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16. Abstract

This study was undertaken at the request of the Texas Department of Transportation in response to its obligations under Senate Bill 352, 72nd Texas State Legislature (Texas Revised Statutes, Article 6669C) to conduct a fact-finding study in support of a state-funds contracting and procurement program for businesses owned by minorities and women.

We have had joint responsibility for this study. To assist in carrying out the assignment, we recruited a number of economic, financial, business, legal, and policy experts from both the public and private sectors. This draft report was prepared under our supervision by Dr. John R. Allison, Graduate School of Business, The University of Texas at Austin. Professor Allison serves as the Mary John & Ralph Spence Centennial Professor of Business Administration, Chairman of the Business Law section, Associate Chairman of the Department of Management Science and Information Systems, and Director of the Center for Legal and Regulatory Studies. He was assisted by Mr. David Pryor, Staff Research Assistant.

This brief has been prepared in order to help the Texas Department of Transportation reconcile the mandate of the Texas State Legislature to implement a state-funds procurement program for disadvantaged business enterprises (DBE's) with the constitutional strictures set forth by the decision of the U.S. Supreme Court in Richmond v. Croson and developed in case law since then. The rigorous legal analysis contained herein describes, as precisely as possible, the parameters under which the TxDOT must operate in order to construct a constitutionally valid, enforceable goals program for state-funded contracting, subcontracting and procurement.

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by
Ray Marshall,
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and
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Disadvantaged Business Enterprise (DBE) Capacity Study

conducted for the

Texas Department of Transportation

by the

LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS
CENTER FOR TRANSPORTATION RESEARCH
GRADUATE SCHOOL OF BUSINESS

THE UNIVERSITY OF TEXAS AT AUSTIN

November 1993

SUMMARY AND IMPLEMENTATION STATEMENT

This report, entitled "Legal Standards for the Establishment and Implementation of a Disadvantaged Business Enterprise Program by the Texas Department of Transportation," is the first report of the seven-volume "Disadvantaged Business Enterprise Capacity Study." The study was undertaken at the request of the Texas Department of Transportation in response to its obligations under Senate Bill 352, 72nd Texas State Legislature (Texas Revised Statutes, Article 6669C) to conduct a fact-finding study in support of a state-funds contracting and procurement program for businesses owned by minorities and women.

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Ray Marshall, Co-Principal Investigator, Project 7-980, Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin

Naomi Ledé, Co-Principal Investigator, Project 7-980, Center for Transportation Training and Research, Texas Southern University

J. Jorge Anchondo, Co-Principal Investigator, Project 7-980, Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin

Jon Wainwright, Research Director, Project 7-980, Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin

Prepared in cooperation with the Texas Department of Transportation.

DISCLAIMER

The contents of this report reflect the views of the co-principal investigators, the research director, and the author of this volume, all of whom are solely responsible for the facts and the accuracy of the data presented herein. The contents do not necessarily reflect the official views or policies of the Texas Department of Transportation. This report does not constitute a standard, specification, or regulation.

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I. BACKGROUND

In 1991, the 72nd Texas Legislature adopted Senate Bill No. 352, codified as Article 6669C, Texas Revised Statutes, which mandated that the Texas Department Highways and Public Transportation (now denominated the Texas Department of Transportation, or TxDOT) establish a disadvantaged business enterprise (DBE) program. Specifically, the legislature required that TxDOT "set and strive to meet annual goals for the awarding of all state or federally funded contracts, including construction, maintenance, supply, and service contracts to disadvantaged businesses."[1] Although the legislature spoke of both state and federally funded contracts, the only effect of the statute was to require a DBE program for state-funded contracts because TxDOT was already required by the U.S. Department of Transportation to operate a DBE goals program for the expenditure of federal funds.[2]

Further, the legislature required TxDOT to "perform a capacity study to assess the availability of disadvantaged businesses in the state."[3] More specifically, TxDOT was directed to "attempt to identify disadvantaged businesses in the state that provide or have the potential to provide supplies, materials, equipment, or services to the Department."[4] In addition, the legislature directed TxDOT to "give disadvantaged businesses full access to the contract bidding process" and "inform and offer assistance to disadvantaged businesses regarding the Department's

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[1] Art. 6669C, sec. 2(A).

[2] 49 CFR Part 23. These U.S. Department of Transportation regulations implement section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), in which Congress specified that, except to the extent that the Secretary of Transportation determines otherwise, at least 10% of highway funds appropriated to states be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. The definition of such businesses is taken from section 8(d) of the Small Business Act. There is a rebuttable presumption that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans are within the "socially and economically disadvantaged" category. 49 CFR 23.62.

[3] Art. 6669C, sec. 2(B).

[4] Id., sec. 2(C).

contract bidding process and identify barriers to participation by disadvantaged businesses in" this process.[1]

Presumably in an effort to draw as much as possible on past experience and existing DBE procedures in the realm of federally funded contracts, the legislature also stated that "Contract goals shall approximate the federal requirement on federal money used in highway construction and maintenance, consistent with applicable state and federal laws."[2] The existence of this statement in the legislation necessitates that all interested parties clearly understand the different constitutional status of federal and state (or local) DBE programs. The last phrase of the sentence, as well as the fact that the legislature ordered a capacity study, indicates that the legislature recognized this difference, but it is of such paramount importance that it warrants emphasis.

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[1] Id.

[2] Id., sec. 2(A). This provision of Art. 6669C also presumably evidences a legislative intent to adopt the federal definition of a DBE, as summarized in footnote 2.

II. THE BASIC CONSTITUTIONAL RULES AND THE LEGAL DIFFERENCE BETWEEN FEDERAL AND STATE (OR LOCAL) DBE PROGRAMS

When any federal, state or local government action, including the awarding of contracts, makes important distinctions among individuals or businesses, there is at least a threshold question of whether the government action violates the constitutional guarantee of "equal protection."[1] For many years the courts have applied different equal protection standards depending on the basis for the government distinction or classification. If a governmental body makes a distinction based on race or national origin, or that infringes on a fundamental right such as free speech, the distinction is valid only if it passes the so-called "strict scrutiny" test. A classification subjected to the strict scrutiny test is valid only if the government proves that the classification is necessary to further a compelling governmental interest and is narrowly tailored so as to take race or national origin into account (or burden the fundamental right) to no greater extent than is required to promote the compelling interest. The requirements of the strict scrutiny test will be discussed in greater detail subsequently. At the other end of the spectrum, when government makes a distinction that is neither based on an immutable personal characteristic nor burdens a fundamental right, the distinction is valid so long as it has some "rational basis." The strict scrutiny test is exceedingly difficult to pass and the rational basis test exceedingly easy. Between these two extremes, there is a very ill-defined test that is often referred to as "intermediate scrutiny." This middle level of protection is applied to gender-based classifications and probably to government actions that burden persons because of certain other immutable personal characteristics. It requires proof that the classification bear a "substantial relationship to an important governmental interest."

Until the U.S. Supreme Court's 1989 decision in Richmond v. Croson,[2] the strict scrutiny test was applied only to those racial distinctions that burdened

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[1] By its terms, the Equal Protection clause of the fourteenth amendment applies only to state and local governments; however, courts usually apply the same requirements to federal government actions by incorporating equal protection standards into the due process clause of the fifth amendment.

[2] 488 U.S. 469 (1989).

members of an ethnic minority. In Croson, however, the Court concluded that strict scrutiny also should be applied to state or local government programs that make "benign" racial distinctions, that is, affirmative action programs intended to aid historically disadvantaged groups. The Court emphasized that its decision applied only to state or local government programs, and that Congress has considerably greater latitude to engage in race-conscious affirmative action. Thus, while applying strict scrutiny to such programs at the state or local government level, in Croson the Court expressly reaffirmed the position it had taken in 1980 in Fullilove v. Klutznick.[1]

In Fullilove the Court had upheld the constitutionality of a provision in the federal Public Works Employment Act that required state and local governments to set aside for "minority business enterprises" at least 10% of the federal funds appropriated to those entities for public works projects. The rationale for the conclusion that Congress has much greater latitude to use benign race-conscious measures than state or local governments is that section 5 of the Fourteenth Amendment explicitly grants to Congress broad powers to enforce the substantive provisions of the amendment (including the Equal Protection clause) against the states. The Court in Fullilove did not use or even refer to any of the traditional equal protection tests.

In 1990, after Croson, the Supreme Court again reaffirmed that Congress has much more power than state or local governments to use race-conscious measures. In Metro Broadcasting, Inc. v. FCC,[2] the Court upheld the constitutionality of certain congressionally mandated race-conscious FCC policies regarding television station licensing. These policies were quite modest and did not burden nonminority license applicants substantially. The Supreme Court reaffirmed its earlier ruling in Fullilove. Strict scrutiny is not to be applied to benign race-conscious programs that are either mandated by Congress or that are attached by Congress as conditions to the appropriation of federal money to state or local governments. Again, however, the Supreme Court did not indicate whether it was

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[1] 448 U.S. 448 (1980).

[2] 497 U.S. 547 (1990).

using one of the other two traditional equal protection tests. In finding the FCC policies to be valid, however, the Court used the language of the intermediate scrutiny test--that is, the Court held that the program in question was substantially related to an important government interest. Thus, this program met the requirements of intermediate scrutiny, but the Court did not tell us whether intermediate scrutiny or the rational basis test is to be used in future challenges to federal DBE programs or other benign race-conscious measures. What is important for present purposes, however, is the knowledge that a DBE program implemented by a state or local government as a condition of receiving federal funds is significantly easier to justify constitutionally. When neither a federal mandate nor a condition for receipt of federal monies is involved, the strict scrutiny standard of Richmond v. Croson is applicable. We will now examine that decision and its requirements more closely. Following that examination, we will analyze the application of those requirements by lower courts in the three years since Croson.

III. RICHMOND V. CROSON

In 1983, the city council of Richmond, Virginia, enacted a city ordinance requiring that prime contractors who were awarded city contracts to award at least 30% of the total dollar amount of their contracts to "minority business enterprises." The ordinance allowed the city's Department of General Services to promulgate rules which permitted a waiver of the set-aside requirement if the prime contractor demonstrated that the requirement could not be satisfied. The MBE set-aside program had been adopted by the city council on the basis of evidence presented at a public hearing demonstrating that, between 1978 and 1983, only 0.67% of the city's prime construction contracts had been awarded to MBE's, despite the fact that 50% of the city's residents were black. The study upon which the council relied also showed that there were virtually no black members of the various contractor trade associations in the Richmond area. In addition, one councilman, who had been a practicing attorney in the area since 1961, testified that racial discrimination in the construction industry was widespread in metropolitan Richmond, the state, and the nation. The council also relied on the evidence of nationwide discrimination in construction earlier adduced by Congress and relied on by the Court in Fullilove. Opponents of the ordinance contended that the low percentage of MBE participation in city contracts did not reflect discrimination, and that there were not enough MBE's in the Richmond area to satisfy the 30% minimum. Representatives of contractors' associations denied any intentional exclusion of minority contractors. After the hearing, the council adopted the ordinance by a 6-2 vote, with one member abstaining.

In 1983, the city solicited bids for the installation of plumbing fixtures at the city jail. J.A. Croson Co. ("Croson") made plans to submit a bid. Croson's regional manager contacted several MBE's in an effort to satisfy the set-aside requirement. Melvin Brown, the president of a local MBE, responded to Croson's solicitation and subsequently contacted two vendors who sold the fixtures specified in the city's original bid solicitation. One company that Brown contacted had previously quoted Croson a price for the fixtures but refused to quote the fixtures to Brown; the other supplier did not want to extend credit to Brown without a satisfactory credit check. Croson turned out to be the only bidder. On the day bids were opened,

Brown informed Croson that he was having difficulty securing credit approval. Six days later, Croson submitted a request for waiver of the set-aside requirement on the basis that Brown was "unqualified" and that other MBE's had been unresponsive. After learning of Croson's request for a waiver, Brown contacted another fixture supplier and later submitted a bid to Croson. After Brown notified the city that he could supply the fixtures for the project, the city denied Croson's waiver request and advised Croson that it had ten days to submit an MBE utilization form. Croson responded with a letter arguing that Brown was not an authorized dealer of the plumbing fixtures in question. Croson also stated to the city that Brown's bid was subject to credit approval and that the price Brown had quoted was substantially higher than any other price quotation that Croson received. In a second letter to the city, Croson explained in some detail the additional costs that would result from Brown's participation and requested authorization to adjust its bid in accordance with the increased costs. The city denied Croson's waiver petition as well as its request for a cost adjustment, and decided to rebid the project. Croson then filed suit in federal district court challenging the constitutionality of Richmond's set-aside program under the equal protection clause. Both the district court and the court of appeals upheld the city's program, relying essentially on the standards of Fullilove and the evidence of such a gross disparity between Richmond's minority population and MBE participation in city contracts. The Supreme Court reversed.

A. COMPELLING GOVERNMENTAL INTEREST

As indicated previously, the Court concluded that strict scrutiny should be applied to a state or local government affirmative action plan for procurement when no congressional mandate or conditional federal appropriation is involved. To fulfill this standard, the state or local government entity first must prove that the program is necessary to promote a "compelling" governmental interest. In a different context (freedom of association), the Court had already held that preventing invidious discrimination against minorities qualified as a compelling governmental interest.[1] In Croson, the Court extended the scope of the compelling

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[1] See New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988). In that case, the Supreme Court held that the City of New York had a compelling interest in prohibiting large private clubs from having membership requirements excluding minorities and women. Because the city ordinance amounted to a content-based restriction on existing club members' freedom of association (which is a

interest standard by holding that a state or local government has a compelling interest in (1) remedying the continuing effects of previous discrimination against minorities, and (2) preventing the use of taxpayers' money to subsidize the discriminatory practices of private parties (e.g. discrimination by prime contractors against minority subcontractors).

The Supreme Court found, however, that the city of Richmond had not produced evidence demonstrating the existence of such a compelling interest. With respect to the city's compelling interest in remedying the effects of past discrimination, the Court held that evidence of "societal discrimination" was insufficient to support an Richmond's MBE set-aside program. Indeed, even testimonial evidence that discrimination against minorities was prevalent in the construction industry generally was treated as merely showing "societal discrimination" having no value as proof of a compelling interest to support the Richmond program.

Instead, there must be evidence of actual discrimination against members of particular minority groups in the awarding of either (1) prime contracts by the city of Richmond or (2) subcontracts by Richmond-area prime contractors. The Court stated that statistical evidence is an essential part of the foundation needed to demonstrate discrimination. The Court concluded, however, that statistical evidence comparing the percentage of city contract dollars awarded to MBE's with the percentage of minorities in the general population of Richmond is not relevant. To the contrary, the Court stated that there must be evidence comparing the availability of MBE contractors in Richmond qualified to do city contract work with the actual utilization of MBE's in that area. A very substantial disparity between availability and utilization, according to the Court, may provide support for an inference of discrimination.

However, substantial anecdotal evidence (as drawn from systematically conducted interviews, for example) is also necessary to buttress the statistics sufficiently to demonstrate a compelling government interest. To be probative, this anecdotal evidence must show actual instances of discrimination by government

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component of free speech protected by the First Amendment), the city had to meet the same compelling interest and narrow tailoring requirements that exist under the strict scrutiny standard for racial discrimination. The city was able to meet these standards and the ordinance was upheld.

personnel, prime contractors, or both. Anecdotal reports of actual discrimination must, however, be investigated and verified to the extent possible or they will probably not be given a great deal of weight. Claims of discrimination are easy to make. Any party implicated as a discriminator should also be interviewed and given an opportunity to provide his own version of the events in question. Finally, the Court held that evidence submitted by the city showing that local contractor associations had virtually no minority business members was neither statistically nor anecdotally probative of actual discrimination.

B. NARROWLY TAILORED

Once a compelling interest has been proved, Croson's strict scrutiny test then requires proof that a race-conscious procurement program be narrowly tailored to take race into account only to the extent necessary to promote the compelling interest. The Court found that the Richmond program failed this second component of the strict scrutiny test as well as the first. Several factors led the Court to conclude that Richmond's program was not narrowly tailored. (1) The set-aside requirement could be satisfied by using MBE's from anywhere in the country; the Court held that any such program's operative effect must be limited to the program's sponsoring jurisdiction. Although this aspect of narrow tailoring makes some sense intuitively, it introduces a troublesome degree of artificiality into the market definition exercise. Some of the markets relevant to a program will be naturally local, some naturally regional, and others naturally nationwide or even broader. For the present, however, this lack of economic sophistication on the part of the Supreme Court and the artificiality it produces are matters that we can only accept and cope with. (2) The Richmond program was not sufficiently flexible. It set a rigid set-aside requirement, with very minimal waiver opportunities. To be valid under Croson, a program probably has to set only goals, with ample opportunities for waiver of these goals. A true set-aside program (rather than a goals program) probably cannot pass the Croson standard for narrow tailoring. An overall set of goals for particular ethnic groups and women is probably permissible, but passing Croson's flexibility requirement likely requires that these overall goals be monitored and perhaps modified frequently; to be valid, a program may have to go so far as to set goals on a project-by-project basis. (3) The Richmond program included some minority groups, such as Aleuts and Eskimos, that almost certainly were not

represented in the Richmond population of actual or potential minority-owned businesses. Croson requires that the population of actual or potential MBE's (or DBE's) be measured within the particular procurement jurisdiction; this measurement must then be compared with actual utilization. The Court said that the "gross overinclusiveness" of the city's set-aside program "strongly impugned the city's claim of remedial motivation." (4) The evidence must demonstrate that race-neutral (as well as gender-neutral in the case of a broader DBE program including women-owned businesses) measures must be inadequate to correct any substantial disparities between capacity and utilization, or else race-conscious (or gender-conscious) remedies such as DBE goals will not be narrowly tailored. Race- and gender-neutral measures include such efforts as (a) outreach programs aimed at educating all small businesses about contracting opportunities with the particular governmental body, (b) provision of training programs for all small businesses that assist them in developing basic business skills, (c) identifying any unnecessary institutional obstacles in the government's procurement process that make doing business with the agency more difficult for small businesses than for larger ones, and either lowering those obstacles or assisting small businesses in overcoming them, and (d) helping small businesses with bonding and financing requirements if it is determined that these requirements have served as obstacles to small business participation (or identifying and correcting any actual discriminatory practices in the bonding and financing aspects of doing business with the government agency).

C. ADDITIONAL OBSERVATIONS ON GENDER-CONSCIOUS PROCUREMENT PROGRAMS

The Croson case addressed a set-aside program that applied only to ethnic minorities; the Richmond program did not include women-owned business enterprises. In the case of invidious discrimination against women, the Court has applied the intermediate scrutiny test rather than strict scrutiny. One can only speculate about whether the Supreme Court would also apply this lower level of constitutional scrutiny to a gender-conscious state or local government procurement program. Using an intermediate level of scrutiny for invidious gender-based discrimination might make sense. In the case of benign gender-based discrimination, however, the logic of using a test that is less rigorous for women-owned business enterprises than for minority-owned businesses seems faulty.

Assuming that the TxDOT program ultimately uses the federal definition of socially and economically disadvantaged businesses, it will include both minority-owned and women-owned business enterprises. We do not know whether the Supreme Court would apply the same standard to both categories. As a practical matter, of course, we should be prepared to justify all aspects of any DBE goals program under a strict scrutiny standard.

IV. APPLICATION OF THE CROSON STANDARDS BY LOWER COURTS

One of the most difficult problems in assessing the effect of Croson on the decisions of lower federal courts is that so little time has passed since the Supreme Court's decision. Most of the cases in which courts have been called upon to apply Croson have involved DBE programs that were instituted well before the Supreme Court's decision requiring strict scrutiny. In a few of these cases, however, the contracting agency had done a surprisingly good job of laying a foundation for its program. Some of these programs included design features demonstrating much thought, sensitivity, and study, and some of them did not. A couple of cases have litigated programs that were based on studies conducted after Croson, and these are necessarily of great interest. In addition, a few of the post-Croson cases that have involved challenges to federal-funds DBE programs have included rulings that have some bearing on state-funds DBE programs. All of the relevant post-Croson cases are categorized and thoroughly analyzed. Following that analysis is a conclusion that draws together the critical rulings and statements from these cases, and makes recommendations regarding the formulation of a DBE program for TxDOT that will increase its chances of surviving any legal challenge.

A. CHALLENGES TO PROGRAMS DESIGNED PRIOR TO CROSON AND HAVING LITTLE IF ANY FACTUAL FOUNDATION

In Miami Tele-Communications, Inc. v. City of Miami,[1] the holder of a cable television franchise licensed by the city of Miami was fined $2,500 per day by the city for several alleged violations of license conditions. Among the conditions allegedly violated were two provisions that required the licensee to (1) establish an employment training program, particularly for minority youth, and (2) make a reasonable and good faith effort to make 20% of its annual purchases by dollar volume from minority business enterprises. The ordinance establishing the set-aside explicitly presumed that the minority group members controlling and managing the MBE's would be either Black or Hispanic. The set-aside requirement included all purchases except "factory direct purchase terms or items purchased from a sole

[1] 743 F. Supp. 1573 (S.D. Fla. 1990).

source of supply." The city had adopted the cable licensing ordinance in 1980, probably in reliance on Fullilove. Shortly after Croson, the federal district court declared the ordinance unconstitutional and enjoined its enforcement because it lacked any of the factual foundation required by Croson.

In Northeastern Florida Chapter of the Association of General Contractors v. City of Jacksonville,[1] the city of Jacksonville, Florida, adopted a 10% MBE set-aside requirement for capital improvements and other construction contracts. In a case filed by a contractors' association, the federal district court found the city ordinance to be unconstitutional and granted a preliminary injunction against its enforcement. Although the court of appeals indicated that it also had some reservations about the program's constitutionality, it did not analyze or rule on the merits of the program. Instead, it reversed the district court because the granting of a preliminary injunction pending the ultimate outcome of litigation is intended to preserve the status quo and is only granted if the plaintiff proves that it will suffer irreparable harm otherwise. The court of appeals held that the plaintiff had not shown such irreparable harm.

In American Subcontractors Association, Georgia Chapter, Inc. v. City of Atlanta,[2] the dispute involved a situation in which, after an earlier Atlanta DBE goals program had been invalidated by the Georgia Supreme Court on the grounds that it violated the city charter (Georgia Branch v. City of Atlanta, 321 S.E.2d 325 (Ga. 1984)), the city amended the charter and reinstituted the program. Under the program, which the court noted was without an expiration date, the mayor was required to set separate goals annually for MBE and WBE participation in city contracting, after first addressing specific criteria, including a forecast of eligible projects and the number of MBE and WBE firms available. The 1985 goal for MBE and WBE participation was 35%. Like the Richmond program, this one was unlimited in geographic scope; a MBE or WBE from anywhere could avail itself of the prescribed goal. The Atlanta program permitted waiver of the DBE requirements for a bidder who demonstrated good faith but unsuccessful efforts to comply.

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[1] 896 F.2d 1283 (11th Cir. 1990).

[2] 376 S.E.2d 662 (Ga. 1989).

There was no statistical or anecdotal evidence to establish the factual predicate of past discrimination. What evidence there was pointed only to nationwide and statewide employment discrimination, and very generally and anecdotally to an underutilization of Black contractors in the Atlanta area. Under the standards of Croson, which had been decided shortly before this decision by the Georgia Supreme Court, the Atlanta program did not even come close to meeting either the compelling interest or narrow tailoring requirements.

In F. Buddie Contracting Co. v. City of Elyria,[1] the city of Elyria, Ohio, passed a MBE/WBE ordinance in 1983 providing for the following set-asides (they appeared to be true set-asides, not just goals): (1) For any public contract valued at more that $20,000, the contractor was required to award to certified MBE's subcontracts valued at 14% of the total contract value in the case of construction, repair or maintenance contracts, and 5% in the case of supplies, services or professional contracts. (2) For any public contract valued at more than $30,000, subcontracts had to be awarded to WBE's valued at 3% and 3% for the two categories of contracts identified in (1). When the ordinance was challenged, the city defended by alleging that it was intended to prevent present and future discrimination, and no statistical or anecdotal evidence of prior discrimination was presented. The court declared the ordinance unconstitutional under Croson with little analysis.

O'Donnell Construction Co. v. District of Columbia,[2] involved a situation in which, for fifteen years, the District of Columbia awarded District-funded construction contracts under its locally enacted (not congressionally enacted) Minority Contracting Act. This law set a 35% Minority Business Enterprise goal for all contracting agencies with the D.C. local government. Only local MBE's were targeted by the law--those with their principal place of business in D.C. These agencies were required to submit quarterly reports to the District's Minority Business Opportunity Commission (a 7-member administrative and enforcement agency appointed by the mayor) setting forth the degree to which they had met the goal and an explanation of any failure to do so. In order to achieve the 35% goal, the

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[1] 773 F. Supp. 1018 (N.D. Ohio 1991).

[2] 963 F.2d 420 (D.C. Cir. 1992).

Commission was required to establish as one of its MBE-assistance programs a "sheltered market approach." This meant that contracting agencies set aside certain contracts and subcontracts for competition only among MBE's; non-MBE's were not permitted to bid on these sheltered contracts. Each contracting agency was required to use the sheltered market approach as necessary to meet the 35% goal; this meant, of course, that the 35% "goal" program was an absolute set-aside rather than a true goals program. The law also required that any prime contractor had to perform at least 50% of the work, and if subcontracting was to be done, at least 50% of the subcontracted work had to go to MBE's. In addition, the law gave the Commission several discretionary powers to increase MBE participation. For example, in individual cases the Commission could waive bonding requirements or recommend subdividing contracts if "necessary to achieve the purposes of the act."

The most recent version of the D.C. law, which was passed in 1983, defined minority as "Black Americans, Native Americans, Asian Americans, Pacific Islander Americans, and Hispanic Americans, who by virtue of being members of the foregoing groups, are economically and socially disadvantaged because of historical discrimination practiced against these groups by institutions of the United States of America." This definition excluded Eskimos and Aleuts, who had been included in the earlier version. There were no findings or other evidence to indicate a reason for the change.

The U.S. Court of Appeals for the D.C. Circuit first determined that Croson represented the applicable law; the court then concluded that despite using the term goal, the law did not call for a flexible goal but instead constituted an absolute set-aside. This by itself would have been a sufficient basis for striking down the law under Croson's standards. In addition, there was absolutely no factual predicate for the D.C. set-aside program; the only legislative findings merely spoke of overall societal discrimination and the large percentage of Blacks (70%) in the D.C. population. In the litigation, the city did supply a report showing a substantial disparity between number of MBE's and contract awards for one city agency, the General Services Department, in 1974. The court observed that (1) this evidence was too old to support a law passed in 1983, especially where the 1983 law raised the set-aside to 35% from the 25% that had been contained in the earlier (1977) law; (2) the report did not indicate how many of the MBE's identified by the General Services Department were qualified to do relevant work (no certification procedure); and (3)

in any event, data relating to one of many city agencies could not support a program that applied to all city agencies.

The district court had denied the plaintiff's request for a preliminary injunction, but the court of appeals reversed and granted the injunction because of its conclusion that plaintiff had a very high probability of success when the case was fully litigated, that the law was causing irreparable harm to plaintiff (the plaintiff only did paving work, all or most of which had been sheltered for MBE's), and that granting the preliminary injunction would not cause significant harm to third parties pending the ultimate disposition of the case.

B. CHALLENGES TO PROGRAMS DESIGNED PRIOR TO CROSON BUT HAVING A SIGNIFICANT FACTUAL FOUNDATION AND SOME WELL-CONCEIVED DESIGN FEATURES

In Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo,[1] a post-Croson challenge was made to a statewide program in New York. In 1988, one year before Croson, the New York state legislature enacted legislation designed to increase the participation of minority and women-owned business enterprises ("MBE's" and "WBE's") in all contracts awarded by the state and its agencies. Although the legislation applied to procurement by all state agencies, the particular program challenged in this case was the one implemented by the state Department of Transportation pursuant to the legislative mandate. (The state DOT actually had adopted W/MBE participation goals for state-funded contracts, along with federally funded ones, beginning in 1980, although not under any state statutory mandate.) The 1988 program obviously was designed and implemented before Croson. The particular challenge was made by a bridge construction and renovation company and contested the constitutionality of both the state program and the federal program required by STURRA and 49 CFR 23. The federal district court applied strict scrutiny to the state MBE program, and intermediate scrutiny to the state WBE program, finding both to be unconstitutional and granting a preliminary injunction against their enforcement. It is interesting to note that, although the court nominally applied different levels of equal protection scrutiny to the MBE and WBE

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[1] 743 F. Supp. 977 (N.D. N.Y. 1990).

components of the program, in actuality the court seemed to required exactly the same kind of proof to support the WBE program under intermediate scrutiny as for the MBE program under strict scrutiny. The court upheld the federal program under the minimal standards of Fullilove.

In analyzing the state program under Croson, the court found insufficient evidence of actual discrimination to establish either a compelling interest under strict scrutiny or a strong interest under intermediate scrutiny. The court consequently did not deal with the narrow tailoring requirement. Because the legislative mandate and agency implementation occurred before Croson, of course, no in-depth disparity study had been done. Despite this, the New York program was a relatively well-designed one that seemed to have a reasonable factual foundation. Had it been supported by a disparity study and paid a little more attention to race- and gender-neutral measures in addition to race- and gender-conscious ones, it probably would have survived. In view of this fact, it may be instructive to outline the program's basic elements.

The centerpiece of the New York legislation was the establishment of the Governor's Office of Minority and Women's Business Development (GOMWBD). The director of this office, among other things, was required to "encourage and assist contracting [state] agencies in their efforts to increase participation by minority and women-owned business enterprises on state contracts and subcontracts so as to facilitate the award of a fair share of such contracts to them." One of the duties of the director was to develop a directory of "certified minority and women-owned business enterprises" which are available to be solicited for state contract and subcontract work by either state agencies or general contractors. The director was further required to "provide measures and procedures to ensure that certified business shall be given the opportunity for meaningful participation in the performance of state contracts and to identify those state contracts for which certified businesses may best bid to actively and affirmatively promote and assist their future participation in the performance of state contracts so as to facilitate the award of a fair share of state contracts to such businesses." At no point did the statute specify a quota or percentage set-aside of work on state contracts for W/MBE's. Instead, the statute used phrases such as "participation requirements" or "fair share" to designate those portions of a particular state contract targeted for W/MBE's, and attempted to "encourage" contractors with state agencies to reach the

designated W/MBE participation requirements by requiring contractors to submit a W/MBE "utilization plan" prior to the award of a state contract. The contracting agency was required to review the utilization plan, notify the contractor in writing of any deficiencies, and require than any deficiencies be remedied. Failure by the contractor to cure deficiencies could result in revocation of the contract. However, the contractor was given the right to notification of the specific grounds for revocation, an administrative appeal, and an appeal to an intermediate-level state appellate court.

The New York statute also contained a provision whereby a contractor could apply for a complete or partial waiver of the W/MBE participation requirements on a state contract. The waiver could be granted if the contractor was able to show that it could not, after making "good faith efforts," comply with the participation goal. When deciding whether to grant the requested waiver, the contracting agency was required to consider factors such as: the number and type of MBE's and WBE's available to work in the region of the state where the contract was to be performed (which sounds a lot like a disparity study); the dollar value and scope of the contract; the ability of W/MBE's from outside the region to perform the work; the contractor's solicitation of W/MBE's individually and through appropriate media; whether a WBE or MBE had responded to a bid solicitation in a timely and competitive manner; and whether the contractor had attempted to reorganize the contract work so as to increase the likelihood of W/MBE participation. If a waiver request was denied for failure to comply with the participation requirements, both the contractor and contracting agency could file a complaint with the Director of GOMWBD. Thereafter, the director was to attempt to resolve the problem and, if not resolved, refer the matter to arbitration for a report and recommendation. The statute gave the director discretion whether to levy unspecified penalties against the contractor; if penalties or sanctions of any kind were imposed, however, the contractor had a right to court appeal.

State agencies such as the state DOT were required to submit to the GOMWBD Director an "agency goal plan" which set the goal for the percentage participation by WBE's and MBE's on contracts to be issued by the agency, along with a justification for the goal. The Director could accept, reject, or modify the proposed agency goal plan. Contracting agencies also were required to establish a W/MBE participation goal for each individual contract. When setting the

individual contract goals the agency was required to take into account (1) the scope of the work; (2) the number, type, and availability of WBE's and MBE's in the region of the state where the contract was to be performed; (3) the dollar value of the contract; (4) the percentage of the minority group members and women in the population of the region where the contract was to be performed; (5) the possible effects of past discrimination in reducing the participation of WBE's and MBE's in state contracts; and (6) the ability of other state agencies to meet their participation goals in a particular region of the state.

Under the New York DOT implementing regulations, prime contractors selected as low bidder were required to submit a "utilization plan" specifying the WBE's and MBE's which the contractor intended to employ as subcontractors, the amount of money to be paid to the W/MBE's, and a description of the work that these subcontractors would perform. If the contractor was unable to meet the WBE/MBE participation requirement specified by the agency for the contract, the contractor had to submit a request for a waiver. The legislatively mandated procedure for requesting and acting upon waivers was described above. Implementing this legislative requirement, the state DOT adopted regulations providing that partial or total waivers from W/MBE requirements could be granted by the agency only upon the submission by the contractor of a written request which documents the "good faith efforts" made toward the achievement of the "goal requirements." The state DOT regulations did not specify exactly what constituted a good faith effort on the part of a potential contractor. Instead, the regulations specified a non-exhaustive list of factors to be considered, including, among other things: (1) whether a completed utilization plan was submitted; (2) whether bid solicitations were placed in general circulation, trade, and minority- and women-oriented publications; (3) whether appropriate WBE's and MBE's, listed in the directory of certified businesses received written bid solicitations; (4) the extent to which WBE's and MBE's were available and responded to the bid solicitations in a timely and competitive manner; (5) efforts undertaken by the contractor to restructure the work to increase the likelihood of participation by minority- and women-owned businesses; and (6) whether information was provided to potential W/MBE's which was sufficient to permit them to submit an informed and timely bid.

When the contracting agency determined that the contractor had not documented good-faith efforts toward meeting the W/MBE participation goals the contracting agency in its discretion could "award the contract to the next lower responsible bidder, or to the next most technically qualified or otherwise acceptable proposer, notwithstanding that the disqualified bidder or proposer pursues any [available] remedies." A disqualified contractor was entitled to an administrative hearing to review the agency's decision; and if the hearing officer found the agency's decision to be arbitrary or capricious then the officer had to direct a refund of the bid deposit. However, the hearing officer had no authority to direct the state agency to actually award the contract to the wrongfully disqualified contractor. The hearing officer's decision was appealable to an intermediate state appellate court. The state DOT regulations also provided an opportunity for both the contractor and the contracting state agency to file complaints with the Director of GOMWBD, any remaining disputes being submitted to arbitration; the arbitration decision, however, was not self-executing, but merely advisory to the GOMWBD Director, whose final decision was appealable to an intermediate state appellate court.

For 1989, the most recent year at issue in the case, the W/MBE participation goal was set at 17% for both state- and federal-funded contracts. This goal was set after considering the availability of W/MBE's, the level of W/MBE participation achieved in the previous year, and the type of work to be performed in the coming fiscal year. The W/MBE participation goals in 1989 for individual contracts with subcontracting possibilities were set by reference to a federal DOT-developed table which designated goals depending on the dollar amount of the contract, the location within the state of the work to be performed, and the type of work to be performed. The state DOT contended that the table used was based on the availability of W/MBE's and the recent success or failure of efforts to obtain W/MBE participation in a particular area of the state. The state DOT asserted that the W/MBE participant goals for both the state and federal programs were re-examined annually. The state DOT emphasized that the low bidder's compliance with federal DBE and state W/MBE goals was only one factor taken into account when deciding whether the low bidder was the lowest responsible bidder.

The state DOT further asserted that the flexibility of the program was demonstrated by the fact that, of the $755 million in contracts let by the state DOT from 4/1/88 to 3/31/89, about 1/3 of the total went to contractors who had failed to

achieve the W/MBE participation requirements, yet still made a satisfactory showing of good faith efforts.

The state submitted a number of affidavits and reports concerning the legislature's factual basis for the state W/MBE program. Despite a substantial amount of statistical and anecdotal evidence strongly suggesting that widespread discrimination existed in the construction industry, and that white prime contractors used W/MBE subcontractors only when forced to, the evidence did not meet the rigorous standards of Croson.

In Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia,[1] the city of Philadelphia first adopted an ordinance creating a minority- and women-owned business goals program for city contracts in 1982. The ordinance was amended in 1987 and 1988 to become a more comprehensive DBE goals program applicable to "small businesses that are at least 51% owned by one or more socially and economically disadvantaged individuals." The class of "socially and economically disadvantaged individuals" was defined as those "who have either been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." The city agency created to administer the program was permitted (but not required) to make a rebuttable presumption that all minority persons (defined in the typical way), women, and handicapped persons are socially and economically disadvantaged. The ordinance borrowed the definition of handicapped person from the federal Rehabilitation Act of 1973, which is essentially the same definition used for "persons with disabilities" under the Americans with Disabilities Act of 1990. Before making the rebuttable presumption, however, the agency was also required to take into account the "liquid assets and net worth" of the particular individuals. Moreover, once a DBE received a cumulative total of $5,000,000 in city contracts because of its DBE status, the business was then rebuttably presumed not to be a DBE.

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[1] 945 F.2d 1260 (3d Cir. 1991).

For businesses classified as DBE's, the program set "goals" of 15% participation in city contracts for minority-owned businesses, 10% for women-owned businesses, and 2% for handicapped-owned businesses. The administering agency was also required by the ordinance to determine the total number of DBE's in the Philadelphia area and to devise a certification procedure for DBE's. The agency had the authority to grant a waiver of the DBE participation goal to a prime contractor who demonstrated that it was unable to meet the goal despite making a good faith effort; in addition, the agency could also declare an entire class of contracts as exempt from the DBE goals requirement on the basis of a formal finding that an insufficient number of qualified DBE's were available to ensure adequate competition and an expectation of reasonable prices within that class of contracts.

The federal district court granted the plaintiffs' motion for summary judgment, striking down the city's DBE program without going to trial, on the grounds that the city had not met the Croson requirement of proving that actual discrimination had occurred in city contracting. The court of appeals reversed, not on the merits but on the basis of its conclusion that the district judge should have permitted the defendants (the city and a minority contractors' association that had been permitted to intervene as a defendant) more time for pretrial discovery before entering summary judgment. The defendants claimed that much of the information needed to prove actual prior discrimination was in the records of the plaintiffs (nonminority contractors' and building trades associations) and was not available anywhere else. At the time that the district court had granted the plaintiffs' motion for summary judgment, the defendants had a number of requests for depositions and unanswered interrogatories outstanding. The court of appeals ruled that a district court abuses its discretion by granting a motion for summary judgment under such circumstances.

Although this case seems to indicate that the factual predicate necessary to prove Croson's requirements can be developed through pretrial discovery after a program has been operationalized and challenged in court, there is reason to doubt whether this is possible. There certainly could be anecdotal evidence of discrimination in the records of contractors associations and their members, but it seems unlikely that the statistical evidence of DBE capacity could ever be developed in this manner. Thus, if no formal capacity study is performed, the

necessary factual predicate probably cannot be developed by means of pretrial discovery.

In General Building Contractors v. City of Philadelphia,[1] after the city of Philadelphia determined that it did not have the resources to build a planned convention center, the state of Pennsylvania enacted a statute in 1986 creating the Pennsylvania Convention Center Authority (PCCA), a local government entity with responsibility for constructing and maintaining the convention center in Philadelphia. The state legislation creating and empowering PCCA included a provision requiring that entity to develop and implement an affirmative action plan to assure that all persons were accorded equality of opportunity in employment and contracting by PCCA, its contractors, subcontractors, vendors, and suppliers. The statute expressly provided that the PCCA and parties with whom it dealt would not be subject to any DBE or discrimination ordinances of the city of Philadelphia. To help it develop an affirmative action program, the PCCA retained the Philadelphia Urban Coalition (PUC), a nonprofit organization created to address urban problems, promote racial harmony and intergroup relations, and act as an advocate on behalf of disadvantaged communities in the area.

In 1987, the PCCA adopted as an agency regulation the plan submitted by the PUC. The purpose of the plan was not to remedy past discrimination but, rather, to ensure that business concerns owned and controlled by minorities and women had the maximum practicable opportunity to participate in the performance of all types of contracts let by the PCCA. The plan stated:

> The fundamental requirement of the Plan is that all contractors, vendors, and consultants, who engage in work for the [PCCA] that they have made their "best efforts" to involve in such work as many women and minorities or firms owned by minorities and women as possible. The burden of proving that a "best effort" has been made will be met if the level of participation in any particular phase of the project is deemed to be "meaningful and substantial" under criteria adopted by the Authority after consultation with [PUC]. The "best effort" requirement may also be satisfied if it can be demonstrated that "meaningful and substantial" levels of participation are not possible for a legitimate reason. "Meaningful and substantial"

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[1] 762 F. Supp. 1195 (E.D. Pa. 1991).

> shall be interpreted by the [PUC] and the [PCCA] as meaning a level of participation which reflects the overall relationship of minorities and women to the general population of the Philadelphia Metropolitan Statistical Area. The [PCCA] will consider the availability of bona fide minority and women businesses and potential workers in the various areas of contracting or employment opportunities. Participation shall be measured in terms of the actual dollars received by women and minority businesses (except in the case of a minority/female controlled joint venture), and actual hours worked by minority and female workers.

The plan also provided that, prior to the dissemination of any request for bids, the PCCA was to determine what level of minority and/or female participation was meaningful and substantial in the area to be bid. The PCCA had to include this information within the bid solicitation package along with the names and addresses of bona fide minority- and female-owned businesses or sources of potential minority and female employees available for contracting or hiring opportunities in the area. All bidders were required to submit within their bids a detailed affirmative action plan listing the names, addresses, dollar amounts, and scope of work to be subcontracted to minority- and female-owned businesses. If the level of minority- and/or female-owned businesses met or exceeded the level determined by the PCCA to be meaningful and substantial, there was a presumption of compliance with the plan. If, however, the proposed level of participation fell below the pre-determined level, the contractor was required to prove to the satisfaction of the PCCA that it had used its best efforts and that its proposed level of participation was the best that could be obtained. In making the best-efforts determination, the PCCA considered the contractor's outreach efforts, e.g., whether the bidder had contacted minority and female firms to bid on potential subcontracting opportunities under the contract, had advertised in certain publications concerning subcontracting opportunities, had participated in conferences and seminars designed to solicit minority and female business participation, had utilized the resources offered by the PUC, and had negotiated in good faith with interested minorities and women.

As mentioned earlier, the plan generally defined the "meaningful and substantial" requirement as a level of participation reflecting the overall relationship of minorities and women to the general population in the metro area.

In actual application of the plan, the terms "meaningful" and "substantial" were given more specific content, however. "Meaningful" was interpreted in a qualitative sense; work was considered meaningful when the subcontractor had control over what it was doing and was a type of work that would help minority- and female-owned businesses grow and develop their expertise. "Substantial" was interpreted as a quantitative measure, namely, the actual dollars received by minority and female firms on a particular contract. Target goals for quantitative participation were set for each contract, the goals varying with the type of work to be performed and the availability of minority and female subcontractors in the particular trades. In determining quantitative targets for a particular contract, the contract first was reviewed for the technical specifications and work components involved. Next, the PUC surveyed the market by looking to various state and local directories as well as its own directories and prepared a list of certified minority and female firms qualified to do the work components under the contract. Finally, the dollar value of the work that could be performed by those certified minority and female firms was totalled and divided by the projected dollar value of the contract. For each contract, representatives of the PCCA and PUC met with contractors to explain the program and the target goals for that contract.

Despite the program's contract-by-contract effort to measure MBE and WBE capacity and tailor goals to fit that capacity, and despite the program's flexibility as shown by its "best efforts" determinations and waiver policies, the federal district court found the program to be unconstitutional. The court held that Croson permitted a race- or gender-conscious measure only for the purpose of remediating identified discrimination. The court read Croson as prohibiting a purely forward-looking program. Moreover, the court also found that, in practice, the PCCA had delegated the entire task of administering and reviewing the program to one overworked person who had neither construction, engineering, or other relevant expertise. This fact, plus the large number of contracts involved, led the court to believe that the "goals" actually would be quotas in many cases. In addition, the court said that the PCCA had not demonstrated that it had exhausted, or even effectively used, race- and gender-neutral measures to achieve its objectives. Despite finding the program to violate the equal protection clause, however, the court refused to award any damages to plaintiffs because they had not proved that the program had caused them to lose any particular contract. The court also refused

to grant plaintiffs' requested injunctive relief because they had not proved that any irreparable harm to them was of an immediate nature. Thus, the court essentially told the PCCA that it had to reformulate its program, but refused to grant any relief to these particular plaintiffs.

In Cone Corp. v. Hillsborough County,[1] the Hillsborough County, Florida, Equal Opportunity Office ("EOO") had been in charge of administering affirmative action requirements for the expenditure of federal funds since the mid-1970s. These federal requirements led the county to also institute a voluntary Minority Business Enterprise program for non-federal funds in 1978. Included within the term minority were women and several identified ethnic groups. The program was aimed at obtaining information about minority business participation in non-federally funded county contracting; the county merely asked contractors to fill out forms detailing whether they had solicited MBE participation in making their bids on county construction projects. In 1981, the EOO began a study of the of the county's MBE program. The study included surveys of the number of minority businesses in the county, the problems encountered by MBE's, and county expenditures to minority business. The study indicated that minorities were significantly underrepresented in county contracts. Nevertheless, the county commission (the county's governing body) refused to develop a race-based plan in 1982, urging the staff to redouble efforts under the existing voluntary MBE program. In 1984, however, the county found that in spite of the MBE program, minorities and women were receiving a disproportionately small percentage of the county's construction business. The county concluded that without some affirmative legal obligation placed on contractors, the voluntary program would fail to ensure MBE participation in county contracting projects. As a consequence, the county began developing a race- and gender-conscious MBE law.

During various workshops and seminars on the subject, the county attorney's (with admirable foresight) office told the various officials that such a law could be enacted only to remedy clear instances of past discrimination, and that the law would have to be narrowly drawn. After considering various ways to comply with the county attorney's advice, the county passed a comprehensive MBE ordinance in

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[1] 908 F.2d 908 (11th Cir. 1990).

1988. In addition to establishing race- and gender-conscious goals for the first time, the law also called for measures such as (1) arranging adequate time for submission of bids, (2) breaking large projects into several smaller projects to facilitate small business participation, (3) holding seminars or workshops to acquaint MBE's with county procurement activities, and (4) providing contracting opportunities for professional services. The ordinance set an overall annual goal of 25% total MBE participation in county construction contracts, with 20% of the participation coming from economically disadvantaged MBE's.

Under the law, a county Goal-Setting Committee ("GSC") set a participation goal for each project. In setting the goal, the GSC reviewed the available and eligible MBE contractors and compared them with the various subcontractable areas on the project. If there were at least three eligible MBE's in a subcontractable area, an MBE goal was set for that area. A goal for any particular project could not exceed 50% MBE participation. After the goals were set for the entire project, the GSC discussed the goals, looking at such issues as the complexity of the work and the necessity for high quality work in a particular subcontractable area. The GSC then set a firm goal for the project. At any time prior to advertisement of the project, the MBE goals could be waived if minority participation could not be achieved without detriment to public health, safety, or welfare, including the financial welfare of the county. The goals could not be waived, however, after the project was advertised. After the project was advertised, a pre-bid conference was scheduled, at which contractors could ask questions and discuss concerns, and the county explained how the MBE requirements would work.

Upon receipt of bids for a project, the three lowest bids were transmitted to the manager of the MBE section for review. The low bidders were given five days to submit their executed minority business contracts. The manager determined whether the bids generally met the MBE goals. If the goals were met, he recommended that the bid be awarded to the lowest bidder. If the MBE goals were not met by the lowest bidder, the bidder's good faith efforts were reviewed for "responsiveness." Bidders whose bids were determined to be non-responsive were given time to submit protest letters to the Capital Projects Department. The Protest Committee decided whether to change the responsiveness determination. If the Committee did not change its determination and the next lowest bid was either $100,000 or 15% higher than the low bidder, the MBE goal was waived and the low

bidder received the contract. If the next lowest bid was neither $100,000 nor 15% higher and the Protest Committee did not change the non-responsiveness determination, the County Administrator made the final decision about whether to award the contract. (It can be seen from this description that the law's provision stating that goals could not be waived after advertisement was more theoretical than real; the actual waiver process was far more flexible and extended to the point of final award.)

In the fiscal year 1988-89, MBE participation in the projects in which goals were set totalled 19.6%, 8.5% less that the total goal but 7.6% higher than the percentage of minority contractors in the county. The value of the MBE participation totalled 15.6% of the total contract value awarded during this period. Goals were waived in some projects. The county deemed five low bids non-responsive upon initial review, but determined after the good faith review that all five were responsive.

Several months after Croson was decided, a group of non-minority contractors filed suit in federal district court seeking a declaratory judgment that the county ordinance was unconstitutional and injunction against its enforcement. The district court held that the facts of the case were almost identical to those in Croson and granted a preliminary injunction against enforcement of the ordinance. After permitting the county an opportunity to conduct further pretrial discovery, the court granted summary judgment for the plaintiffs and permanently enjoined enforcement of the ordinance.

On appeal, the 11th Circuit concluded that the county's ordinance and its operation were very different from Croson, and that there were genuine issues of disputed fact on the questions of compelling interest and narrow tailoring, thus precluding summary judgment and requiring a full trial. The court of appeals found this difference mainly because the Hillsborough County MBE ordinance was enacted as a result of statistics tabulated during the six years that the voluntary MBE program was in effect. The court of appeals stated that these statistics indicated the following:

> (1) An analysis of statistical data on minority businesses, which included a review of contracts awarded by the County over a three-year period, indicated that minorities (in particular blacks and women) were significantly underrepresented in such awards.

> (2) According to data collected in 1983, minorities made up ten percent of the business population in Hillsborough County. Narrowing the category to construction contractors, MBE contractors comprised twelve percent of the total contractor population of Hillsborough County.
> (3) Between October 31, 1982 and July 31, 1983, 7.89% of the purchase orders awarded by the County were awarded to minorities. [This apparently included both federal and county funds.] Of County dollars spent for purchases, 1.22% of the total County dollars expended went to minorities....908 F.2d at 914-15.

Continuing, the court of appeals stated that, although some of the factors relied on by the county were identical to those rejected in Croson, other factors were markedly different.

> Unlike Richmond, Hillsborough County decided to implement its law based on statistics indicating that there was discrimination specifically in the construction business commissioned by the County, not just in the construction industry in general. The County documented the disparity between the percentage of MBE contractors in the area and the percentage of County contracts awarded to those MBE contractors. Hillsborough County determined the percentage of County construction dollars going to MBE contractors compared to the total percentage of County construction dollars spent. It is clear, in other words, that the County MBE law was not the result of some vague government desire to right past wrongs. The law resulted from prolonged studies of the local construction industry that indicated a continuing practice of discrimination. The statistics gleaned from these studies provide a prima facie case of discrimination sufficient to clear the summary judgment hurdle. . . . The data extracted from the studies indicates that while ten percent of the businesses and twelve percent of the contractors in the County were minorities, only 7.189% of the County purchase orders, 1.22% of the County purchase dollars, 6.3% of the awarded bids, and 6.5% of the awarded dollars went to minorities. The statistical disparities between the total percentage of minorities involved in construction and the work going to minorities, therefore, varied from approximately four to ten percent, with a glaring 10.78% disparity between the percentage of minority contractors in the County and the percentage of County construction dollars awarded to minorities. Id. at 915-16.

The court also found that the county had presented substantial anecdotal evidence of actual discrimination. The testimonial evidence showed that MBE contractors made numerous complaints to the county regarding discrimination by prime contractors. According to the complaints, when MBE contractors approached prime contractors, some prime contractors either were unavailable or would refuse to speak to them. Other prime contractors would accept estimates from MBE subcontractors and then not submit those estimates with their bids. Contrary to their practice with non-minority subcontractors, still other prime contractors would take the MBE subcontractors' bids around to various non-minority subcontractors until they could find a non-minority to underbid the MBE. Non-minority subcontractors and contractors got special prices and discounts from suppliers that were unavailable to MBE purchasers.

The court of appeals also held that genuine fact issues preventing summary judgment were present with respect to the narrow tailoring requirement. Working goals were actually smaller than the stated overall goals, and these working goals were set for each project based on the number of qualified MBE subcontractors available for each subcontractable area. Other aspects of the program showing flexibility and the use of race- and gender-neutral measures were described above. In addition, the Hillsborough County program was limited in operative scope only to that county, and, unlike the program in Croson, did not include within its definition of minorities groups that were not significantly represented in the locale. The Hillsborough County law broke its 25% goal down by minority groups, targeting African-Americans (10% goal), Hispanics (7% goal), women (2% goal), "others" such as Asians and American Indians whose numbers in the county were small (1% goal), and MBE's who were not economically disadvantaged (5% goals). The court of appeals thus reversed the district court's summary judgment for plaintiffs and remanded the case for trial. On remand, somewhat strangely, the district court never reached the merits of the case, but dismissed it on the grounds that the plaintiffs had made an insufficient showing of injury to have standing to pursue the claim.

This case was rather unusual in that a program developed and adopted prior to Croson very likely did meet Croson's standards. The county clearly had proceeded very cautiously and devised a good program. The statistics were not as good as those that can be developed by a comprehensive pre-program disparity

study, but were fairly good given the circumstances. There is certainly a chance, however, that another court of appeals, such as the 7th Circuit, would find these statistics to be inadequate.

Concrete General, Inc. v. Washington Suburban Sanitary Commission,[1] involved a situation in which, in a district court decision on plaintiff's and defendant's motions for summary judgment, the court ruled on the constitutionality of the Minority Procurement Policy (MPP) adopted by the Washington Suburban Sanitary Commission (WSSC). WSSC is a Maryland state agency that regulates the construction, maintenance and operation of the water supply, sewer, drainage, and roadway systems for the Washington Suburban Sanitary District, located in Prince George's and Montgomery County, Maryland. In 1978, WSSC adopted a legislative resolution pledging to encourage and promote increased participation of minority-owned businesses in the awarding of procurement contracts. It did so after engaging in a fact-finding mission to determine the level of participation by minority-owned businesses in WSSC programs, from which WSSC concluded that few contracts were awarded to such firms. It was not until 1985, however, after collecting additional data, that WSSC developed and adopted the MPP. The MPP set the goal of awarding to MBE's at least 25% of the total dollar value all procurement contracts awarded each year. The policy was revised in 1987.

Under this revised 1987 version, the MPP set forth six different procedures by which WSSC could encourage increased MBE participation and achieve its goal. WSSC purchasing agents were given discretion to use one or more of the following practices: (1) require contractors whose bids included subcontractors to subcontract at least 10% of the contract's total value to MBE's; (2) require that a procurement contract be awarded to a MBE firm submitting a bid within 10% of the lowest bid (i.e., a 10% bid preference); (3) require or recommend that competitive bidding on certain contracts be restricted to MBE's (i.e., a "restricted bidding" or "sheltered market" provision); (4) require or recommend that procurement contracts be directly negotiated with one or more minority-owned firms (another version of the "sheltered market" concept); (5) waive or reduce all or part of the WSSC's bonding and/or insurance requirements for MBE's if the Purchasing Agent determined that

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[1] 779 F. Supp. 370 (D. Md. 1991).

the requirements would deny the MBE firm an opportunity to perform the contract which the firm had shown itself otherwise capable of performing: and (6) recommend waiver of a bid's or proposal's corporate experience requirement for a MBE firm if the firm had at least one year's relevant corporate experience and the firm's principals had corporate experience.

The MPP also required that the Purchasing Agency consider the following criteria in selecting one or more of the procedures prior to awarding the contract under the program: whether the selected procedure was (1) likely to increase the number of MBE firms responding to procurement requirements in the future; (2) likely to increase the dollar value of awards to MBE firms in the future: (3) likely to further the WSSC's goals under the MPP without unnecessarily interfering with the efficient operation of the WSSC; and (4) the most effective alternative available which would further the WSSC's MBE participation goals.

The MPP defined a MBE as an entity at least 51% owned and controlled by one or more members of any of the following groups: Blacks, Hispanics, American Indians, Alaskan Natives, Asian or Pacific Islanders, women, or the physically or mentally disabled. The MPP did not limit eligible MBE contractors to those from Prince George's and Montgomery counties, and in fact had no geographical limitation whatsoever. The MPP also had no expiration date, but instead required that WSSC annually review the program to determine what changes, if any, were necessary to improve the effectiveness of the program.

The facts leading to this case arose in 1988 when the WSSC invited bids on two roadway paving contracts. The solicitation for bids on one contract indicated that the 10% bid preference provision would apply, but it ultimately was not applied and the contract was awarded to the low bidder, Concrete General. The other contract used the sheltered market approach with bidding limited to MBE's. Despite the limitation of bidding to MBE's, Concrete General also tried to bid on this contract. When denied the opportunity to bid, Concrete General filed suit in federal district court challenging the MPP. The court first concluded that WSSC had no legal authority to adopt the MPP for procurement contracts, including the paving contracts at issue here. The state legislature had specifically authorized an MBE program (details were not specified) for <u>construction</u> contracts, and WSSC had adopted a program in compliance with the mandate. The legislature had not,

however, granted any authorization for the WSSC to adopt such a program as the MPP for procurement contracts.

Even if legally authorized, the court found that the MPP violated Croson's equal protection standards. The court held that the facts were sufficiently in dispute to preclude granting plaintiff's summary judgment on the compelling interest requirement. WSSC had conducted a disparity study that compared MBE utilization with general populations statistics (which clearly is inadequate under Croson), but that also compared actual MBE availability (by number of firms as a percentage of the total number of firms on WSSC's bid list) with the percentage of the total dollar value of contracts awarded to MBE's. The plaintiff argued that even this disparity measure was inadequate because it did not separate MBE's or non-MBE's into categories based on the type of work they were qualified to do (like paving). If ultimately proved, this allegation by plaintiff would probably destroy the value of the disparity analysis. The court said there was a genuine factual issue on this point; however, the court said that the MPP was so obviously not narrowly tailored that plaintiff was entitled to summary judgment on this basis (in addition to WSSC's lack of legal authority). The lack of narrow tailoring was due to the fact that (1) minority groups were included without regard to whether there was any evidence that MBE's run by members of such groups were located in the area, (2) application of the program was not limited to MBE's located in the two counties over which WSSC had jurisdiction, (3) there was no evidence that WSSC had tried race-neutral measures in the past or in conjunction with its race-conscious measures, (4) there were no flexible waiver provisions, (5) there were no time limits for operation of the program, and (6) there was no provision for "graduating" an MBE from the program.

In Associated Pennsylvania Constructors v. Jannetta,[1] the challenged program resulted from an executive order issued by the Pennsylvania governor creating the Office of Minority and Women Business Enterprises in 1987. In 1988, pursuant to this executive order, the state Department of General Services (DGS) published a "Statement of Policy," which was essentially an administrative agency regulation, establishing Minority Business Enterprise and Women's Business Enterprise

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[1] 738 F. Supp. 891 (M.D. Pa. 1990).

"participation objectives" for the Pennsylvania Department of Transportation (PennDOT) and other state agency construction projects. Several construction contractors' associations challenged the constitutionality of the policy for PennDOT projects on its face (i.e., they claimed that it was unconstitutional without regard to how it was applied in particular circumstances). Assisting the federal district judge, a magistrate made findings that the judge adopted. These findings dealt primarily with the issue whether the policy was used merely as a screening device to determine whether discrimination had occurred in contractors' utilization of subcontractors, manufacturers, or suppliers.

Under Pennsylvania law, contracts administered by DGS and PennDOT were required to be awarded to the lowest responsible bidder. The bidding process established by the DGS policy for PennDOT contracts provided that a bidder was prohibited from discriminating against an MBE or WBE in the solicitation and utilization of subcontractors, manufacturers, or suppliers. Bidders were required to submit documentation showing MBE/WBE participation levels. The policy statement continued by providing that the state would presume that discrimination had not occurred if a bidder had achieved the prescribed levels of MBE/WBE participation in the specific job being bid, and no further review would be undertaken. The policy statement then set forth the general participation objectives on a district-by-district basis for MBE's and WBE's. The policy statement also provided that the specific minimum levels of MBE/WBE participation were to be stated for each contract in the bid documents, and that these specific levels would be based on factors such as geographical location, contract size, contract type, and availability of MBE and WBE firms. DGS was required to perform an initial review of construction contract bid submittals to ensure that required MBE/WBE documentation had been submitted. Failure to submit the required information on MBE/WBE participation would result in a rejection of the bid as nonresponsive. If a bid included the information and showed that the bidder met the prescribed minimum levels for MBE/WBE participation, the contractor would be presumed not to have discriminated in its selections. If the minimum levels were not met, however, DGS was required to perform a further review to determine whether discrimination had occurred. If this further inquiry revealed no discrimination, the low bidder would receive the contract regardless of its failure to meet the

participation levels. On the other hand, if this further inquiry revealed that the bidder had discriminated against MBE's or WBE's, its bid would be rejected.

The magistrate recommended that the state's motion to dismiss plaintiffs' complaint be granted because the DGS policy was neither a set-aside nor a goals program; instead, it was merely a screening device to determine whether actual discrimination had been practiced by a bidder. The district court agreed that this was neither a goals nor a set-aside program; its objective was not to remedy past discrimination or to achieve racial or gender balance, but rather was nothing more than an aid in the detection of actual present discrimination. Thus, the district court held that Croson did not apply; instead, the rational basis test applied, and it was not necessary for the state to establish a factual predicate of prior discrimination. The court concluded, however, that the motion to dismiss should not be granted because there needed to be further pretrial and perhaps trial proceedings to examine how the policy had actually been applied in practice. If pretrial discovery revealed that the policy had been applied as stated, the court almost certainly would grant summary judgment in favor of the state.

First Capital Insulation, Inc. v. Jannetta,[1] involved a challenge to the actual application of the Pennsylvania DGS policy that had been found facially valid in Associated Pennsylvania Constructors v. Jannetta. In this instance, the DGS policy was applied to the bidding for a contract to remove asbestos insulation from a state university. The low bidder, First Capital, showed in its bid documents that it met the 5% WBE participation level set for that contract, but had secured a MBE participation level of only 5%, which was 10% lower than the level set for the project. The reason for rejection of the bid was that there were significant discrepancies in First Capital's documentation between the amount of MBE business the bidder had solicited and the amount that it ultimately had committed to, and that First Capital had not included the required explanation for the discrepancy. The officials in the DGS's Office of Minority and Women Business Enterprises (OMWBE) who reviewed this and other bids for compliance with the MBE/WBE policy stated that if the required explanation had been included, and if further inquiry had revealed the explanation to be plausible, First Capital likely would

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[1] 768 F. Supp. 121 (M.D. Pa. 1991).

have received the contract as the low bidder. Possible explanations that First Capital could have included might have been that the prices of the MBE who was solicited were noncompetitive or that the solicited MBE did not have the proper equipment. Without any explanation to review, the OMWBE recommended that the contract be awarded to the second lowest bidder, American Abatement Group, and the state's Contracting and Bidding Division accepted this recommendation.

This lawsuit was basically the result of an administrative glitch in writing the letter to First Capital rejecting its bid as nonresponsive. This letter from DGS to First Capital was supposed to incorporate the memo that DGS's OMWBE had sent to the Contracting and Bidding Division explaining its reasons for rejecting First Capital's bid as nonresponsive. Whoever sent the letter failed to do so, however, and made it sound as though First Capital's bid had been rejected because it had failed to meet the MBE goal. The district court was satisfied with this explanation, and that the DGS policy was in fact administered as stated; thus, it was only an aid to detect actual discrimination and was not required to meet Croson's strict scrutiny standards. No factual predicate establishing prior discrimination was necessary.

In Main Line Paving Co. v. Board of Education (Philadelphia),[1] the low but losing bidder on a contract to remove asbestos from and demolish an abandoned school building challenged the Philadelphia school board's affirmative action policy. Beginning in the early 1970s, the school board became aware that few of its contracts were being awarded to minority and women-owned businesses. Minority business owners complained of being unable to obtain adequate, timely, and correct information about school district contracting opportunities and contracting procedures. They further complained of being unable to obtain subcontracts from non-minority prime contractors. Investigations during the 1970s and 1980s led the school board to conclude that most of the discrimination was caused either by its own employees or the district's continued exclusive reliance on a bidder's list that contained very few minority or women-owned firms. For a short time in the 1970s, the school board tried a set-aside program for relatively small contracts; this program apparently was a failure because school district employees responsible for its procurement and construction activities impeded the program from working

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[1] 725 F. Supp. 1349 (E.D. Pa. 1989).

properly. The school district also continued to use overly restrictive bid specifications that artificially excluded many MBE's and WBE's, and used bonding and insurance requirements that were grossly in excess of what was needed to protect the district. In addition, the school district continued to solicit bids from its list of firms that it had done business with before, perpetuating the "old boy network" that had dominated Philadelphia school district contracting for years.

Ultimately, the school board adopted an affirmative action plan that amounted to an absolute set-aside for MBE's and WBE's. It was based on no relevant statistical studies, and the only evidence of discrimination was that related above--discrimination perpetrated by school district employees and by board policies. The federal district court, after finding that the plaintiff had standing, concluded that the set-aside program failed to satisfy Croson's equal protection standards. The evidence of discrimination was insufficient to justify the need for a set-aside because the district had only to correct its own and its employees' discriminatory practices and policies. District employees identified as having been perpetrators of discrimination had not been disciplined, and the district's own offensive policies had not been adequately cured. Moreover, there was no showing of any outreach programs or other race-neutral programs as an alternative to race- and gender-conscious set-asides. Finally, although the district's set-aside program included provisions for waivers, the evidence indicated that waivers were very rarely granted and, indeed, the district even advertised to prospective bidders that waivers were a rarity. Thus, the district's set-aside program clearly violated the equal protection clause as interpreted by Croson. It was difficult to determine precisely whether the court viewed the case as one in which no compelling interest had been established, or in which such an interest had been justified but the resulting program was not narrowly tailored because it did not first attack the in-agency discriminatory practices and policies. Under Croson, the most logical conclusion is that substantial evidence of in-house discrimination by agency policies and employees would establish the compelling interest requirement, but that a program that employed a set-aside without first attending to in-house problems would not be viewed as narrowly tailored.

C. CHALLENGES TO PROGRAMS DESIGNED AFTER CROSON

In Associated General Contractors of California, Inc. v. Coalition for Economic Equity and the City & County of San Francisco,[1] the facts indicated that San Francisco had originally adopted an ordinance in 1984 that required the city to set aside designated percentages of its contracting dollars to minority-owned and women-owned business enterprises. In addition, the 1984 ordinance required that MBE's, WBE's and locally-owned businesses (LBE's) receive a 5% bidding preference to be taken into account when the city calculated the low bid on city contracts. In 1987 the U.S. Court of Appeals for the 9th Circuit, applying Croson-like equal protection standards prior to Croson, struck down the set-aside provisions for MBE's but upheld them for WBE's and LBE's. The court also found that the bid preference violated a provision of the city charter requiring that contracts over $50,000 be awarded to the "lowest reliable and responsible bidder." (AGCC v. City & County of San Francisco, 813 F.2d 922 (9th Cir. 1987) ("AGCC I")). The city then began investigating continued discrimination in city contracting. In that effort, the city had received, among other information, testimony from 42 witnesses, and written submittals from 127 minority, women, local, and other business representatives. After this preliminary effort to document discrimination in city contracting, the Supreme Court decided Croson, and the city responded with a much more intensive effort to lay a sufficient factual foundation to satisfy Croson's requirements. It held ten public hearings, commissioned two statistical studies, and sought written submissions from the public. Out of this process emerged a new ordinance in 1989. The 1989 ordinance was challenged in this case ("AGCC II")

These studies, hearings, and written submittals established to the court's satisfaction that city departments continued to discriminate against W/MBE's and continued to operate under the "old boy network" in awarding contracts. Furthermore, based on its commissioned statistical studies of the city and county, the city Board of Supervisors found the existence of large disparities for the 1987-88 fiscal year between the number of San Francisco-based MBE's and the value of city contracts awarded to them. For example, in prime contracting for construction, MBE availability was 49.5% but MBE dollar participation was only 11.1%; in prime

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[1] 950 F.2d 1401 (9th Cir. 1991).

contracting for equipment and supplies, MBE availability was 36% and participation 17%; in prime contracting for general services, MBE availability was 49% and participation was 6.2%. In addition to the statistical evidence of disparity, the record documented a "vast number of individual accounts of discrimination." These accounts included numerous reports of MBE's being denied contracts despite being the low bidder, MBE's being told they were not qualified although they were later found qualified when evaluated by outside parties, MBE's being refused work even after they were awarded the contracts as low bidder, and MBE's being harassed by city personnel to discourage them from bidding on city contracts. The statistical disparity studies and most of the anecdotal evidence related only to MBE's rather than WBE's; this is probably explainable by the city's recognition that more evidence was likely to be available regarding MBE's than for WBE's, and that the courts would probably apply the less rigorous intermediate scrutiny to WBE's.

Rather than providing the set-asides that had been present in the earlier ordinance, the 1989 ordinance gave bid preferences to prime contractors who were members of groups found to have been disadvantaged by previous bidding practices. Specifically, the new ordinance provided a 5% bid preference for LBE's, WBE's, and MBE's. Because the WBE and MBE preferences were treated cumulatively with the LBE preferences, local MBE's and WBE's were eligible for a 10% total bid preference. The ordinance defined MBE as an economically disadvantaged business owned and controlled by one or more Blacks, Latinos, or Asians. The definition of WBE simply substituted women for the minority groups. "Economically disadvantaged," insofar as the term applied to public works construction contracts, was defined as a business whose average gross annual receipts in the three fiscal years immediately preceding its application for certification did not exceed $14 million. Non-MBE's and non-WBE's were allowed to benefit from the bid preferences by extending the 5% preference to any firm that engaged in a joint venture with a local MBE or WBE provided that the local MBE's or WBE's participation in the venture was between 35% and 51%. If the local MBE's or WBE's participation in the joint venture was 51% or more, the 10% bid preference was applied. The new program also provided for a waiver of the bid preference where no MBE or WBE was available to provide the necessary goods or services.

After passing the new ordinance, the city sought and obtained voter approval for a charter amendment giving the city's Board of Supervisors authority to increase

or decrease the dollar threshold for the competitive bidding requirement. The Board then passed an ordinance raising the threshold from $50 thousand to $10 million. Contracts valued at over $10 million would still be subject to the "lowest reliable and responsible bidder" requirement, while contracts below that level presumably would be subject to the new bid preference system. The AGCC filed this action seeking a preliminary injunction against enforcement of the new program on both city charter and equal protection grounds. The federal district court denied AGCC's request for a preliminary injunction pending an ultimate decision on the merits. The court of appeals affirmed the denial; with respect to AGCC's claimed charter violation, the court held that it raised a disputable question but failed to meet the high standards for a preliminary injunction by failing to demonstrate that the balance of hardships tipped sharply in its favor. With respect to its constitutional claim, the court held that AGCC filed to demonstrate a sufficient likelihood of success on the merits.

Not only did the court of appeals conclude that the program was probably supported by a sufficient factual predicate to demonstrate a compelling interest, but also that the narrow tailoring requirement probably was met. There were no rigid quotas, the court viewed the bid-preference system as a more modest race- and gender-conscious measure than even a goals program, and preferences were provided only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. For example, Black-owned medical services firms did not receive bid preferences because there was no evidence that they had been discriminated against or otherwise disadvantaged in the past. In addition, ample flexibility was provided by both the joint-venture provisions and the availability of waivers when MBE's or WBE's were not available. During the first nine months of the new program's operation, the city waived the preferences for approximately 44% of contracting dollars awarded under the program. Also, unlike the old (1984) program and unlike the Richmond program struck down in Croson, the new one was limited in geographic scope of operation to the city's borders. Although the new program did not include race- or gender-neutral alternatives, the city had tried such measures for as long as ten years prior to adoption of the 1989 ordinance in an attempt to eradicate discrimination, but the measures had no substantial impact. These measures had included prohibiting discrimination by city contractors and

requiring them to take affirmative steps to integrate their work forces. In adopting the 1989 program, the city specifically considered and rejected neutral measures because they had been ineffectual in the past.

Although not a final disposition of the merits, the court of appeals' analysis of the evidence was so thorough, and its conclusion apparently so strong, there appeared to be a very high probability that the program would be upheld in the end. The only apparent weak point I can see is that the city's race- and gender-neutral policies that had been tried in the past had not included a number of possibilities such as assistance with bonding and financing requirements. The new program would be on even stronger footing if it included such neutral components, especially if they were provided for all small businesses.

In Coral Construction Co. v. King County,[1] the facts indicated that shortly following the Croson decision, King County, Washington amended its eight-year-old MBE and WBE program. Under the amended program, a "minority business" was one certified by the State of Washington as being legitimately owned and controlled by a minority person or persons. The term minority included Blacks, Hispanics, Asian-Americans, American Indians, and Alaskan natives (all of which were probably represented significantly in that area). A "women's business" similarly had to be certified by the state. The M/WBE program provided two methods by which M/WBE's could receive preferences in bidding on county contracts. For county contracts of $10,000 or less, the "percentage preference method" gave a contract bidder who either was an M/WBE or would use M/WBE's on the project a preference if its bid was within 5% of the lowest bid. For county contracts of more than $10,000, the "subcontractor set-aside method" applied, under which the successful contractor had to use M/WBE's for a prescribed percentage of the work performed on the contract. The actual percentages of required M/WBE participation were individually determined for each project, according to the availability of qualified M/WBE's.

The program permitted a reduction in the amount of set-aside levels for a given contract if it was not feasible to meet higher levels, qualified M/WBE's were not available, or M/WBE price quotes were not competitive. Likewise, the

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[1] 941 F.2d 910 (9th Cir. 1991).

percentage preference method could be used for contracts exceeding $10,000 if this alternative would be a "more feasible method of achieving" the M/WBE utilization goal. Finally, in certain circumstances, all or portions of the M/WBE program could be waived entirely (such as when a non-M/WBE was the sole source of a good or service, where no M/WBE was available or competitively priced, or where the contract was awarded to certain governments or non-profit groups). This challenge to the King County program arose when Coral Construction Co., an Oregon firm with a branch office in King County, was the low bidder (at $178,100) on a county contract to install guardrails along various county roads, but lost the contract to an Oregon-based MBE that submitted a bid of $185,153 because the county used the "percentage preference method" for the contract.

Although the federal district court upheld the program's constitutionality under Croson's standards, the county nevertheless amended the program again in 1990. These amendments incorporated two consultant reports into the record underlying the M/WBE program. The first study documented through statistics and anecdotal evidence the impact of discrimination in the local construction, architecture, and engineering fields. The second study, conducted by a different consulting firm, focused on discrimination in the local goods and services industries. The two studies were financed by several local government entities, including King County, the city of Seattle (located within King County), the Port of Seattle, the Municipality of Metropolitan Seattle, and Pierce County (which adjoined King County).

In addition to incorporating these two statistical studies into the record, the 1990 amendment also altered the mechanics of the M/WBE program. The "percentage preference" method for allocating set-asides was modified; rather than using a fixed 5% preference, a flexible-percentage preference was employed, the percentage to be determined on a case-by-case basis. In addition, under the 1990 amended version, all prime contractors, even those that were themselves women- or minority-owned, were required to employ minority- or women-owned subcontractors, unless the prime contractor itself was to perform 25% or more of the contract. Finally, the 1990 amendment required the county's Office of Civil Rights and Compliance to monitor the effects of the M/WBE program to ensure that it did not disproportionately favor a particular racial or ethnic group, and that it did not remain in force longer than necessary to offset the effects of prior discrimination.

On appeal, the court of appeals held that it was required to review the program as it existed when Coral Construction Co. allegedly suffered its injury, that is, the 1989 version. First, in determining whether the evidence demonstrated a compelling government interest by showing actual prior discrimination, the court of appeals held that the evidence had to be limited to the city of Seattle, King County, the Port of Seattle, and the Municipality of Metropolitan Seattle, all of which were virtually coterminous. Adjoining Pierce County, however, had to be excluded. Even though it was part of the same market area for many purposes, and there was significant logic in including it, Croson required that race- or gender-conscious legal measures be limited to the particular jurisdiction enacting these measures. Thus, the case had to be remanded to the district court for reconsideration in light of the required exclusion of Pierce County. (Although this part of Croson forces a material degree of artificiality into any attempted market definition, we must live with it.) The court found that the record supporting the 1989 program provided ample anecdotal evidence of discrimination. The 700-plus page record contained the affidavits of at least 57 minority or women contractors, each of whom complained in varying degrees of specificity about discrimination within the local construction industry. Those swearing to the affidavits reflected a broad spectrum of the contracting community; the break-down was roughly as follows: Black contractors = 23; Hispanic contractors = 13; Asian contractors = 10; Native American contractors = 6; Women contractors = 3*; and Others = 2. (The court observed that the record contained far more than three affidavits from women-owned contractors; however, many of the other women were also minorities, and attributed the hostility toward them to racial factors rather than gender.) Many of these affidavits contained complaints of being unable to obtain contracts for private sector work. One woman president of a construction company in Seattle testified: "I believe the refusal of prime contractors, developers and architects to award contracts to my business for private sector work is due to discrimination against minority persons and minority-owned businesses generally." Likewise, the president of a minority-owned construction company in Seattle, wrote:

> I have tried repeatedly in the past to obtain contracts and subcontracts on private construction contracts and have been unsuccessful. I know from my eleven years of experience in the construction industry that my business's prices are competitive with nonminority businesses' prices and that my business performs as high quality work as nonminority businesses. Nonetheless, when I have submitted bids to prime contractors for work on private projects or when I have attempted to negotiate contracts with these persons, I have been refused the right to participate in the projects.

The complaints also extended to subcontracting awards on public projects. The president of a minority construction firm in the area, testified by affidavit: "We recently were in line to receive the site work contract for the King County Goodwill Games Pool Project, and were bypassed for a nonminority firm when King County relaxed their requirements for MBE participation." Similarly, the president of a minority engineering firm declared that he had heard comments such as "there is no minority requirement on this project, so we are going to use someone else."

The court held that this evidence was ample to supply the anecdotal portion of the factual predicate, but that statistical evidence was notably absent from the record supporting the 1989 ordinance under challenge. The court stated that statistical evidence of a substantial disparity between M/WBE availability and utilization was necessary for the program to survive strict scrutiny. The question for the court then was whether the two statistical studies conducted after enactment of the 1989 ordinance could be taken into account. The court held that it is permissible for a state or local government entity, upon discovering substantial evidence of discrimination, to take remedial action and then follow up on that action by developing a more complete factual record of such discrimination. Thus, the court of appeals remanded the case to the district court not only because of the need to exclude Pierce County data, but also to permit inclusion of the two statistical studies and determine their sufficiency. On remand, the plaintiff should be given a full opportunity to challenge these studies and attempt to rebut the inference of discrimination that may be created by them. Such rebuttal can take two general forms. First, rebuttal evidence may consist of a neutral explanation for the statistical disparities. Second, the rebutting party (plaintiff) may wish to attack the statistics themselves by means such as (1) showing that the statistics are flawed; (2)

demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.

Finally, the court of appeals considered the narrow tailoring requirement. The court identified the first and most important element of narrow tailoring as a requirement that a race-conscious program be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. In this case, the record revealed that the county considered alternatives, but determined that they were not available as a matter of law. State law, for example, prohibited counties from avoiding bonding requirements, so King County could not relax bonding requirements for small disadvantaged businesses as a race-neutral alternative. State law also forbade counties or cities from extending credit to businesses. The court went on to observe, however, that King County had in fact adopted some race-neutral measures in conjunction with the M/WBE program. For example, the county annually hosted one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. In addition, the county provided information on accessing small business assistance programs. The race-neutral requirement was met.

The second element of narrow tailoring is the use of flexible utilization goals set on a case-by-case basis, rather than a system of rigid numerical quotas. The court found that the King County program met the flexibility requirement through its case-by-case goals approach and, alternatively, its percentage preference approach, both coupled with flexible waiver provisions.

The third characteristic of a narrowly tailored program is that its operation be limited to the enacting jurisdiction. As indicated previously, the court of appeals held that Pierce County data had to be excluded by the district court when trying the case on remand.

Associated General Contractors of Connecticut v. City of New Haven,[1] involved the following facts: From 1977 through 1989, the city of New Haven had in effect a set-aside ordinance that reserved to MBE's and WBE's a percentage of the city's construction contracts. During this period, the share of such contracts

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[1] 1992 U.S. Dist. Lexis 6618 (D. Conn. May 1, 1992).

received by MBE's and WBE's rose significantly. Between 1974 and 1979, minority and women-owned companies combined received less than 1% of public contracts. From 1983 to 1985, MBE's and WBE's, which then formed approximately 10% of all area construction companies, received approximately 10.6% of the city's construction contracts. In 1986, their share fell to 2%, but rose to 20% in 1987, and to almost 25% in 1988. Of 198 M/WBE's in New Haven in 1988, 8%, or 16, were in construction. The average age of the M/WBE's was 10.8 years. As of 1987, 6% of the New Haven construction firms were black-owned, 0.5% were Hispanic-owned, and 3% were women-owned. This was unchanged over the prior four years. From 1983 to 1985, MBE's were awarded 7.5% of the city contract awards (by number) and WBE's were awarded 3%. In dollar terms, MBE's received 7% and WBE's 3%. These were slightly below the set-aside established in the new M/WBE program adopted by city ordinance in 1989. The relatively small differences between the set-aside percentages in the new 1989 ordinance and the percentage of the contract dollars received by M/WBE's in 1983-85 were consistent, according to an expert witness, with the volume of complaints received from non-minority contractors of the unavailability of M/WBE's to do the work at reasonable prices. In 1986, M/WBE's received only a combined total of 2% (I presume that this is not a typo in Lexis; the case is not otherwise reported) of city contracts. In 1987, however, WBE's received 20% (no % given for MBE's in 1987), and in 1988 MBE's received 24% and WBE's 25%. No information was given as to whether these were local M/WBE's or whether were from outside the area.

In 1989, the city conducted studies of racism within the city's construction industry, and determined that the need for a set-aside ordinance continued to exist. It adopted a new M/WBE ordinance virtually identical to the old one. The ordinance provided that "on all City Construction Contracts and Development Agreements . . . where the costs of construction exceed $75,000, the Construction Contractor or the Developer . . . shall make maximum practicable efforts to insure that 4% of the construction costs shall be set aside for subcontractors, which are certified as women business enterprises and that 19% of the construction costs shall be set aside for subcontractors, which are certified as disadvantaged business enterprises. . . ." A disadvantaged enterprise is controlled by one or more "disadvantaged individuals," identified as persons who are either (a) in a presumptively disadvantaged group (Blacks, Hispanics, and other identified ethnic

groups), or (b) if not presumptively disadvantaged, "are certified disadvantaged on a case-by-case basis, based on the following standards: (i) disadvantage must stem from his or her color, national origin, physical handicap, long-term isolation from the mainstream of American society beyond the individual's control; and (ii) demonstrated personal experience of disadvantage based on the above; and (iii) disadvantage must be sustained and substantial, not fleeting or insignificant; and (iv) disadvantage must have negatively affected his or her entry into and/or advancement in, the business world . . . ."

Prior to adopting the 1989 set-aside ordinance, a committee established by the city conducted hearings at which representatives of minority and women-owned construction firms testified about the current state of discrimination in the construction industry in New Haven. Instances of workers' tools being stolen from job sites and inability of minority and women-owned firms to get loans were noted. Individuals were targets of mistreatment. A job site sign proclaimed "no niggers allowed." Questionnaires were obtained from minority and women-owned businesses. The results of hearings by the commission on equal opportunities were reviewed. Dr. Jaynes, a professor of African-American studies at Yale University, reported on minority and female participation in the New haven construction industry. He described the history of discrimination since the late 1800s in the United States, Connecticut, and New Haven and examined discrimination in the construction industry in New haven from the 1970s to 1989. The low numbers of minority contractors in the 1970s were attributed to inadequate, or lack of, schooling, proper guidance, or counseling and apprenticeship training. Discrimination in the industry was found to exist in the 1970s. However, no statistics such as those required by Croson were available.

The city stated the following as the factual basis to support the new ordinance at the time of its adoption:

1. Long entrenched and widespread patterns of racial and gender discrimination in the New Haven construction industry;
2. Inability of race-neutral alternatives to achieve desired goals;
3. The substantial lack of MBE and WBE participation in commercial contracts where there were no set-aside programs;

4. The effectiveness of set-aside programs in increasing the participation of MBE's and WBE's in the construction industry; and
5. The need to prevent irreparable injury to MBE's and WBE's in the New Haven construction industry.

The local chapter of AGC filed suit challenging the constitutionality of the new ordinance under Croson's standards. The district court concluded that, even if the city's anecdotal evidence of discrimination was sufficient, the city had not presented sufficient statistical evidence of availability-utilization disparities. The problem with the statistics presented by the city is that they showed availability and utilization to be roughly in alignment. This, of course, is going to be a problem for any governmental entity that seeks to renew a DBE program that apparently has worked reasonably well so that there are no longer substantial disparities. The district court held that, in such a situation, the only way for the city to prove that a compelling interest continued to exist is to demonstrate that a substantial disparity would still be present without the existing DBE program. Admitting that this might be difficult, the court did suggest that such proof might be accomplished by showing that striking disparities continue to exist in private sector contracting where no DBE programs apply. In this case, however, no such statistics were presented, and the city therefore failed to establish a compelling government interest in using race-conscious measures.

Regarding the city's anecdotal evidence, the court stated:

> The testimony of minority and women contractors of their recurring, current, and continuing experiences with discrimination on the job and in vying for contracts, fifteen examples of which are cited by defendant, is not enough. . . . A set-aside ordinance is not justified to prevent minorities and women from having tools stolen and otherwise being harassed, nor will it help minorities and women to get needed loans. As plaintiffs note, eight of the defendant's fifteen examples reflect animus on the part of unions and problems in vocational training, bonding or insurance. These are argued to be entry level problems, not reflective of discrimination in contract awards. Six of the fifteen pertained to on-the-job incidents of individual conduct directed toward minority or women workers. None of these reflect difficulty getting work. Indeed, they occurred while those who testified were at work. Two

> incidents arose from disputes related to performance where contracts were awarded. Two did suggest that close relations among general contractors resulted in MBE or WBE exclusion. These do not rise to the level of showing a systemic pattern of discrimination to the exclusion of any other explanation. Once a city identifies discrimination within its jurisdiction, "some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion" [quoting from the King County case]. Defendant has shown evidence of continuing general societal discrimination, including specific instances of discrimination directed at blacks and women in the construction industry. However, this is not sufficient substantiation from which it might be found that the city has a compelling interest in apportioning public contracts through the use of racial and gender goals.

Although holding that the ordinance was not justified by a compelling interest, the court nevertheless examined the narrow tailoring requirement. First, the operative scope of the DBE ordinance extended beyond the city of New Haven to the entire state of Connecticut. The court stated that this was completely different from the overbreadth problem in Croson, where the scope of the Richmond ordinance extended to the entire U.S., and held that the New Haven ordinance was not overly broad. (Connecticut is a small state, and New Haven is a small city.)

Also regarding narrow tailoring, the court held that the New Haven ordinance was in practice only a goals program rather than a "set-aside" program as it had been labelled, with flexible application of the goals and very flexible waiver provisions. Thus, the program met this aspect of the narrow tailoring requirement.

In response to the plaintiff's claim that race-neutral measures had not been adequately tried or considered, the court noted that, as far back as the late 1960s, the city had implemented race-neutral alternatives. An Office of Business Development was created to provide counseling and assistance to minorities operating small businesses. Funds were provided to private and quasi-public organizations that offered advice and provided consulting services to small businesses. Moreover, the city provided funds to the Greater New Haven Business and Professional Association in an attempt to increase minority business participation. By the late 1980s, the city had in place three small business assistance corporations -- the New Haven Development Corporation, the New Haven Community Investment Corporation, and the Technology Investment Fund. The 1989 ordinance mandated

that the Equal Opportunity Commission in New Haven assist New Haven community agencies in the effort to increase participation by minority and women firms in the construction industry. The new law also directed the commission to advocate and monitor changes to the state's statutes as recommended by the New Haven Board of Aldermen with respect to bonding assistance and other race-neutral alternatives. Other easing of the paths of MBE's and WBE's in bonding, insurance, bidding, and available capital were tried. Furthermore, the beneficiaries of these neutral measures had been limited to those certified as serving New Haven. Thus, the city had made more than adequate attempts to use race- and gender-neutral measures.

If the city had established a compelling interest, it would have easily met the narrow tailoring requirement; the ordinance was very well-crafted and sensitively administered. The city simply needed a better study that gathered better anecdotal evidence and examined disparities in the private sector to show that public sector disparities would continue without DBE goals.

Cone Corporation v. Florida Department of Transportation[1] involved a Florida statute passed in 1989 establishing a DBE goals program for state-funded construction projects administered by the state Department of Transportation. The program required by the legislation was identical in all relevant ways to the program required for federally funded highway construction and maintenance projects under the federal statute (STURAA) and federal DOT regulations (49 CFR 23), including the same definitions of socially and economically disadvantaged individuals, the same presumptive groups, the same minimum 10% DBE goal, and so on. The federal district court upheld the state law implementing the federal mandate, but struck down the state law for state-funded contracts, holding that the latter was subject to the Croson requirements and failed to meet them because no statistical or anecdotal evidence was ever developed demonstrating prior discrimination.

The court of appeals reversed and dismissed the plaintiffs' complaint because they had not alleged, much less produced any evidence that they had lost a contract because of the state DBE program, or that they were imminently likely to. Thus, the

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[1] 921 F.2d 1190 (11th Cir. 1991).

court of appeals concluded that these plaintiffs had no standing to assert a constitutional challenge to the statute. They would not be prevented from making such a challenge in the future, however, if they could show injury or imminently threatened injury as a result of the DBE program for state-funded construction contracts. It bears observing that, despite the fact that the program included a flexible waiver policy, there was no evidence to establish the compelling interest requirement of Croson and no evidence that race-neutral alternatives had been attempted or included in the present program. Thus, if a plaintiff challenging the Florida program for state-funded highway contracts could pass the standing hurdle in the future, this program almost certainly would be held unconstitutional.

D. DECISIONS REGARDING FEDERAL-FUNDS DBE PROGRAMS HAVING IMPLICATIONS FOR STATE-FUNDS DBE PROGRAMS

In Milwaukee County Pavers Association v. Fiedler,[1] the dispute involved a challenge to both the state-funds and federal-funds DBE programs. In 1988, prior to Croson, the state of Wisconsin adopted a DBE program that set aside an absolute amount of $4 million per year of state construction contracts for award to DBE's (defined in the typical overinclusive way to create a rebuttable presumption that firms at least 51% owned and controlled by one or more individuals who is either a woman or a Black, Hispanic, American Indian, Eskimo, Aleut, Native Hawaiian, Asian-American, or Asian Pacific-American were disadvantaged). There was no evidence and no specific factual findings to establish the existence of a compelling interest. The 7th Circuit noted that a less rigorous standard might have applied to the WBE part of the program, but that the state had waived this argument by not presenting it to the trial court; thus the court of appeals assumed that strict scrutiny applied to the entire program. More specifically, it held, unsurprisingly, that a rebuttable presumption of W/MBE status constitutes a sufficient level of discrimination to bring the equal protection clause into play. This has been an implicit part of other decisions. In the particular case, the plaintiffs challenged not only the program setting aside state funds for DBE's, but also the state's administration of the federal Department of Transportation program under 49 CFR

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[1] 922 F.2d 419 (7th Cir. 1991).

23. The court held that Fullilove, not Croson's strict scrutiny standards, applied to state administration of the federal program. Notably, however, the court held that a state which exceeds the federal DBE goals for expending federal highway funds comes under the strict scrutiny standard to the extent that it exceeds federal goals. This seems to conflict with the decision in the Michigan Road Builders case, decided by a district court located within the 6th Circuit, which is discussed below.

In S.J. Groves & Sons Co. v. Fulton County,[1] the case involved a Fulton County, Georgia, MBE program enacted for the specific purpose of qualifying for federal DOT funds (90% of the cost) for improving a county airport runway. If not improved, the federal FAA (part of DOT) would close it and it could no longer be used as a feeder airport for Hartsfield International Airport. A contractor who was low bidder did not get the contract because he failed to comply with the county MBE ordinance. The court of appeals held that the county had violated the Georgia low-bid statute in effect at the time the facts arose in 1982 (despite the fact that the Georgia legislature subsequently amended the low-bid statute in 1986 to permit large-county MBE ordinances). The only defense for the county would be that the Georgia low-bid statute was preempted by the federal regulations under which Fulton County acted. Federal preemption would be possible only if the relevant federal law was constitutional. Consequently, the 11th Circuit remanded the case to the federal district court for a determination of whether the federal regulations were constitutional under an intermediate level of equal protection scrutiny; although admitting that the question was not without doubt, the court of appeals determined that in Metro Broadcasting the Supreme Court had adopted intermediate scrutiny for congressionally mandated benign race-conscious measures. If the district court on remand were to find the DOT regulations constitutional under intermediate scrutiny, and if the federal government exercised a substantial hand in developing the county MBE ordinance, then the Georgia low-bid statute would be preempted by federal law and the county would not be liable to the plaintiff.

In Tennessee Asphalt Co. v. Farris,[2] the U.S. Court of Appeals for the Sixth Circuit held that the state of Tennessee did not have to make its own particularized

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1 920 F.2d 752 (11th Cir. 1991).

2 942 F.2d 969 (6th Cir. 1991).

findings of prior discrimination in the award of Tennessee highway contracts in order to administer the federal DBE program that was required for the state to receive federal highway funds. The court noted that "the highway construction set-aside program is Congress' initiative designed to ameliorate the effects of past and present discriminatory restrictions on opportunities for minority road contractors to participate in a sphere of publicly-funded activity that exists at every level of government. The structure of the Act [STURAA] makes it virtually impossible for a state to carry on a comprehensive highway construction and maintenance program without abiding by the set-aside requirements of [STURAA]." Thus, the court held that Fullilove and Metro Broadcasting were the applicable precedents, not Croson, and the state did not have to establish a factual predicate for its participation.

In Michigan Road Builders Association v. Blanchard,[1] a fact situation was presented that was similar to Tennessee Asphalt. In a pre-Croson decision in 1987, the Michigan set-aside program for highway construction had been declared unconstitutional because the state had laid no factual foundation at all for the existence of prior discrimination. Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583 (6th Cir. 1987, aff'd, 489 U.S. 1061 (1989) ("Road Builders I"). In the present case, sometimes referred to as "Road Builders II," the plaintiff challenged the constitutionality of Michigan's administration of the federal DOT requirements that states establish and maintain DBE programs as a condition of receiving federal highway funds. The court held that Fullilove and Metro were the governing law. Moreover, the court held that Croson does not become applicable even if the state has called for greater than the federal 10% goal for federal funds, because the federal law sets a goal of "not less than" 10%. Thus, Michigan's adoption of a 15% goal and an absolute set-aside of 1.32% for federally funded projects was within the scope of the federal law and continued to be governed by the more relaxed standards of Fullilove and Metro. This decision appears to conflict with that of the 7th Circuit Court of Appeals in the Milwaukee County Pavers case. The district court in the present case, Michigan Road Builders, is located in the 6th Circuit.

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[1] 761 F. Supp. 1303 (W.D. Mich. 1991).

In the same group of cases is Ecco III Enterprises, Inc. v. Metro-North Commuter Railroad Co.[1] Metro-North was a New York public-benefit corporation (created by the state--analogous to a local government entity) that operated an interstate railroad system as a subsidiary of the Metropolitan Transportation Authority. In connection with its expenditure of federal funds for construction of 14 platform extensions along its rail line, Metro-North adopted a 20% DBE participation goal. Ecco was the low bidder, but its bid included only 9.6% DBE participation. The second-lowest bidder, Perini, included 19.5% DBE participation. Perini was awarded the contract. After the contract award, Metro-North advised Perini that two of its DBE subcontractors had been denied DBE certification. It was then permitted to increase its allocation to another of its DBE subcontractors from 2.1% to 15.4%, raising its total DBE allocation to 22.5%. Ecco, the low bidder, was given no opportunity to establish that it had made a good faith effort to achieve the DBE goal, nor was it given any opportunity to manipulate its allocation in the way that Perini was permitted to do. Ecco had made repeated requests for a compliance hearing. The intermediate-level New York state court invalidated the contract award process because of the obvious procedural favoritism shown toward Perini. More important to our present inquiry, the court also held that the 20% goal was unconstitutional under Croson. Although recognizing that STURAA and DOT regulations set a minimum goal of 10%, and that a state or local government entity may set a DBE participation goal higher than 10% in connection with a federally funded project, the contract-awarding agency must establish a Croson-type of factual predicate for that part of its goal that exceeds the federal 10% minimum. This state court decision agrees with the 7th Circuit ruling in Milwaukee County Pavers, and conflicts with the Michigan federal district court decision in Michigan Road Builders.

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1 565 N.Y.S.2d 103 (App. Div. 1991).

V. CONCLUSION

A. LAYING THE FACTUAL FOUNDATION

1. Statistical Evidence

Just as the Supreme Court specified in Croson, lower federal courts have required the establishment of a substantial factual predicate as a starting point for determining whether any type of race- or gender-conscious contracting program is constitutional. Although the Supreme Court indicated that this predicate may be proved by showing prior discrimination by the contracting agency itself, one lower court dictates caution in such a case. If this is a significant part of the factual foundation for a DBE goals program, the court is likely to find that the program fails the narrow tailoring requirement unless attempts have first been made to eradicate the in-house problems.

The foundation is normally laid by statistical evidence of a substantial disparity between DBE capacity and utilization, plus substantial anecdotal evidence showing actual instances of discrimination by contractors against subcontractors. Both types of evidence are necessary, and both must be drawn solely from within the contracting agency's geographical jurisdiction. The statistical evidence must be drawn from relevant populations--non-minority and DBE firms that do or potentially would do business with the contracting agency. Thus, in our present study we should limit our statistical evidence to firms whose principal place of business is within the state of Texas. There are various possible ways to measure DBE capacity (or availability). The easiest and most obvious way is to count the number of relevant DBE firms. When determining whether a disparity exists, the number of relevant DBE firms may be calculated as a percentage of the total number of relevant firms (DBE plus non-DBE), this percentage then being compared with the percentage of total contract dollars that have been awarded to DBE's during the period of time being examined. Dividing the former percentage by the latter percentage produces a disparity index. If this index is 1.0, there is no disparity. As it decreases, the evidence of disparity increases. The only problem with the disparity index as a basis for inferring prior discrimination is that the single thing it

shows is that, on the average, DBE's are smaller than non-DBE's. If the index is strikingly low, thus showing a tremendous disparity between the average market share of DBE and non-DBE firms, there is probably a basis for inferring discrimination.

The case for inferring discrimination from the index will be far stronger if there is some other statistical evidence buttressing the index, especially if the evidence suggests why DBE firms have a significantly lower average market share than non-DBE firms. An attempt might be made, for example, to examine the index in a sample of DBE and non-DBE firms that have been in business for roughly the same length of time. If the index is low in this sample, this result does tell us that the reason for lower average DBE market shares is not that they are just newer firms. This provides a stronger basis for inferring that DBE's are not competing in a truly honest market.

In a similar vein, the inferential power of the disparity index would be greater if a sample of DBE's and non-DBE's from roughly the same size group (such as those within the federal government's small business definition) were compared. If there is a gross disparity in the amount of TxDOT business between these two comparably-sized groups, an inference of discrimination in TxDOT contracting (or probably subcontracting) would be much stronger. If the federal definition of small business proved unworkable, an initial decision would have to be made about how to measure size. Government contract revenues obviously would not be an appropriate measure. If possible, net worth, number of employees, or other measures could be combined.

Additionally, the inference that DBE's do not compete in an honest, unbiased market would be strengthened by statistical evidence showing that most of the business they get derives from the DBE program, and that they have been unable to gain a comparable share of business in the relevant private sector. This tends to show that, without the race- or gender-conscious program for government contracts, they would be getting a far smaller share of that government business than they should be getting. Indeed, if a DBE program is being renewed rather than initiated, and the disparity study shows that presently DBE's are receiving a commensurate share of government contract dollars, it may be absolutely necessary for renewal of the program to demonstrate that gross disparities still exist in the private sector.

Again, this suggests that they would not be getting their fair share of government contracts without the DBE program.

2. *Anecdotal Evidence*

The anecdotal evidence must show actual instances of discrimination. Obviously, the more of this evidence that can be collected, the stronger is the factual foundation for the DBE program. The factual foundation also will be stronger if claims of discrimination made during interviews or in survey responses are further investigated to determine whether the claims have substance. It may or may not be possible in a given case to verify the claim of discrimination, but a good faith effort should be made. There is a reasonable chance that a court might reject anecdotal evidence consisting of claims of discrimination when there has not even been an effort to verify those claims by further inquiry. To the extent feasible, the gathering of anecdotal evidence should include interviews and surveys of DBE principals, minority individuals who once ran DBE's but have now gone out of business, as well as principals and employees at non-DBE firms. It is important for the study to use interviews to obtain the views of nonminority-owned companies, as well as minority-owned ones. Present and former agency personnel obviously must be interviewed, as well.

Although referred to as anecdotal because it seeks to identify specific stories of discrimination, evidence gathered by surveys must follow sound statistical principles. The survey process actually must be so statistically sound that the term "anecdotal" is really misdescriptive. Again, however, there is a practical reason for using the term anecdotal for this evidence despite the fact that it will be inadequate if truly anecdotal in the scientific sense. Great care must be exercised in constructing the sampling technique; both sample size and response rate are extremely important. In addition, any follow-up conducted to increase the response rate and sample size must be done in such a way as to not interfere with the randomness of the original sampling effort.

Interviews of those in the DBE and non-DBE business communities must also be conducted in a systematic fashion to ensure that the evidence gathered is cross-sectionally representative in terms of geographic areas, product and service markets, firm size, and other relevant characteristics. Although the interviews cannot meet the same statistical standards as the surveys, the design and

implementation of the interviewing process should pay attention to the same basic principles as are applied to the surveys and to the gathering of other statistical evidence. In sum, the more scientifically sound is the process for gathering "anecdotal" evidence, the more probative it will be.

B. NARROW TAILORING

1. General Principles of Narrow Tailoring

As discussed earlier in describing and analyzing the Croson decision, narrow tailoring entails a number of requirements:

a. The DBE program must not be a true "set-aside"; that is, it must not set an inflexible percentage of contracts or contract dollars that must be awarded to DBE's. This means that a "sheltered market" approach, even if used as an adjunct to a flexible goals program, is probably illegal.

b. A "goals" program must be exactly that, not a set-aside in disguise. In other words, it must be very flexible. An overall annual goal is permissible, but should be reviewed at least annually. Moreover, adequate flexibility probably requires that individual goals must be set for each contract, based on a particularized examination of DBE availability for the type of work called for in the project to be contracted.

c. Flexibility also requires realistic waiver provisions when the prime contractor can demonstrate that it made a good faith effort to fulfill the goal on a project and can plausibly explain the reasons for its failure to do so. When delineating the requirements that a contractor must meet to receive a "good faith efforts" waiver, it is permissible to require that a contractor must have taken affirmative action to advertise and otherwise reach out to find qualified MBE's. Clearly, however, the requirements for meeting such a waiver requirement must be an integral part of the entire program that was communicated to all potential bidders no later than the time when the request for bids or proposals was first announced by the contracting agency.

d. Some courts have indicated that a "bid preference" system, in which a DBE's bid is treated as being the lowest if it is within a certain percentage of the true lowest bid, is less problematic constitutionally than a percentage goals program. Unless the bid preference is very low, however, this seems to be less flexible and

more burdensome for non-minority contractors, and certainly more costly to taxpayers, than a well-constructed flexible goals program. The strong point of a bid preference system, of course, is its simplicity. It is very easy to administer, and requires fewer agency personnel to administer. This simplicity might save enough money in administrative personnel costs to offset the higher cost to taxpayers of automatically raising the cost of a project, but only if the bid preference is very small. Five percent, say, of several hundred million dollars of government contracts can pay for a lot of agency personnel to administer a much less simple goals program. From the multiple perspectives of constitutional standards as they are likely to be developed further, taxpayer cost, and fairness to non-DBE's, I personally feel that bid preferences should be avoided.

e. A narrowly tailored goals program must be limited to those ethnic groups (and women) who are actually represented significantly in the relevant population and for which there is a factual foundation in the form of evidence of prior discrimination. No Eskimos in Texas.

f. The DBE goals program should have a specific duration, i.e., a sunset provision, subject to review and consideration at a specified later time for either abandonment or renewal. The problems of renewing one that apparently has worked well were discussed earlier. If the program has produced a situation in which substantial disparities no longer exist, but the agency wishes to renew it because of the belief that disparities will reappear if the program is discontinued, the agency must be prepared to demonstrate that substantial disparities still exist in the private sector, that provable instances of actual discrimination are continuing to exist, or both.

g. The DBE goals program must have a "graduation" provision for DBE's, that is, an objective standard such as annual revenues that, when reached, causes the particular DBE to no longer be eligible for any type of preference.

2. *Race- and Gender-Neutral Alternatives*

Another part of the narrow tailoring requirement that is sufficiently important to be treated separately is the Croson demand that race- or gender-neutral alternatives must have been tried as a prerequisite to the use of race- or gender-conscious measures. The strongest evidence, of course, would show that neutral measures had been attempted for several years prior to the implementation of a DBE

goals program and had failed to achieve the desired results. Race- and gender-neutral measures must also be included in the present program, whether or not such neutral measures had been attempted in the past. Thus, any DBE program proposed for TxDOT should not only include various neutral measures, but also should attempt to document any measures that have been employed in prior years. Moreover, if possible, an attempt should be made to document such neutral measures (such as DBE or general small business outreach and training programs) that have been employed by other state and local government agencies that may have reached those who do or potentially might do business with TxDOT.

When many people speak of neutral measures, they seem to be referring to any measures aimed at the supply side, that is, measures aimed at increasing the supply of DBE's. Although supply-side measures aimed at DBE's are important, and should be included, they are not truly neutral if targeted only at minorities and women. To be really neutral, these measures need to be aimed at small businesses regardless of whether they are owned by minority individuals, women, or white males. In reality, there should be supply-side programs for both DBE's and for small business people generally.

There are many possible kinds of race- and gender-neutral measures. All require significant resources, and it has to be understood that an agency may not have the money to do everything that it would in a world of unlimited resources. These measures include, but are not limited to:

a. Well-publicized statewide outreach programs of various types that are intended to inform individuals and small businesses of the type of work TxDOT contracts for, how to do business with TxDOT (including how to fill out all the forms), and who to contact at TxDOT for specific assistance in preparing necessary documentation and otherwise complying with technical requirements.

b. Training (probably contracted out to community colleges or other established institutions) in the fundamentals of running a business. The fundamentals of accounting, asset and cash-flow management, personnel management, and relevant business laws and tax laws should be included. It also might be wise to inform small businesses, including DBE's, about some of the employee leasing companies that can handle the payroll (including all of the required deductions, so as to keep the firm out of payroll-related trouble), workers compensation and other insurance and benefits coverage, and other personnel tasks.

Although there are a number of good, reputable employee leasing companies, there are also some bad ones that may take the firm's money but not take care of paying for employee benefits. Thus, the use of such a company may be an excellent idea for many small businesses, but care must be exercised in selecting one.

c. Aside from business-specific training, in some areas of the state it may be worthwhile to contract for broader educational programs. An actual or potential small business owner who speaks only Spanish, or at least very little English, is quite unlikely to succeed, much less reach his potential, in business (for TxDOT or otherwise). The same can be said of others who, even if they are not Spanish speakers, are virtually illiterate in written English. This may be beyond TxDOT's responsibility or capability, but TxDOT could play an instrumental role in getting state government as a whole more involved in such an effort. The Texas economy could only benefit. Indeed, the entire Texas economy also would benefit from a more broadly targeted business-training effort as described above in b.

d. If it is feasible to divide a large project into a number of small parts without substantially undermining efficiency, such a measure could make it much easier for small businesses in general, including DBE's, to compete for TxDOT contract work.

e. An effort should be made to determine whether bonding, insurance, or other requirements are more burdensome than they have to be. Do bonds have to be as large as they are? If it is determined that some of these requirements could be relaxed, especially for small businesses (including DBE's), without exposing the state to a much greater financial risk, such action should be taken. Another possibility is to reduce or waive the bonding requirement for a small business when the agency is otherwise convinced that the company can do the work well, but couple this waiver or reduction with a contractual provision specifying that default or unsatisfactory performance by the firm will result in its being barred from further TxDOT work for a substantial period of time (say, one or two years, or perhaps longer).

f. Although the state cannot lend money to DBE's or other small businesses, creative avenues for helping such firms overcome financing barriers should be investigated. It might be possible, for example, for TxDOT (or the state government as a whole) to work out arrangements with banks that would provide the banks with some type of benefit (such as preferences in receiving deposits of state funds) in

return for relaxing loan requirements for small businesses that are trying to do business with the state. Changes in state law might be necessary to accomplish any such plan. Obviously, such an effort could be constrained by federal liquidity and other banking regulations, but the idea should at least be given some consideration. Also, consideration should be given to working out such arrangements with non-bank institutions that could serve a role in financing but that are not subject to restrictive banking regulations.

g. TxDOT (or any other state or local government contracting agency) must make a meaningful attempt to identify any current policies or practices within the agency that erect barriers to contracting by DBE's and other small businesses and, to the extent feasible, remove these barriers.

h. The agency also should attempt to identify actual discrimination in bonding, financing, or other services ancillary to contracting, and take whatever steps necessary (even adopting new regulations or proposing new legislation if necessary) to remedy that discrimination.