

Setbacks Ahead for Set-Asides

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In January 1989, the U.S. Supreme Court by a 6-3 margin struck down Richmond's minority set-aside program for city contracts. Richmond had failed, the Court found in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, to prove the discrimination in the award of municipal contracts that the set-aside was supposed to remedy.

Six weeks later, and further south, the Georgia Supreme Court relied on *Croson* to strike down Atlanta's 35-percent minority and female set-aside. Bent on reinstating the program if at all possible, Atlanta hired a group of consultants, headed by former Federal Reserve Board member Andrew Brimmer and former Secretary of Labor Ray Marshall, whose goal was to establish an evidentiary basis for a set-aside program.

When the 1,178-page Brimmer-Marshall Report was issued last June, it was hailed by *The Atlanta Constitution* as presenting, "a compelling case for new set-asides." Releasing the report, Mayor Maynard Jackson noted that, while minorities were securing 37 percent of the city's procurement before the *Croson* decision, the figure had dropped to 14 percent for the latter part of 1989 and 24 percent for the early part of 1990. He concluded that "affirmative

action is necessary, essential, and urgently needed."

Atlanta's city council recently held hearings to determine the most desirable course of action. There is every reason to expect that the city will implement a set-aside program not dissimilar to the one invalidated two years ago.

The prospects for such a program withstanding judicial scrutiny, however, are small indeed- and if Atlanta proceeds incautiously, the city may face unfortunate consequences.

Like many other jurisdictions seeking a basis for sustaining or reinstating set-asides, Atlanta is pinning its hopes on Justice Sandra Day O'Connor's plurality opinion in *Croson*. O'Connor rejected Richmond's claim that discrimination was proved by comparing the 50 percent of the city's population that is black with the less than one percent of prime construction contracts that go to blacks. She went on, however, to suggest that an inference of discrimination could arise where there were significant differences between the percentage of minority contractors and the percentage of contracting dollars going to minority-owned firms.

Applied mechanically, this formula could yield some bizarre results. For it seems to say that in a city with one enormous non-minority firm and one

tiny minority firm, discrimination should be inferred unless each company receives 50 percent of the city's work.

Presumably, Justice O'Connor meant no such thing, and eventually the Court will explain that determining what the minority participation in city contracts and subcontracts would be absent discrimination- the baseline for inferring discrimination through statistics- is a far more complex matter. Jurisdictions that seek to prove past discrimination by relying on a literal interpretation of O'Connor's remarks are in for some unpleasant surprises.

How Much is Enough

But the most difficult problem facing local governments seeking to uphold set-aside programs may not be establishing past discrimination, but justifying the size of the set-aside they would like to impose.

Consider a situation where a locality determines that, absent discrimination, minorities would receive 10 percent of the dollar value of city business, but minority firms, in fact, receive only 5 percent. Assume the Supreme Court would find this an adequate basis for race-conscious remedial action.

In all probability, the Court would not approve a set-aside greater than the 10 percent that would represent non-discrimination in the present, much less a set-aside several multiples higher, as has sometimes been used in local set-aside programs. More likely, the Court would limit the set-aside to that 10 percent.

Admittedly, at least one significant precedent goes the other way on these issues. In *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (1990), the U.S. Court of Appeals for the 11th Circuit

overturned a ruling invalidating Hillsborough County, Fla.'s minority set-aside program.

Without considering the size of the contracting firms, the Court of Appeals said that disparities between the percentage of minority contracts and contracting dollars going to minorities "indicat[ed] that the racial classifications in the county plan were necessary." And the panel was untroubled by the fact that the set-aside figure was significantly greater than the proportion of minority contractors.

On Nov. 26, 1990, the Supreme Court denied a petition for certiorari. If everyone knows a denial of certiorari is not supposed to mean very much, almost everyone is ready to find it to mean a great deal when he or she wants it to. A *Washington Post* editorial, for example, would read the denial of *Cone Corp.* as signaling that "there is still plenty of room for minority set-asides of [the kind struck down in *Croson*] if local legislators read the Richmond case carefully and follow its guidelines."

In reality, the principal significance of the denial of certiorari in *Cone Corp.* is probably that when the Court squarely considers the appropriate evidentiary basis for a set-aside or how high a set-aside can be, it may well have a larger conservative majority than it has now. Jurisdictions that act on the belief that the Supreme Court will follow the 11th Circuit's approach in *Cone Corp.* face troubles down the road.

Salient Statistics

The Supreme Court's likely ultimate rejection of the 11th-Circuit's approach is but a minor part of hurdles facing Atlanta as it tries to reinstitute a set-aside program.

While much of the Brimmer-Marshall Report is devoted to accounts of (uninvestigated) individual complaints of discrimination, it ultimately relies on statistics. And buried among a mass of data of marginal relevance are two salient figures.

On Page 117 of Part 1, it is observed in passing that 94.8 percent of Atlanta's businesses are owned by white males, meaning that minorities (including white women) own only 5.2 percent; and in Table 5 of Part V, it is shown that in the critical category of "construction, sub-dividers, and developers," minority firms made up only 12 percent of Atlanta's firms in 1982 (the most recent data available) and only two percent of the firms that actually had a payroll.

Regardless of which of these figures one uses (and forgetting about the report's extensive documentation of the smaller size and limited bonding capacities of minority firms), these data suggest two hard-to-answer questions.

First, in light of the 14-percent and 24-percent minority participation rates that Mayor Jackson noted existed even after the set-aside was eliminated, what need is there for a set-aside for minority firms? Second, even if a set-aside were needed, what justification could there be for a general set-aside greater than 5 percent- or for construction, a set-aside of 12 percent or (more realistically) 2 percent?

The Brimmer-Marshall Report does not even acknowledge these questions. It does, however, suggest at various points that a principal justification for a set-aside program (given the absence of evidence of disadvantage in the city contracting process) is to make up for the discriminatory denial of contracts in the *private* sector.

Nothing in Justice O'Connor's *Croson* opinion supports this proposition. A reference to a local government's "use [of] its spending powers to remedy private discrimination" occurs in her discussion of the situation where the prime contractors on city projects discriminate against minority subcontractors. Thus, it is possible that O'Connor (and the Supreme Court) would support a set-aside if it were shown to be necessary to ensure that contractors on city projects did not discriminate against minority subcontractors on those same projects. And very likely the Court would approve a wide range of actions undertaken by a city to eliminate discrimination in private contracts, including a refusal to do business with any other contractor found to discriminate against minority businesses (or workers).

But it is close to inconceivable that the Court would allow a city to set aside a major portion of its business for minority firms in order to make up for the discriminatory denial of business in the private sector.

Thus, if Atlanta establishes a set-aside at all resembling its earlier program, it will face considerable liability in the years ahead and will greatly complicate the lives of minority entrepreneurs who secure credit anticipating the continuation of such a program.

In addition, Atlanta's near future holds a particular prospect for set-aside disaster: contracting for the immense, one-time construction connected with the 1996 Olympic Games, which the city will host.

The cover story for the January 1991 issue of *Black Enterprise* magazine argues that while minorities did not fairly share in the enormous profits made

in the Los Angeles Olympics, the same must not be the case for the Atlanta Olympics.

Whatever Atlanta decides to do with set-asides for regular municipal contracting, it may well do something very similar for Olympic construction. And though the precise interaction between public and private control of the games is not altogether clear, there will probably be sufficient state action involved in any race-conscious contracting procedures to implicate the 14th Amendment; the prohibitions of 42 U.S.C. §1981 on public- and private-sector discrimination in contracting certainly will apply as well.

Given the amount of money at stake, challenges to any such program are likely to abound. And sometime between 1992 and 1994, a court is probably going to invalidate any program that sets aside a substantial part of the Olympic construction for minority firms. Apart from any impact on preparation for the games, imposition of set-aside for Olympic construction that will not withstand judicial scrutiny may result in substantial enough damage awards to turn a potentially immensely profitable undertaking into an economic disaster.