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Can Vague Regulations Be “Narrowly Tailored”? An Analysis of the U.S. Department of Transportation’s DBE Regulations

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Federal law requires recipients of federal funds for United States Department of Transportation (“USDOT”) construction projects to take affirmative action to promote the participation of disadvantaged business enterprises (“DBEs”) in those projects.¹ Federal regulations describing those affirmative action obligations in more detail require that a prime contractor who is awarded the contract for such a project utilize DBE subcontractors on the project even if the DBE’s price is higher than a non-DBE’s price as long as the price differential is not “unreasonable.”² In reviewing these programs, courts give heightened judicial scrutiny to any government contracting program that is based on racial classifications.³ The unintended consequence of USDOT’s DBE program, however, is that prime contractors must apply an undefined, vague standard of reasonableness to determine whether a DBE’s bid must be used. To require such a vague stan-

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¹Exec. Order No. 11, 246, 3 C.F.R. § 409 (1965).

²49 C.F.R. Pt. 26, App. A IV D(2).

³See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158, 67 Fair Empl. Prac. Cas. (BNA) 1828, 40 Cont. Cas. Fed. (CCH) P 76756, 66 Empl. Prac. Dec. (CCH) P 43556 (1995) requiring the use of strict scrutiny to ensure the DBE program is “narrowly tailored” to achieve a “compelling interest.” As the Eighth Circuit observed, “[t]hrough the DBE program confers benefits on ‘socially and economically disadvantaged individuals,’ a term that is facially race-neutral, the government concedes that the program is subject to strict judicial scrutiny, no doubt because the statute employs a race-based rebuttable presumption to define this class of beneficiaries and authorizes the use of race-conscious remedial measures.” *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003) (citing *Adarand*, 515 U.S. at 212–213).

dard does not survive strict scrutiny and is unconstitutional; it is also harmful to the goals of affirmative action.

Addressing discrimination in the construction industry is a compelling governmental interest,⁴ but as this article posits, the remedy currently being used to achieve that goal is constitutionally and economically flawed. This article concludes with a proposal for an alternative program that would remove the troubling ambiguity from the current regulations and help the government better achieve its goals.

Affirmative Action in Highway Construction

There is a long history of Executive Orders requiring affirmative action to address racial segregation in the construction industry.⁵ In the transportation industry, the USDOT has promulgated federal regulations to implement its affirmative action program.⁶ Under these regulations, the state's receipt of federal transit funds is conditioned on the State's establishment of a DBE program that complies with the USDOT's regulations.⁷ The Secretary of Transportation establishes a national goal regarding the percentage of authorized funds that are to be spent toward DBE participation and provides guidelines to States to determine the appropriate local DBE participation percentage goals.⁸ Once the appropriate goal is set,⁹ the regulations encourage States to meet their established goals through race-neutral

⁴Adarand Constructors, Inc. v. Peña, 515 U.S. at 237, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it." See also Taylor, *The End of an Era? How Affirmative Action in Government Contracting Can Survive After Rothe*, 39 Pub. Cont. L.J. 853, 867 (2010).

⁵For a short history of affirmative action laws, see Theodore C. Edwards II, *Maximizing Minority Participation on Construction Projects*, in 2004 *Construction Law Update* 5 (2004); see also Taylor, *The End of an Era? How Affirmative Action in Government Contracting Can Survive After Rothe*, 39 Pub. Cont. L.J. 853, 856 (2010).

⁶See 49 C.F.R. Pt. 26.

⁷See 49 C.F.R. Pt. 26; 49 C.F.R. § 26.21.

⁸See *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 2001 WL 1502841 (D. Minn. 2001), *aff'd*, 345 F.3d 964 (8th Cir. 2003); 49 C.F.R. § 26.45. These federal and state goals are aspirational, not quotas. 49 C.F.R. § 26.41. If they were quotas, they would be unconstitutional. *Grutter v. Bollinger*, 539 U.S. 306, 334, 123 S. Ct. 2325, 156 L. Ed. 2d 304, 177 Ed. Law Rep. 801, 91 Fair Empl. Prac. Cas. (BNA) 1761, 84 Empl. Prac. Dec. (CCH) P 41415 (2003) ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system.") Accordingly, the Eighth Circuit Court of Appeals has upheld Min-

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measures¹⁰ and further indicate that as long as a State or contractor attempts to implement or comply with the DBE program in good faith, no penalty will be imposed for a failure to meet the aspirational goal.¹¹

Of course, using race-neutral means to combat racial discrimination is rarely controversial; issues invariably arise, however, when the regulations require the affirmative use of racial preferences. If the overall program goal cannot be met through race-neutral means, the USDOT’s regulations require that recipients of federal funds set DBE participation goals for individual project contracts, and the prime contractors on those projects are required to use race-conscious “good faith efforts” to meet DBE participation goals. Appendix A to 49 C.F.R. Pt. 26 lists non-exclusive criteria by which those efforts are to be judged.¹² One of those criteria is whether a contractor, in its attempt to achieve the goal, used a DBE subcontractor at a price higher than a non-DBE subcontractor’s price for the same work:

The following is a list of types of actions which you should consider as part of the bidder’s good faith efforts to obtain DBE participation A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm’s price and capabilities as well as contract goals into consideration. *However, the fact that there may be some additional costs involved in finding and using*

nesota’s implementation of the federal DBE program partially on the ground that, on its face, it does not contain a race- or sex-based quota. *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964, 972 (8th Cir. 2003). The Court stated that the flexibility of the program was key to fulfilling the narrow tailoring requirement: “A State may obtain waivers or exemptions from any requirement and is not penalized for a good faith failure to meet its overall goal.” *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964, 972 (8th Cir. 2003); see also *Western States Paving Co., Inc. v. Washington State Dept. of Transp.*, 407 F.3d 983, 990 (9th Cir. 2005) (“While ‘[q]uotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, . . . a permissible goal . . . requires only a good-faith effort . . . to come within a range demarcated by the goal itself.”) (citing *Grutter*, 539 U.S. at 335).

⁹The debate over the proper constitutional basis for setting participation goals based on sex and race is beyond the scope of this article. See, e.g., *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 91 Empl. Prac. Dec. (CCH) P 43388 (Fed. Cir. 2008).

¹⁰See 49 C.F.R. § 26.51(a).

¹¹See *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 2001 WL 1502841 (D. Minn. 2001), *aff’d*, 345 F.3d 964 (8th Cir. 2003); 49 C.F.R. § 26.47(a) and (b).

¹²49 C.F.R., Pt. 26, App. A IV (the list of good faith efforts is not “intended to be exclusive or exhaustive”).

*DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.*¹³

As long as the DBE subcontractor's bid is low and the DBE is a "responsible" bidder,¹⁴ there should be no good reason not to require the prime contractor to use the DBE subcontractor's bid. If the DBE's price is above market—i.e., above the low bid available from another "responsible" non-DBE subcontractor—the issue becomes much more complicated. A non-DBE subcontractor that submits a low bid and establishes the market price for its section of work suffers racial discrimination if its low bid is not accepted and is replaced by a higher, non-market DBE bid. The legal justification for this current discrimination is the societal value gained from the affirmative action program, namely remediation of past discrimination.¹⁵

The non-DBE subcontractor does not know the price differential between his bid and a higher DBE bid at which his bid will be rejected or accepted by the prime contractor. If his bid is accepted, presumably the cost of the DBE's higher bid was excessive or "unreasonable"; if his bid is not utilized, the cost of the DBE's bid must have been sufficiently close to be considered "reasonable." If the non-DBE subcontractor does not know when

¹³49 C.F.R. 26, App. A IV D(2) (emphasis added).

¹⁴To be determined responsible, a contractor must: have adequate financial resources; be able to comply with the required schedule; have a satisfactory performance record; have a satisfactory record of integrity and business ethics; have the necessary organization, experience, accounting and operational controls, and technical skills; have the necessary production, equipment and facilities; and be otherwise qualified and eligible under applicable laws and regulations. 48 C.F.R. § 9.104-1. "Responsible" means a bidder "who can or will be able to perform the contract as promised." *City of Rochester v. U.S. Environmental Protection Agency*, 496 F. Supp. 751, 756, 15 Env't. Rep. Cas. (BNA) 1241, 28 Cont. Cas. Fed. (CCH) P 81054 (D. Minn. 1980).

¹⁵See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 702, 127 S. Ct. 2738, 168 L. Ed. 2d 508, 220 Ed. Law Rep. 84 (2007) (governmental discrimination on the basis of race is only justified by a compelling interest such as remedying past discrimination); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000) ("[The] federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements.").

or at what cost his bid will be accepted or rejected, he does not know how to price his product or service in order to effectively compete against his DBE competitors. The same is true for the DBE subcontractors competing for the same work: they too do not know at what price their bids will be considered unreasonable.

It does not advance the goals of the program to create an inefficient market in which DBEs do not know how to price their goods and services in order to obtain the work. The adjectives “reasonable” or “unreasonable” do not give bidders adequate guidance, and if they guess incorrectly as to their meaning, they will suffer economic harm—i.e., they will not get the work.

The prime contractor is in a similar state of uncertainty from the same regulation. It is not clear at what price the prime contractor should be expected to replace a lower, non-DBE subcontractor bid with a higher DBE subcontractor bid. In order to show “good faith efforts” to comply with the DBE regulations, the prime contractor must accept a DBE subcontractor’s higher-than-market bid, but other than being told that the price disparity only needs to be “reasonable,” the prime contractor does not know the extent of its obligation. Unfortunately, the consequences of interpreting the word “reasonable” incorrectly can cause the prime contractor to lose the project. A simple hypothetical reveals why: suppose prime contractor A bids \$1 million for a project and contractor B bids \$1,010,000. Suppose that the DBE goal for the project is 15% and each prime contractor can obtain 5% DBE participation by using market (i.e. low bid) subcontractor bids so their bid prices are unaffected by that level of DBE participation. Suppose further that more DBE participation becomes more expensive: an additional 5% to reach 10% participation will add \$20,000 to each bid; an additional 7.5% to reach 12.5% participation will add \$50,000; and an additional 10% participation to reach 15% will cost an additional \$100,000.

Under this hypothetical, if Contractor A and Contractor B both bid 5% participation, Contractor A wins the lucrative job because he is \$10,000 low and 5% DBE participation does not affect price. However, the DBE regulations require that prime contractors also include “reasonable” non-market DBE bids, so both Contractor A and B, to be compliant, must use some non-market DBE bids. As mentioned, the DBE regulations do not precisely instruct how far beyond market pricing the bidding primes are expected or required to go. In order to win the award, the prime contractor needs to be low, but if Contractor A uses more non-market pricing than necessary or “reasonable” and includes the higher DBE prices in his bid, Contractor A may lose the price competition.

The hypothetical shows the risk: if Contractor B utilizes 10% DBE participation, his price will be \$1,030,000, but if Contractor A uses 12.5% DBE participation, his price will be \$1,050,000—and Contractor A will lose the job unless he can convince the public agency that Contractor B's use of only 10% participation was not “good faith efforts.” The result is flipped if Contractor B uses 15% DBE participation for a total price of \$1,110,000, and Contractor A uses 12.5% DBE participation at a cost of \$1,050,000.

Again, the only guidance given is that the price difference not be unreasonable. In a competitive bidding situation, avoiding even small price differentials can be considered reasonable because those differentials can be the difference between success and failure.¹⁶ It is not uncommon for prime contractors to bid different levels of DBE participation below the stated goal,¹⁷ and the problem of not knowing how much more to pay for that participation cannot be solved by simply requiring that all contractors meet the project's 15% DBE participation goal because such a hard requirement would transform an aspirational goal into an unconstitutional quota.¹⁸

The economic fates of the DBE and non-DBE subcontractors as well as the prime contractor depend upon an after-the-fact definition of the word “reasonable” by an uninvolved third-party decider, but to paraphrase Dickens, the word “reasonable” is a

¹⁶As the Minnesota Supreme Court observed in commenting on price differentials, “Although this may seem minor, in a sharply competitive bidding situation, contract awards are often determined by slight differences.” *Telephone Associates, Inc. v. St. Louis County Bd.*, 364 N.W.2d 378, 382 (Minn. 1985).

¹⁷The bid results and DBE commitments from bidders on several Minnesota Department of Transportation projects show that prices and DBE commitments are typically varied. On State Project (S.P.) No. 6244-30, which involved the construction of a major bridge, the DBE goal was 12.00% and the bidders and their committed DBE participation were as follows: Bidder A \$130,380,898.32 (8.00% DBE commitment), Bidder B \$133,630,916.23 (8.00% DBE commitment), Bidder C \$143,696,971.44 (3.70% DBE commitment), Bidder D \$148,987,180.51 (12.00% DBE commitment), Bidder E \$172,260,437.00 (12.00% DBE commitment), and Bidder F \$191,511,142.52 (6.00% DBE commitment). Another smaller project, S.P. No. 1380-63, had established a 3.5% DBE goal, and the results were also similarly varied: Bidder W \$9,105,186.46 (3.00% DBE commitment), Bidder X \$9,444,462.70 (3.50% DBE commitment), Bidder Y \$9,538,798.58 (3.50% DBE commitment), and Bidder Z \$10,249,133.18 (2.48% DBE commitment). A third, even smaller project with a 10% DBE goal, S.P. No. 1928-55, shows the same type of variance: Contractor L \$2,508,383.37 (3.00% DBE commitment), Contractor M \$2,811,357.03 (5.00% DBE commitment), Contractor N \$2,897,024.60 (0.00% DBE commitment).

¹⁸See *supra*.

remarkable word; it means a different thing to every man. A guideline of undefined reasonableness is an unconstitutionally vague standard upon which to base a program utilizing racial preferences that is, therefore, subject to strict judicial scrutiny.¹⁹ In order to survive strict scrutiny, the program and its provisions must be “narrowly tailored,”²⁰ yet under the current DBE regulations, both DBE and non-DBE subcontractors do not know how to price their bids because they do not know at what point the subcontract bid price difference will stop being reasonable and become unreasonable. Similarly, prime contractors do not know how to evaluate more-expensive DBE participation because they cannot predict how “reasonable” will be defined on their project. If the actors in a program do not know how to act, the program cannot be said to be “narrowly tailored” to meet its objective.

USDOT’s DBE Regulation Is Void for Vagueness

The vagueness doctrine is an outgrowth of the Due Process Clause of the Fifth Amendment.²¹ A court examining whether a particular statute or regulation is void for vagueness applies a two-prong test. First, a law may be invalid if it fails to provide the kind of notice that will enable ordinary people to understand and not have to guess at the conduct it prohibits.²² Second, a statute is vague if it authorizes or encourages arbitrary enforcement.²³ Courts also examine whether the statute threatens to inhibit the exercise of a constitutionally protected right or activity, for example, freedom of speech.²⁴ If so, a more stringent vagueness test applies.²⁵

As discussed above, the current DBE regulations do not provide ordinary prime contractors with notice of the kinds of behavior

¹⁹See *Adarand*, 515 U.S. at 227.

²⁰See *Adarand*, 515 U.S. at 227.

²¹*U.S. v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

²²*City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999). A statute is said to be unconstitutionally vague if a person of ordinary intelligence has to guess what it means. See *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

²³*Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

²⁴*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).

²⁵*Williams*, 553 U.S. at 304.

expected of them other than a statement that they do not have to use “unreasonable” DBE prices. The problem is that the prime contractor’s “good faith efforts” and the applicable definition of “unreasonable” are determined *after* the prime contractor submits its bid. As a result, the prime contractor has no basis to know whether or not his understanding of the extent to which he must take affirmative action is correct. If the prime contractor does not know the extent to which he should take racially-based action, the statute is unconstitutionally vague. The DBE subcontractor also does not know how to price its goods and services to be competitive. The DBE subcontractor only learns whether its pricing was unreasonable after the fact, and it cannot make efficient, rational market pricing decisions to obtain work. The result of the ambiguity is that the DBE subcontractor cannot take full advantage of—and in fact may lose—the opportunity the program was designed to provide.

The level of scrutiny afforded to a statute under the vagueness doctrine depends on the kind of activity that the statute addresses. Specifically, economic regulation is subject to a less strict level of scrutiny.²⁶ The grounds for this relaxed scrutiny are that the subject matter of an economic regulation is often more narrow, and businesses can be expected to consult legislation in advance of action or clarify the ambiguous regulation by their own inquiry or by resort to an administrative process.²⁷ Because the DBE regulations provide that the definition of “unreasonable”

²⁶Hoffman Estates, 455 U.S. at 498. See also *Boyce Motor Lines v. U.S.*, 342 U.S. 337, 72 S. Ct. 329, 96 L. Ed. 367 (1952); *U.S. v. National Dairy Products Corp.*, 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963); *U.S. v. Petrillo*, 332 U.S. 1, 67 S. Ct. 1538, 91 L. Ed. 1877, 20 L.R.R.M. (BNA) 2254, 12 Lab. Cas. (CCH) P 51255 (1947).

²⁷Hoffman Estates, 455 U.S. at 498. Even in the economic regulation arena, the vagueness doctrine is most often applied to statutes which involve a clear prohibition—i.e., in the case of *United States v. National Dairy Products Corp.*, in which the court examined a statute making it a crime to sell goods at “unreasonably low prices.” 372 U.S. at 29. But courts have also applied the doctrine to statutes not involving a clear prohibition of a specific act. In *Big Mama Rag, Inc. v. United States*, a nonprofit corporation challenged the conclusion of the IRS that it was not entitled to tax exemption as an educational institution. *Big Mama Rag, Inc. v. U.S.*, 631 F.2d 1030, 1032, 80-2 U.S. Tax Cas. (CCH) P 9674, 46 A.F.T.R.2d 80-5723 (D.C. Cir. 1980). The nonprofit argued that the term “educational” was unconstitutionally vague. The court agreed, noting that “the latitude for subjectivity afforded by the regulation has seemingly resulted in selective application of the [regulation]—one of the very evils that the vagueness doctrine is designed to prevent.” *Big Mama Rag, Inc. v. U.S.*, 631 F.2d at 1037. The court relied in part on the fact that the First Amendment implications of denial of tax exemption to an educational institution mandated a stricter level of scrutiny of the vagueness of the regulation at issue. *Big Mama Rag, Inc.*

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is to be determined after the fact, however, the prime contractor cannot be expected to ascertain in advance what he needs to know by consulting the DBE regulations. Nor is there an administrative process that will tell the prime contractor the definition of a reasonable price differential *before* the bid is due. While this ambiguity may be constitutionally acceptable for purely economic regulation, the DBE program is not designed primarily to help economically depressed businesses. Rather, it is a program created to combat the effects of racial discrimination.²⁸ As a program that discriminates based on race, its provisions should be subject to scrutiny higher than applied to regular economic regulation.²⁹ Thus, the regulation is impermissibly vague on its face.

When vagueness permeates the text of a statute or regulation, it is subject to facial attack.³⁰ Although several courts have stated that facial challenges are applicable only when a statute implicates First Amendment concerns,³¹ the reasoning of these cases should be applicable to a situation where, as here, a regulation challenged as vague implicates the different, but equally important, interest of race neutrality under the 14th Amendment. Broader iterations of the vagueness doctrine have asked whether the vague law or regulation infringed on any constitutionally-protected interest.³² As equal protection is a constitutionally-protected interest, the race-based DBE regulations should be subjected to a vagueness analysis.

When a statute is vague, it may be interpreted in many different ways. Those charged with determining whether the price paid by a prime contractor for additional DBE participation is

v. U.S., 631 F.2d at 1032. Specifically, “although First Amendment activities need not be subsidized by the state, the discriminatory denial of tax exemptions can impermissibly infringe free speech.” *Big Mama Rag, Inc. v. U.S.*, 631 F.2d at 1034.

²⁸See *supra*, note 3.

²⁹*Adarand*, 515 U.S. at 200.

³⁰See *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (“When vagueness permeates the text of such a law, it is subject to facial attack.”).

³¹See *Virginia v. Hicks*, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003); *U.S. v. Hasner*, 340 F.3d 1261, 1269, 62 Fed. R. Evid. Serv. 213 (11th Cir. 2003); *U.S. v. Greenpeace, Inc.*, 314 F. Supp. 2d 1252, 1258 (S.D. Fla. 2004).

³²See *Hoffman Estates*, 455 U.S. at 499 (“The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.”).

reasonable³³ will necessarily exercise individual judgment, and it is not only possible, but likely, that different fact finders will reach different conclusions about what is or is not “reasonable.”³⁴ Some fact finders may narrowly define “reasonable” and thereby limit the acceptable price differences between DBE and non-DBE subcontractors; a different set of fact finders may adopt a broader definition. The end result will be a program that cannot be called “narrowly tailored” because it will produce different results on essentially the same facts depending on the definition of “reasonable” fashioned by different sets of fact finders reviewing prime contractors’ good faith efforts on various projects. Further, the ambiguity in the regulations does not allow the government to know whether its goal of remediating past discrimination is being properly and narrowly met, which is not only unhelpful to the DBE community, but also places an unconstitutional burden on the prime contractors forced to engage in this vague race-based system.³⁵

The United States Supreme Court has held that the terms “unreasonable” and “excessive” when used in reference to prices or profit are unconstitutionally vague. Therefore, forcing prime contractors and both DBE and non-DBE subcontractors to guess as to what price differentials are reasonable or unreasonable places an unconstitutional burden on them.

In *United States v. L. Cohen Grocery Company*, the Court addressed language in the Lever Act prohibiting the selling of necessities at “unjust or unreasonable” prices.³⁶ The Court held that such terms failed to provide notice of prohibited conduct because

³³Or, the contra positive, that the non-payment by the prime is not unreasonable.

³⁴See, e.g., *Central Tablet Mfg. Co. v. U. S.*, 1974-2 C.B. 109, 417 U.S. 673, 693, 94 S. Ct. 2516, 41 L. Ed. 2d 398, 74-2 U.S. Tax Cas. (CCH) P 9511, 34 A.F.T.R.2d 74-5200 (1974) (characterizing reasonableness as a question of fact).

³⁵*Seattle School Dist. No. 1*, 551 U.S. at 702 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211, 115 S. Ct. 2097, 132 L. Ed. 2d 158, 67 Fair Empl. Prac. Cas. (BNA) 1828, 40 Cont. Cas. Fed. (CCH) P 76756, 66 Empl. Prac. Dec. (CCH) P 43556 (1995)); *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586, 61 Empl. Prac. Dec. (CCH) P 42290 (1993) (“As we have held, one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff.”).

³⁶*U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 89, 41 S. Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045 (1921).

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the language did not forbid a “specific or definite act.”³⁷ By failing to confine the investigation of reasonableness to a particular element of a sales transaction, the law “[e]ft open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.”³⁸

In *Weeds, Inc. v. United States*, the Court applied the Cohen vagueness analysis to another section of the Lever Act prohibiting “excessive” prices.³⁹ The Court explained that the term “excessive” is “equally wanting in standard and equally as vague as the provision as to unjust and unreasonable rates and charges dealt with in the Cohen case.”⁴⁰

In *Cline v. Frink Dairy Company*, the Court addressed a state anti-trust statute that prohibited various monopolistic enterprises except those formed to obtain “a reasonable profit.”⁴¹ The Court explained that this exception vitiated the entire statute because there was no fixed standard with which to gauge reasonable profit. Ascertaining an “unreasonable profit” as a basis for judgment would be “impracticable and complicated” such that the nature of a jury’s task “would be legislative, not judicial”;⁴² thus,

³⁷*U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 89, 41 S. Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045 (1921).

³⁸*U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 89, 41 S. Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045 (1921). To illustrate its point the Court referenced a series of district court opinions, each approaching the concept of an “unreasonable price” differently; viewed as a whole, this collection of cases is an excellent example of how the regulation of an economic activity via a “reasonableness” standard produces an incoherent body of law. *U.S. v. L. Cohen Grocery Co.*, 255 U.S. at 91. In commenting on the issue in a later case, the Court stated: “The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty.” *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 240, 45 S. Ct. 295, 69 L. Ed. 589 (1925) (quoting *Standard Chemicals & Metals Corporation v. Waugh Chemical Corporation*, 231 N.Y. 51, 54, 131 N.E. 566, 14 A.L.R. 1054 (1921)).

³⁹*Weeds, Inc., v. U.S.*, 255 U.S. 109, 110, 41 S. Ct. 306, 65 L. Ed. 537 (1921).

⁴⁰*Weeds, Inc., v. U.S.*, 255 U.S. at 110.

⁴¹*Cline v. Frink Dairy Co.*, 274 U.S. 445, 456, 47 S. Ct. 681, 71 L. Ed. 1146 (1927).

⁴²*Cline v. Frink Dairy Co.*, 274 U.S. at 457.

even one attempting to abide by the statute is left to guess at how it would be enforced.⁴³

These cases indicate that it is unconstitutionally vague to use the word “reasonable” as a standard to judge whether business or economic conduct is lawful. While the cases in this line of precedent may have concerned alleged criminal violations of the Lever Act or anti-trust acts, the Court made it clear that its analysis was also applicable to civil legislation.⁴⁴ In fact, failure to pay a “reasonable” additional cost for more DBE participation can expose prime contractors and subcontractors to penalties similar to those imposed for anti-trust violations, making the application of the holdings in cases such as *Cohen*, *Weeds*, and *Cline* appropriate to the USDOT DBE regulations.⁴⁵ Thus, the same type of concerns expressed in these cases regarding the unconstitutional

⁴³The Court’s analysis that it is impermissible to use “reasonable” as a standard for determining an acceptable level of profit is equally applicable to the similar “reasonable” price differential standard used in USDOT’s DBE regulations: “[I]t will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge, involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result. When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detailed restriction of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impracticable standard for a jury’s discretion. A Legislature must fix the standard more simply and more definitely before a person must conform or a jury can act.” *Cline v. Frink Dairy Co.*, 274 U.S. at 465.

⁴⁴*A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S. Ct. 295, 69 L. Ed. 589 (1925) (“The ground or principle of [*Cohen* and *Weeds*] was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.”); see also *Cline*, 274 U.S. at 463 (“The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation.”).

⁴⁵The risk for prime contractors and subcontractors attempting to comply with the DBE regulations is not just the significant, potential loss of the contract on which they are bidding. If the agency overseeing the project conducts an audit during or after performance of the contract and believes that the prime contractor or subcontractors did not use “good faith efforts” to employ an adequate number of DBE subcontractors, the agency can assess the prime contractor and subcontractor significant penalties. For instance, the Minnesota Department of Transportation assesses what it claims are liquidated damages for not exercising “good faith efforts.” The liquidated damages are not based on the money the prime contractor saved by not using a higher priced DBE subcontractor or the profit allegedly lost by the DBE subcontractor who arguably should

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vagueness of using “reasonable” as a standard by which to judge pricing should apply to the similar standards at issue in the USDOT DBE regulations. A California appellate court applied a vagueness analysis in *Monterey Mechanical Co. v. Sacramento Regional County Sanitation District*,⁴⁶ in which the court examined local legislation that stated, in pertinent part, that “[s]ince the utilization of available M/WBE businesses is expected, only significant price differences will be considered as cause for rejecting such M/WBE bids.”⁴⁷ The court held the preference requirement void for vagueness because “[b]idders are left to guess what amount of bid differential will be considered ‘significant.’”⁴⁸

have been but was not used. Instead, the liquidated damages the Department assesses are the total amount of the DBE subcontractor’s bid that the Department claims the prime contractor should have used. The Texas Department of Transportation has a similar liquidated damage provision that it can invoke when it concludes based on an audit that the prime contractor did not pay a reasonable amount above market to obtain what the Department considers adequate DBE participation. Because these so-called liquidated damage provisions are not based on any measure of actual damages (i.e. either improper gain to the prime contractor or actual lost profit to the DBE subcontractor), these provisions are clearly penalties imposed for alleged non-compliance with the DBE program. See generally, *Gorco Const. Co. v. Stein*, 256 Minn. 476, 99 N.W.2d 69 (1959); *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991); *Johnson Engineers, Inc. v. Tri-Water Supply Corp.*, 582 S.W.2d 555, 557 (Tex. Civ. App. Texarkana 1979). In addition, the federal government can assert a False Claims Act (“FCA”) violation against a prime contractor or subcontractor if the government believes that the contractors have intentionally or recklessly misrepresented that they have made “good faith efforts” to comply with the DBE program by paying a “reasonable” amount above market to obtain DBE participation. The FCA allows the government to pursue criminal charges and assess civil penalties such as treble damages. 18 U.S.C.A. § 287; 31 U.S.C.A. §§ 3729 to 3733. Thus, the potential liquidated damage penalties and FCA penalties to which contractors can be exposed under the USDOT DBE regulations are not dissimilar to those at issue in *Cohen, Weeds, and Cline*, which militates in favor of a similar vagueness analysis being applied to the DBE regulations.

⁴⁶*Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.*, 44 Cal. App. 4th 1391, 52 Cal. Rptr. 2d 395 (3d Dist. 1996).

⁴⁷*Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.*, 44 Cal. App. 4th 1391, 52 Cal. Rptr. 2d at 402.

⁴⁸*Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.*, 44 Cal. App. 4th 1391, 52 Cal. Rptr. 2d at 404. The court concluded, “If the bidder guesses wrong [about what premium to pay for DBE participation], even total compliance with all the other requirements may go for naught. The only way the bidder can guarantee a finding of good faith effort is to comply with all other good faith criteria and accept all MBE and WBE [i.e. DBE] sub-bids, regardless of cost. The Legislature has not chosen to impose such an open-ended requirement, and the District is precluded from doing so on its own.”

To make matters worse, the federal government has not provided contractors with any guidance in implementing its regulations. In fact, in response to an inquiry from a prime contractor about how much more a prime contractor was expected to pay under the regulations for DBE participation, the Federal Highway Administration Division replied: “The language in the federal regulations [about price] is intentionally vague so there is no absolute percentage or number that I can give you . . . I do realize the [sic] seems like I have sent you in a circle, but, congress has deemed the DBE program to be important by writing it in federal law and has given primes lots of room implementing by not being over prescriptive.”⁴⁹ Clearly, if the agencies entrusted in enforcing the regulations understand them to be “intentionally vague,” the regulations are not narrowly tailored because the conduct being required from prime contractors—i.e. how much more they should pay for DBE participation—is not precisely defined or understood.

USDOT’s DBE Regulation Encourages Bid Shopping

The ambiguity in the regulations regarding how much more a prime contractor should pay for DBE participation encourages bid shopping, a practice that undercuts the purpose of the DBE program. “Bid shopping” occurs when:

a general contractor discloses the bid price of one subcontractor (or suppliers) to its competitors in an attempt to obtain a lower bid than the one on which the general contractor based *its* bid to the owner. Put another way, bid shopping occurs when a “general contractor uses the lowest bid received to pressure other subcontractors to submit even lower bids.”⁵⁰

If a prime contractor must pay more to attempt to reach a project’s DBE goal, it is not hard to understand why prime contractors have an incentive to bid shop DBE subcontractors’ prices—the DBE subcontractors’ prices are higher than market

Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist., 44 Cal. App. 4th 1391, 52 Cal. Rptr. 2d at 404. (emphasis in original). If the vagueness at issue in the Sacramento case effectively required the prime contractor to achieve the DBE participation goal regardless of cost, the program would also effectively be an unconstitutional quota. See *supra*.

⁴⁹Email from Federal Highway Administrator to Forest Lake Contracting dated August 9, 2011. The email was also copied to Minnesota Department of Transportation officials charged with enforcing the DBE program.

⁵⁰Donald W. Gregory and Eric B. Travers, Ethical Challenges of Bid Shopping, 30 Construction Law. 29 (No. 3 Summer 2010) citing Valley Crest Landscape, Inc. v. City Council, 41 Cal. App. 4th 1432, 49 Cal. Rptr. 2d 184 (3d Dist. 1996), as modified on denial of reh’g, (Feb. 21, 1996).

and the prime contractor needs to be the low bidder to get the project award. Because the prime is not given any definite pricing guidance other than it may avoid “unreasonable” DBE subcontractor bids, the prime contractor has an incentive to squeeze DBE prices lower through bid shopping in order to obtain the most DBE participation toward the goal as possible for the least amount of money. Not only is bid shopping the logical consequence of the current regulations, it is generally understood in the transportation industry to be required by the regulations under the euphemism “negotiations.”⁵¹ Indeed, in a recent hearing to review the Minnesota Department of Transportation’s Office of Civil Rights (OCR)’s rejection of a contractor’s bid due to allegedly inadequate DBE participation, the OCR argued that a contractor’s good faith efforts should be judged in part by whether it engaged in “negotiations” with DBE subcontractors. While the OCR denied it was promoting bid shopping, the OCR’s attorney provided a definition of negotiations indistinguishable from bid shopping:

Attorney for OCR: The most basic negotiations you could do would be for the prime to call up the sub and say—a DBE and say, we got your bid; thank you for putting in this bid; it’s a little high; we want to know if there’s some flexibility; is there any way you can bring your price down a little more. That’s the sort of negotiation that the federal regs. require and the kind of negotiation that did not occur here.⁵²

While facially legal, bid shopping is nevertheless universally reviled in the construction industry as “abhorrent” and “unethical.”⁵³ Irrespective of its corrosive effect on the competitive bidding process, bid shopping also undercuts the purpose of the DBE program, which is to encourage opportunities and growth for DBE subcontractors. These affirmative action opportunities will be counter-productive and the growth of DBE firms limited if the DBE subcontractors have their profit “shopped” out of their bids through “negotiations” with prime contractors—“negotia-

⁵¹26 C.F.R. Pt. 26, App. A IV D(1) and (2). Section D(1) requires “negotiations” with DBE firms, and Section D(2) states that those negotiations should “take a firm’s price . . . into consideration.”

⁵²Administrative Reconsideration Hearing, pursuant to 49 C.F.R. Pt. 26 — S.P. 069-604-060., p. 37, ll. 11–18.

⁵³See Gregory and Travers, *supra*, note 50 at 29. The deleterious effects of bid shopping include undermining the system of simultaneous bid disclosure in competitive bidding; promoting lower quality work and corner-cutting (to pay for the bid reduction); increasing claims and change orders (to recover the bid reduction); and lowering subcontractor profit to dangerously low levels. “Gregory and Travers, *supra*, note 50, at 31–32.

tions” that are required by the regulations. If this process is repeated often enough, the DBE subcontractors will not emerge into viable, competitive companies, they will submerge into debt and bankruptcy.⁵⁴ If the DBE program’s goal is to promote growth of DBE firms to remedy the effects of past discrimination, the current regulations promoting “negotiations” to reduce DBE pricing are not narrowly tailored to achieve that goal; in fact, they subvert it.

A Workable Alternative

The DBE regulations do not survive strict scrutiny because their vagueness does not give adequately precise direction on how much more a prime contractor must pay DBE subcontractors in order to make a sufficient “good faith effort” to meet the government’s racially-based DBE participation goals. There are, however, other, more promising methods that would better achieve the program’s objectives. One such device is to employ bidding preferences. A bidding preference gives DBEs a percentage discount that could be used to evaluate their bids for the purpose of determining which prime contractor was the successful low bidder. The percentage preference applicable to DBE bids could be established through legislative findings and adjusted periodically if necessary. The bidding preference would apply to all existing DBE subcontractors for a period of years found appropriate by the legislature, and the period would start when a new DBE subcontractor entered the construction market.⁵⁵

The following is an example of how such a program could work:

⁵⁴Gregory and Travers, *supra*, note 50, at 32 (citing Cody Andreasen, Mark O. Lords & Kevin R. Miller, *Contracts, Bid Shopping and Project Buyout*, Proceedings of the 45th Annual ASC Conference (2009)).

⁵⁵For a more detailed description of bidding preferences, see Oppenheimer, *Understanding Affirmative Action*, 23 *Hastings Const. L.Q.* 921, 927–929 (1995–1996). The bidding preference described above is not a *de facto* quota because the preference does not guarantee that the DBE participation goal for the project will be met nor would it completely eliminate non-minorities from consideration for a certain percentage of opportunities; if the non-DBE subcontractors’ prices are lower than the DBE prices with the preference, the non-DBE subcontractors will get the work. Unless the bidding preference is established at an extraordinarily high percentage, the preference will not make “the factor of race . . . decisive,” which was a concern of the United States Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304, 177 Ed. Law Rep. 801, 91 Fair Empl. Prac. Cas. (BNA) 1761, 84 Empl. Prac. Dec. (CCH) P 41415 (2003) and *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257, 177 Ed. Law Rep. 851, 91 Fair Empl. Prac. Cas. (BNA) 1803, 84 Empl. Prac. Dec. (CCH) P 41416 (2003). The analysis in *Grutter* and *Gratz* is not wholly on point, however, as those cases evaluated a

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The state legislature could issue findings that a 6% DBE bidding preference was appropriate to address past racial discrimination in the construction industry. Suppose a non-DBE subcontractor submitted a bid for \$95 for a certain item of work and a DBE subcontractor submitted a bid for \$100 for the same item. The prime contractor rationally would use the DBE's bid when he submitted his prime bid because under the preference program, the DBE's bid would be entitled to the 6% preference and be treated as a bid for \$94. While the DBE's bid would be read as \$94 for the purposes of calculating which prime contractor had the lowest bid, the prime contractor and DBE subcontractor would be paid the DBE's actual bid of \$100 once the prime contractor was determined to be low and awarded the contract.⁵⁶

The advantages of a bidding preference system solve many of the issues created by the current DBE regulations. Most importantly from a constitutional perspective, a bidding preference system would resolve the vagueness in the current regulations regarding how much above normal market prices a prime

“compelling interest” different from the one justifying the DBE program. The “compelling interest” at issue in both *Grutter* and *Gratz* was whether the admissions preference system established by the University of Michigan was narrowly tailored to achieve the goal of obtaining the educational benefits of classroom diversity. In the context of that goal, the Court held that some level of individual consideration of each applicant in relation to achieving the stated goal was required. In the context of USDOT construction work, however, the “compelling interest” is to remedy the past effects of discrimination that have been legislatively found to exist in the industry, and a national DBE participation goal, which can be adjusted for local conditions, has been set to address that problem. Thus, the DBE program should be judged on whether it is narrowly tailored to help achieve the DBE participation goal established to remedy past discrimination. The current DBE regulations already make price a consideration in achieving the goal, but do so vaguely in a way that does not help the program achieve its goal.

⁵⁶At first glance, this might appear to cost the government more for DBE participation than it otherwise might have to pay, but the current regulations already require the government to pay more, the only difference being that the prime contractors and DBE subcontractors currently do not know how much more when bids are submitted. The only time they are able to find out if they guessed right is when a government agency reviews the prime contractor's “good faith efforts” after the fact. As a result, we cannot know if the current system costs more or less than a bidding preference system would; the current system depends on how a particular government agency might define the word “reasonable” on a particular project. Situations could arise in which application of the preference resulted in the DBE participation goal being exceeded by an excessive amount, which could indicate that the DBE market for a particular project was not in need of the program's assistance; to address those situations, agencies could create a flexible mechanism by which to reduce uniformly the bidding preference applied on a particular project.

contractor should pay a DBE in order to be considered to have made “good faith efforts” to obtain DBE participation. Prime contractors could confidently select the subcontractor bids they desire to use after applying the bidding preference, and they would not have to guess if they should pay more or less for DBE participation at the risk of losing the project. Instead, the prime contractor would rationally include in its bid the bids of all DBE subcontractors whose bids were low after the preference was applied, as that would be the best way for prime contractors to ensure that their bids were the lowest. In short, a bidding preference system would remove the problem of attempting to properly divine the definition of “reasonable.”

Second, the bidding preference would reduce bid shopping because the current program’s incentive for the prime contractor to try to convince the DBE subcontractor to reduce its bid to match a lower one from a non-DBE subcontractor would no longer be present. In other words, the bidding preference would already give the prime contractor the bidding advantage he usually seeks from bid shopping if he uses the lower DBE subcontractor’s bid adjusted by the preference.⁵⁷

Third, the bidding preference system helps DBE subcontractors because the DBE subcontractor is actually *paid* its bid price (in the above example, the full \$100) even though its bid is *considered* to be lower for the purposes of both its bidding competition with other subcontractors and the prime contractor’s bidding competition with other primes. In this way, the DBE’s pricing (as adjusted by the preference) becomes more competitive for the purposes of bidding, and the DBE is not being pressured to reduce the amount it is actually getting paid to less than what it thought it could afford.

Fourth, a bidding preference system is also manageable in terms of its duration. The legislature could determine how long the preference should apply to emerging DBE subcontractors to combat the effects of past discrimination.⁵⁸ Fifth, the workings of a bidding preference system are transparent, a goal of any

⁵⁷Of course, prime contractors could still choose to bid shop DBE subcontractors for reasons other than obtaining adequate DBE participation, but the bid shopping of DBE subcontractors can be limited by requiring prime contractors to list and promise to use the DBEs they have included in their bids or by using bid depositories for DBE bids. Gregory and Travers, *supra*, note 50, at 33.

⁵⁸How long an affirmative action program is created to exist is a factor used to consider in determining whether it is narrowly tailored. See *U.S. v. Paradise*, 480 U.S. 149, 171, 107 S. Ct. 1053, 94 L. Ed. 2d 203, 43 Fair Empl.

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healthy public bidding system.⁵⁹ When the government makes its desires clear, prime contractors are better able to present the government with what it wants.

Conclusion

Combating racial discrimination is a compelling and admirable goal, but the current DBE regulations are too vague to constitutionally or effectively implement that goal. Strict scrutiny requires more narrowly tailored solutions such as bidding preferences. Whatever solution the government creates to correct the problem, it should provide clear guidance to governments, prime contractors, and DBEs about the extent of the program’s obligations. If the obligations under the regulations are clear, the government will be better able to administer the program, contractors will be better able to comply with it, and courts will be better able to ensure it is “narrowly tailored” to achieve its goals.

Prac. Cas. (BNA) 1, 42 Empl. Prac. Dec. (CCH) P 36752 (1987) (plurality and concurring opinions); *Grutter v. Bollinger*, 539 U.S. 306, 342, 123 S. Ct. 2325, 156 L. Ed. 2d 304, 177 Ed. Law Rep. 801 (2003) (periodic legislative debate over duration of the program “assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself”). In addition, as a matter of policy, it is important to know how much any governmental program costs. Currently, governmental entities are not keeping track of how much more is being paid for DBE participation on projects because the current regulations delegate the decision of how much more to pay to obtain that participation to the prime contractors. If an agency decided it was important to know the cost impact of the program, a bidding preference system could easily request contractors to keep track of the cost differential and report it to the agency.

⁵⁹See Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 *Pub. Procurement L. Rev.* 103 (2002), in which the author lists transparency, procurement integrity, and competition as the three most important “pillars” of any public procurement program and states that efficiency, customer satisfaction, best value, wealth distribution, risk avoidance, and uniformity are other important goals. A bidding preference system not only satisfies the “wealth distribution” goals of the affirmative action program, but it also is open and “transparent,” runs as a “competitive” and “efficient” market once the preference is applied, and can be “uniformly” and consistently applied. The end result is that participants and the public should have confidence in the “integrity” of the bidding preference system.