

CITY OF DELRAY BEACH

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MEMORANDUM

DATE: June 5, 2014
TO: City Commission
FROM: Terrill Pyburn, Interim City Attorney *TP*
SUBJECT: Minority Business Enterprise/Preferences

General Law on Minority Business Preferences or Set Asides

The sentinel case in the area of law regarding the Constitutionality of programs that seek to remedy discrimination in government contracting is City of Richmond v. J.A. Croson. Co., 488 U.S. 469, 109, S.Ct 706 (1989). (See Exhibit 1 for summary of case). The Court held in Croson that the program setting aside 30% of government contracts was unconstitutional because there was not sufficient evidence of discrimination and held that the 30% set aside or preference was not narrowly tailored. In short, the program failed to meet the strict scrutiny security test applied by the court. Under the 14th Amendment, if a classification is made on the basis of race or ethnicity, the Court will apply a strict scrutiny standard.

Under the strict scrutiny stand, the proponent of the program (the City) bears the burden of proving that a racial or ethnic set aside or preference or classification serves a compelling governmental interest in setting up programs to remedy past discrimination. There must be a strong basis in evidence. One cannot rest on a mere claim of societal discrimination. The City must show gross statistical disparities between "the proportion of minorities awarded contracts and the proportion of minorities willing and able to do the work". Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F.Supp.2d 1305 (S.D. Fl. 2004) (See Exhibit 2 for a good and detailed review of a court's analysis).

Further, four factors must be addressed to demonstrate that a program is narrowly tailored. Hershell Gill Consulting Consulting Engineers, Supra at 1330. These factors are: 1. Necessity of the relief. 2. Effectiveness of other remedies 3. Flexibility and duration of relief and waiver provisions, and 4. The relationship of

numbers to the market and the impact on 3rd parties. Id. 1330. One must look to see if there are serious good faith race-neutral alternatives.

Finally, as in the Hershell case cited above, if improper preferences are made that do not withstand strict scrutiny by the Court, there exists a remedy for damages and attorneys' fees for violations of the equal protection clause. I am providing you a copy of the Hershell case because it lays out the law so coherently, in the event you desire more in depth knowledge of the subject matter.

Some cities have abandoned attempts to establish set asides or preferences. They have, however, established programs that open up public bidding and contracting to smaller firms. The City may give preferences and award contracts and make distinctions based on economics. To do so the City need not meet strict scrutiny standards. The City must establish a non-racial basis as a rational basis to uphold its provision of incentives to enable smaller businesses to compete. St. Petersburg has set up such a program.

St. Petersburg Small Business Enterprise Ordinance

When St. Petersburg's disparity study showed no prevalent and statistical discrimination based on race or ethnicity, the city abandoned its MBE programs and established a Small Business Enterprise Assistance Program. The program requires certification and provides special bid award adjustments, reduced bonding and requires different bonds than normally required, allows for special program payments, issuance of joint checks, sheltered market programs and other helpful administrative procedures, participation percentages and other incentives. I am providing you a copy of materials from St. Petersburg outlining their program. (See Exhibit 3).

City Policy

The City currently has a policy for reduced bonding, but it could be modified in order to expand incentives to attract small business enterprises. (See Exhibit 4 for current City policy).

Conclusion

To have a Minority or Disadvantaged Business Enterprise System, the City must be prepared to support a program which demonstrates actual discrimination before giving preferences or set asides on the basis of race or ethnicity. The study must be sufficient to constitute a "strong basis in the evidence" in order to support a program. It may not rest on a claim of societal discrimination. A study, if

conducted, must be updated often to ensure that the basis of having a program is legally sustainable. Further, the program must be limited or narrowly tailored to remedy past discrimination. These studies require constant review. The City of Tampa recently spent \$70,000.00 in addition to \$110,000.00 it spent previously to make sure it had an accurate study. (See Exhibit 5).

Another approach based on economics and with the goal of supporting small business enterprises without reference to gender, race or ethnicity, is to set up a small business enterprise program that encourages economic development of the entire community. The St. Petersburg model is one such approach.

Please let me know if you have any questions or if you require additional materials.

TCP:smk

Attachments