

Late Backup

M/WBE Program Update for the City of Austin

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March 2020

City of Richmond v. J.A. Croson Co.

- Race-based public contracting programs are subject to strict scrutiny
- Court struck down Richmond's 30% MBE quota
- Government defendant has burden of production
- Plaintiff has ultimate burden of proof
- Government can use its spending powers to eradicate private discrimination to avoid being a "passive participant" in a discriminatory marketplace

City of Richmond v. J.A. Croson Co.

- No need to prove the agency discriminated
- “Societal” discrimination not sufficient
- All racial & ethnic groups must suffer in the local marketplace
- Disparities between population & agency utilization of minorities & women is insufficient
- Race-neutral measures must be seriously considered
- Strict scrutiny need not be fatal in fact: some affirmative action programs are permissible

Adarand v. Peña

- Applied strict scrutiny to federal enactments through the 5th Amendment
- USDOT & other agencies reviewed contracting affirmative action programs
- Led to major revisions to 49 CFR Part 26 for the USDOT Disadvantaged Business Enterprise Program for federal-aid transportation contracts

Strict Scrutiny as Applied

- Two pronged test
 - Strong basis in evidence of the government's "compelling interest" in remedying discrimination
 - Remedies must be "narrowly tailored" to that evidence
- Ultimate question of law not fact; standard of review is de novo
- "Intermediate scrutiny" for gender?
- Location & size subject to "rational basis" scrutiny

Strict Scrutiny as Applied

- Narrow tailoring
 - Examine the efficacy of race- & gender-neutral remedies
 - Contract “unbundling”
 - Reduced insurance & bonding requirements
 - Small business set-asides
 - Mentor-protégé programs
 - Technical assistance
 - Goals must be based upon availability
 - Contract by contract goals are required
 - Contract goals must be based on the availability of M/W/DBEs to perform the anticipated scopes of work of the project

Strict Scrutiny as Applied

- Program must be flexible
 - No quotas or race-based setasides
 - Good faith efforts must be permitted
 - Can't prefer a bidder that met goals over good faith efforts
 - Can't prefer a bidder that exceeded goals over one that merely met goals
 - No "points" for participation
- Remedies cannot be over- or under-inclusive
 - Beneficiaries must be established by the evidence; "random inclusion" of minority groups is a red flag of illegitimate motives
 - Economic disadvantage & business size tests required
 - Firms must graduate from the program

Strict Scrutiny as Applied

- Review the burden on third parties
 - Some burden sharing is necessary for any effective remedy
 - Reduce through race- & gender-neutral measures, such as SBE setasides, unbundling, etc.
- Consider program duration & engage in regular review
 - Determine measures of success
 - Set a sunset date
 - Review the program & conduct a new study approximately every 5 years



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