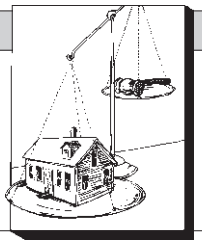
Minority Set-Asides: Setting the Record Straight



by janet Stearns, Esq.

Contractors who have worked on government jobs are probably familiar with "set-asides" for minority- and women-owned businesses. In an effort to encourage the entry of these apparently underrepresented groups into the construction industry, governments will often require that a certain percentage of public contract work be performed by companies controlled by minorities and women. The use of set-asides is widespread; they have been adopted by the federal government, 36 states, and more than 190 local governments. In spite of a recent Supreme Court case successfully challenging a local set-aside ordinance, these incentive programs are here to stay.

Fullilove

The Supreme Court first ruled on the constitutionality of set-asides in 1980 in *Fullilove v. Klutznick*. In this case, the court upheld the Federal Public Works Employment Act of 1977, which authorized $4 billion to be granted to state and local governments for public improvements. This act required that 10 percent of federal funds given to the state or local grantees be used to buy from businesses owned more than 51 percent by citizens who were "Negroes, Spanish-speaking, Oriental, Indians, Eskimos, and Aleuts."

This set-aside was challenged as unconstitutional, with the argument that the United States Constitution, in the Fourteenth Amendment, prohibits discrimination on the basis of race. The Supreme Court rejected this claim of revers discrimination on the basis of race. The Supreme Court rejected this claim of reverse discrimination, and found that Congress could adopt programs that were "race-conscious" in order to remedy past discrimination. In other works, legislation giving minorities preferential treatment was legal since Congress had determined that minorities, as a group, had generally been the victims of racial discrimination.

The Legacy of Fullilove

Fullilove was interpreted broadly by state and local governments to authorize minority set-asides. However, many question persisted regarding the scope and meaning of this decision. Numerous legal challenges in recent years have raised a variety of questions:

- Who in the government can determine that there has been past discrimination? And how much weight should be given to lower levels of government? It's generally been held that the opinion of the local school board should have less weight than state or county legislature's decision.
- When are the findings made? Did the governing body have a proven record of discrimination when they passed the set-aside law? Lower courts have disagreed as to whether such evidence is needed, or whether it can be reconstructed later, if the set-aside is questioned.
- What constitutes a finding? Legislative hearings, executive orders, prior litigation, and independent studies may be used as evidence. Some courts have required that the particular governmental body put forth evidence that it discriminated, while others have considered proof of pervasive societal discrimination enough.

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- Guidelines vs. requirements—courts have generally looked more favorably upon statutes which encourage but do not require the use of minority-owned businesses. For example, if a stature gives bonus points in a bid for contractors using minority-owned subcontractors, this policy is less restrictive (and more preferred by the courts) than one that mandates that 50 percent of all contracts by given to minority-owned business. Furthermore, courts have encouraged the use of administratively-granted waivers for situations where meeting the statutory set-aside has been impossible.

Set-Asides Revisited

In January of this year, the Supreme Court reconsidered minority set-asides in *City of Richmond v. J.A. Croson Company*. In this case, the Court declared unconstitutional a city ordinance mandating that contractors awarded city projects subcontract 30 percent of the contract value to minority business. The ordinance defined this term as "a business from anywhere in the country at least 51 percent of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo or Aleut citizens."

A number of factors were critical to the Court's decision.

- A municipality does not have the same broad powers given to the federal government to redress societal discrimination.
- Richmond had not shown discrimination locally. It had relied on the "general conduct of the construction industry in this area, and the State, and around the nation." Membership in local contractors' associations was low overall, so percentages of minorities in the associations were held by the Court to not have much significance. Further, there was absolutely no evidence of discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in Richmond's construction industry.
- The city council that adopted the ordinance was controlled by minorities; five of the nine seats on the council were held by black representatives. The court feared the potential existed for the political majority to unfairly discriminate against white contractors.
- The provision allowing national contractors owned by minorities to take priority over white contractors from Richmond was held to be an inappropriate remedy for the locality.
- The facts of the case revealed a white contractor who had made efforts to obtain minority subcontractors but could not find businesses who were able or interested to work on the job.

The Future of Set-Asides

Although the Supreme Court invalidated Richmond's ordinance, it did not put an end to preferential treatment for minorities in public contracts. The Court wrote that, "Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." The Court is merely requiring a showing of past discrimination by the entity before it adopts a race-conscious program. The Court also notes the variety of "race-neutral" programs that assist small entrepreneurs of all races. For example, simplifying bidding procedures, relaxing bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would "open the public contracting market" to many smaller contractors.

Governments will likely be reviewing their laws in light of this recent Supreme Court decision. Members of the construction industry will continue to confront set-aside laws when they bid on public contracts, however. Until minorities and women are reflected in greater numbers in the industry, set-asides, in some form, will still be around. ■

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