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Local Government Reparations and Contracting Programs
Crafting Restorative Policy and Contracting Programs That Meet Constitutional Muster

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Increasing Public Contracting Opportunities for MBEs

And How to Avoid Legal Challenges

Explore Race-Neutral Measures First

- There are a number of race-neutral programs that can be implemented to benefit all small businesses, including minority owned businesses.
- *Croson* requires public entities to utilize such race-neutral measures before implementing race-conscious programs in order to satisfy the narrowly tailored requirement of the strict scrutiny test.

Examples of Race-Neutral Measures

- Non-discrimination requirements in contracts (enforcement may be critical to demonstrating sufficient effort to utilize race-neutral measures and to eliminate discrimination)
- Simplification of bidding procedures: eliminate obstacles to small businesses bidding
- Training programs
- Financial assistance
- Relaxation of bonding requirements - must comply with state law; waive bonds on smaller projects
- Mentor-protégé programs

More Examples of Race-Neutral Measures

- Prompt payment requirements in contracts
- Outreach programs
- Sponsoring networking sessions to acquaint large firms with small firms
- Expanded and targeted advertisement of contracting opportunities
- Unbundling of contracts
- Establishing subcontracting goals with small businesses
- Include points in best value procurement for companies that commit to high percentage of SBE contracting
- Seek legislation creating exceptions to public bidding statutes – e.g., direct solicitation of certified small businesses for public contracts under $XXX

Key to Success of Race-Neutral Programs

- Need procurement department that is committed to disparity reduction and that is supported by county administration and county board and all affected departments

Disparity Study Required for Race-Conscious Programs

- *Croson* established the need for a disparity study to show a compelling governmental interest in remedying past discrimination.
- Disparity study should be done before implementing race-conscious program, not post-enactment.
- Public entities have the burden of proof when challenged on Equal Protection grounds and must show a strong basis in evidence for the conclusion that remedial action is necessary.
- A local government may meet its burden by relying on "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."
- A significant statistical disparity is typically demonstrated by a disparity index below 80. A disparity index compares the number of firms ready, willing and able to perform public procurement work versus the rates at which such firms are actually utilized.

Courts have identified important elements of a Disparity Study

- Disparity studies have been deemed insufficient for failing to address certain factors.
- A disparity index requires a utilization analysis and an availability analysis.
- Evidence of discrimination must not be too old.
- Study must show disparity for individual race or group that is target of remedial program.
- Study must include relevant geographic market.
- Must show discrimination in particular sector of market, such as public construction.
- Must control for race-neutral causes of disparity, such as inability to obtain financing and bonding. The statistical analysis should include a regression analysis to account for any independent variables.
- Must include anecdotal evidence in addition to statistical evidence.

Disparity Study does not need to show Public Entity actively discriminated .

- In *Croson* (plurality opinion) the Court stated: “Thus, if the city could show that it had essentially become a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”
- However, the compelling interest test may be more clearly met if there is direct evidence of past or present discrimination by the public body.

Remedial Programs must be Narrowly Tailored to address discrimination identified in Disparity Study

Factors identified by the courts to show that a program is narrowly tailored include:

- Flexibility
- Good faith efforts provisions
- Waiver provisions
- Relationship of goals to relevant labor market
- Sunset provisions
- Limited to groups for which there were findings of discrimination
- Graduation provisions
- Limited in geographic scope
- Minimizes burden on third parties
- Use and efficacy of race-neutral measures
- Limited to smaller firms

What to Avoid

Quotas or anything that looks like a quota. Carefully consider defensibility of set-asides or preferences before adopting them.

Safer Ground



Adopt reasonable goals



Model program after court sanctioned programs.



Governing body adopt resolution supported by appropriate findings

Jurisdictions Differ

- Research federal and state caselaw for your jurisdiction.
- In addition to Equal Protection challenges, race-conscious programs can be attacked on other grounds, including competitive bidding statutes, state constitutions, and anti-discrimination laws.