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DEPARTMENT OF  
GENERAL SERVICES

CITY OF SACRAMENTO  
CALIFORNIA

5750 - 24TH STREET  
BUILDING FOUR  
SACRAMENTO, CA  
95822-5699

MINORITY AND WOMEN  
BUSINESS ENTERPRISE PROGRAM

June 1, 1989

916-498-505

Budget and Finance Committee  
Transportation and Community Development Committee

Honorable Members in Session:

Subject: Minority/Women Business Enterprise Program - 1988/89  
Third Quarterly Progress Report

Attached is the Third Quarterly Progress Report for the  
Minority/Women Business Enterprise (M/WBE) Program for the period  
ended March 30, 1989.

As you are aware, the U.S. Supreme Court decision in the case of  
the City of Richmond v. J.A. Croson Co. will require that changes be  
made in the City's M/WBE Program. This report has been delayed in the  
hope that it could be presented in conjunction with suggested  
revisions to the M/WBE Program. However, because the program  
revision process has been more time-consuming than was originally  
anticipated, it is requested that you receive this report and forward  
it to the Council for its information.

Work on revision of the program in response to the Supreme Court  
decision is continuing, and it is anticipated that suggested changes  
will be ready for your review and approval by mid-July.

Respectfully submitted,

Robbin DeShields Randolph  
Purchasing Manager/  
M/WBE Program Manager

Approved:

Jack R. Crist,  
Deputy City Manager



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CITY OF SACRAMENTO  
CALIFORNIA

5730 - 24TH STREET  
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95822-3699

MINORITY AND WOMEN  
BUSINESS ENTERPRISE PROGRAM

March 31, 1989

916-449-8505

City Council  
Sacramento, California

Honorable Members in Session:

Subject: 1988-89 Minority/Women Business Enterprise Program -  
Third Progress Report

SUMMARY

The attached report summarizes year-to-date progress for the City's Minority/Women Business Enterprise (M/WBE) Program. The analysis contains purchasing statistics as well as an overview of activities conducted during the last ninety days. In addition to accepting this report, it is requested that the joint committees forward it to the City Council for its information.

BACKGROUND

In June 1988, the City Council established a formal M/WBE Program and directed staff to prepare reports on a quarterly basis in order to keep the Council apprised of progress toward meeting established M/WBE goals. The City's goals are 20% minority and 5% woman business enterprise participation in City business transactions. This report covers work activities conducted during the period from January 1, 1989 through March 31, 1989.

ANALYSIS

A. SPECIAL ACTIVITIES

1. New Program Manager.

On February 6, 1989, Robbin DeShields Randolph assumed duties as the new M/WBE Program Manager. Management of the M/WBE Program is in addition to her responsibilities as the City's new Purchasing Manager. Ms. Randolph was Executive Director of the Sacramento City/County Human Rights/Fair Housing Commission prior to coming to work for the City.

2. M/WBE Conference.

The City's Third Annual Minority/Women Business Enterprise Conference was held on March 13, 1989 at the Sacramento Hilton Inn. There were 124 registered participants.

This year's conference marked a change in focus from primarily an outreach effort to an emphasis on education. To this end a workshop format was utilized, providing information on business marketing, financing, and bidding on various types of City projects. It was also the first time that an effort was made to make the conference a self-supporting event by charging a registration fee to cover conference expenses. The nominal registration fee (\$20.00) allowed presentation of a quality program while at the same time keeping the cost low enough so as not to discourage attendance.

Mayor Anne Rudin addressed the conference participants following a buffet luncheon during the mid-day break. Based on comments from conference participants and feedback from an evaluation form those attending were asked to complete, the conference was judged a successful endeavor. The information disseminated should further enhance the opportunities for M/WBE vendors to participate in City business and at the same time improve their chances of successful performance when such opportunities do arise.

3. Supreme Court Decision.

On January 23, 1989, the United States Supreme Court handed down a decision in the case of City of Richmond v. J. A. Croson Co. (A brief synopsis of the case is included as Exhibit "E"). This case involved a contract set-aside program in the City of Richmond, Virginia, which the Court held to be unconstitutional. While the full ramifications of the decision are not yet clear, the City Attorney has indicated that the decision will affect the City's M/WBE Program as currently structured. This issue will be addressed by staff in a separate report.

4. Capital Improvement Projects M/WBE Reporting.

Prior to issuance of the Supreme Court decision cited above, staff had been working on development of administrative procedures for monitoring of M/WBE utilization in Capital Improvement Projects (CIP's). On the advice of the City Attorney's Office, that effort has been suspended pending a determination of the effect of the Court decision on the M/WBE Program.

5. Commodity-Code/Bid List Update.

Staff is in the process of installing a newly-updated and more comprehensive list of commodity/service codes for use in conjunction with the City's Local Government Financial System (LGFS). When this project is completed, it will allow for a more precise definition of the products and/or services that vendors would propose to provide to the City as well as allowing City staff to better identify prospective new vendors when issuing bids or otherwise seeking to expand the supplier base for fulfilling the City's needs.

B. CONTINUING ACTIVITIES

1. Participant Certification.

M/WBE certification under the new program began on October 10, 1988. In this reporting period, more than 150 new vendors have been added to the City's list of certified M/WBE vendors. The City's centralized LGFS computer system now contains a total of 589 certified M/WBE vendors.

2. Mayor's M/WBE Task Force.

The third meeting of the Mayor's Special Task Force on M/WBE was held on January 9, 1989. In addition to reviewing the Second Progress Report, a random drawing was utilized to set the length of the initial term of office for Task Force members. Half of the members will serve one-year initial terms, the other half two-year terms. This will allow for continuity on the Task Force. The Task Force also decided that its main issues for focus this year should be as follows:

- \* City Manager should develop compliance policies which ensure that departments meet City Council approved M/WBE goals.
- \* Programs should be developed to reduce vendors' fears about doing business with the City. An instructional package/brochure should be developed for small businesses which outlines the process.
- \* A Task Force CIP Committee should be created to assist in the development/review of CIP-related administrative procedures.

A list of the major issues identified by the Mayor's Task Force, titled "Consolidation of Issues" is attached to this report as Exhibit "C". A current Task Force membership roster is attached as Exhibit "D".

3. Outreach.

The M/WBE Conference was the major outreach effort of this reporting period. In addition to the conference, staff was involved in the following outreach activities:

- \* Made a presentation at a NEDA-sponsored contracting seminar about the City's M/WBE Program and how the City's procurement process works.
- \* Participated in a Career Day at University of California, Davis campus.
- \* Offered program information at a small-business outreach workshop sponsored by the Sacramento Metropolitan Chamber of Commerce.
- \* Attended meetings of the United Minority Business Entrepreneurs (U.M.B.E.) and made presentations.

4. Cross-Certification.

The City M/WBE Program continues to accept certification by CalTrans and Sacramento Housing and Redevelopment Agency (SHRA) as sufficient evidence of M/WBE qualification for certification under the City's program. Staff from the City and SHRA are continuing to work on streamlining the process in order to enhance the operations of both agencies' programs and at the same time provide the greatest possible degree of responsiveness to M/WBE vendors.

C. FUTURE ACTIVITIES

1. Program Redesign.

Due to the impact of the recent U.S. Supreme Court decision in City of Richmond v. J.A. Croson, some major changes in the structure of the M/WBE Program will be necessary. In response to this, staff will offer recommendations in a separate report addressing this issue.

2. M/WBE Vendor Directory.

In order to make it easier to locate City-certified M/WBE vendors, staff is developing an M/WBE Vendor Directory. This directory will be a ready-reference document for City employees to use whenever they need to find someone to supply a particular product or perform a specific service. The directory may be modified prior to initial issue to include small businesses, depending upon the future structure of the program.

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3. Certification Application/Bid List Application Revisions.

In an effort to better identify what products and services prospective vendors would like to supply to the City, staff has been working on implementing an improved commodity/service coding system. As an adjunct to this system, a new bid list application is being developed to permit collection of more detailed information on vendors who apply to do business with the City. In conjunction with this update, the M/WBE Certification Application will be revised as necessary to address any program-change requirements and to provide a clearer, easier-to-understand document for vendors to fill out.

D. YEAR-TO-DATE STATISTICS FOR THE THIRD QUARTER

During the first nine months of enhanced M/WBE monitoring, the City spent a total of \$17,566,628 in "baseline" purchases for goods and services from the operating budget. The amount spent with M/WBE firms year-to-date is \$1,241,731. This represents 7.1% of the total "baseline" City purchases in the operating budget for the period from July 1, 1988 through March 31, 1989. It is also a fairly significant increase from last quarter's 4.2%.

The increased level of participation by M/WBE firms reflected in the above percentages is attributable to a combination of factors:

- 1) City staff has continued to identify and certify those M/WBE firms with whom they are already doing business on a regular basis.
- 2) Program staff has been de-bugging the computerized tracking system to make sure that all reportable transactions are included in the statistical data base. Over time, different methods have been used to make the computer pick out M/WBE transactions. Part of the de-bugging process has been to make sure that the vendors identified under "old" methods are included in the current reports.
- 3) Increased certification and utilization of "new" M/WBE vendors by City employees.

The statistics are presented in three ways: 1) Total Purchases; 2) Decentralized Purchases; and 3) Centralized Purchases. Within each of these sections, the purchases have been broken down by group to show dollar amounts and percentages. Group percentages from the second quarter appear in the last column for comparison purposes.

TABLE 1  
 Third Quarter Year-To-Date M/WBE Purchases  
 OVERALL TOTALS

<u>Classification</u>	<u>Amount</u>	<u>3RD QTR %</u>	<u>2ND QTR %</u>
Total Baseline Purchases	\$17,566,628	100.0%	N/A
Total M/WBE	1,241,731	7.1%	4.2%
Total Minority Male	687,141	3.9%	1.3%
Total Minority Female	225,785	1.3%	1.2%
Total Non-Minority Female	328,805	1.9%	1.7%
- - - - -	- - - - -	- - - - -	- - - - -
Total Minority-Owned*	912,926	5.2%	2.5%
Total Woman-Owned**	554,590	3.2%	3.0%

TABLE 2  
 Third Quarter Year-To-Date M/WBE Purchases  
 DECENTRALIZED PURCHASES

<u>Classification</u>	<u>Amount</u>	<u>3RD QTR %</u>	<u>2ND QTR %</u>
Total Decentralized Purchases	\$ 7,548,549	100.0%	N/A
Total M/WBE	690,344	9.1%	6.3%
Total Minority Male	257,244	3.4%	0.6%
Total Minority Female	198,492	2.6%	2.7%
Total Non-Minority Female	234,608	3.1%	3.0%
- - - - -	- - - - -	- - - - -	- - - - -
Total Minority-Owned*	455,736	6.0%	3.3%
Total Woman-Owned**	433,100	5.7%	5.7%

\* Includes Minority Male and Female  
 \*\* Includes Minority and Non-minority Women

**TABLE 3**  
**Third Quarter Year-To-Date M/WBE Purchases**  
**CENTRALIZED PURCHASES**

<u>Classification</u>	<u>Amount</u>	<u>3RD QTR %</u>	<u>2ND QTR %</u>
Total Centralized Purchases	\$10,018,079	100.0%	N/A
Total M/WBE	551,387	5.5%	2.5%
Total Minority Male	429,897	4.3%	1.8%
Total Minority Female	27,293	0.3%	0.0%***
Total Non-Minority Female	94,197	0.9%	0.7%
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Total Minority-Owned*	457,190	4.6%	1.8%
Total Woman-Owned**	121,490	1.2%	0.7%

\* Includes Minority Male and Female  
 \*\* Includes Minority and Non-minority Women  
 \*\*\* Less than one-tenth of 1%

The activity detail for the information contained in the above tables is attached as Exhibit "A" (Decentralized) and "B" (Centralized). In addition, departmental/divisional detail is on file in the City Clerk's Office.

RECOMMENDATION

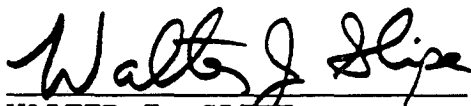
This report is for Council information and no action is required.

Respectfully submitted,



ROBBIN DESHIELDS RANDOLPH  
 Purchasing Manager/  
 M/WBE Program Manager

FOR CITY COUNCIL INFORMATION:



WALTER J. SLIVE  
 City Manager

EXHIBIT A

CITY OF SACRAMENTO  
M/WBE GOAL SUMMARY FOR OBJECT CODES IN DECENTRALIZED CATEGORY  
FISCAL YEAR 1989

Responsible Activity	Current Approved Budget	MBE Adjusted Goals	WBE Adjusted Goals	3rd QTR YTD MBE	3rd QTR YTD WBE	3rd QTR YTD Purchases	M/WBE use Percents
Mayor/Council	14,220	2,844	711	0	4,653	12,053	38.60X
City Manager	103,505	5,095	1,274	35	0	66,810	.05X
City Attorney	23,206	640	160	0	0	23,700	.00X
City Clerk	102,787	225	56	0	0	234,575	.00X
City Treasurer	50,510	10,102	2,526	0	200	27,973	.71X
Finance	705,479	86,544	21,636	2,064	4,034	407,206	1.50X
Data Management	721,796	44,040	11,010	13,740	2,277	448,484	3.57X
Personnel	315,519	31,966	15,776	91	3,126	211,098	1.52X
Employee Relations	7,918	20	5	0	0	1,251	.00X
General Services	1,878,136	317,879	79,470	16,705	108,662	1,047,650	11.97X
Police	973,090	77,124	19,281	445	26,730	484,042	5.61X
Fire	318,265	37,959	9,491	0	1,590	174,283	.91X
Public Works	4,881,247	890,928	222,734	56,542	84,451	2,164,492	6.51X
Planning & Development	688,921	137,784	34,446	27,766	689	658,185	4.32X
Library	866,914	107,621	26,905	303	21,256	230,802	9.34X
Community Center	717,121	140,654	35,140	0	4,195	170,074	2.47X
Parks & Community Services	1,982,995	395,299	98,826	139,553	171,237	1,185,871	26.21X
<b>TOTAL DECENTRALIZED</b>	<b>14,351,629</b>	<b>2,286,724</b>	<b>579,447</b>	<b>257,244</b>	<b>433,100</b>	<b>7,548,549</b>	<b>9.15X</b>

"EXHIBIT B"

CITY OF SACRAMENTO  
M/WBE GOAL SUMMARY FOR OBJECT CODES IN CENTRALIZED CATEGORY  
Fiscal Year 1989

Responsible Activity	Current Approved Budget	MBE Goal 20%	WBE Goal 5%	3rd QTR YTD MBE	3rd QTR YTD WBE	3rd QTR YTD Purchases	Combined M/WBE Percents
Central Services	1,163,565	232,713	58,178	3,276	1,501	731,009	.65%
Communications	1,195,946	239,189	59,797	5,065	174	817,692	.64%
Data Management	216,133	43,227	10,807	0	0	137,864	.00%
Finance	481,065	96,213	24,053	0	44,214	159,635	27.70%
Fleet Management	9,967,066	1,993,413	498,353	232,838	2,047	3,643,794	6.45%
Multi-Department	147,100	29,420	7,355	0	0	74,434	.00%
Personnel	99,713	19,943	4,986	0	2,521	84,268	2.99%
Procurement Services	8,572,624	1,714,525	428,631	188,718	71,033	4,369,383	5.94%
<b>TOTAL CENTRALIZED:</b>	<b>21,843,212</b>	<b>4,368,642</b>	<b>1,092,161</b>	<b>429,897</b>	<b>121,490</b>	<b>10,018,079</b>	<b>5.50%</b>

Consolidation of Issues

<u>Issue</u>	<u>Description of Issue</u>	<u>Suggestor</u>
1.	Businesses need to have the technical experience necessary to do business with the City. (Statement)	Pauline Marzette Janet Ruiz-Anderson Dennis Tootelian
2.	The City's payment schedule should be reviewed to ensure that it does not cause a problem for small businesses. (Staff responsibility)	Edmundo Lopez
3.	Programs should be developed to reduce vendor's fears about doing business with the City. An instructional package/brochure should be developed for small businesses which outlines the process. (Potential Task Force item)	Gene Fong
4.	A process should be developed to identify how small businesses can get additional help with their marketing plans so that they can better market themselves to the City. (Potential Task Force item)	Dennis Tootelian
5.	A short survey pamphlet/questionnaire should be developed for Task Force members to use to identify community problems - this should be an aid to members know where staff assistance is needed. (Potential Task Force item)	Gene Fong
6.	The various Task Force members need to get community information so that they can make recommendations in line with community needs. This may be accomplished at the February conference. (Potential Task Force item)	Maureen White
7.	The City should ensure that bid evaluation criteria are clear and consistent. (Staff responsibility)	Bud Rogers
8.	Small businesses need to have information about "where to start" to do business with the City of Sacramento. (Staff responsibility)	Janet Ruiz-Anderson Dennis Tootelian

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<u>Issue</u>	<u>Description of Issue</u>	<u>Suggestor</u>
9.	The City's program should continue to emphasize goals/good faith efforts so that stronger methods (like quotas) can be avoided. (Statement)	Bud Rogers Maxine Cornwell
10.	CIP goals should be set on a project-by-project basis and be realistic given the market. (Staff responsibility)	Maureen O'Connor
11.	The City should strive to maintain a high level of integrity in its certification process. (Statement)	Edmundo Lopez Bud Rogers
12.	The City should try to increase M/WBE participation in the program. (Staff responsibility)	Walter Hare Maxine Cornwell
13.	The Task Force should develop a business referral directory of local M/WBE vendors. (Potential Task Force item)	Gene Fong
14.	The Task Force needs to be actively involved in the conference and should assist in topic selection, design, supplying speakers, etc. (Statement)	Maureen White
15.	The City should make better use of pre-bid conferences. An increased emphasis should be placed on bringing subs and primes together as a part of this process. (Staff responsibility)	Pauline Marzette
16.	A comprehensive M/WBE public information campaign should be developed. (Staff responsibility)	Maureen O'Connor
17.	Contractor "good faith " efforts should be more clearly defined. (Staff responsibility)	Walter Hare
18.	The City Manager should develop compliance policies which ensure that departments meet City Council approved M/WBE goals. (Staff responsibility/Task Force item)	Pauline Marzette Maxine Cornwell

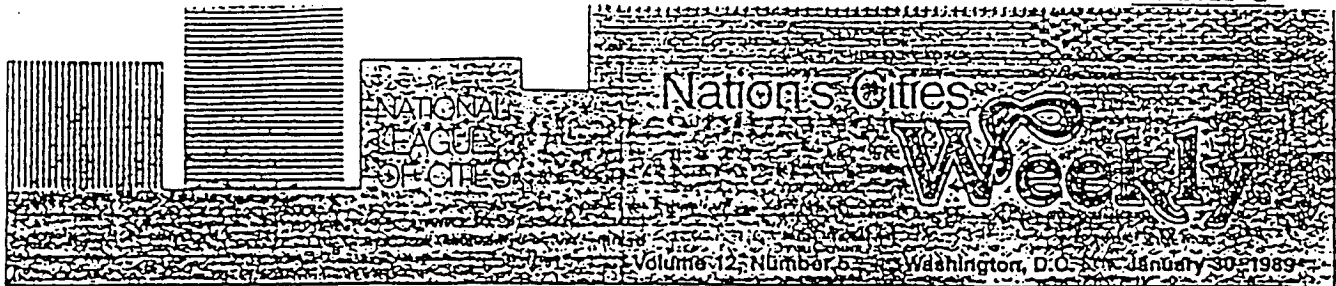
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Consolidation of Issues  
Page 3

<u>Issue</u>	<u>Description of Issue</u>	<u>Suggestor</u>
19.	M/WBE goals should be applicable to all contracts including M/WBE prime contractors. (Staff responsibility)	Maxine Cornwell
20.	M/WBE certification paperwork should be minimized to the maximum extent possible while ensuring the integrity of the certification process. (Statement)	Maureen O'Connor
21.	Certification enforcement procedures should be established (steps to be taken in the event of M/WBE certification fraud). (Staff responsibility)	Janet Ruiz-Anderson Maxine Cornwell
22.	The City should establish bond acceptability criteria for projects. (Staff responsibility)	Walter Hare
23.	A manifestation of the City's commitment to M/WBE will be increasing the level of monitoring authority and resources which are allocated to the M/WBE program. All of the City's M/WBE efforts should be clearly administered through the M/WBE office. (Potential Task Force item)	Edmundo Lopez
24.	A Task Force CIP Committee should be created to assist in the development/review of CIP-related administrative procedures. (Potential Task Force item)	STAFF

M/WBE TASK FORCE ROSTER

<u>MEMBER NAME</u>	<u>TITLE</u>	<u>AGENCY</u>	<u>ADDRESS</u>	<u>CITY/ZIP</u>	<u>PHONE</u>	<u>AFFILIATION</u>
Haxine Cornwell	Program Manager	SHRA	630 I Street	Sacramento, CA 95814	440-1322	SHRA
Janet Ruiz-Anderson	Director	NEDA-San Joaquin Valley	530 Bercut Drive, Ste. D	Sacramento, CA 95814	443-0700	US Dept of Commerce
Edmundo Lopez	Chief	Office of Civil Rights	1120 N Street, Rm. #3400	Sacramento, CA 95814	445-2059	State Agency
Pauline Marzette	President	Marzette & Associates	3015 O Street	Sacramento, CA 95816	455-0708	Metro Chamber of Commerce
Trudy Evans	President	Trudesign Graphics	1100 N Street Suite 4C	Sacramento, CA 95814	446-6975	Black Chamber of Commerce
Beatriz Molina	President	Imagine	2727 B Street	Sacramento, CA 95816	441-6312	Hispanic Chamber of Commerce
Gloria Apolinario	Insurance Agent	Farmers Insurance Company	7913 Bruceville Rd.	Sacramento, CA 95823	689-5777	Filipino Chamber of Commerce
Maureen O'Connor	Assistant Vice President	Sacramento First National Bank	925 L Street	Sacramento, CA 95814	441-1250	Banking
Dennis Tootelian	Director	Small Business Center, CSUS	2190 Morley Way	Sacramento, CA 95864	971-4096	Cal State Univ., Sacramento
Walter Hare	President	Excel Surety	2417 Front Street	W. Sacramento, CA 95651	373-0261	Insurance/Bonding
Maureen White	Manager of Re-Entry Services	Sacramento City College	3835 Freeport Blvd.	Sacramento, CA 95822	449-7533	Sacramento Women's Network
Bud Rodgers	President	Associated General Contractors	3095 Beacon Blvd.	W. Sacramento, CA 95691	371-2422	Construction
Gene Fong	Manager of Compliance/Training	Aerojet - Dept. 9250	P.O.Box 13222 Bldg 2001	Sacramento, CA 95813	355-2206	Private Corporation



# Supreme Court ties cities' hands on bias

by Cynthia Pols

In a far-reaching decision, the U.S. Supreme Court last week struck down a minority business set aside requirement and imposed stringent new restrictions on the use of race-based preferences by state and local governments. The 6 to 3 ruling in the long-unsettled case applies to any state or local requirement which favors members of one race over another, and, despite reports to the contrary, its impact extends well beyond quotas.

## IMPACT

The decision casts a pall of uncertainty over state or local programs which use a numerical quota or any other form of racial preference. It is likely to lead to the reassessment of affirmative action plans and other race preferences in many communities, and could well lead to a rash of lawsuits alleging reverse discrimination against cities.

The ruling makes clear that, before a racial preference can be used, a state or government must clearly demonstrate discrimination which can be traced to

deliberate acts of clearly identified parties. Racial preferences cannot be used to compensate for societal discrimination or to eliminate entry barriers of an economic or social nature. The decision, however, does not appear to affect the use of race-neutral criteria such as set asides for new businesses or financially disadvantaged firms.

The decision applies only to state and local governments and does not limit the authority of the federal government to use racial preferences. The ruling—because it interprets a constitutional provi-

sion which applies only to government—does not affect the use of racial preferences or affirmative action in the private sector.

The ruling appears to apply to the use of racial preferences in the employment context, although its impact is less certain because of the existence of a federal statute—Title VII—prohibiting race discrimination in employment practices. It appears to have less of an impact on sex-based preferences since the constitutional provision at issue does not provide

See p.6, col.1

## PG-6 Court from p.1

the same type of protection against sex discrimination as it does against race discrimination.

## BACKGROUND

The case—*City of Richmond v. J.A. Croson*—arose following the enactment of an ordinance by the Richmond, Va. city council in 1983 to establish a five-year program requiring contractors awarded construction contracts by the city to subcontract at least 30 percent of the dollar amount of the contract to minority businesses. The ordinance included a mechanism under which this requirement can be waived by showing that the contractor cannot comply with it for valid reasons.

The city established the set aside requirement after finding that, in a city with a 50 percent black population, only 0.67 percent of the city's prime construction contracts were being awarded to minority businesses and virtually no minorities were members of the various state and local associations for contractors.

The Richmond ordinance—like many state and local laws enacted in the late 1970s and early 1980s—was modeled on the set aside requirements established by Congress in the Public Works Employment Act of 1977 which provided \$4 billion in anti-recession assistance to state and local government for public works projects. That law required the set aside of 10 percent of each grant for minority businesses and defined eligible minorities as blacks, Hispanics, Asians, Indians, and Aleuts. It also included a waiver mechanism and was upheld by the Supreme Court in the 1980 *Fullilove v. Klump* decision. The Richmond ordinance adopted the federal law's definition of a minority business and included a similar waiver mechanism.

The Richmond ordinance was challenged soon after its enactment by a local contractor under the Civil Rights Act of 1971 (section 1983)—with the backing of Associated General Contractors of America—as a violation of the Equal Protection Clause of the 14th Amendment. That clause bars any state or local government from denying "any person within its jurisdiction the equal protection of the laws" and has frequently been used to challenge discrimination against blacks and other racial minorities.

The contract at issue governed the installation of plumbing fixtures in the city jail. The prime contractor originally requested a waiver of the minority subcontracting requirement. After that request was denied, the contractor asked for an increase in the contract price which it claimed was needed to cover the additional costs of using a minority subcontractor for the fixtures. In response, the city decided to accept new bids for the contract, and the contractor then filed the lawsuit.

The district court ruled in the city's favor, but the appeals court—the U.S. Court of Appeals for the Fourth Circuit—reversed, ruling that a city could only act to remedy its own discrimination, and could not remedy discrimination by private contractors or other parties. Following the appeals court ruling, the percent-

age of city construction contracts going to minority businesses fell from about 30 percent to less than one percent.

## MAJORITY RULING

In a multipart ruling, the Supreme Court struck down the Richmond plan in an opinion authored by Justice Sandra Day O'Connor, joining in key parts of her opinion were Chief Justice William Rehnquist Jr. and Justices Anthony Kennedy, John Paul Stevens, and Byron White. Justice Antonin Scalia issued a separate opinion which voiced even stronger criticism of the Richmond plan in particular and race preferences in general for a solid six-vote majority in favor of limiting the use of race preferences to only extreme cases of clearly demonstrated racial discrimination.

## The New Rule

At the heart of the decision is the court's application of the "strict scrutiny" standard to review of state and local laws which create preferences for minorities. This standard—used for many years to invalidate state and local laws or practices which favor whites—could well lead to the striking down of many state and local laws which create a preference or an advantage for minority group members. This new standard of review applies to any state or local requirement which results in a race-based preference, whether in the form of a quota, target, goal, timetable, or an advantage on the competition.

In effect, the court has construed the Equal Protection Clause as preventing "reverse discrimination" against whites and providing the same protections against discrimination for whites as it does for blacks and other racial minorities. Under this new approach, O'Connor wrote, the "standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."

Under "strict scrutiny" rules, a state or local law which discriminates against blacks must be struck down unless it serves a "compelling governmental interest" and is narrowly tailored to meet that interest.

In explaining the court's reasoning in striking down the set aside requirement, O'Connor found the constitutional ban on race discrimination to apply to whites and racial minorities in the same fashion, writing, "To whatever racial group they belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."

## The Specifics of the Case

In one of the few bright spots for local governments, the court reversed the lower court's finding that a local government could not take action to remedy discrimination by private interests. Thus, a local government can attempt to remedy discrimination in the construction industry and other local industries (as well as its own discrimination) to the extent permitted by state law and subject to the stringent new proof requirements.

A city which documents its own discriminatory conduct could well be opening itself up to retroactive liability for those actions.

In applying this new rule in the Richmond case, the court set out a number of restrictions on affirmative action and other race-based preferences. Before taking action in favor of a minority group, a local government must establish a well-documented record of past or present discrimination in the local community against qualified minorities. Moreover, the remedy provided must be "narrowly tailored."

a. The Facts Relied on by Richmond  
In attempting to establish the existence of discrimination, Richmond relied primarily on five facts, each of which the court found to be insufficient or irrelevant. The court's treatment of these facts suggests the heavy burden of proof imposed on cities.

First, in the city's view, the set aside requirement was needed to remedy past discrimination. The court found this rationale to be of no significance, stating that the city's declaration of a "benign purpose" should be given "little or no weight."

Second, members of the city council found that the set aside requirement was necessary to correct prior discrimination. The court rejected these assertions as overly generalized, particularly in light of the "suspect" nature of the classification used by the city.

Third, the city relied on the fact that there was a huge disparity between the percentage of its prime contracts which were awarded to black firms and the percentage of blacks in the city (0.67 percent versus 50 percent). The court rejected this argument, stating that the only relevant disparity is the difference between the percentage of contractors who are minority contractors and are qualified to perform the task in question and the percentage of city contracts awarded to minority contractors.

Fourth, only a handful of minority contractors were members of the state and local associations for contractors. The court dismissed this concern, noting that there could be any number of explanations for this disparity, including differences in the respective career choices of blacks and whites and societal discrimination (racial preferences cannot be justified on the basis of societal discrimination). In the court's view, the only fact in this area which could possibly be relevant is the disparity between the number of minority businesses eligible to be members and the number of actual members.

Fifth, when it enacted the 1977 public works bill, Congress found discrimination in the construction industry to be widespread. The court found the value of this evidence to be "extremely limited," stating that a local government must establish the existence of discrimination in its own jurisdiction through its own fact-finding process. The court also noted that a city cannot rely on the findings of a neighboring jurisdiction or a jurisdiction with similar demographic characteristics.

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