International Municipal Lawyers Association
2012 Annual Conference
Austin, Texas

Work Session II: Public Contracting
Crafting and Defending Supplier Diversity Programs in Public Contracting

2012 Conference Presentation

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Race-Based Programs in Government Contracting: Where There's a Need There's a Way

By Lino Mendiola III[1]

Introduction to Race-Based Procurement Programs

Race-based affirmative action in government contracting dates back at least three decades,[2] and has been vigorously attacked for nearly as long. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding the Public Works Employment Act of 1977's minority enterprise program). Yet, in the face of nearly incessant constitutional attacks, elected officials and government policymakers continue to craft methods to ensure enterprises owned by minorities participate in government procurement programs through so-called "minority business enterprise" (MBE) programs.[3] Justice Bradley, a former Justice of the Supreme Court, once said: "[W]hen a man has emerged from slavery and by the aid of beneficent legislation has shaken off the irreparable harm, there must be some stage in the progress of his elevation where he takes the rank of a mere citizen and ceases to be a special favorite of the laws." Civil Rights Cases, 109 U.S. 3, 25 (1883). More than 125 years after Justice Bradley made his pronouncement, many elected officials and government policymakers who continue to support affirmative action apparently believe that this time has not yet come.

Policymakers at the federal, state and local levels who create and administer race-based programs often justify such programs as important to effectuate policy objectives such as wealth distribution, competition and advancing basic notions of equity. However, because of the stringent examination a court will conduct when considering race-based affirmative action programs, only the most carefully crafted programs are legally defensible. This paper explores the contours of race-based affirmative action in public procurement, the constitutional limitations on such programs, and offers practical advice to elected officials, policymakers and public procurement officers on how to craft such programs consistent with constitutional law.

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[2] The Federal Office of Minority Business Enterprise was established in 1969. Exec. Order No. 11,625, 36 Fed. Reg. 19,967 (Oct. 14, 1971). However, the first "minority enterprise" provision was included in Congress's Public Work Employment Act of 1977. Pub. L. No. 95-28, 91 Stat. 116 (1998) (mandating a ten percent seat aside for minority businesses).

[3] Most government affirmative action programs also include a women business enterprise program as well. This article, however, focuses solely on race-based affirmative action programs. The federal program is known as the "Disadvantaged Business Enterprise" (DBE) program, which include enterprises owned and controlled by both minorities and women.

The Genesis of Affirmative Action in Public Procurement

Following the civil rights movement of the 1960s, the use of race-based affirmative action programs in government procurement rapidly gained momentum.[4] In 1961, President Kennedy coined the term "affirmative action" in his executive order directing all contractors on federal government contracts to agree to "take affirmative action to ensure the applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."[5] Exec. Order No. 10,925, 26 Fed. Reg. 1977 (March 6, 1961) Subpart A, Sec. 301 (1961). President Nixon took this a step further when he ordered federal agencies to develop specific plans and program goals for a national MBE contracting program. Exec. Order No. 11,625, 36 Fed. Reg. 19,967 (Oct. 13, 1971). President Reagan's 1983 Executive Order No. 12432 directed all federal agencies with "substantial procurement and grantmaking authority [to] establish minority enterprise development objectives..." to effectuate the federal government's "goal of encouraging greater economic opportunity for minority entrepreneurs." State and local governments quickly followed suit with their own affirmative action procurement programs.[6]

Are Race-Based Procurement Programs Needed?

That public procurement plays an important role in our economy is indisputable. The impact of government purchases of goods and services is estimated at 10 percent of GDP. *See* R. Preston McCafee and John McMillan, Government Procurement and International Trade, 26 J. Int'l. Econ. 291(1989). Public entities often use the tool of public procurement to effectuate policy goals, including the goal of wealth distribution or re-distribution. Wealth distribution has been recognized among other important goals of public procurement, including competition, transparency, risk avoidance, and efficiency. Steven L. Schooner, Desiderata: Objectives for a System of Government Contract Law, 11 Public Procurement Law Review 103 (2002). One commentator argues that our elected representatives "have viewed our procurement system as a vehicle to distribute wealth." *Id.* at 12. In fact, elected policy makers often give preferential treatment to domestic over international suppliers in order to further the goals of

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[4] President Franklin D. Roosevelt was the first in a long line of presidents to issue an executive order with the purpose of impeding ongoing discrimination by government contractors. Exec. Order No. 8802 (1941) (prohibiting discrimination in the national defense industry and requiring all defense contracts to include provisions barring private discrimination by private contractors). This executive order contained no enforcement authority.

[5] This executive order was superseded by Executive Order 11,246, Subpart B, Sec. 202(1), also requiring federal contractors to take affirmative action to provide equal opportunity to minorities, and amended to include women. Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,935 (Sept. 24, 1965).

[6] A 1998 survey by the National Association of State Procurement Official concluded that 18 states gave price preferences to minority-owned businesses. Qiao, Yuhua, Thai, Khi V., Cummings, Glenn, *State and Local Procurement Preferences: A Survey*, 9 Journal of Public Procurement at 375 (2009). As of 2009, 11 states provided a price preference to MBEs. *See http://www.naspo.org/documents/2009_Survey_of_State_Government_Procurement_Exec_Summary.pdf*

wealth distribution. Similarly, MBE programs may be put into place in order to use the tools of public procurement to distribute wealth to enterprises owned by minorities.

A significant amount of research demonstrates that the wealth gap between races is wide and persistent and a public policy issue worthy of consideration. Two researchers, D'Ambrosio and Wolff, conducted research showing "that there was a sizable increase in wealth polarization that occurred in the US from 1983 to 2004 though particularly over the period from 1998 to 2004." In 2004, for example, the non-white population in the United States averaged only 27 percent of the net worth of the white population. Legal scholars have also noted that "analysis of wealth reveals a huge differential between whites and people of color in the United States." Barnes, Chemerinsky and Jones, A Post Race Equal Protection?, Legal Research Paper Series No. 2010-12 (2010). These researchers observe that governmental and institutional policies can impair the ability of African Americans to accumulate wealth: "The cumulative effect of these systematic forces has arguably cemented Blacks at the bottom of the economic hierarchy." *Id.* at 986.

Thus, using public procurement as a wealth distribution tool to address the wealth gap may be one reason why elected officials and other policymakers embrace MBE programs. Indeed, a well-crafted and narrowly tailored MBE program can be the beginning of an antidote to some historic policies which created the wealth gap in the first place.

The need for race-based affirmative action programs is evidenced by jurisdictions' analyses of the statistical disparity between the procurement firms ready, willing and able to perform public procurement work and the rates at which such firms are actually utilized. The effectiveness of these programs in redressing under-utilization is placed in high relief when examining minority participation following the mass dismantling of these programs in the 1990s.

State and local disparity studies,[7] which determine the need for affirmative action by comparing firms ready, willing and able to perform public procurement work versus the rates at which such firms are actually utilized (referred to as the "disparity index"), demonstrate that non-minority contractors are often awarded a significantly disproportionate amount of government contracts. An extensive 1997 survey of state and local disparity studies by the Urban Institute, "reveal[ed] substantial disparities between the share of contract dollars received by minority-owned firms and the share of all firms that they represent." Maria E. Enchautegui, Michael E. Fix, et. al., Do Minority-Owned Businesses Get a Fair Share of Government Contracts?, The Urban Institute (1997), http://www.urban.org/publications/307416.html. According to this survey, MBEs received only 57 cents of each dollar they would expect to receive based on the availability of these firms. *Id.* A 1995 study of federal programs also concluded

[7] Disparity studies are discussed in depth, *infra*.

that "the evidence is overwhelming that the problems affirmative action seeks to address - widespread discrimination and exclusion and their ripple effects - continue to exist." George Stephanopoulos and Christopher Edley, Jr., Affirmative Action Report to the President, 20 (July 19, 1995).

More than a decade later, disparity studies' findings are just as bleak. For instance, a 2008 disparity study conducted by Austin, Texas revealed "statistically significant adverse disparities" for several minority groups. City of Austin Disparity Study: Race, Sex, and Business Enterprise: Evidence from the City of Austin, NERA Economic Consulting at 185,221 (May 15, 2008). Likewise, the City of Memphis's 2010 disparity study found that "MWBEs were under-utilized across all procurement categories…." The State of New York recently released a research report which demonstrated "significant discrepancies between the number of M[ ]BEs available to perform contracts and those who receive business from [New York] state agencies." Thomas P. DiNapoli, MWBE Firms Do Not Get Fair Share of Contracts, Audits Report Show Persistent Problem with Current Program (Oct. 8, 2010), at http://www.osc.state.ny.us/press/releases/oct10/100810a.htm.

Evidence of the need for affirmative action programs to address these "significant discrepancies" is the dramatic drop in minority participation following *Croson* (the seminal case discussed in detail below). Immediately after the Supreme Court decided *Croson*, at least 33 states and political subdivisions dismantled or suspended their minority business goals or assistance programs. United States Commission on Minority Business Development, Final Report on Historically Underutilized Businesses 98 (1992). The adverse consequences for minority businesses were significant. In Richmond, Virginia, minority businesses received nearly 40 percent of the city construction dollars in 1987, but immediately after the court's decision, the minority business share fell to 15 percent. *Id.* In Tampa, the 25 percent goal in contracting was suspended after *Croson*, and contracts awarded to Black businesses decreased 99 percent and contracts to Hispanic firms decreased by 50 percent. *Id*. In Philadelphia, the participation rate for women- and minority-owned businesses dropped 97 percent in the year after its program was struck down; in the six months after Croson, the minority participation rate was only 1.92 percent of all subcontracts. *Id*. at 99. Based on this snapshot, it seems apparent that the significant discrepancy between public contracts actually awarded to minorities versus the number of contracts one would expect to be awarded to minorities based on their availability will not be redressed in the absence of affirmative action programs.

Government procurement is a big business,[8] which, as demonstrated above, largely benefits non-minorities. Advocates of affirmative action programs

[8] In 1990, for instance, state and local government spending on procurement accounted for approximately $250 billion. Maria E. Enchautegui, Michael E. Fix, et. al., *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* (1997), found at http://www.urban.org/publications/307416.html.

recognize that the wide chasm between public contracts awarded to non-minority firms versus those awarded to minority firms must be nullified. These proponents argue that equity demands affirmative action programs to "level the playing field," *see, e.g., Cone Corp. v. Hillsborough Cty*., 983 F.2d 197, 199 (11th Cir. 1993); *Builders Ass'n of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725, 734 (N.D. Ill. 2003), or offer MBEs the same opportunities open to similarly situated non-minority firms.

Those that oppose affirmative action programs take the counter-view that by providing an advantage to minority firms, the result is anything but equitable. These critics of affirmative action fail to recognize that, as demonstrated above, the lingering effects of de jure discrimination still greatly affect MBEs' opportunities in public contracting. As aptly stated by President Johnson in 1965: "You do not wipe away the scars of centuries by saying: 'now, you are free to go where you want, do as you desire, and choose the leaders you please.' You do not take a man who for years has been hobbled by chains, liberate him, bring to the starting line of a race, saying 'you are free to compete with all the others,' and still justly believe you have been completely fair..."

Equitable arguments notwithstanding, policymakers are not unfettered in the creation and administration of affirmative action programs.

Constitutional Limitations on Affirmative Action Programs

> *"[I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier."*

Justice Thurgood Marshall, dissenting in *Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265, 387 (1978).

Most challenges to a state's or local government's use of race classification are brought under the Fourteenth Amendment, which guarantees equal protection to all persons.[9] Because the Fourteenth Amendment is only applicable to state and local governments, cases against the federal government's use of racial classifications must be brought under the Equal Protection Clause of the Fifth Amendment, which the Supreme Court has stated is coextensive with the Equal Protection Clause of the Fourteenth Amendment. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). Thus, this discussion is applicable to all levels of government.

The Fourteenth Amendment reads:

[9] An equal protection challenge to an affirmative action program is by no means the only method of attack. Other methods include challenges under state constitutions, competitive bidding statutes, state anti-discrimination laws, and administrative rules.

> [a]ll persons born or naturalized in the United States, and subject to this jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.[10]

The Fourteenth Amendment applies equally to all races, that is its purpose, and that is the holding in Supreme Court cases from over 100 years ago. *Slaughter-House Cases,* 83 U.S. 36, 59 (1872). On its face, one might argue the Fourteenth Amendment requires colorblindness. However, consider one of the earliest interpretations of the Fourteenth Amendment. In *Strauder v. West Virginia*, the Supreme Court stated that "the true spirit and meaning of the Reconstruction Amendments cannot be understood without keeping in view the history of the amendments when they were adopted and what they plainly sought to accomplish." 100 U.S. 303,306 (1879). Laurence Tribe, one of the country's foremost authorities on Constitutional Law, has stated that

> Despite the suggestion that our Constitution should be "colorblind," it has long been recognized that this is a misleading metaphor. Just as race has played a crucial role in our nation's past, so it must play a role in the present—whether to eradicate racial distinctions from our future, or to overcome the lingering effects of racial discrimination. . . There is no doubt that courts must often take explicit account of race and the different circumstances of persons of different races—both in formulating the adequate remedies for unlawful past discrimination and in assessing the constitutionality of classification favoring racial minorities.

Laurence H. Tribe, *American Constitutional Law* 1521 (2d ed. 1988).

Consistent with this view, the Supreme Court has taken race into account in a number of areas, including education, employment, and public contracting. That being said, using race in such a way is heavily scrutinized by the courts.

Strict Scrutiny Review

Affirmative action programs are subject to strict scrutiny—the most exacting standard of review under the Constitution. It was in *Korematsu v. United States*, 323 U.S. 214, 216 (1944), that the Supreme Court first announced that racial classifications are subject to strict scrutiny. And although the Supreme

[10] Cases against the federal government's use of racial classifications must be brought under the Equal Protection Clause of the Fifth Amendment, which the Supreme Court has stated is coextensive with the Equal Protection Clause of the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. at 499 (1954).

Court first addressed affirmative action programs in government procurement in 1980, *Fullilove v. Klutznick* 448 U.S. 448 (1980),[11] a majority of the court did not decide that strict scrutiny was the proper standard to apply to these programs, or any "benign" racial classifications, until *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989), (discussed below)[12], which applied strict scrutiny to state and local governments' race-based affirmative action programs. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), extended this holding to federal government programs.

The strict scrutiny test now involves two questions. The first is whether the government's interest in making racial classifications is sufficiently compelling to overcome the suspicion that race ought to be irrelevant so far as treatment by the government is concerned. The second is whether the government has narrowly tailored its use of race so that race-based classifications are applied only to the extent required to reach the government's stated interest.

A "compelling" interest is required "because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic..." *Fullilove v. Klutzinick*, 448 U.S. 448, 533-535 (1980) (Stevens, J., dissenting). The use of race must also be "narrowly tailored" to the achievement of that interest because racial preferences create both a benefit and a burden, and when the burden touches "upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Regents of the Univ. of Cal.*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.). To further illustrate the court's analysis under this two-part test, a detailed discussion of *Croson*, a seminal case on affirmative action in local government contracting, is warranted.

City of Richmond v. J.A. Croson Co.

In *Croson*, the City of Richmond, VA established a minority business set-aside program in which prime contractors working on city contracts were required to subcontract at least 30 percent of the contract's total amount to MBE

[11] The court had previously addressed affirmative action in the context of education,. s*ee, e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) ; *Regents of the Univ. of California*, 438 U.S. 265 (1978), and employment, *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 99 S. Ct. 2721 (1979).

[12] The court applied strict scrutiny to affirmative action programs adopted by state and local governments. The court in *Croson* did not address the standard of review the Fifth Amendment requires for similar action taken by the federal government. The court continued to apply a more lenient intermediate scrutiny to affirmative action programs adopted by Congress until its decision in *Adarand Constructors, Inc. v. Pena*. Gender-based affirmative action programs, however, are not subject to strict scrutiny. In *United States v. Virginia Military Institute*, 518 U.S. 515,531 (1996), the Supreme Court stated that parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for the distinction.

subcontractors.[13] Richmond justified its plan on the basis of promoting "wider participation by minority business enterprises in the construction of public projects." Croson, a prime contractor who was denied a contract because of his failure to utilize minority subcontractors, filed suit in United States District Court for the Eastern District of Virginia, alleging the unconstitutionality of the city's affirmative action ordinance on its face and as applied. Both the district court and the Fourth Circuit upheld the ordinance. *Id*.. at 483-84.

The Supreme Court vacated the Fourth Circuit's decision, and remanded the case for reconsideration in light of its intervening decision in *Wygant v. Jackson Bd. of Educ.*, which clarified strict scrutiny analysis. On remand, the Fourth Circuit held that Richmond's set-aside program failed both prongs of strict scrutiny analysis. The city petitioned the Supreme Court for a new writ of certiorari, which the Supreme Court again granted.

In a fractured opinion, a majority of the court held that state or local governmental race-based classifications are subject to strict scrutiny. In what has served as a catalyst for disparity study consultants, the court created a statistical standard to show the present efforts of past discrimination. Justice O'Connor, quoting from Justice Powell's opinion in *Bakke*, stated that a remedial racial classification must be justified by more than a general history of societal discrimination. The court held that Richmond's generalized assertion of racial discrimination in the construction industry was insufficient to justify an affirmative action plan.

Croson has had two long-lasting effects on affirmative action analysis:

1. The Birth of the Disparity Study

In order to determine whether the city had a compelling interest to adopt an affirmative action plan, the court closely examined the city's data on discrimination, including: (1) statistical disparities between the size of the minority population in Richmond and the number of contracts awarded to minorities, (2) membership of minority contractors in the local contractors' association, and (3) a previous finding by Congress, relied upon in another case, that discrimination in the construction industry was prevalent across the nation. *Id.* at 500-04. The court found that these facts were inadequate to justify Richmond's affirmative action plan. *Id.* at 505. Although the court stated that "[w]here 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," *id.* at 509 (citation omitted), it found that Richmond did not meet this standard. The court

[13] The Minority Business Utilization Plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled... by minority group members." 488 U.S. at 478 (*quoting* Richmond, VA City Code 12-23 (1985)). The plan defined "[m]inority group members" as "citizens of the United States who are Blacks, Spanish-speaking, Oriental, Indians, Eskimos, or Aleuts." *Id.*

noted that the city did not even know how many MBEs in the market were qualified to undertake prime or subcontracting work in public construction projects, let alone how many had been utilized. Justice O'Connor, however, expressly left open the possibility that "in the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Id.*

2. Passive Participant Analysis

Croson also stands for the point that even if a local government cannot show that it has discriminated in the past, it may have a compelling interest in remedying its past passive participation in local discrimination, or in avoiding passively funding discrimination in the local market.

> If the City could show that it had essentially become a "passive participant" in the system of racial exclusion practiced by elements of the local construction industry... the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity... has a compelling interest in assuring that public dollars... do not serve to finance the evil of private discrimination. *Id.* at 492.

A city's desire to avoid financing private discrimination with public tax dollars, and thus becoming a passive participant in local discrimination, has been widely accepted by courts as a compelling interest sufficient to satisfy strict scrutiny. *See, e.g., Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity,* 950 F.2d 1401, 1413 (9th Cir. 1991); *Coral Const. Co. v. King County,* 941 F. 2d 910, 916 (9th Cir. 1991), *cert denied,* 112 S. Ct. 875 (1992).

On the narrow tailoring side of strict scrutiny analysis, Justice O'Connor noted that Richmond had failed to implement any race neutral options to increase minority participation in the construction industry. Accordingly, Richmond's use of a rigid 30 percent quota was insufficiently tailored to a satisfying strict scrutiny. *Croson,* 488 U.S. at 508.

Immediately following *Croson,* a number of programs were struck down as unconstitutional. *See, e.g., Webster v. Fulton County,* 51 F. Supp. 2d 1354 (N.D. Ga. 1999), aff'd, 218 F.3d 1267 (11th Cir. 2000); *Associated Util. Contractors of Md., Inc. v. Mayor of Baltimore,* 83 F. Supp. 2d 613 (D. Md. 2000); *W. H. Scott Constr. Co. v. City of Jackson,* 199 F.3d 206 (5th Cir. 1999); *Ass'n for Fairness in Bus. v. New Jersey,* 82 F. Supp. 2d 353 (D. N.J. 2000); *Associated Gen. Contractors of Ohio Inc. v. Drabik,* 214 F.3d 730 (6th Cir. 2000); *Milwaukee County Pavers Ass'n v. Fiedler,* 922 F.2d 419 (7th Cir. 1991). These cases, and cases in which a court upholds a program, provide insight into what a policymaker should consider when crafting a legally defensible program.

Practical Suggestions on Crafting a Constitutionally Defensible Affirmative Action Program

Adarand rejected the proposition that strict scrutiny means "strict in theory, but fatal in fact," and noted that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country" may justify the use of race-based remedial measures. 515 U.S. at 202. It is certainly hard to win a case defending a race-conscious program, but it is not impossible. Where there is a proven history of discrimination, where a program is necessary to remedy discrimination, and where a program is necessary to keep the state from being a passive participant in a system of discrimination, then a narrowly tailored race- conscious program is appropriate. *Croson* and subsequent decisions have provided guidelines on what policymakers should consider when crafting an affirmative action race-based procurement program.

Compelling Interest

Although not necessarily the only legitimate compelling interest in the context of government procurement,[14] we do know that a government's interest in remedying the effects of past and present discrimination or remedying its past passive participation in local discrimination has passed judicial muster. *Croson*, 488 U.S. at 492-93. Whatever the compelling interest, the government must present a "strong basis in evidence" to support the compelling interest identified. *Croson,* 488 U.S. at 500 (*quoting Wygant*, 476 U.S. at 277 (plurality opinion)).

As noted above, the *Croson* Court stated that "[w]here 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." *Id.* at 509. As a result of this pronouncement, various statisticians developed an expertise in quantifying both the availability of minority- and women-owned businesses and their utilization in a particular market.[15] The results are published in a disparity study, an important aspect of every major affirmative action case in government contracting since *Croson*. *See, e.g.*, *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992) (noting statistical evidence would been "an

[14] In *Grutter v. Bollinger*, the court rejected the notion that "remedying past discrimination is the only permissible justification for race-based governmental action." 539 U.S. 306, 326-28 (2003). The court upheld the use of race as a factor in admission to the University of Michigan Law School when used to secure "the educational benefits that flow from a diverse student body," a non-remedial objective. *Id.*

[15] In particular, five national firms account for the bulk of studies created: (1) Brown, Bortz, and Coddington (BBC) and the Minority Business Educational and Legal Defense Fund (MBELDEF); (2) D.J. Miller & Associates; (3) MGT of America; (4) Mason Tillman Associates (MTA) and (5) National Economic Research Associates (NERA). George R. LaNoue, *Who Counts? Determining the Availability of Minority Business for Public Contracting After Croson*, 21 Harv.J.L.&Pub.Pol'y 793, *798* (Summer 1998).

invaluable tool" and concluding that without statistical evidence, the program could not stand).

The Disparity Study

Not just any disparity study will do, however. A court will methodically evaluate the validity of the disparity study. *See, e.g., Webster v. Fulton County,* 51 F.Supp.2d 1354, 1376-78 (1999); *Contractors Ass'n. of E Pa., Inc.*, 91 F.3d at 599-600 (3d Cir. 1996); and *Eng'g Contractors Ass'n of S. Fla. v. Metropolitan Dade Cnty*, 934 F. Supp. 1546 (S.D. Fla. 1996), aff'd, 122 F..2d 895 (11th Cir. 1997). Although courts have critiqued individual disparity studies, no court case provides definitive rules on what must be included in a disparity study. These cases as a whole, however, do provide some insight into what a court would deem sufficient.

A government may not be able to establish a compelling interest merely by demonstrating a statistical disparity alone, particularly in a context such as public contracting where special qualifications are relevant. *See Drabik*, 214 F.3d at 736; *see also Rothe Dev. Corp. v. United States Dept of Defense*, 545 F.3d 1023, 1041-42 (Fed. Cir. 2008). For example, as mentioned earlier, persuasive disparity evidence may require the identification of *available* minority contractors, or those that are ready, willing and able to perform construction work of the particular type and size required for public contracts covered by the MBE program. *See Drabik*, 214 F.3d at 736. *Rothe* indicated that this inquiry may, in some circumstances, include a determination of whether a firm has the capacity to work on more than one project at a time. *Rothe Dev. Corp. v. United States Dep't of Defense,* 545 F.3d 1023, 1043-44 (2008). In *Rothe Dev. Corp. v. United States Department of Defense*, the court noted that firm size could be accounted for by employing a "regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract-dollars awarded to it." *Id.* However, the court recognized that a minority-owned business's capacity and qualifications might also be affected by discrimination but offered no insight into how this could be controlled in a properly conducted disparity study. *Id.* at 1045. Other cases have indicated that the right approach is to not control for capacity *if* capacity itself is reflective of discrimination. *See, e.g.*, N*orthern Contracting, Inc. v. Illinois Dep't of Transp.*, 2004 U.S. Dist. Lexis at *76-77 (N.D. Ill. Mar. 3, 2004); *see also Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 981, 983 (recognizing that minority- and women-owned firms were smaller and less experienced *because of* marketplace and industry discrimination).

Several courts have also held that disparity evidence justifies a preference for individuals of a specific race, ethnic group or gender only if the evidence establishes discrimination against that particular race, ethnic group or gender. *See Webster*, 51 F. Supp. 2d at 1375; *Ass'n for Fairness in Bus. v. New Jersey*, 82 F. Supp. 2d 353, 360 (D. N.J. 2000). These courts have determined that evidence showing a disparity in the utilization of some aggregated group of minorities is

insufficient to support a preference for that same aggregated group of minorities. To demonstrate a compelling interest, the government's evidence must specifically prove discrimination against each favored group.

The disparity study also must demonstrate discrimination in a specific sector of the market, such as public construction contracts, rather than discrimination in the broader marketplace as a whole. *See Webster*, 51 F. Supp. 2d at 1369. Disparity statistics also should be specific to the relevant geographic market for a particular program, as demonstrated by past utilization statistics. *See Webster*, 51 F. Supp. 2d at 1373.

Disparity statistics also are vulnerable to attack if they fail to control for race-neutral factors that may affect MBE availability and utilization, such as the ability to obtain financing and bonding. *See Webster*, 51 F. Supp. 2d at 1369–70. A government actor must be extremely careful when it includes references to race-neutral causes of disparity in its affirmative action statutes or regulations if the impact of those causes has not been controlled for statistically. In many instances, a court will seize upon those references as evidence that any statistical disparity is not the result of race discrimination, but rather the result of race-neutral factors. *See Ass'n for Fairness in Bus.*, 82 F. Supp. 2d at 360. The statistical analysis should include a regression analysis to account for any independent variables. *Webster*, 51 F. Supp. 2d at 1370.

Evidence of discrimination must also be fairly recent in order to justify race-conscious classifications. *See Drabik*, 214 F. 3d at 735 (rejecting disparity evidence over 20 years old as stale). Furthermore, courts generally require the government to present only pre-enactment disparity evidence to establish its compelling interest, thereby rejecting government efforts to justify an affirmative action program only after that program has been implemented and/or challenged. *See, e.g., id.* at 738; *Associated Util. Contractors*, 83 F. Supp. at 620–21 *West Tenn. Chapter of Associated Builders & Contractors v. Bd. of Educ.*, 64 F. Supp. 2d 714, 718–20 (W.D. Tenn. 1999). *But see Webster v. Fulton County*, 51 F. Supp. 2d 1354, 1373 (N.D. Ga. 1999) (admitting post-enactment disparity evidence but striking down program for other reasons).[16] All of the controversy surrounding post-enactment evidence stems from the statement in *Croson* that a municipality "must identify [the] discrimination... with some specificity before [it] may use race-conscious relief." *Croson*, 488 U.S. at 504 (1989). Courts rejecting the use of post-enactment evidence also cite to the *Shaw* court's statement that an "institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative action program.'" *Shaw v. Hunt*, 517 U.S. 899, 910

[16] One of the courts refusing to consider post-enactment evidence recognized that its decision conflicted with precedent in the Second, Third, Ninth, Tenth and Eleventh Circuits but cited the Supreme Court's opinion in *Shaw v. Hunt* 517 U.S. 899 (1996), in support of its position. *See W. Tenn. Chapter of Associated Builders & Contractors*, 64 F. Supp 2d at 718.

(1996) (*quoting Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (Powell, J., plurality op.)).

Anecdotal Evidence

In addition to statistical evidence, courts may look at anecdotal evidence. For instance, in *Concrete Works*, 36 F.3d 1513, the Tenth Circuit cited approvingly Denver's use of anecdotal evidence demonstrating public and private discrimination. This evidence included testimony delivered in public hearings, interviews with MBE/WBEs, case studies conducted by the disparity study team and reports generated during Denver's compliance investigations. Although anecdotal evidence alone would be insufficient to demonstrate a compelling interest, the *Concrete Works* court stated: "[A]necdotal evidence of a municipality's institutional practices that exacerbate discriminatory market conditions are often particularly probative. Concrete Works cites no case eschewing the consideration of anecdotal evidence." *Id.* at 1520.[17]

Narrowly Tailored

Once a government actor shows a compelling interest, it must then demonstrate the program is sufficiently narrowly tailored to address the compelling interest. Courts have emphasized that, to be narrowly tailored, there must be some link between an affirmative action program's participation goals and the disparity evidence establishing a compelling governmental interest. *See Ass'n for Fairness in Bus.*, 82 F. Supp. 2d at 361–62; *Ritchey Produce Co. v. Ohio*, 707 N.E. 2d 871, 923-24 (Ohio 1999). As a result, judicial decisions on the narrow tailoring issue often circle back to the courts' discussion of the appropriate parameters for disparity studies, which often mirror the factors first mentioned in *United States v. Paradise*: "(i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority group members in the relevant population or workforce; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties." *United States v. Paradise*, 480 U.S. 149, 187 (1987). Other courts have added a sixth factor: the over-inclusiveness or under-inclusiveness of the racial classification. *See, e.g., Rothe Dev. Corp. v. United States Dept. of Defense,* 545 F.3d 1023, 1036 (2008). Most courts, including the *Croson* Court, consider some—if not all—of these factors when determining whether a program is narrowly tailored.

[17] Other courts have been critical of anecdotal evidence. *See, e.g., Eng'g Contractors Ass'n of S. Fl.*, 934 F. Supp. at 1577-80 (questioning whether those believing that they had been discriminated against had all the knowledge required).

The Need for the Program, and the Efficacy of Alternative Remedies

A governmental body's race-conscious program should exist only when other race-neutral remedies are ineffective. Courts, including the *Croson* court, have rejected programs where the city failed to consider any race-neutral alternatives. *Croson*, 488 U.S. at 507 (Richmond considered no alternatives to race-based quota); *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 738 (6th Cir. 2000) ("record contains no evidence 'that the Ohio General Assembly gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas.'"), aff'd 214 F3d 730 (6th Cir. 2000); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("Philadelphia III")*, 91 F.3d, 586, 609 (1996) ("To the extent the City failed to consider or adopt [race-neutral] alternatives, it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors."). Such alternatives may include "simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races." *Croson*, 488 U.S. at 509. However, a government body should not merely pay "lip service" to the notion of using race-neutral remedies. *Webster v. Fulton Cnty.*, 51 F.Supp.2d 1354, 1380 (N.D. Ga. 1999) ("[T]he Court is not persuaded that [Fulton County] has seriously considered race-neutral remedies."). Rather, it must consider race-neutral alternatives in good faith. *Id.* Governmental bodies are not required, however, to exhaust every possible alternative, and they need not pursue "irrational, unworkable, ineffective or legally unavailable approaches." *Associated Gen. Contractors of Cal., Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1417 (9th Cir. 1991) ("[W]hile strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative...however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.") (internal citations omitted).

The Flexibility of the Program

An MBE program should have sufficient flexibility to allow for the awarding of contracts to those who, despite good faith efforts, fail to meet stated participation goals. Governmental bodies can create flexible programs by allowing for waivers of MBE participation requirements. *See Paradise*, 480 U.S. at 177-78 (determining that a program was flexible when it allowed for the waiver of certain hiring requirements if no qualified black candidates were available). For example, the Tenth Circuit has stressed that the availability of a waiver transformed the MBE program from a rigid quota-based system to one with more flexibility. *Adarand Constructors, Inc. v. Slater* ("*Adarand VII*"), 228 F.3d 1147, 1181 (10th Cir. 2000). In *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, the Eighth Circuit noted with approval that the federal DBE program allowed for waivers and exemptions from the requirements and did not penalize contractors for good faith failures to meet the aspired participation goals. 345 F.3d 964, 972 (8th Cir. 2003).

Although the availability of waivers strongly implies that a program is flexible, mere "availability" is not always sufficient. A program might be deemed inflexible if a city makes waivers technically "available," but only grants them in rare circumstances. In *Philadelphia III*, for example, the court rejected a program, in part, because the city only granted waivers in less than 2 percent of its public works projects. 91 F.3d at 608; *see also Croson*, 488 U.S. at 478-79, 499 (considering program to be a "rigid racial quota" because waivers of the participation goals were only permitted in "exceptional circumstances.").

The Duration of the Program[18]

The Supreme Court has concluded that race-conscious policies must be limited in time. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). Courts often note the "possibility that a program might someday have satisfied its purposes." *Drabik*, 214 F.3d at 737. The Supreme Court faulted the circuit court in *Adarand* for not considering "whether the program was appropriately limited such that it 'will not last longer than the discriminatory effect it is designed to eliminate.'" *Adarand*, 515 U.S. at 238 (quoting, *Fullilove*, 448 U.S. at 513). One of the factors leading to the court's holding that the City of Chicago's M/WBE Program was no longer narrowly tailored was the lack of a sunset provision. *Builders Ass'n of Greater Chicago v. City of Chicago*, 298 F. Supp. 2d 725, 739 (N.D. Ill. 2003); *see also Webster*, 51 F. Supp. 2d at 1382 (one telling disqualifier was that Fulton County had been implementing a "quota" program since 1979 with no contemplation of program expiration). As reiterated by the Eleventh Circuit Court of Appeals, the "unlimited duration of the [District's] racial goals also demonstrates a lack of narrow tailoring... While the District's effort to avoid unintentional discrimination should certainly be ongoing, its reliance on racial classifications should not." *Virdi v. DeKalb Cnty. Sch. Dist.*, 135 Fed. App'x. 262, 268 (11th Cir. 2005) (per curiam) (unpublished). Similarly, the USDOT DBE Program's periodic review by Congress has been repeatedly held to provide adequate durational limits. *See, e.g., Western States Paving Co., Inc. v. Washington State Dept. of Transp.*, 407 F.3d 983, 994-95 (9th Cir. 2005).

The Relationship of the Numerical Goals to the Relevant Labor Market

A governmental body must base its numerical participation goals on the level of minority participation in the relevant labor market. *See Webster*, 51 F.Supp.2d at 1379, 1381. This means that a governmental body cannot speculate as to the appropriate participation levels. Rather, the governmental body must support its goals with sufficient evidence about the current labor market. *Adarand VII*, 228 F.3d at 1182 ("[W]e can find no explanation in the record before us of the basis in evidence on which the FHA relied in adopting this 12-15

[18] Portions of this section rely upon Colette Holt & Associates, *The State of Minority- and Women-Owned Business Enterprises in the Austin, Texas Construction Economy* at 36 (March 2006). The authors gratefully acknowledge Colette Holt's prior work on these issues and her generous mentorship.

percent goal."). Some courts have suggested that governmental body does not need to cap its goals at the current level of MBE availability, since the existence of past discrimination has presumably created an artificially low level of participation by minority businesses. *Id.* at 1181. *See, e.g., Adarand VII*, 228 F.3d at 1181 ("However, because Congress has evidence that the effects of past discrimination have excluded minorities from the construction industry and that the number of available minority subcontractors reflects that discrimination, the existing percentage of minority-owned businesses is not necessarily an absolute cap on the percentage that a remedial program might legitimately seek to achieve."). However, other courts have rejected such an analysis and have required a more direct relationship between participation goals and actual participation levels. *Webster*, 51 F. Supp. 2d at 1381 (It might be good policy to set participation goals at a level that is higher than current availability in order to compensate minorities for past discrimination and lack of opportunity in the private sector. But it is "inconsistent with Justice O'Connor's analysis in *Croson* as followed by the Eleventh Circuit."); *Builders Ass'n of Greater Chicago v. Chicago*, 298 F. Supp. 2d at 740 ("The City program is … related not to the number of available, willing and able firms but to concepts of how many of those firms there should be...[Such] formulistic percentages cannot survive strict scrutiny.").

The Impact on the Rights of Third Parties

Courts often fail to address this factor when analyzing whether public contracting affirmative action programs are narrowly tailored. Nevertheless, in evaluating whether a program puts an undue burden on innocent third parties, courts will sometimes look to the type of rights that are burdened, and the degree to which the burden is diffused among many individuals. In a non-construction context, the court held that a statute providing for the laying-off of white employees in order to achieve racial balance placed an undue burden on innocent parties because it resulted in "serious disruption[s]" of important or well-established rights. *Wygant v. Jackson Bd of Educ.*, 476 U.S. 267, 282-84 (1986). One's well-established career, the court concluded, is likely to be one of the most important assets that a worker owns. And whereas hiring goals/targets may create a diffuse burden that forecloses one of several opportunities for employment, layoffs "impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Id.* at 283.

In the public contracting context, courts typically find that (i) the right to participate in public contracts is not sufficiently well-established, and (ii) the burden on non-minority contractors is sufficiently diffuse. In *Adarand VII*, for example, the court noted that "at the margin, some non-DBE subcontractors such as Adarand will be deprived of business opportunities." But because the program eliminated only one of several opportunities for employment, it placed only a "diffuse burden" on innocent third parties. And courts have held it is not impermissible for a program to require that innocent parties share in the burden of

remedying past discrimination. *Adarand VII.*, 228 F.3d at 1183 ((*quoting Wygant,* 476 U.S. at 280-81) (Powell. J.)).

The court's declaration in *Fullilove* was that an incidental burden may be permissible, provided that it occurs in the course of executing a properly tailored remedy. In practice, this factor in the Paradise test is often subsumed by the others. There do not appear to be any cases where the "impact on third parties" was especially dispositive. *See e.g., Eng'g Contractors*, 943 F. Supp. at 1580-84 (finding an undue burden, but basing finding of lack of narrow tailoring primarily on city's failure to seek race-neutral remedies). Rather, it appears that the other factors are more important. In fact, courts seem willing to accept, as a necessary evil, some burdening of innocent third parties in order to effectuate the very purposes of an affirmative action program. *Western States Paving Co., v. Wash. State Dep't of Trans.*, 407 F.3d 983, 995 ("Implementation of the race-conscious contracting goals…will inevitably result in bids submitted by non-DBE firms being rejected in favor of higher bids from DBEs. Although this places a very real burden on non-DBE firms, this fact alone does not invalidate [the program.] If it did, all affirmative action programs would be unconstitutional because of the burden upon non-minorities.").

Under- and Over-Inclusiveness

Although not specifically included in the *Paradise* factors, under-inclusiveness and over-inclusiveness is often considered by courts when determining whether an MBE program is narrowly tailored. *See, e.g., Rothe Dev. Corp.*, 545 F.3d at 1036. No court, however, has invalidated a program solely on this basis.

In *Croson*, the court noted that the "gross over-inclusiveness" of the city's racial preferences "strongly impugn[ed] the city's claim of remedial motivation." *Croson*, 488 U.S. at 471, 507. The program included many minority groups, including Orientals, Eskimos, and Asians, within the set-aside provision. Concluding that "there is absolutely no evidence of past discrimination" against such groups, the court held that Richmond's program failed to be narrowly tailored in addressing discrimination. *Id.* at 471. Many circuit courts have reached similar conclusions. *See Builders Ass'n of Greater Chicago v. Cnty. of Cook*, 256 F.3d 642, 647 (7th Cir.2001) ("The County's laundry list of favored minorities includes two groups -- persons whose ancestors came to the United States from Spain or Portugal -- that common sense (not contradicted by any evidence) instructs have never been subject to significant discrimination by Cook County."); *Drabik*, 214 F.3d at 737 ("By lumping together the groups of Blacks, Native Americans, Hispanics, and Orientals (and leaving unclear the exact extent of the last two designations), the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven."); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 714 (9th Cir.1997) ("The statute before us also lists groups highly unlikely to have been discriminated against in the California construction

industry."); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 ("The District also concedes that the Council has never made any findings with respect to discrimination in the construction industry against Hispanic Americans, Asian Americans, Pacific Islander Americans, or Native Americans, all of whom are included in the Act's current definition of "minority.").

Jana-Rock, a Second Circuit case, stands for the proposition that under-inclusiveness may not necessarily cause an MBE program to fail the strict scrutiny test. In *Jana-Rock Construction, Inc. v. New York State Dep't of Econ. Dev.*, the plaintiff, a contractor of Spanish descent, brought an equal protection claim challenging the M/WBE program on the grounds that the program's definition of "Hispanic" should have included individuals from Spanish or Portuguese descent. 438 F.3d 195, 199-200 (2d Cir. 2006). Although strict scrutiny review of the MBE program was appropriate under *Croson*, the court refused to apply strict scrutiny to the city's decision to exclude certain national origins from the definition of Hispanic. *Id.* at 205-06. Having determined that (i) the city had a compelling interest in implementing an affirmative action program, and (ii) the city's program was narrowly tailored, the court held it was unnecessary to apply strict scrutiny to the city's decision to exclude certain national origins from its definition of "Hispanic." Rather, the court applied the less exacting "rational basis" standard, under which it concluded that the decision to exclude those of Spanish decent was not irrational. *Id.* at 213-14. The court concluded that a governmental entity must show that it has a compelling interest in remedying past discrimination, and that it does so in a narrowly tailored way. But once a governmental entity provides that it has a narrowly tailored remedy for discrimination against certain groups, a governmental entity need not also "justify [its] decision not to remedy discrimination against other groups as well." *Id.* at 205 (emphasis added).

It should be noted that over-inclusiveness, in addition to affecting whether a program is narrowly tailored, also affects whether a program addresses a compelling state interest. A program that needlessly includes Aleuts in its definition of "minority" fails the strict scrutiny test, both because there is no compelling state interest in providing special treatment to Aleuts, and because the definition of "minority" is not narrowly tailored to remedy past discrimination.

Conclusion

More than 40 years after the inception of affirmative action programs in public procurement, statistical evidence demonstrates the lingering effects of past discrimination. This evidence supports policymakers' inclination to implement such programs in an effort to "level the playing field" for MBEs. Proponents of affirmative action argue that the existence of these programs is deeply rooted in basic notions of equity. These advocates also cite to the economic benefit to the government as well as the communities as additional reasons to support affirmative action programs. However, in the wake of *Croson* and subsequent court rulings, crafting a program that will withstand judicial scrutiny is

precarious. That being said, a well-crafted program based on a thorough disparity study is legally defensible.

Key Takeaways

- Policymakers at the federal, state and local levels who create and administer race-based programs often justify such programs as important to effectuate policy objectives such as wealth distribution, competition and advancing basic notions of equity. However, because of the stringent examination a court will conduct when considering race-based affirmative action programs, only the most carefully crafted programs are legally defensible.
- The strict scrutiny test now involves two questions. The first is whether the government's interest in making racial classifications is sufficiently compelling to overcome the suspicion that race ought to be irrelevant so far as treatment by the government is concerned. The second is whether the government has narrowly tailored its use of race so that race-based classifications are applied only to the extent required to reach the government's stated interest.
- A city's desire to avoid financing private discrimination with public tax dollars, and thus becoming a passive participant in local discrimination, has been widely accepted by courts as a compelling interest sufficient to satisfy strict scrutiny.
- Although not necessarily the only legitimate compelling interest in the context of government procurement, we do know that a government's interest in remedying the effects of past and present discrimination or remedying its past passive participation in local discrimination has passed judicial muster. Whatever the compelling interest, the government must present a "strong basis in evidence" to support the compelling interest identified.
- Although courts have critiqued individual disparity studies, no court case provides definitive guidance on what a disparity study must include to be deemed sufficient.
- Several courts have held that disparity evidence justifies a preference for individuals of a specific race, ethnic group or gender only if the evidence establishes discrimination against that particular race, ethnic group or gender. In other words, these courts have determined that evidence showing a disparity in the utilization of some aggregated group of minorities is insufficient to support a preference for that same aggregated group of minorities. To demonstrate a compelling interest, the government's evidence must specifically prove discrimination against each favored group.
- Disparity statistics also are vulnerable to attack if they fail to control for race-neutral factors that may affect MWBE availability and utilization, such as the ability to obtain financing and bonding. A government actor must be extremely careful when it includes references to race-neutral

causes of disparity in its affirmative action statutes or regulations if the impact of those causes has not been controlled for statistically. In many instances, a court will seize upon those references as evidence that any statistical disparity is not the result of race or gender discrimination, but rather the result of race-neutral factors.

- Once a government actor shows a compelling interest, it must then demonstrate the program is sufficiently narrowly tailored to address the compelling interest. Courts have emphasized that, to be narrowly tailored, there must be some link between an affirmative action program's participation goals and the disparity evidence establishing a compelling governmental interest.
- An M/WBE program should have sufficient flexibility to allow for the awarding of contracts to those who, despite good faith efforts, fail to meet stated participation goals.
- A governmental body must base its numerical participation goals on the level of minority participation in the relevant labor market. This means that a governmental body cannot speculate as to the appropriate participation levels. Rather, the governmental body must support its goals with sufficient evidence about the current labor market.