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### "Affirmative Action: Crafting a Challenge Proof Program"

*American City and County*

August 1, 1999

Fired just one month ago, the latest shots in the affirmative action wars provide clear evidence that such programs still have the ability to create confusion and controversy 20 years after their inception. Fulton County, Ga.'s, affirmative action program became the latest casualty, when U.S. District Court Judge Tom Thrash threw out the county's five-year-old program and enjoined it from using "racial, ethnic or gender participation goals in accepting or rejecting future bids."

The ruling was the result of a lawsuit brought by Daniel Webster, a landscape contractor whose firm was passed over for a county contract in favor of a minority contractor that the court agreed was both less qualified and more expensive than Webster. Flush with victory in that case, the conservative Southeastern Legal Foundation, which represented Webster, took aim at Atlanta's affirmative action program, vowing that it would meet the same fate. (The two programs were based on the same economic studies, which both governments maintain showed a past history of discrimination against minorities. The judge disagreed.)

Larry Wallace, the city's chief operating officer, vowed to fight the foundation's efforts. Atlanta's affirmative action program is "legal, legitimate and appropriate," he told the Atlanta Journal/Constitution.

Mayor Bill Campbell agreed. "We are drawing a line in the sand," he told the newspaper. "There will be no compromise, no mediation, no discussion, no capitulation. This is a fight to the death."

Campbell has his hands full. Atlanta's program, the subject of a series of biting articles in the newspaper, has been riddled with charges of corruption, political favoritism and incompetence. According to the paper, the biggest beneficiaries of the program are those with political --- and financial --- ties to the mayor.

Constitution editorial page editor Cynthia Tucker charged that the program "is no longer doing the work of helping disadvantaged minority and female business owners get a leg up. If the court strikes it down, will it matter to anyone but the well-heeled and well-connected?"

Still, the idea of affirmative action has its defenders --- Tucker among them. Vice President Al Gore recently told an audience that affirmative action programs capture "the accumulated impact of history cascading down throughout the generations," and he vowed to continue the "special efforts" that he says have shrunk the wage and high school graduation gaps between whites and blacks.

#### **Strict scrutiny**

Affirmative action was declared all but dead in 1995, when, in *Adarand Constructors v. Peña*, the Supreme Court held that a federal program offering financial incentives for prime contractors to hire minority subcontractors was unconstitutional. The court ruled that all racial classifications are subject to "strict scrutiny," the most stringent judicial review.

The strict scrutiny test requires that, to be constitutional, racial classifications must serve a compelling government interest and must be narrowly tailored to serve that interest. However, aside from applying the rigorous strict scrutiny test to affirmative action programs, the nine Supreme Court justices cannot agree on what precisely makes an affirmative action program unconstitutional. The justices' opinions on the subject rarely reflect consensus, and it is not unusual for a major affirmative action case to contain six separate opinions.

Proponents of affirmative action argue that such programs serve the important social purpose of attempting to remedy the lingering effects of past discrimination. They point out that the distribution of millions of dollars in construction contracts and coveted public benefits such as jobs, education and housing are at stake.

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Opponents, on the other hand, stand ready to attack the slightest defect in an affirmative action program. And, because the federal statute often used to attack affirmative action programs (Section 1983) guarantees an award of attorneys' fees to the prevailing party, lawyers have an incentive to urge lawsuits.

Taking the stakes higher still, in 1996, a federal court in Maryland held that a poorly conceived affirmative action program for hiring firefighters was unconstitutional and that the county officials charged with administering it were not entitled to qualified immunity for their actions, opening the door to personal liability.

### **Crafting a program**

Most attacks on affirmative action programs are based on failure to satisfy the strict scrutiny test. Even if a local government can prove a compelling interest, courts will strike a program down if it is not narrowly drawn and designed to place as light a burden as possible on non-beneficiaries. Thus, in drawing up their affirmative action programs, local government officials must understand what constitutes a compelling interest and narrow tailoring.

The most common compelling interest is the interest a government has in remedying the present effects of its own historical discrimination. If a city has a documented past of active discrimination against minorities and women --- for example, if it has persistently underused minority and women contractors or if minorities and women are consistently overlooked in hiring --- that city will likely have a compelling interest in curing the problem of continued under-representation with affirmative action.

If the local government cannot prove past discrimination, it will have a difficult time showing that its affirmative action program is justified by a compelling interest. However, it may argue that avoiding "passive participation" in continued private local discrimination constitutes the compelling interest. A well-executed disparity study, buttressed by credible personal evidence that discrimination still exists, can help a local government's argument that it has a compelling interest in ensuring that its public funds are not used to finance private industry discrimination.

Additionally, the discrimination that a local government seeks to remedy or seeks to avoid participating in must be prevalent in the local community. The Supreme Court rejects the idea that a local government has an interest in remedying the effects of general societal discrimination.

As for the requirement that the programs be narrowly tailored, the Supreme Court has never conclusively delineated the elements that would fulfill that requirement. However, it has identified five general factors relevant to the analysis of a program. They are: \* the efficacy of alternative remedies, including whether a local government has attempted in the past to implement race-neutral remedies such as simplified bidding procedures or lower bonding requirements; \* the planned duration of the remedy. Courts like to see affirmative action programs with specific ending dates or a specific future date for reconsideration of the program; \* the availability of qualified participants. Any numeric goals must be tied to that factor and not merely to the percentage of minority group members in the relevant population; \* the availability of a waiver provision if no qualified candidates present themselves. Strict numerical quotas are almost always struck down unless they have been explicitly ordered by a court as a precise remedy for past discrimination; and \* the burden the program places on innocent third parties. In an effort to make programs as narrow as possible, local governments are beginning to create non-preferential programs that do not consider race in the allocation of public benefits. Rather, they seek to increase the general pool of applicants.

Considered by many to be the least controversial of affirmative action programs, non-preferential outreach, recruiting or counseling programs target minority candidates to raise the interest in applying for government jobs, contracts, housing or schools. The local government hopes only to increase interest by disseminating information to potential participants.

Opponents of affirmative action are asking courts to strike down even those programs, but no consensus exists among the federal courts as to whether recruitment and outreach programs that target minority groups violate the constitution. In the California case of *Monterey Mechanical Co. v. Wilson*, a general contractor sued the state over a requirement that he make good faith efforts to inform minorities about subcontracting opportunities. The trial court held that, since the requirement was

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only that the contractor reach out to minority subcontractors (as opposed to setting hiring quotas), it was not likely to be found unconstitutional. The federal court disagreed, but the case settled before a final ruling on the merits.

Local governments with outreach and information campaigns insist that standards of evaluation are uniform for all applicants, thereby releasing the programs from the strict scrutiny test. Under that view, local governments may gather information regarding the racial makeup of participants and even encourage more minority participation as long as the racial awareness does not affect the decision-making process.

That logic is not so clear cut, according to some courts. For example, at least one court has held that merely sending information to groups on the basis of race or gender is unconstitutional. In *Lutheran Church Missouri Synod v. The Federal Communications Commission*, the influential federal court of appeals for the District of Columbia held that a minority outreach program required by the FCC was unconstitutional. Other courts, however, have refused to condemn outreach programs. In *Raso v. Lago*, the First Circuit Court of Appeals found no problem with tying federal funds to a requirement that a developer use an affirmative action program to attract minority applicants to a housing development.

### **Leveling the playing field**

Local governments are rightly concerned with finding aggressive and meaningful ways to counter the effects of discrimination. Well-planned and executed affirmative action programs can serve that purpose, but local governments attempting to craft them should proceed with caution.

For assistance, many communities are hiring consultants who stay abreast of the law and developments in the affirmative action field. Some work with other local governments to pool resources, hire outside experts or share information. If more thought is put into the front end of affirmative action programs, less will be required when the program comes under inevitable attack.

Despite what seems to be a growing national trend against affirmative action, local governments are attempting to level the playing field for all. As long as it is done carefully, officials can carry out their policy objectives while limiting the risk of personal liability and governmental financial loss.

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