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The "Race-Neutral" Option for Local Government Contracting Programs

— *by Alan C. Weinstein* —

In its 1989 decision striking down Richmond, Virginia's mandatory contract set-asides for minority business enterprises (MBEs), *City of Richmond v. J.A. Croson Co.*,[1] the Supreme Court ruled that any state or local race-conscious affirmative action plan for public contracts or purchases would be subject to strict scrutiny if challenged.[2] To satisfy strict scrutiny, a local government must demonstrate that its race-conscious MBE contracting program can meet both the "compelling governmental purpose" and "narrowly-tailored" prongs of that test. In *Croson*, the Court ruled that remedying the prior effects of past discrimination—including a local government's "passive" participation in private sector discrimination[3]—is a compelling governmental purpose, provided that the local government has evidence that such discrimination has occurred. Such evidence may consist of both statistical proof of discrimination—by demonstrating a statistically valid disparity between the availability of qualified minority subcontractors and their utilization by majority prime contractors[4]—and anecdotal evidence of particular instances of discrimination, normally in the form of individuals' testimony about discrimination they have suffered.

Developments After *Croson*

Following *Croson*, majority contractors, and contractors' trade associations, challenged a number of state and local government MBE programs.[5] At first, local governments enjoyed significant success in such litigation.[6] In particular, the courts in these early cases found that when the local government, or its consultant, had produced a "disparity study" that purported to show discrimination in government contracting based on race and/or gender, such a study met the evidentiary standard set forth in the *Croson* decision and the city's MBE program was upheld.[7] Writing several years after the *Croson* decision, Professor George La Noue argued that these positive outcomes were due, in large part, to the fact that the plaintiffs, encouraged by *Croson*, had underestimated the resources needed to challenge a local government program "shielded" by a disparity study and chose not to challenge these studies on their merits in a bench trial.[8]

In its 1989 decision striking down Richmond, Virginia's mandatory contract set-asides for minority business enterprises (MBEs), *City of Richmond v. J.A. Croson Co.,* the Supreme Court ruled that any state or local race-conscious affirmative action plan for public contracts or purchases would be subject to strict scrutiny if challenged.

In light of these outcomes, it was not surprising that a demand soon arose for consulting firms to produce disparity studies that supported existing or proposed race-conscious contracting programs.[9] According to La Noue, by 1997, approximately 140 disparity studies had been completed at an estimated cost of over $54 million.[10] Regrettably, these studies did not represent the good-faith objective efforts of neutral experts to uncover whether discrimination could be proved and, if so, what narrowly-tailored remedies would suffice to remedy these wrongs. Rather, "[t]he studies were instead designed to be briefs for MBE programs and to function as insurance policies designed to discourage litigation. If a lawsuit was brought, the study would provide the appearance of an attempt to follow *Croson* in a way that would undermine any claim for damages by contractors adversely affected by racial preference programs."[11]

The Vulnerability of Disparity Studies

When those challenging MBE programs came to understand the evidentiary hurdles posed by disparity studies, they responded by hiring their own experts who could both call a defendant city's study into question from the witness stand, and assist counsel in preparing for cross-examination of the defendant's own consultants. The result of this change in plaintiffs' strategy has been dramatic. In contrast to the initial successes enjoyed by local governments in summary proceedings,[12] no state or local MBE program has withstood judicial scrutiny to date when subjected to a full bench trial in federal court.[13]

Moreover, local governments no longer can routinely expect success in summary proceedings.[14] As a result, in some cases, local governments have simply declined to defend an MBE program when a suit is filed.[15]

While a detailed critique of the evidentiary flaws in disparity studies revealed in these successful challenges is beyond the scope of this article,[16] many of the studies deemed to be flawed shared the following characteristics. First, the studies failed to identify with sufficient specificity those minority businesses which were being discriminated against. In the worst cases, a study would lump all minority firms together indiscriminately for purposes of statistical analysis, with no attempt to either distinguish among discrete groups (Hispanic, Native-American, African-American, and others) or the separate categories (e.g., electrical sub-contractors, paving prime contractors, and architectural firms) of a city's contracting or purchasing. In other instances, the study's distinctions were found insufficient; for example, several studies were deemed flawed because they failed to analyze awards separately for prime contractors and sub-contractors within particular contracting categories.

Second, the studies failed to meet *Croson's* requirement that only those minority firms that were "qualified, willing and able" to perform if awarded a city contract should be considered in determining whether there was discrimination in government contracting.[17] In many cases, a study would consider *any* minority firm in the U.S. Census database for a given jurisdiction as potentially "qualified, willing and able" to perform *any* government contract in its field of work, without regard to such critical factors as the firm's size, experience, capitalization, bonding capacity, and others. Thus, for example, a minority individual with a full-time job, who also repaired residential driveways on a part-time basis as the sole proprietor of an asphalt-paving "firm," might well be counted as a minority "highway construction firm" in determining whether MBEs were discriminated against in the city's award of major road construction contracts. Another flaw shared by many studies regarding the "qualified, willing and able" standard was their failure to explore whether market factors, rather than discrimination, might account for an apparent disparity in contract awards to MBEs. For example, in litigation challenging Philadelphia's MBE program, the plaintiffs showed that, during a period when the city's disparity study claimed MBEs were being discriminated against by not receiving an appropriate percentage of the city's contracts, few MBEs were "willing and able" to participate in those contracts because many were already engaged to their full capacities in federally-funded projects.[18]

To satisfy strict scrutiny, a local government must demonstrate that its race-conscious MBE contracting program can meet both the "compelling governmental purpose" and "narrowly-tailored" prongs of that test.

Other Problems With Race-Conscious Programs

In case after case, courts have also found that the studies' statistical analyses either used inappropriate techniques or did not support a finding of discrimination.[19] While the courts' assessments of the validity and probity of anecdotal evidence provided in disparity studies have not been as uniformly critical as that directed at the statistical evidence,[20] no decision has found that anecdotal evidence, standing alone, even comes close to justifying a race-conscious program.[21]

Finally, the cases striking down MBE programs have noted two other major shortcomings in disparity studies and the ordinances based on their recommendations. First, local governments have failed to meet *Croson's* requirement that race-neutral remedies be "considered" before enacting a race-conscious remedy.[22] In most cases, local governments have merely paid lip service to this requirement by listing some possible race-neutral remedial measures and then intoning that they have concluded these would not be adequate to remedy past discrimination.[23] Second, when a disparity study is successfully challenged, the court will invariably find that the expansive MBE program enacted on the basis of the flawed study also violates the narrowly-tailored prong of strict scrutiny.[24]

Crafting a Valid Program

The foregoing discussion does not mean that it is not currently possible for a local government to enact a race-conscious MBE program that will withstand strict scrutiny; however, it does mean that there are significant practical barriers to doing so. Obtaining and analyzing the data required to produce a statistical analysis that will satisfy strict scrutiny is the most significant of these. Given the courts' criticisms of past disparity studies, a local government would, for example, need to analyze the following data over a span of several consecutive years to conduct an adequate disparity study of construction contracts:

- A comprehensive list of all minority vendors—identified by race, gender, ethnicity, and location of place of business—objectively determined

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to be "qualified, willing and able" to bid and perform in specific categories of contracts as a prime or subcontractor.

- Complete bid data for all contracts.
- Payment data for all contract vendors, both prime and sub-contractors, including all changes and modifications, from inception to completion.

Further, as a practical matter, the above data would have to be available in an electronic format that could readily be downloaded to appropriate software, since the cost of compiling several years of such data from paper records would be prohibitive.[25]

"Consideration" of Race-Neutral Remedies

A second significant practical barrier is meeting the *Croson* requirement that race-neutral remedies be "considered." Race-neutral remedies are targeted at categories of businesses defined by criteria other than race, gender or ethnicity, such as size, age, "disadvantaged status," or location. Race-neutral programs (in contrast to race- or gender-conscious programs) are designed to benefit all eligible participants regardless of race, and are directed toward smaller or newer or "disadvantaged" businesses. Since these more often than not include many MBEs in need of aid, such firms can be significantly benefitted by a race-neutral program.

Local race-neutral programs employ three basic techniques to enhance access to and participation in government contracting, namely:

- Increase the likelihood that the identified group(s) are awarded contracts via aspirational goals, set-asides or bid preferences.
- Utilize one or more of various technical, educational, and financial assistance programs aimed at improving the skills; expertise; and access to capital, insurance and bonding; of the business owner.
- Make operational changes in government contracting to increase the likelihood that the identified group(s) can learn about and benefit from contracting opportunities.

In addition, local government may also adopt policies that directly address possible discrimination in government contracting, such as sanctioning prime contractors who refuse to use minority subcontractors or suppliers.

Obviously, some of these programs may be more effective or practical than others for a local government. Additionally, courts have consistently held that governments need not exhaust all possible race-neutral alternatives before implementing race-conscious ones. What is important, however, is that the local government demonstrate that it has considered and implemented an array of race-neutral programs that it believes could be effective in increasing access to government contracting opportunities for "disadvantaged" or "new and small" businesses, regardless of how these are ultimately defined.

As noted previously, for both practical and political reasons, local governments have normally attempted to skirt *Croson*'s requirement of showing they have "considered" race-neutral remedies, and found them inadequate, prior to adopting a race-conscious remedy. As a practical matter, race-neutral programs have been disfavored because they can require significant staff and resources—for funding, subsidies, and training—and changes in how the city conducts its contracting and purchasing. Politically, it has been difficult for local government leaders to muster much support for postponing the enactment of a race-conscious remedy in order to test the efficacy of a race-neutral program.

Reconsidering Race-Neutral Remedies

The time has come, however, for local governments to reconsider the role a race-neutral program can play in their good faith efforts to identify and remedy discrimination in the contracting marketplace. When combined with an adequate computer-based system for the collection of contracting and vendor data, a well-designed and administered race-neutral program can assist enormously in insulating a city from successful legal attack when it takes appropriate measures, including race-conscious remedies, to address documented discrimination in the contracting marketplace.

Why is this so? In brief, when a local government enacts a well-designed race-neutral contracting program (combining several of the elements outlined previously) and administers it properly over a period of time, it has clearly met *Croson*'s requirement that race-neutral remedies be "considered." When such a program is run in conjunction with a comprehensive program of data-collection for government contracting, a local government has the ability to document and evaluate the outcomes of its race-neutral program over time to determine whether these programs are effective in eliminating private sector discrimination against women and minorities in obtaining government contracts. To make this determination, the city would analyze the government contracting data it had collected, using appropriate statistical methods. If that analysis shows a statistically significant variance between the availability and utilization of a specific minority in a particular contracting area (e.g., African-American electrical sub-contractors or Hispanic custodial firms), implementation of some form of race-conscious remedy, narrowly-tailored to address that segment of the city's contracting activity, could then be considered.

It is important to understand that the process just suggested must be dynamic, not static. A local government engaged in this process will regularly analyze its contracting data and evaluate outcomes to determine whether the status quo in any particular contracting area (which is always the race-neutral portion of the program to start, but may shift to a race-conscious portion if a statistically significant disparity is found) needs to be reconsidered. Over time, a city's contracting program is likely to take on a mosaic quality when viewed at any particular time, with race-neutral elements sufficing in certain categories, while race-conscious elements are implemented in others. Again, because this is inherently a

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dynamic process, specific categories will not only transition from race-neutral to race-conscious, but also change back from race-conscious to race-neutral, since narrow-tailoring requires that any given race-conscious remedy have a "sunset" provision.[26]

Further adding to this dynamism is an element of program design not yet discussed. In most race-neutral programs, firms do not remain eligible to receive program elements forever. Firms lose their eligibility when they either exceed some eligibility criterion (for example, gross revenue or number of employees) or meet some durational limit (e.g., each of the federal Small Business Administration's race-neutral programs for "disadvantaged" businesses limit the number of years a business remains eligible).[27] Accordingly, a given firm may be eligible to participate in the race-neutral program at some times, in the race-conscious program at others, and at some point, may no longer be eligible for either and is treated no differently than a firm that had never been eligible to participate in the race-conscious or race-neutral program.

Conclusion

Despite the dismal record cities have compiled of late in defending their race-conscious contracting programs, this article seeks "to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.'"[28] If a local government follows the course outlined above, and combines the ability to monitor and analyze *all* relevant contracting data with the enactment and implementation of a multi-faceted race-neutral program, it has laid a sound foundation for the subsequent enactment of race-conscious remedies that are narrowly-tailored to address statistically valid disparities in utilization of specific categories of MBEs that remain after the race-neutral program has been in operation for a reasonable period of time. Based on the standards established by the caselaw to date, such a narrowly-tailored race-conscious remedy should survive strict scrutiny.

Notes

1. 488 U.S. 469 (1989).
2. Six years later, in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), the Court held that race-based federal contracting programs are also subject to strict scrutiny. The *Adarand* decision resolved the issue of what level of scrutiny was appropriate for federal race-based affirmative action programs. In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court upheld a federal law that required that ten percent of federal public work monies granted to local governments be set aside for minority-owned businesses. While the Court clearly rejected the application of strict scrutiny to race-based Congressional enactments, the Justices could not agree on precisely what level of scrutiny was appropriate. After *Croson*, many observers expected that the Court would, at its next opportunity, extend strict scrutiny to federal race-based programs, but one year later, in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), the Court, in a 5-4 decision, held that federal race-based programs should be analyzed under intermediate scrutiny. Five years later, *Adarand* made clear that strict scrutiny was the appropriate standard; however, the *Adarand* Court did not expressly overrule *Fullilove*.
3. When a local government awards public contracts to non-minority contractors who discriminate against minority sub-contractors, it becomes a passive participant in their private system of racial discrimination. In contrast, active discrimination by a local government requires that the government itself discriminate against racial minorities.
4. Writing for the majority, Justice O'Connor noted: "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."
5. *See, e.g.*, Cone Corp. v. Hillsborough County, 723 F. Supp. 669 (M.D. Fla. 1989); Coral Construction Co. v. King County, 729 F. Supp. 734 (W.D.Wash. 1989); Ohio Contractors Ass'n v. City of Columbus, 733 F. Supp. 1156 (S.D. Ohio 1990); F. Buddie Contracting Co. v. City of Elyria, Ohio, 773 F. Supp. 1018 (N.D. Ohio 1991); Concrete Gen. Inc. v. Washington Suburban Sanitary Comm'n, 779 F. Supp. 370 (D.Md. 1991).
6. *See, e.g.*, Coral Construction Co. v. King County, 729 F. Supp. 734 (W.D.Wash. 1989), *aff'd in part and rev'd in part*, 941 F.2d 910 (9th Cir. 1992) and Associated General Contactors of California v. City & County of San Francisco, 748 F. Supp. 1443 (N.D.Cal. 1990), *aff'd*, 950 F.2d 1401 (9th Cir. 1991).
7. Id.
8. George R. La Noue, *The Impact of Croson on Equal Protection Law and Policy*, 61 ALB. L. REV. 1, 7-13 (1997). In contrast, a plaintiff successfully challenged a local government which had neither conducted a disparity study prior to enacting its MBE program, nor produced such a study after enacting its program. *See*, F. Buddie Contracting Co. v. City of Elyria, Ohio, 773 F. Supp. 1018 (N.D. Ohio 1991).
9. La Noue, *supra* n. 8, at 15. Elsewhere, the author notes: "Consequently, disparity studies, in many instances, were not objective analyses for the purpose of discovering when and where discrimination was occurring, so that narrowly tailored remedies could be designed. Indeed, they rarely identified the details of the discrimination they asserted as rampant, or found any person, agency, procedure, practice, or company to be the cause of the discrimination. The studies were instead designed to be briefs for MBE programs and to function as insurance policies designed to discourage litigation. If a lawsuit was brought, the study would provide the appearance of an attempt to follow *Croson* in a way that would undermine any claim for damages by contractors adversely affected by racial preference programs." *Id.* at 12-13.
10. *Id.* at 13.
11. *Id.* at 12-13. Footnote omitted.
12. I am using the term "summary proceedings" to encompass any proceeding short of a full bench trial, e.g., motions for a preliminary injunction, dismissal, or summary judgment.
13. *See* Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 893 F. Supp. 419 (E.D. Penn.1995), *aff'd*, 91 F.3d 586 (3rd Cir. 1996), *cert. den.* 519 U.S. 1113 (1997); Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County, 943 F.Supp 1546 (S.D.Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997), *cert. den.*, 523 U.S. 1004 (1998); Associated General Contractors of America v. City of Columbus, 936 F. Supp.1363 (S.D. Ohio 1996), *vacated on other grounds*, 172 F.3d 411 (6th Cir. 1999); Associated General Contractors of Ohio v. Drabik, 1998 WL 812241 (S.D. Ohio 1998), *aff'd*, 214 F.3d 730 (6th Cir. 2000); W.H. Scott Construction Co., Inc. v. City of Jackson, Miss., 199 F.3d 206 (5th Cir. 1999); Webster v. Fulton County, Georgia, 51 F. Supp.2d 1354 (N.D.Ga 1999); Concrete Works of Colorado, Inc. v. City and County of Denver, 86 F. Supp.2d 1042 (D.Colo. 2000). *But see* Ritchey Produce Company, Inc. v. State of Ohio, Department of Administrative Services, 85 Ohio St.3d 194, 707 N.E.2d 871 (1999). Here, a state trial court found that Ohio's race-conscious program for purchasing goods and services was uncon-

stitutional and that ruling was upheld on appeal. Subsequently, the Ohio Supreme Court voted unanimously to overturn that ruling, despite the fact that a federal district court had previously struck down the state's race-conscious construction program which relied on the same statistics and rationale as the purchasing program; *see* Associated General Contractors of Ohio v. Drabik, 1998 WL 812241 (S.D. Ohio 1998), *aff'd*, 214 F.3d 730 (6th Cir. 2000). Following the *Ritchey* decision, the state moved that the federal court stay its order enjoining enforcement of the race-conscious construction program pending the decision on appeal to the Sixth Circuit. The district court rejected the motion in a lengthy opinion that detailed the evidentiary flaws in the statistical analysis relied on by the Ohio Court in *Ritchey*; *see* Associated General Contractors of Ohio v. Drabik, 50 F. Supp.2d 741 (S.D. Ohio 1999).

14. *See, e.g.*, Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 83 F. Supp.2d 613 (D.Md. 2000); Houston Contractors Assoc. v. Metropolitan Transit Authority of Harris County, 993 F. Supp. 545 (S.D. Tex.1997).

15. *See, e.g.*, Jan R. Smith Construction Co. v. DeKalb County, 18 F.Supp.2d 1365 (N.D. Ga. 1998) (county suspending program after suit was filed).

16. *See generally* La Noue, supra n. 8.

17. "'Qualified,' 'willing' and 'able' are the three pillars of the *Croson* test; a fortiori, a municipality may not enact race-based remedial measures unless it determines that qualified, willing and able minority contractors have been excluded from participating in public contracting." Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 893 F. Supp. 419, 432 (E.D. Penn.1995), *aff'd*, 91 F.3d 586 (3rd Cir. 1996), *cert. den.* 519 U.S. 1113 (1997).

18. Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586, 605 (3rd Cir. 1996). The court stated: "The [trial] court was thus undoubtedly right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contacts."

19. *See, e.g.*, Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 893 F. Supp. at 433; Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County, 943 F. Supp at 1567; Webster v. Fulton County, Georgia, 51 F. Supp.2d 1354, 1378 (N.D.Ga 1999); Concrete Works of Colorado, Inc. v. City and County of Denver, 86 F. Supp.2d 1042, 1071 (D. Colo. 2000).

20. *Compare* Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County, 943 F. Supp at 1584, expressing strong concerns about the validity of the anecdotal evidence in the study, *with Concrete Works of Colorado, Inc.*, 86 F. Supp.2d at 1071, describing anecdotal evidence as "more illustrative than probative," *and* Webster v. Fulton County, Georgia, 51 F. Supp.2d at 1379, finding that "[t]he anecdotal evidence reflects the honest and concerned beliefs of many...that they have been or are the victims of discriminatory practices."

21. *See Concrete Works of Colorado, Inc.*, 86 F. Supp.2d 1042 and Webster v. Fulton County, Georgia, 51 F. Supp.2d at 1379, "This is clearly not the exceptional case where anecdotal evidence standing alone may justify a race, ethnic or gender preference program."

22. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (criticizing the fact that there was no evidence that the city had considered, and rejected as inadequate, any alternatives to a race-based quota).

23. *See Concrete Works of Colorado, Inc.*, 86 F. Supp.2d at 1078 (finding that the disparity study's conclusion that race neutral remedies would not be adequate is "unsupported by the evidence.").

24. A common failing, for example, is that a race-conscious remedy is provided for all minorities in all contracting categories, despite the fact that there is no factual support for past discrimination extending so universally. *See Concrete Works of Colorado, Inc.*, 86 F. Supp.2d at 1077 (noting that the city did not limit its goals program to those groups who have suffered identifiable discrimination).

25. One of the consistent methodological shortcomings in disparity studies stems from their choice of data-sampling method. Sampling is necessary because consultants are typically unable to analyze all the available data (which is normally in paper format) due to budget constraints.

26. This does not mean, of course, that a race-conscious remedy may not subsequently be reinstated should a disparity reemerge.

27. *See, e.g.* ,13 C.F.R. § 124.1014 (2000) (providing for certification of a business as socially disadvantaged under the "8(d)" program for a maximum of three years after initial certification without submission of a new application and receipt of a new certification).

28. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995)(quoting Justice O'Connor's disagreement with a statement made by Justice Marshall in Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)). **ML**

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