Affirmative Action and Governmental Procurement Policies: The Rules of the Game Have Changed

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Abstract

State and local governments have adopted hundreds of affirmative action programs that set-aside a percentage of government procurements for minority-owned businesses. For a number of years, these programs were commonly upheld based upon certain relatively relaxed constitutional rules. Recently, however, the Supreme Court articulated stringent new rules that will significantly curtail future programs of this nature. Governmental procurement policies must be quickly altered to accommodate these new constitutional limitations.

I. Introduction

The past ten years have witnessed a proliferation of hundreds of state and local governmental programs that provide preferential treatment for minority-owned business enterprises (MBEs) in connection with awarding government procurement contracts (Bates, 1985; "The Nonperpetuation of Discrimination," 1988, p. 1797; "Stigmatic Harm," 1989). Although subject to intense controversy ("Court in the Middle," 1989), there is evidence that these programs have enabled MBEs to become established and succeed which they otherwise could not have done (Blake, 1987). As a direct result of the Supreme Court's recent decision in City of Richmond v. J.A. Croson Co.(Croson) (1989), however, many MBEs must quickly learn to survive without as much, and in many cases without any, preferential treatment regarding governmental procurement contracts. Public administrators must also recognize that it is no longer business as usual regarding affirmative action in governmental procurement policies. The rules of the game have changed.

This article initially provides an overview of the structure and the rationale for voluntary state and local government set-aside programs for MBEs (set-aside programs). An analysis is then provided of the rules pursuant to which set-aside programs previously conformed and the newly articulated constitutional rules that set-aside programs must satisfy. Finally, the implications that these new constitutional standards portend for state and local governments and MBEs are explored.

II. An Overview of Set-Aside Programs

A. Structure of Set-Aside Programs

Although the structure of set-aside programs may vary, these programs typically share certain characteristics. As a condition to being awarded prime contracts for certain government projects, set-aside programs typically require nonminority prime contractors to subcontract a certain percentage of the dollar amount of each prime contract to qualified MBEs. Days (1987) suggests that the percentages subcontracted to MBEs range from rather nominal amounts such as 5% to as high as 50%. Most programs, however, provide waivers for prime contractors if MBEs are unavailable and in certain other situations (see Croson, 1989).

The Richmond, Virginia set-aside program involved in Croson (the Richmond Plan) is representative of most set-aside programs in defining MBEs as businesses at least 50% of which are owned and controlled by particular minorities (Croson, 1989). In recent years, increasingly rigorous certification procedures have been incorporated into many programs to assure that MBEs are actually minority-owned and are not merely "fronts," that is, businesses owned by nonminorities posing as MBEs in order to qualify for set-aside preferences (see Robson, 1986). Historically, the problem of fronts in MBE programs has been significant. For instance, Suggs (1985) suggests that fronts may have accounted

for 25% to 40% of MBEs that have been awarded contracts under certain programs.

Set-aside programs vary considerably in their designation of what businesses qualify for preferential treatment. Some programs, such as the Wisconsin program in Milwaukee County Pavers v. Fieldler (1989, pp. 1023-1027), prefer "disadvantaged" businesses that are largely, but not exclusively, comprised of MBEs. Other programs prefer specific minorities, and many programs such as the Richmond Plan are relatively all-inclusive defining qualifying minority members as "'[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts'" (Croson, 1989, p. 709). Many set-aside programs also extend preferential treatment to businesses owned and controlled by women (WBEs). The validity of programs that benefit WBEs, however, are subject to a different, and less stringent, constitutional standard (Woodside & Marx, 1988, p. 380) and are not addressed in this article.

The final significant attributes of set-aside programs relate to their scope and duration. Some programs only pertain to specific government procurement contracts or projects. The Public Works Employment Act of 1977 which reserved for MBEs 10%, or $400 million, of federal funding for certain public works projects is representative of many federal programs that target specific contracts or projects for preferential treatment of MBEs. In contrast, the Richmond Plan is representative of many state or local programs that either subject all governmental procurement contracts to set-aside preferences, or subject all contracts of a particular nature, such as public construction projects, to preferential treatment (Croson, 1989). Most state or local set-aside programs are also adopted for a limited period of time comparable to the five-year period adopted for the Richmond Plan in Croson (1989).

B. Rationale for Set-Aside Programs

The harsh reality is that small businesses, including MBEs, are frequently unable to effectively compete with their larger, more experienced, and better capitalized brethren for large public and private contracts (see Porter & Porter, 1983; Robson, 1986; "The State of Small Business," 1988). Robson (1986) observes that this disparity to some extent is simply the result of normal market forces. MBEs, however, also have been severely hampered by virtually insurmountable impediments attributable solely to the color of their skin.

The racial obstacles confronting MBEs include discrimination in the awarding of governmental procurement contracts or related subcontracts. At least one report also suggests that relatively widespread discrimination by bankers and bonding companies has significantly hurt the success of MBEs ("The Nonperpetuation of Discrimination," 1988, pp. 1807-1808). Similarly, numerous MBEs are disadvantaged as a result of the lingering effects of societal discrimination in education, housing, and training (Blake, 1987, p. 39; "The Nonperpetuation of Discrimination," 1988). This societal discrimination, in turn, deprives MBEs of the opportunity to develop the personal, social, and business contacts that frequently facilitate obtaining governmental procurement contracts or related subcontracts.

The cumulative effect of the foregoing discriminatory forces on the success rate of MBEs has frequently been devastating. For example, in Richmond, Virginia during the period 1978 - 1983, less than 1% of the city's prime construction contracts were awarded to MBEs even though nearly 50% of Richmond's population was Black (Croson, 1989). Moreover, laws prohibiting discrimination in both the awarding of public contracts and employment practices of employers often have proven ineffectual in surmounting these racially-induced impediments (Croson, 1989, p. 726). As a consequence, many public entities have determined that affirmative action in connection with governmental procurement contracts is necessary to assist MBEs.

Notwithstanding the meritorious purposes of MBE programs and their recent popularity among state and local governments, these programs are imperiled by the Supreme Court's recent decision in Croson. The magnitude of this peril and the implications that it portends for state and local governments and MBEs can be fully appreciated only if one first understands the rules by which set-asides previously operated and the new rules that will govern them in the future.

III. Set-Aside Programs: The Rules of the Game -- Past and Present

A. The Name of the Game: Are Set-Aside Programs Constitutional? An Issue of Equal Protection

Set-aside programs have been subjected to extensive legal challenge since their inception (see Sculnick, 1988). The grounds for such legal challenges have generally fallen into one of two categories. First,

numerous set-aside programs have been challenged on the ground that they violate state or local laws. In particular, several programs have been invalidated as violations of laws that require government bids to be awarded to the lowest bidder ("Atlanta Set Aside Plan Nixed," 1984; "The Nonperpetuation of Discrimination," 1988, p. 1798). The more ominous danger for set-aside programs, however, is that they may violate the fourteenth amendment's guarantee of equal protection.

The constitutional argument against set-aside programs is that these programs deny government benefits and opportunities to nonminority businesspersons solely on the basis of their race. Thus, opponents of MBE programs generally would agree with Justice Scalia's position in Croson (1989, pp. 735-739) that these programs violate equal protection by failing to treat all individuals equally and in a "color-blind" fashion.

Proponents of set-aside programs, on the other hand, maintain that these programs merely redress MBEs for present and past racial discrimination, and prevent the government's procurement policies from contributing to discrimination's perpetuation (see Days, 1987, p. 454; "The Nonperpetuation of Discrimination," 1988). Advocates of MBE programs argue, therefore, that the preferences accorded by these programs are constitutionally defensible because they are necessary for MBEs to realize equal protection as mandated by the fourteenth amendment ("The Supreme Court," 1980, pp. 129-130). Persons endorsing this position would agree with Kubasek & Giapetro (1987) that the good resulting from affirmative action for minorities outweighs the limited disadvantages that nonminorities experience under these programs. Set-aside proponents are equally convinced that affirmative action programs do not violate distributive ethics (see Nalbandian, 1989, pp. 41-42). As reasoned by Kubasek & Giapetro (1987) in connection with affirmative action programs in general, it is permissible to prefer minorities because minorities and nonminorities are not truly equal due to the effects of discrimination.

B. The Old Rules of the Game: The Perceived Constitutionality of Set-Aside Programs Under Pre-Croson Law

The Supreme Court never addressed the constitutionality of state and local MBE programs before Croson which was rendered in 1989. Prior to this time, state and local governments by necessity attempted to deduce the constitutional rules for set-asides from other Supreme Court affirmative action decisions (Hsieh, 1986, pp. 77-82). The overwhelming choice of state and local governments was Fullilove v. Klutznick (Fullilove) (1980).

The Supreme Court's 1980 decision in Fullilove upheld Congress' power to require states to implement race-conscious set-aside programs as a condition for receiving federal funding for local public works projects. While Fullilove largely turned on the question of congressional power to enact race- and ethnic-conscious programs, hundreds of state and local governments erroneously read Fullilove to also generally validate state and local programs (see Days, 1987, p. 454). Moreover, these state and local government bodies purposefully patterned their set-aside programs after the federal program addressed and constitutionally vindicated in Fullilove (see Days, 1987; "The Nonperpetuation of Discrimination," 1988, p. 1797). The consensus of state and local government officials clearly was that Fullilove established the constitutional rules for their set-aside programs.

As Bohrer (1981, p. 511) observed shortly after Fullilove was rendered, "[e]qual protection analysis is in chaos." And so it was. The Supreme Court in Fullilove was hopelessly divided regarding virtually every significant rule of constitutional law as it applied to race-conscious affirmative action programs (see Croson, 1989, p. 743). Nonetheless, Fullilove was perceived by many state and local government actors as definitively enunciating rules for their set-aside programs. In turn, these perceived rules largely dictated how state and local set-aside programs were devised and implemented during the 1980s (see Croson, 1989, p. 754).

Fullilove was interpreted by many state and local governments as establishing the following rules:

1. Standard of Constitutional Review: The standard of constitutional review for race-conscious affirmative action programs, such as MBE programs, is less rigorous than the traditional strict scrutiny standard of review. The constitutional standards seemingly endorsed in Fullilove were sufficiently relaxed to permit a wide range of set-asides during much of the 1980s. Set-aside programs were viewed as being free from strict scrutiny, which historically invalidated all race- and ethnic-conscious programs excepting only the infamous programs for the internment of Japanese-Americans during World War II (see Bohrer, 1981, p. 475).

2. Competency to Use Set-Aside Programs to Remedy

Discrimination: State and local governments, as well as Congress, have the legal power to take remedial actions to redress actions that deny equal protection to racial and ethnic minorities ("The Supreme Court," 1980, pp. 134-135). Under appropriate circumstances, these remedial actions may include the use of race-conscious affirmative action programs, such as MBE set-aside programs (see Fullilove, 1980).

3. Particular Purposes Justifying Use of Set-Aside Programs: Race-conscious affirmative action programs may be undertaken to redress the effects of past, generalized discrimination that has occurred in particular industries, and to prevent the government's procurement policies from perpetuating the effects of discrimination ("The Supreme Court," 1980, pp. 127-132). For example, in Fullilove (1980, pp. 477-478), the Supreme Court upheld the congressionally-authorized MBE program that was adopted to rectify a longstanding, nationwide pattern of societal discrimination against MBEs in the construction industry.

4. Required Evidence of Discrimination: The Supreme Court in Fullilove (1980) held that some findings of discrimination must be made to justify a set-aside program, but such findings may be rather general. Statements by government officials recognizing both a general, national pattern of racial discrimination over the past 200 years, and a significant disparity between the percentage of MBEs in the nation and the percentage of Blacks in the national population was sufficient evidence in Fullilove (1980, pp. 477-478) to establish remediable discrimination.

5. Required Precision of Set-Aside Programs: Set-aside programs must be reasonably related to accomplishing their remedial purposes and should not be overly expansive ("The Supreme Court," 1980). Nonetheless, considerable imprecision in structuring set-aside programs is tolerated. This laxity is exemplified by the MBE program in Fullilove (1980) that was determined sufficiently tailored because the 10% preference granted MBEs was roughly half-way between the 4% MBE presence in the national market and the 17% Black population in the nation.

During the period 1980 through 1985, it appeared that state and local governments were generally correct in their assessment of Fullilove. During this period, several state and local set-aside programs were determined by lower courts not to violate the equal protection clause (see "The Nonperpetuation of Discrimination," 1988). In 1986, however, the Supreme Court decided Wygant v. Jackson Board of Education (Wygant) (1986). In Wygant, the Supreme Court declared unconstitutional a race-conscious, employment affirmative action plan and the Court did not specifically address set-asides. Wygant, however, was interpreted by some as calling into question the constitutionality of state and local set-aside programs that were premised upon Fullilove. In fact, nearly all state and local set-aside programs challenged after Wygant were negated by lower federal courts as violations of equal protection (see Associated General Contractors v. San Francisco, 1987; Michigan Road Builder's Association v. Milliken, 1989). State and local governments and MBEs, however, generally continued to operate under the fairly relaxed constitutional rules perceived from Fullilove. The stage was now set for Croson.

C. The New Rules of the Game: The Constitutionality of Set-Aside Programs After Croson

Croson was the perfect candidate to test the validity, and continued vitality, of the old rules pursuant to which most state and local set-aside programs had been devised and operated during the 1980s. The Richmond Plan in Croson was representative of many other state and local set-aside programs. More importantly, the Richmond Plan was also essentially a replica of the federal program upheld in Fullilove.

The Supreme Court in Croson (1989, p. 730) struck down the Richmond Plan as a violation of the equal protection clause. In doing so, the Court specifically addressed, and in many instances changed, the perceived rules pursuant to which the Richmond Plan had been conceived and operated. The new rules of the game for voluntary state and local set-aside programs for MBEs as stated in Croson can be summarized as follows:

1. Standard of Review: For the first time, a majority of the Supreme Court has determined that set-aside programs are subject to the strict scrutiny standard of constitutional review (Croson, 1989, pp. 721, 735). This standard of review is the most rigorous of all standards of constitutional review and requires compelling governmental interests to use race-conscious remedies and further requires that the remedies closely fit the goals to be obtained (Croson, 1989). The more relaxed and permissive standard of review of Fullilove does not apply to state and local set-aside programs.

2. Competency to Use Set-Aside Programs to Remedy

Discrimination: The Court in Croson reaffirms that states and cities may act to ameliorate public discrimination. Croson (1989), however, marks the first time that a majority of the Court has confirmed that states also have the authority to eradicate the effects of private discrimination within the bounds of their jurisdiction. Importantly, the Court acknowledges in Croson (1989) that in extreme cases, race-conscious set-aside programs may be utilized to prevent or eradicate the effects of certain types of discrimination, but only if such actions are undertaken in strict conformance with the dictates of equal protection.

3. Particular Purposes Justifying Use of Set-Aside Programs: Compelling governmental interests are required to justify state and local governmental programs that grant preferential treatment to persons because of their race. This limitation applies whether minorities or nonminorities are the beneficiaries of such preferential treatment (Croson, 1989, pp. 720-721, 735). Thus, compelling interests are needed to justify any state or local race-conscious, economic affirmative action plan, including MBE programs.

In the context of set-aside programs, the Supreme Court in Croson (1989, pp. 720, 729-730) recognizes that a sufficiently compelling interest may be to rectify the effects of identified discrimination within a respective jurisdiction. Such identified discrimination includes eliminating or rectifying the effects of prior identified discrimination by the government body itself, or by private businesses. Importantly, states and their subdivisions may also utilize set-asides to prevent their procurement policies from exacerbating the effects of past discrimination (Croson, 1989, p. 720). In addition, a state or local body is justified in taking appropriate action against individual firms that are racially motivated in refusing to deal with MBEs and to provide appropriate relief to the victim.

Set-aside programs are not justified by generalized allegations of past discrimination within a given industry or locale, nor if the MBEs' disadvantages are merely the result of past societal discrimination in general (Croson, 1989, pp. 723-728). Thus, the fact that MBEs continue to be disadvantaged because of non-specific discrimination in an industry or because of discrimination in housing, education, or training, is insufficient to justify adopting an MBE program. The significance of this departure from the perceived rules of Fullilove becomes clear when one recognizes that virtually every state and local set-aside program contested in recent years was justified on the basis of one of the two foregoing rationales and, therefore, would fall prey to the new constitutional rules of Croson (see Associated General Contractors v. San Francisco, 1987; Michigan Road Builder's Association v. Milliken, 1989).

4. Required Evidence of Discrimination: State and local governments must identify remedial discrimination with "some specificity" before they may use MBE set-asides (Croson, 1989, p. 727). The Supreme Court indicates that this required level of evidence requires proof of discrimination nearly equivalent to that necessary for establishing "a prima facie case of a constitutional or statutory violation" (Croson, 1989, p. 727). The Richmond Plan in Croson largely failed because the City of Richmond could not satisfy this evidentiary requirement. Interestingly, the congressionally-mandated set-aside in Fullilove also would have failed this significantly more exacting evidentiary standard.

Not only did the Court in Croson change the rules regarding the amount of evidence required to establish that remediable discrimination has occurred, but the Court additionally changed the rules regarding what facts have probative value in meeting this requirement (Croson, 1989, pp. 723-728). Generalized allegations of past discrimination in the subject jurisdiction or in other states or municipalities are no longer sufficient. Statements by government officials that a set-aside is being adopted for benign or remedial purposes are also of virtually no value. Similarly, a significant disparity between the percentage of public contracts awarded MBEs, or the percentage of MBEs in local trade associations, as compared to the minority's percentage of the general population is of very little evidentiary value. Instead, convincing evidence is required to establish that past identified discrimination, and not race-neutral factors or societal discrimination, caused the dearth of MBEs. Due to the skilled nature of the work performed by most MBEs, this hard evidence of discriminatory exclusion will frequently rely upon gross statistical disparities between the percentage of contracts awarded MBEs and the percentage of MBEs in the relevant work-area that are competent to perform the required work. The absence of this type of gross statistical disparity contributed significantly to the downfall of both the Richmond Plan in Croson, and several other state and municipal MBE programs that have been invalidated by federal appellate courts in other recent decisions (see Associated General Contractors v. San Francisco, 1987; Michigan Road Builder's Association v. Milliken, 1989).

5. Required Precision of Set-Aside Programs: The Supreme Court dictates in Croson that set-aside programs must be narrowly tailored to the goal sought to be accomplished. Virtually no imprecision will be tolerated. Additionally, state and local governments should at least consider, and perhaps exhaust, race-neutral remedial actions prior to adopting set-aside programs. The Court in Croson (1989) also strongly suggests that set-aside programs should be structured to identify the specific class of MBEs that have actually suffered from the past discrimination and to tailor the program to help them, as opposed to utilizing some other program structure that may only be administratively expedient. It is additionally necessary that MBE programs incorporate administrative procedures to safeguard against misapplications of programs and to prevent undeserving MBEs or fronts from abusing the programs (see United States v. Paradise, 1987, p. 171). Set-aside programs also must consider a program's impact upon nonminority businesses.

IV. Implications of the New Rules of the Game

The precise impact that the new constitutional rules for set-aside programs will have upon state and local governments and MBEs is not absolutely certain. At this juncture, however, the rules stated in Croson provide significant insight into at least certain repercussions.

Justice Marshall observes in his Croson (1989) dissent that the validity of numerous set-aside programs are called into question by the new rules articulated in Croson. Some of these programs have already been, and will continue to be, voluntarily rescinded or amended. Yet other programs will be judicially invalidated as was Michigan's MBE program in Michigan Road Builder's Association v. Milliken (1989). It is unlikely, however, that Croson spells the complete demise of set-aside programs as one commentator has predicted ("Stigmatic harm," 1989).

Strict scrutiny is a "daunting standard" for state and local governments to satisfy (Croson, 1989, p. 754). However, this standard is not intended to "preclude a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction" (Croson, 1989, p. 729). Certain political bodies that previously have been antagonistic towards affirmative action programs (see Daniel, 1988), may use the new rules as a convenient excuse to jettison unwanted programs. The impressive number of set-aside programs that have recently been adopted suggests, however, that continuing support for these programs will induce many governmental bodies to modify their programs to conform to the strictures of Croson rather than to abandon this type of program altogether. At least one municipality already has done so (Flynn, 1989).

Public administrators must be particularly sensitive to several factors in conforming their future set-aside programs to the requirements of Croson. Programs can be adopted only after the public actor has sufficiently identified discrimination against the particular class of MBEs to be preferred and has considered, and found unsatisfactory, other nonracial alternatives. This in turn necessitates that administrators implement comprehensive and detailed data collection procedures that enable the public body to identify the percentage of governmental procurement contracts (including both prime contracts and subcontracts) that are awarded MBEs, and to identify the percentage of MBEs in the industry that can perform this work. The fact the MBEs have historically suffered from unidentifiable discrimination in an industry or that minorities in general have been discriminated against is no longer sufficient. Public administrators also must institute procedures to assure that only bona fide, deserving classes of MBEs are preferred. It is equally essential that officials monitor a program to verify that it continues to be justified, and that the program effectively pursues its remedial purposes. A program that fails to undertake any of the foregoing administrative steps will surely fail under the new Croson rules.

The financial and entrepreneurial fallout for MBEs resulting from the new constitutional rules for set-aside programs is substantial. For example, in response to the new rules articulated in Croson, Denver, Colorado has temporarily cut back on its set-aside program for MBEs and WBEs from an estimated 37% of public works contracts to an estimated 16% of these contracts (Flynn, 1989). Although some set-aside reductions may be offset with alternative, constitutional programs that benefit all disadvantaged or small businesses (see Milwaukee County Pavers v. Fieldler (1989), it is clear that MBEs must prepare for a significant loss of income resulting from discontinued or scaled-back set-aside programs.

Because income from set-asides comprises a substantial portion of the income of some MBEs (see Dingle, 1985), the elimination or reduction of set-aside programs will inevitably result in the failure of some MBEs. For yet other MBEs that have only been contemplated, but not yet established, the new limitations enunciated in

Croson ensure that they will never be undertaken (see Blake, 1987). The potentially devastating impact that Croson portends for the entrepreneurial efforts of many MBEs can be blunted only if MBEs actively assist their governmental benefactors in defending set-aside programs and in devising alternative programs that may assist them to become established and to succeed.

V. Conclusion

The rules have changed. Voluntary state and local set-aside programs for MBEs will henceforth be subjected to rigorous constitutional scrutiny. This new level of constitutional scrutiny will inevitably lead to a reduction in the number and scope of many set-aside programs, but it does not require their complete abandonment. The new rules for set-aside programs, however, do obligate public administrators and MBEs to cooperate in carefully documenting constitutionally sufficient justifications for programs and in meticulously designing and implementing set-aside programs. These new rules also necessitate government bodies to seek out alternative programs that may contribute to this remedial endeavor, but not at the expense of directly discriminating against nonminorities. The new rules for set-aside programs will work some hardships on MBEs, but all is not hopeless.

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