



MODEL POLICY: EQUALITY IN PUBLIC CONTRACTING

THE PROBLEM: RACE AND SEX DISCRIMINATION IN PUBLIC CONTRACTING

A core principle of American constitutional and civil rights law is that the government treats individuals as individuals and not merely as representatives of their race, sex, color, ethnicity, or national origin. Government racial or ethnic classifications, for example, are only constitutionally or morally justified when they are narrowly tailored to serve a compelling government interest. Remedying specific government wrongs against identifiable individuals qualifies as compelling, but almost nothing else does.

Unfortunately, governments at the local, state, and federal levels often ignore this principle when choosing businesses to fulfill public contracts. Awarding contracts based on characteristics like race or sex, instead of which bidder can do the best job at the best price, is a waste of taxpayer money and an egregious violation of the right to equal protection for all Americans.

THE SOLUTION: STATE LAW PROHIBITING RACE AND SEX DISCRIMINATION IN PUBLIC CONTRACTING

MODEL OF BEST PRACTICE

- (a) The state shall not discriminate against, or grant preferential treatment to any individual on the basis of race, sex, color, ethnicity, or national origin in the operation of public contracting, nor shall it require or encourage public contractors to do so.
- (b) The existence of a statistical disparity between sexes, races, or ethnicities in the percentage of a sex or racial/ethnic group's participation in the marketplace, without more, does not give rise to an inference of impermissible sex, race or ethnicity-based discrimination.
- (c) This section shall apply only to actions taken after the section's effective date.
- (d) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex, which are reasonably necessary for the normal operation of public contracting.
- (e) Nothing in this section shall be interpreted as prohibiting preferences for certified small business enterprises (SBEs) or disabled veteran business enterprises (DVBES), provided those preferences do not discriminate against or grant preferential treatment to any individual on the basis of race, sex, color, ethnicity, or national origin or require such discrimination from SBEs or DVBES.
- (f) Nothing in this section shall be interpreted as invalidating any court order or consent decree that is in force as of the effective date of this section.