

CHAPTER 2.

Legal Framework

The City of Portland (the “City”) M/W/ESB Program includes a Good Faith Effort (GFE) Program encouraging the utilization of MBEs, WBEs and ESBs as subcontractors on City projects. In addition, the City’s Sheltered Market Program (SMP) limits competition on certain contracts to MBE/WBEs and small businesses. Many courts have found programs using such measures to be “race-, ethnic- and gender-conscious.”¹

Throughout the country, a number of non-minority businesses, trade associations and other groups have filed lawsuits challenging the legality of MBE/WBE programs as well as the Federal Disadvantaged Business Enterprise (DBE) Program. Many of the courts hearing these cases have found state and local MBE/WBE programs to be unconstitutional, and some courts have upheld these programs. Several court decisions have found the Federal DBE Program to be constitutional.

Information in this disparity study is instructive to the City to determine whether programs such as the M/W/ESB Programs, GFE Program and SMP meet the standards that the courts have established for legally defensible MBE/WBE programs.

Chapter 2 summarizes the legal standards applicable to race- and gender-conscious programs in four parts:

- A. U.S. Supreme Court decisions regarding MBE programs;
- B. The standard for evaluating the validity of race-conscious programs;
- C. The standard for evaluating the validity of gender-conscious programs; and
- D. A summary of the above three parts.

Appendix B provides additional detail on these topics.

A. U.S. Supreme Court Decisions Regarding MBE Programs

The U.S. Supreme Court has established that government programs including race-conscious elements must meet the “strict scrutiny” standard of constitutional review. The two key U.S. Supreme Court cases in this area are:

- The 1989 decision in *City of Richmond v. J.A. Croson Company* (“*Croson*”), which established the strict scrutiny standard of review for race-conscious programs enacted by state and local governments;² and

¹ For simplicity, in the remainder of Chapter 2 “race-conscious” means “race- and ethnic-conscious.”

² *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

- The 2005 decision in *Adarand Constructors, Inc. v. Peña* (“*Adarand*”), which established the same standard of review for federal race-conscious programs.³

The strict scrutiny standard is a difficult burden for a government entity to meet — it presents the highest threshold for evaluating the legality of race-conscious programs short of prohibiting them altogether. Under the strict scrutiny standard, a governmental entity must:

- Have a *compelling governmental interest* in remedying past identified discrimination; and
- Show that any program adopted is *narrowly tailored* to achieve the goal of remedying the identified discrimination. There are a number of specific elements to consider when determining whether a program is narrowly tailored (Appendix B provides a detailed discussion of relevant cases).

B. Standard for Evaluating the Validity of Race-conscious Programs

A government agency must satisfy the two components of the strict scrutiny standard to have a valid race-conscious program — a program that fails either one is unconstitutional.

Programs that have failed to meet the compelling governmental interest test. In *Croson*, the U.S. Supreme Court held that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”⁴ Disparity studies are a court-approved method to determine whether there is a compelling governmental interest for remedial measures.⁵ These studies analyze whether there is a disparity between the utilization and availability of minority-owned firms.

Lower court decisions since *Croson* have held that a compelling governmental interest must be established for each minority group for which the race-conscious program applies. It is not necessary for the government entity itself to have discriminated against minority-owned firms for the government to act. In *Croson* the Supreme Court found “if [the government entity] could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry ... [i]t could take affirmative steps to dismantle such a system.”

As discussed in Appendix B, many state and local race-conscious programs that have been challenged in court were found to be unconstitutional because the evidence of discrimination produced by the government entity was not sufficient to show a compelling governmental interest.

³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁴ 488 U.S. at 509.

⁵ See Appendix B, pages 6-10.

Programs that have failed to meet the narrow tailoring test. The U.S. Supreme Court in *Croson* also held the City of Richmond failed to demonstrate that its program was “narrowly tailored” to achieve the goal of remedying the identified discrimination. As developed in *Croson* and subsequent cases, review of narrow tailoring includes:

- Whether the government agency seriously considered race-neutral means to increase minority business participation in contracting (e.g., simplification of bidding procedures, relaxation of bonding requirements and training);
- Limitation of the remedy to only those minority groups for which there is evidence of discrimination in the local area;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of race-, ethnicity-, or gender-conscious remedies on the rights of third parties.

Many programs that have failed to meet the narrow tailoring test also fail the compelling governmental interest test. In some cases, public agency programs have been found to fail the narrow tailoring requirement without the court reaching a conclusion as to whether the program met the compelling interest test. (See Appendix B for a comprehensive discussion of relevant case law.)

Programs that have met the strict scrutiny standard. The Federal DBE Program has been held to be constitutional in legal challenges to date. There have been challenges, however, to how state and local government agencies implement the Federal DBE Program. Appendix B explores these issues in detail.

In addition to the Federal DBE Program, some state and local government minority business programs have been found to meet the strict scrutiny standard. Appendix B discusses the successful defense of state and local race-conscious programs, including *Concrete Works of Colorado v. City and County of Denver*⁶ and *H.B. Rowe Company v. Tippet, North Carolina Department of Transportation, et al.*⁷

⁶ *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027 (2003).

⁷ *H. B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al.*, F.3d 2010 WL 2871076 (4th Cir. July 22, 2010); See also *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, 950 F.2d 1401 (9th Cir. 1991).

C. Standard for Evaluating the Validity of Gender-conscious Programs

The U.S. Supreme Court in *Croson* did not specifically address whether strict scrutiny would be the legal standard to apply to gender-conscious programs involving women-owned firms. While the Court did not establish a standard for constitutional review of gender-based programs, certain Federal Courts of Appeal have considered gender-based programs and applied intermediate scrutiny, not strict scrutiny.⁸ The courts have interpreted this standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.⁹

As discussed in Appendix B, the burden based on the application of the intermediate scrutiny standard is less stringent for a government entity to successfully defend implementation of a gender-based program (a WBE program, for example) than a race-based program. Under the traditional intermediate scrutiny standard, a court reviews a gender-conscious program by analyzing whether the government agency has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the government entity to present “sufficient probative” evidence in support of its stated rationale for the program.¹⁰

Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.¹¹ And, the Eleventh Circuit has held that “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort ... Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹²

Although a different legal standard of review may apply, the types of analyses BBC conducted in the disparity study concerning minorities and minority-owned firms are also performed for women and women-owned firms.

D. Summary

The discussion above provides context for the disparity study and background information for the City concerning the legal standards for evaluating the constitutionality of race- and gender-conscious programs. Appendix B discusses relevant case law in more detail.

⁸ See generally, *Western States Paving*, 407 F.3d at 990 n. 6 (9th Cir. 2005); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Monterey Mechanical*, 125 F.3d at 712-13 (9th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Coral Construction Co.*, 941 F.2d at 931-932 (9th Cir. 1991); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n.6 (1996) (“exceedingly persuasive justification”).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *Eng’g Contractors Ass’n*, 122 F.3d at 910.

¹² *Id.* at 929 (internal citations omitted).