any contractor unable to bid because of their inability to meet participation goals. While a contractor underperforming on participation goals would be at a competitive disadvantage to a peer fully performing on them, the reform removes barriers to bidding. In a sense, the proposed system serves the same purpose as a waiver because it will ensure that no contractor is prohibited from bidding due to a legitimate impediment to achieving WMBE targets. Just as a challenging labor market may justify the issuance of waivers, the proposed reform would be fair because market difficulties would be experienced similarly by all bidders.

Ultimately, SUBP already has flexibility at multiple levels. If reformed, SUBP would fulfill the same purpose as good faith

125. *Id.* at 507–08.

126. See *Builders Ass’n of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725, 740 (2003) (“[Because] waivers are rarely or never granted . . . [t]he City program is a ‘rigid numerical quota’ . . . [These] formulistic percentages cannot survive strict scrutiny.”).

127. *Croson*, 488 U.S. at 507 (holding Richmond’s 30% quota to be “outright racial balancing” and not narrowly tailored because it held no relation to the number of minorities actually employed in the construction trade).

128. PURCHASING DEP’T, *supra* note 24.

129. DEP’T OF CIVIL RIGHTS, *supra* note 22.

waivers, even without providing for them. Potentially, a court may even find that the reformed system is more flexible than the current system because it removes barriers to bidding. As such, if WMBE targets are presented as qualitative factors for best value contracting, then the lack of a good faith waiver is unlikely to render the program unconstitutional. If, however, the CCD were concerned with the constitutionality of a system without good faith waivers, there is a more conservative reform option.

The alternative option would be to incorporate the statutory factors that the CCD must consider when deciding to grant a good faith waiver as qualitative factors themselves instead of the WMBE targets. As such, the Technical Review Committee would award points to contractors that: modified their construction schedules to accommodate for WMBEs, broke up large subcontracting jobs into smaller parts more suitable for WMBEs, assisted WMBEs in achieving bonding or insurance requirements, or utilized organizations and resources to help them find WMBEs. While this solution would likely require bidders to submit more paperwork and increase the difficulty of awarding a contract, the assignment of qualitative points would be analytically distinct from the WMBE targets themselves. This may be more “flexible” to a court of law.

Conclusion

Minnesota municipal contracting law and the Minneapolis Small and Underutilized Business Program are closely intertwined. In 2007, the State legislature expressly authorized best value alternative contracting and municipalities gained a powerful new tool with which to exert greater control over the way their cities develop. However, SUBP did not join in this sweeping reform; it continued in the same practices and procedures it has used since 1999. With the expiration of SUBP on the horizon, and the effects of discrimination still uncured in the local construction industry, the Minneapolis set-aside program is well situated for reform.¹³⁰ By recognizing that best value alternative presents the opportunity for awarding bodies to consider qualitative factors, and applying WMBE targets as qualitative factors, contractors would have a greater incentive to take on WMBEs. While this reform presents Equal Protection uncertainty, it also removes WMBE targets as a barrier to bidding and, in so doing, likely provides the flexibility *Croson* demands.

130. MINNEAPOLIS, MINN., CODE OF ORDINANCE tit. 16, ch. 423.160 (2018) (SUBP is set to expire Dec. 31, 2025).