

**MINORITY PREFERENCES IN PUBLIC CONTRACTS ©**

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**A. Lowest Responsible Bidder Requirements and Public Contracting Affirmative Action.**

The general guiding principle of public contracting law is the obligation to let public contracts by bid, and to award the contract to the lowest responsible bidder. This concept is codified for all California general law cities, counties and other public entities in California Public Contracts Code §§ 10108, 20162 and 2000. Additionally, this contracting requirement is set forth in various forms in all known charters used by the multitude of California Charter Cities.

The “lowest responsible bidder” has long been defined by California courts to be the “lowest bidder whose offer best responds in quality, fitness and capacity to the particular requirements of the proposed work.” (West v. City of Oakland, (1916) 30 Cal. App. 556, 560 ; City of Inglewood L.A. County Civic Center Authority v. Superior Court, (1972) 7 Cal. 3d 861.) A similar definition was applied in Department of General Services v. Superior Court, (1978) 85 Cal. App. 3d 273. There, the court confirmed that the concept of competitive bidding would transcend any effort to exempt the State Capital Restoration Project from the State Contract Act. This decision is significant because it is one of the early efforts to address the constitutional issues involved in a challenge to a minority business preference program. Relying upon the U.S. Supreme Court’s decision in University of California Regents v. Bakke (1978) 438 U.S. 265; 98 S. Ct. 2733, the Court noted:

“Minority preference, if constitutional at all, must be remedial; directly responsive to demonstrated precedent violation of statutory or constitutional rights. Post hoc justifications, precipitated by litigation are an inadequate substitute for the kind of administrative or legislative findings required to limit the burden cast on non-minorities to the confines of the compelling governmental need.”

Subsequent court decisions struggled with the apparent conflict faced by public contract awarding authorities between their expressed desire to promote affirmative action and equal opportunities and the statutory mandate to let contracts to the lowest responsible bidder. In Associated General Contractors of California v. San Francisco Unified School District (1980) 616 F.2d 1381, the federal Ninth Circuit Court of Appeal struck down a Board of Education policy to award school district construction subcontracts to minority and women business enterprises. The Ninth Circuit found no authority on the part of the Board to enact a policy which “merely represented the Board’s

beliefs on a controversial social question”. (616 F.2d at 1385, n4). The court, however, did not address the constitutionality of the policy and left the question open until its decision in Schmidt v. Oakland Unified School District, (9th Cir. 1981) 662 F. 2d 550 . In Schmidt, plaintiffs challenged the Oakland Unified School District’s policy that, in order to be a “lowest responsible bidder”, a contractor must use minority owned businesses for at least 25% of the dollar amount of its bid. The requirement was subject to numerous exceptions and provided due process for a bidder who could not meet the 25% minority business level.

The court was satisfied that there was evidence that the State of California had shared its authority to redress past discrimination with its school districts. Further, and most important, there was evidence before the court that the plan was adopted to remedy the effects of discrimination in the subcontracting of school projects, and that the school district had been aware of the problem and involved in specific efforts to develop a solution. The court found statistical evidence to support the school district’s findings and the plan itself was tailored to the problem it intended to solve and flexible enough to permit changes and exceptions where necessary.

The only case prior to 1994 which discussed Affirmative Action type programs in relation to a municipal charter low bid requirement was Associated General Contractors Of California v. City and County of San Francisco (9th Cir. 1987) 813 F.2d 922. In the AGCC case, the Ninth Circuit Court of Appeals considered a challenge to an ordinance which contained contract bidding preferences, set-asides and goals for minority-owned, women-owned and locally-owned business enterprises. Appellants, Associated General Contractors of California, claimed that the ordinance requiring City departments to accept bids that were not the lowest, violated San Francisco’s Charter § 7.200 which required that contracts for services and supplies shall be let to the lowest reliable and responsible bidder.

The Ninth Circuit held that the San Francisco program did in fact conflict with the low bid requirement of the City’s charter. In setting forth its findings the Court stated:

“In sum, we conclude that the ordinance violates the city charter insofar as it authorizes the award of contracts that are worth more than \$50,000 and are not covered by charter § 7.204 to other than the lowest responsible bidders. In so far as the ordinance’s bid preferences, subcontracting goals and set asides would result in awards that violate the charter, they are void.” AGCC, supra. at 927.

No other case in California dealt with the potential conflict between a charter low bid requirement and a municipality’s affirmative action program until the City of Los Angeles was sued on its subcontractor outreach program in 1993, which will be discussed in detail, infra.

## **B. The Croson Decision and its Effect on Affirmative Action in Public Contracting.**

The watershed case affecting municipalities in the area of affirmative action in public contracting is most assuredly City of Richmond v. J.A. Croson Co., (1989) 488 U.S. 469. While not demonstrating unanimity in its approach to affirmative action in public contracting, (there were multiple plurality opinions by the majority and a spirited dissent), the United States Supreme Court in Croson clearly and unmistakably changed how municipalities must harmonize their desire for affirmative action and for equal opportunities with the equal protection clause of the Constitution.

First, the court in Croson affirmatively established that strict scrutiny, the most stringent level of judicial review, was in fact the level of scrutiny required to be applied by a reviewing court where race, a suspect classification, was involved in the matter before the court. Historically, courts had reached differing results discussing the level of judicial scrutiny to be applied to race-conscious programs, first applying in various cases the intermediate scrutiny test (Fullilove v. Klutznick (1980) 448 U.S. 448; Metro Broadcasting v. FCC (1990) 497 U.S. 547) and ultimately evolving to the present strict scrutiny standard. (Croson, Supra; Adarand Constructors, Inc. v. Peña (1995) 515 U.S. 132 L. Ed. 2d 158; 115 S. Ct. 2097 [applying the same strict scrutiny analysis as in Croson to race-conscious affirmative action programs developed by the federal government]).

Croson took all the mystery and flexibility out of the issue. Post Croson, if a municipality has an affirmative action program, public contracting or otherwise, and the program in any manner is race-conscious, strict scrutiny must be applied by any court reviewing the program under an equal protection challenge.

“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.” Croson, supra, at 493.

Accordingly, it is of paramount importance, and legally mandated, that a legislative body justify any race-conscious program with a lot more than just noble motives.

The second major impact of Croson on municipal public contracting affirmative action programs is the now unambiguous requirement that any race-conscious affirmative action program must be remedial in nature and must be supported by clear evidence of past racial discrimination, which the program must be narrowly tailored to remedy. This requirement has led to the need for municipalities who wish to conduct a race-conscious public contracting affirmative action program to conduct a “predicate” or

**“Croson” study to establish the requisite evidence necessary to demonstrate past discrimination. This requirement has proven to be one which is not easily met considering a municipality’s inherently difficult task of collecting and correlating mostly anecdotal evidence of past discrimination in the public contracting arena.**

**Having essentially eviscerated local and state control over affirmative action in public contracting, the United States Supreme Court has left municipalities with only two choices; either comply with the stringent requirements of Croson or find a non race-conscious method to achieve the public policy goals of affirmative action and equal opportunity in the area of public contracting. The Supreme Court stated its preference for race-neutral means in Justice O’Connor’s opinion for the plurality in Croson by stating that:**

**“there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting... Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race-neutral. If MBE’s disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation... There is no evidence in the record that the city has considered any alternatives to race-based quota.” Croson, 488 U.S. at 507.**

**As will be discussed below, the City of Los Angeles’ Subcontractor Outreach Program is such a race-neutral method that has shown positive results in accomplishing the City’s goal of expanding levels of participation by MBE/WBE/OBE’s in its contracting process.**

### **C. The City of Los Angeles’ Response to Croson.**

**The City of Los Angeles established a program to encourage the participation of Minority Business Enterprises (“MBEs”) and Women Business Enterprises (“WBEs”) as subcontractors on its public contracts in 1983. The City’s program, as set forth in Mayor’s Directive 1B, was essentially a mirror image of Public Contract Code §2000. A prime contractor could qualify to be awarded a City contract by either meeting established MBE and WBE subcontracting goals for the contract or if it failed to hire the requisite percentage of certified MBE and WBE subcontractors, it could qualify for the contract if it provided evidence that it had made a “good faith effort” to meet the goals. The contractor’s good faith effort was evaluated against 10 points, essentially the same 10 points set forth in Public Contract Code §2000, and if it passed, it was eligible for award of the contract, regardless of its actual MBE and WBE participation levels.**

Obviously, Croson required a change in this approach. In an effort to comply with the new mandates set forth by the Supreme Court the City modified its program. In Executive Directive 1C, the City's Mayor, on advice from the City Attorney, changed its program to a strict good faith effort test. What the City did was to eliminate the MBE and WBE goals from its program and require all prime contractors to conduct good faith outreach to all types of subcontractors, MBEs, WBEs and "Other Business Enterprises" ("OBEs"). For a contractor to qualify for award of a City contract it had to demonstrate that it had made a good faith effort to reach out to all types of subcontractors. Each good faith effort was evaluated against 9 of the ten points contained in the previous program. The tenth point, meeting the MBE/WBE goals was obviously no longer viable after Croson. Under the City's post Croson program a contractor who does the good faith effort outreach but achieves no MBE or WBE participation is still eligible for award and reciprocally, a contractor who achieves a large percentage of MBE and/or WBE participation but fails to conduct the good faith outreach is not eligible for award.

It was the City's belief that its revamped MBE/WBE/OBE Subcontractor Outreach Program would be the type of program that the courts would find acceptable and not susceptible to statutory or constitutional challenges. In his concurring opinion in Croson Justice Scalia stated that, "the state can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race."Croson, supra, 488 U. S. at 526.

The outreach effort under the City's program first entails the City department specifying an achievable, anticipated level of participation for MBEs and WBEs for the sole purpose of giving contractors a target which a good faith effort could reasonably achieve. To be eligible for award of a contract a bidder or proposer must attain at least 75 out of 100 points in their good faith effort by complying with the 9 indicia of good faith set forth in the Mayor's Directive 1B. These include: attending a pre-bid meeting; breaking the project up into parts which can be subcontracted, inviting qualified MBEs, WBEs and OBEs to submit sub-bids; advertising in several publications; contacting community or contracting organizations who can identify qualified MBEs, WBEs and OBEs; following up on all inquiries by MBEs, WBEs and OBEs; and most importantly, negotiating with all potential subcontractors in good faith. City departments rate each of the nine elements of the bidder's or proposer's good faith effort on a pass /fail basis. A department cannot reject a bid or proposal solely because the bidder did not meet the anticipated levels of participation.

As further proof that no good deed goes unpunished, the City's post Croson MBE/WBE/OBE Subcontractor Outreach Program was eventually challenged by a bidder who failed to submit evidence of its good faith effort to the City's Board of Public Works within three working days as specified in the bid documents. The bidder, Domar Electric, Inc. challenged the City's outreach program on three grounds :(1) that the program

violated the low bid requirements of the City Charter; (2) that the program violated the Equal Protection Clause of the United States Constitution and the Supreme Court's decision in Croson ; and (3) the outreach program was preempted by California Public Contract Code §2000 and was inconsistent with the requirements of §2000.

In October of 1993, the California Court of Appeal, Division 2, found the City's outreach program violated the low bid requirement in the City's charter. The court essentially believed that because the City's charter did not expressly allow a subcontractor outreach program that the City was precluded from requiring all its bidders to perform outreach to be eligible for award of City contracts.

In December, 1994, by a 6 to 1 majority, the California Supreme Court reversed the Court of Appeal and found that the City's Subcontractor Outreach Program was consistent with the intent of the charter's low bid requirement and was therefore a valid prerequisite for award of a City contract. (Domar Electric, Inc. v. City of Los Angeles, (1994) 9 Cal.4th 161, 885 P.2d 934.) The Supreme Court opinion was fairly effusive with its description of the City's program stating at various points in its opinion:

“As the United States Court of Appeal for the Ninth Circuit recognized, perhaps the most important goal of competitive bidding is to protect against ‘insufficient competition to assure that the government gets the most work for the least money.’ (Citation) Mandatory set-asides and bid preferences work against this goal by narrowing the range of acceptable bidders solely on the basis of their particular class. In stark contrast, requiring prime contractors to reach out to all types of subcontracting enterprises broadens the pool of participants in the bid process, thereby guarding against the possibility of insufficient competition.” Domar, supra, at 177.

“This is precisely what the outreach program aims to do in requiring prime contractors to provide MBE's, WBE's and OBE's an equal opportunity to compete for and participate in the performance of all city contracts.” Domar, supra, at 173 to 174.

“Thus, the program provides no incentive to a bidder to use MBE's or WBE's if they are inferior in cost or ability, and the market for public contracts among subcontractors remains a level playing field.” Domar, supra, at 175.

“However, as the record makes clear, the program has a broad focus, requiring outreach to all types of subcontracting enterprises -- MBE's, WBE's and OBE's.” Domar, supra, Footnote 8 at 175.

The Supreme Court was only able to reach the single issue of the alleged conflict between the low bid, City charter requirement and the subcontractor outreach requirement because the Court of Appeal chose not to reach the other two issues raised by Domar when the case was originally before it. The Supreme Court was therefore forced to remand the case back to the Court of Appeal for consideration of Domar's equal protection and Public Contract Code §2000 arguments.

Cognizant of having been recently reversed and aware of the Supreme Court's clear preference for the City's outreach program, the Court of Appeal rendered its second opinion in the Domar case, this time upholding the validity of the City's Subcontractor Outreach Program. (Domar Electric, Inc. v. City of Los Angeles, (1995) 41 Cal.App. 4th. 810. The Court found that the City was subject to the requirements of Public Contract Code §2000, but also held that the outreach program was wholly consistent with the requirements of §2000. Further, the Court of Appeal found Domar's equal protection argument to be totally without merit because the City's program was "race and gender neutral". The court stated:

"The outreach program does not require that certain categories of subcontractors be the beneficiaries of a prime contractor's efforts, nor does it require that certain categories of subcontractors be granted any type of preference. As such, it does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution." Domar II at 827.

According to both the California Supreme Court and Court of Appeal in their decisions in the Domar case, the City's MBE/WBE/OBE Subcontractor Outreach Program does not favor any person or group over any other, promotes competition, and is race and gender neutral. The City's outreach program is therefore exempt from the stringent requirements set forth by the United States Supreme Court in Croson regarding race-conscious affirmative action programs.

The Domar case clearly establishes a viable, race-neutral alternative for municipalities wishing to promote the participation of minority and women owned businesses in public contracting, without the need for establishing a pattern of past discrimination to justify a race-conscious program subject to the hurdles presented by Croson. All cities in California are now free to conduct outreach to all potential subcontractors without the fear of costly and time-consuming litigation.

**D. Adarand and its Impact.**

The Supreme Court decision in, Adarand Constructors, Inc. v. Peña Secretary of Transportation (1995) 515 U.S. 132 L.Ed. 2d 158, 115 S. Ct. 2097 crystallized the constitutional standard for all federal governmental race-conscious affirmative action programs. Adarand held that all race-conscious government classifications are presumptively invalid and will be subject to strict scrutiny by a reviewing court. In so declaring, the Court reviewed an MBE/WBE program for federal highway contracts where preferences were given to prime contractors that sub-contracted with qualified MBEs . Adarand Constructors was passed over for the sub-contract in favor of an MBE and Adarand filed suit. The Court held that absent a compelling governmental interest and a narrowly-tailored program to meet that interest, the minority preference program would be struck down as unconstitutional. Accordingly, the Court in Adarand remanded the case to the lower court for such determination. Adarand essentially did to the federal government what Croson did to municipalities.

Together with City of Richmond v. Croson, Adarand conclusively affirms that all government programs which provide a preference or advantage to one racial group over another will be subject to the strict scrutiny of a reviewing court. Municipalities seeking to expand the universe of qualified responsible bidders are therefore well advised to fashion their contract bidding programs in a manner consistent with the strict edict of the Croson and Adarand decisions or develop race-neutral programs that will accomplish the agency's goals of attracting bids from qualified MBE/WBE's.

**E. The Impact of The California Civil Rights Initiative ("CCRI") on MBE/WBE/ OBE Outreach Programs.**

Race and gender neutral outreach programs like the City of Los Angeles' are clearly safe from a federal constitutional equal protection challenge and the same may also be said of a challenge under the California Civil Rights Initiative ("Proposition 209") now contained in the California Constitution, Article I, Section 31. Although CCRI's main objective was to eliminate affirmative action all together in California, the City's outreach program as a "race-neutral" alternative to race-conscious preferences in public contracting is arguably outside the sphere of influence of the CCRI's ban on race or gender preferences. Further support for this proposition can be found in Justice O'Connor's lead opinion in Croson where a plurality of the Court essentially endorsed the use of race-neutral means by municipalities to achieve increased MBE/WBE participation in government contracts.

In clear, unambiguous language, the California Constitution now bans all race, sex, color, ethnicity or national-origin-based preferences in public employment, public education and public contracting. The approval of Proposition 209 by the voters in

California and the lack of a successful legal challenge to the Initiative's language has had a profound effect on the operation of municipal affirmative action policies and programs. In Hi-Voltage Wire Works, Inc. et al. v. City of San Jose et al. (2000) 24 Cal 4th 537; 12 P. 3rd 1068, the California Supreme Court invalidated the City of San Jose's MBE/WBE program under the California Constitution, Art. I, Section 31.

“To summarize, the City’s own description of its Program---requiring that a responsive bid contain either a sufficient number of MBE/WBE subcontractors or documentation of outreach---demonstrates its invalidity under section 31. (Citation) Satisfying the participation option discriminates against non-MBE’s/WBE’s on the basis of race and sex in the operation of public contracting to the extent the prime contractor utilizes sufficient MBE/WBE subcontractors to meet the City’s evidentiary presumption. Satisfying the outreach option grants preferential treatment because prime contractors must notify, solicit bids from, and negotiate with MBE’s and WBE’s, but may exclude non-MBE’s/WBE’s. If a contractor fails to satisfy either option, the City discriminates on the basis of race and sex by rejecting its bid out of hand even, as is this case, when that bid is the lowest otherwise responsive submission.

This result is precisely what the voters were told Proposition 209 would prohibit.” (Hi-Voltage., *supra.* at 564)

Obviously, the passage of Proposition 209 has added an additional hurdle for any Municipal MBE/WBE program to navigate in order to be found valid. Any such program that in any manner utilizes race or gender in its operation will, most assuredly, be found legally insufficient. While the Court in Hi-Voltage did not directly rule that the City of Los Angeles’ program as validated in Domar I and Domar II pre-Proposition 209, would survive a Proposition 209 challenge, it certainly alluded to such a result in its majority opinion. Also, in his concurring and dissenting opinion, Justice George used the Los Angeles program as an example of acceptable outreach and stated:

“Such pro-active efforts need not necessarily involve race-conscious or gender-conscious measures, but rather can include efforts relating to broad, general outreach to the entire community, including portions of the community that have not been solicited or granted access in the past. The outreach program that was before this court in *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal. 4th 161, requiring contractors bidding public contracts to undertake ‘reasonable good faith outreach to all types of subcontractor enterprises’ (*id.* at p. 174), provides a good example of a general, nontargeted outreach program that ordinarily would be considered an affirmative action program.” (Hi-Voltage at 594)

Although by its terms, the CCRI has no effect on existing consent decrees

and court orders, the Initiative can be interpreted as barring municipalities from entering into future consent decrees granting race or gender based preferences, specifically those which would resolve state court litigation.

Moreover, the California State Constitution now almost certainly prevents municipalities from anticipating future liability by voluntarily utilizing affirmative action remedies where race or sex factors are treated in a preferential manner. Thus, municipalities are limited in the manner they choose to address situations which they encounter in the future which would otherwise support the use of race or sex-conscious measures to bridge an underutilization gap of under-represented groups in contracting or employment.

F. Conclusion

The City of Los Angeles' Subcontractor Outreach Program is not a "preference" program and does not favor a certain classification of bidder over another because of race or sex. As such, the program has not been seriously challenged since the passage of Proposition 209. A plaintiff recently did seek Judicial review of the City's program but was rebuffed by the trial court on a motion for summary judgement. Although part of the Domar litigation focused on a Federal Equal Protection Clause challenge to the City of Los Angeles' Executive Directive 1-B and 1-C Subcontractor Outreach Program, the Court of Appeal's conclusion that the program was "race and gender-neutral" and called for "no preferences, quotas or set-asides" has helped insulate the program from a State Constitutional attack after the adoption of Proposition 209. Finally, as mentioned earlier in this paper, the Supreme Court's Croson opinion specifically endorses the use of race-neutral efforts by municipalities as a means of increasing MBE and WBE participation in the economic benefits flowing from public contracts.