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MEMORANDUM OF LAW

DATE: September 10, 2007

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Overview of Law Concerning Equal Opportunity in Contracting: Existing Programs and Recommendations

INTRODUCTION

On August 1, 2007, the City Council Rules, Open Government, and Intergovernmental Relations Committee [Rules Committee] heard presentations by the Mayor, Interim Chief Operating Officer Jay Goldstone, and the Office of the Independent Budget Analyst regarding the status of the City's Equal Opportunity in Contracting Program [EOC]. The presentations were in response to a request for information by Councilmember Tony Young, as well as increasing public concern regarding the perceived ineffectiveness of the City's programs, lack of enforcement, and unavailability of meaningful statistics that would measure progress of the City's efforts to remedy past discrimination.

At the August 1, 2007 hearing, Councilmembers Young and Atkins requested that the City Attorney prepare a legal analysis of existing programs and provide recommendations, taking into consideration recent developments in the case law concerning Proposition 209 (particularly, *Coral Construction, Inc. v. City and County of San Francisco*, 149 Cal. App. 4th 1218 (2007)) and federal equal protection principles. This memorandum addresses the current state of the law concerning equal opportunity in contracting, programs and recommendations, as well as specific questions presented by Councilmembers Young and Atkins in their memorandum dated July 31, 2007.

QUESTIONS PRESENTED

1. Based on the data currently available, is there a historical pattern of discrimination in contracting at the City of San Diego that rises to the level of that contemplated by the ruling in *Coral Construction*?

2. If the data currently available is insufficient upon which to draw a conclusion, what data should be collected?

3. How might the drop in minority and female contractor participation since the implementation of Proposition 209 and the elimination of the City's outreach and preference programs be relevant to this analysis?

4. Assuming San Diego falls within the parameters of *Coral Construction*, how would the City Attorney advise the Council and the Mayor to proceed with re-instituting outreach and preference programs so as to maximize the likelihood they will withstand a legal challenge based upon Proposition 209?

SHORT ANSWERS

1. While the data currently available shows alarming disparities in City contracting, more information is needed to determine whether the City's contracting practices would be found to include discrimination that makes race/gender-based measures constitutionally necessary under *Coral Construction*.

2. In order to determine whether there is evidence of discrimination necessitating race/gender-based remedies under *Coral Construction*, the City should commission a new disparity study, or at least supplement currently available data, to assess current marketplace realities, availability of minority and women-owned enterprises, and utilization rates.

3. The post-Proposition 209 drop in participation rates is relevant to this analysis, as it shows that race/gender-neutral alternatives have *not been effective* to remedy discrimination in San Diego public contracting.

4. The City would best insulate itself from legal challenge to newly instituted race/gender-conscious preference and/or outreach programs by supplementing current data with a new disparity study, or at least, current statistics comparing actual utilization to the availability of minority and woman-owned enterprises in targeted industries, and basing any new race/gender-conscious programs on such data.

ANALYSIS

I. The City's Equal Opportunity in Contracting Program: Legal and Factual Overview

The following is an overview of the general state of the law regarding federal equal protection principles and the effect of Proposition 209 in the area of public contracting. Against this legal landscape, we summarize the historical development and current status of the City's own equal opportunity laws and programs. This will serve as a starting point for addressing the City Council's specific questions enumerated above.

A. Federal Equal Protection Principles

State action in the area of public contracting is constrained by the Fourteenth Amendment's Equal Protection Clause, which provides that "[n]o State shall... deny any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV. Therefore, any public contracting program in which race,[1] gender, or membership in any other constitutionally protected class is a selection criterion will be subject to heightened scrutiny. A race-conscious program, for example, will be subject to a strict scrutiny[2] analysis, which requires that the government body administering the program demonstrate that the program is: (1) necessary to serve a compelling state interest, and (2) narrowly tailored to address that interest. *City of Richmond v. A. J. Croson Construction Company*, 488 U.S. 469, 496-97, 507 (1989).

Croson continues to be the leading federal decision concerning equal protection in the context of public contracting. In *Croson*, the Court evaluated the constitutionality of the construction contract program administered by the City of Richmond, which required prime contractors to commit at least 30% of their total contract amounts to minority subcontractors. *Id.* at 477. The program was challenged by a local construction company, which could neither satisfy the 30% set-aside nor obtain a waiver from the City. *Id.* at 483.

The City of Richmond defended its program largely on the basis of the Court's prior opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), in which the Court had held that mandatory set-asides could be used to remedy effects of past discrimination in federal construction projects. The *Croson* Court found that *Fullilove* did not justify Richmond's program because, it held, any race-conscious program – even if "remedial" in nature - would need to withstand strict scrutiny analysis under the Equal Protection Clause. Richmond's

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[1] Throughout this memorandum, the word "race" will be used to refer to race, color, ethnicity, and/or national origin.

[2] The U.S. Supreme Court has articulated different levels of scrutiny depending on the nature of the classification at issue. Race and ethnicity-based classifications are subject to strict scrutiny, which has been recognized as the most stringent level of constitutional review. Gender-based classifications are subject to an intermediate level of scrutiny, which requires that the classification be justified by an "exceedingly persuasive justification," serves "important governmental objectives" and the means must be "substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Because any race and gender conscious program will need to withstand both levels of scrutiny, this analysis is focused on the more stringent strict scrutiny test.

attempt to justify its program by reference to generalized findings of discrimination in the national or statewide marketplace did not establish a "compelling state interest" in a program targeting the Richmond construction industry:

> The probative value of [findings regarding nationwide discrimination in construction] for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that *the scope of the problem would vary from market area to market area*... While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, *they must identify that discrimination, public or private, with some specificity* before they may use race-conscious relief...*Id.* at 504-05 (emphasis supplied).

The Court made clear that in order to establish a compelling state interest, the City of Richmond had to provide particularized evidence of discrimination in the local construction industry. In addition, the City would have to establish that the means created to address the effects of that discrimination were narrowly tailored toward that end. Because the City failed to provide market-specific evidence of past or present discrimination, and because the 30% quota was "not linked to identified discrimination in any way," Richmond's program failed to withstand strict scrutiny. *Id.* at 507. The Court also noted that a race-conscious program like the one adopted by the City of Richmond should only be adopted where race-neutral means would not suffice to rectify the problem. *Id.* at 507.

Six years later, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the U.S. Supreme Court reiterated its holding in *Croson* that race-based programs were subject to strict scrutiny regardless of remedial or "benign" intent. *Id.* at 226. The Court also extended the *Croson* rule to federal programs under the Fifth Amendment's Equal Protection Clause. *Id.* at 224. Thus, under *Croson* and *Adarand*, strict scrutiny remains the test for race-based programs in public contracting, regardless of the government body administering the program.

Federal equal protection principles were held to preclude the State of California from enforcing its own state-wide affirmative action program in the area of public contracting in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997). In *Monterey Mechanical*, the court analyzed the portion of the California Public Contracts Code which required prime contractors to either meet mandatory participation levels for minority, women, and disabled veteran-owned subcontractors, or demonstrate "good faith" efforts to do so. *Id.* at 704, *citing* Cal. Public Contract Code section 10115(c)(subsequently repealed). The *Monterey Mechanical* court found that the mandatory set-asides for minority and women contractors failed to withstand strict scrutiny under *Croson* and *Adarand*. Moreover, the "good faith" component did not excuse the program from strict scrutiny analysis because it still required race and gender-conscious conduct on the part of prime contractors and created a financial disadvantage for firms that were not themselves minority, woman, or disabled veteran-owned. *Id.* 712-14.

After *Mechanical*[3] and the passage of Proposition 209, affirmative action programs in California came increasingly under fire, as discussed below.

B. California Law: Proposition 209 and Subsequent Case Law

In 1996, the People of California voted by a narrow margin to amend the State Constitution to prohibit public entities from discriminating against or awarding preferential treatment in public contracting to a person or firm based on race or gender classifications. The language that accompanied the initiative on the ballot made it clear that the purpose of the amendment was to prohibit affirmative action programs based on the enumerated criteria. Proposition 209 states: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a).

Proposition 209 essentially functions as a ban on any race or gender-based discrimination or affirmative action programs unless an exception applies. The exceptions are enumerated in the California Constitution and include: (1) programs requiring bona fide qualifications based on sex that are reasonably necessary to the normal operation of the project, (2) affirmative action programs that have been ordered by a court, and (3) programs that are necessary to obtain or maintain federal funding. *Id.* at § 31(c – d). California courts have interpreted Proposition 209 as an even more stringent restriction on race or gender-based programs than the strict scrutiny test in *Croson* and *Adarand.* As the Third District Court of Appeal explained in *C &C Construction, Inc. v. Sacramento Municipal Utility District*, 122 Cal. App. 4th 284 (2004):

> Section 31 is similar to, but not synonymous with, the equal protection clause of the federal Constitution. Under equal protection principles, state actions that rely on suspect classifications must be tested under strict scrutiny to determine whether there is a compelling state interest. Section 31 allows no compelling state interest exception. [Citations omitted.] Subdivision (a) of Section 31 'prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny.' *Id.* at 293, *citing Connerly v. State Personnel Board*, 92 Cal. App. 4th 16, 42 (2001).

Immediately after its passage, the constitutionality of Proposition 209 was called into question. On November 6, 1996, the day after Proposition 209 was approved by the voters, opponents brought suit in federal court, claiming that Proposition 209 violated federal equal protection principles and was void under the Supremacy Clause. *Coalition for Economic Equity v. Wilson,* 122 F. d 692, 697 (9th Cir. 1997). The United States Court of Appeals for the Ninth

[3] Although *Mechanical* was decided post-Proposition 209, the court expressly noted the contract at issue in the case had been awarded prior to the passage of Proposition 209, and that therefore the new law did not apply. *Mechanical* at 705.

Circuit found that Proposition 209 was not in conflict with federal equal protection laws. *Id.* at 710. The United States Supreme Court denied review of the Ninth Circuit's decision in *Coalition* and it remains good law.

Proposition 209 has called into question many of California's affirmative action programs in the field of public contracting. As discussed above, the portion of the Public Contracts Code that previously allowed participation goals and other preferences for these groups has been repealed as an unconstitutional violation of equal protection of the laws. *Monterey Mechanical, supra*, 125 F.3d at 714. Outreach programs for the economically disadvantaged are still generally permitted, but they must be race/gender-neutral in their focus. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 565 (2000). Municipal programs that combine mandatory and/or voluntary participation levels and outreach components have been examined on a case-by-case basis, as discussed below.

In 1997, the City Attorney issued an opinion examining the potential impact of Proposition 209 on the City of San Diego's equal opportunity laws and programs. Op. San Diego City Att'y No. 97-2 (1997) [Op.97-2]. In the 1997 Opinion, the City Attorney determined that Proposition 209 does not prevent the City from investigating its contractors to ensure that they do not engage in unlawful discrimination, from remedying individual cases of actual discrimination, or from implementing programs that maximize opportunities for all qualified contractors. The City Attorney determined that outreach programs are constitutional, so long as they do not target specific genders, racial, or ethnic groups to the exclusion of others. The Opinion summarized the types of preferential treatment no longer permitted under Proposition 209:

> By banning preferential treatment, Proposition 209 bans affirmative action programs implemented by government agencies that use percentages, quotas, or set-asides to meet a goal of including or benefiting minorities and/or women. Where those programs seek to confer a benefit on individuals or groups identified by gender, race, color, or ethnicity, they are no longer legal. Proposition 209 bans government "programs that would prefer contractors of a certain race or gender in the evaluation of bids for public contracts, programs that would prefer prospective employees of a certain race or gender for public employment, and programs that would prefer prospective students of a certain race or gender for public education or financial aid." [Citation omitted.] Likewise, outreach programs that focus on reaching particular racial or ethnic groups within the community, and do not provide the same outreach to others, express a preference for those groups, and are no longer permitted. Op. 97-2 at 5, *citing Coalition, supra,* 110 F.3d at 1438.

Later in the Opinion, the City Attorney concluded that the broad-based outreach programs passed constitutional muster, and recommended that the City expand its outreach efforts accordingly:

> Proposition 209 extends beyond actual contracting and employment practices, to preclude outreach efforts that are limited by race and/or gender. *However, nothing precludes the City from imposing greater race- and gender-neutral outreach requirements on contractors generally.* The City could continue the current requirements for good faith outreach efforts, but expand the requirements beyond MBEs and WBEs to include all interested bidders. Such an outreach requirement would ensure greater access to parties who may be interested in competing for work on City contracts. As previously noted, the idea is to maximize the opportunities available to all bidders. Op. 97-2 at 22 (emphasis supplied).

The 1997 Opinion also made clear that outreach programs targeting particular categories not encompassed by Proposition 209 (i.e., race/gender neutral categories) continue to be legally sound:

> Proposition 209 discusses five categories of discrimination or preferential treatment: race, sex, color, ethnicity, or national origin.... The only preferences that are banned by Proposition 209 are those that use any of the five categories listed. There are other categories and bases for distinction, however, that are not included in Proposition 209, and not affected by its provisions. Thus, programs that prefer poor applicants, or people who did fairly well on tests despite having gone to a bad school, or children who were raised in single-parent households, or groups defined using any other neutral classification, are untouched by [Proposition 209]. Preferences for applicants who speak a foreign language that will be useful in the job, or who have ties to the geographical area that they're supposed to serve, would likewise remain allowed. This is even true if these neutral programs end up disproportionately benefitting people of a particular race or ethnicity or sex....
>
> Proposition 209 does not ban government action directed toward assisting economically disadvantaged, small, or start-up businesses. Cities and counties may identify such segments of the population or individuals and take action to assist those groups or persons, as long as they articulate justifiable reasons for doing so... The distinction between race, sex, color, ethnicity and national origin on the one hand, and the economically disadvantaged on the other, goes to the heart of Proposition 209....

> The list of banned preferences in Proposition 209 does not include persons who are disabled, veterans, or disabled veterans. Presumably, public agencies may continue to use these categories as bases for benefit programs, to the extent permitted by current federal and state law.... Op. 97-2 at 6-8.

In addition, the 1997 Opinion discussed court decisions regarding particular outreach programs, including the comprehensive Equal Opportunity program implemented by the City of Los Angeles. The Los Angeles program, which advised contractors of *anticipated* levels of MBE/WBE participation and required board-based outreach - but did not in any way use prohibited classifications as selection criteria - was upheld as constitutionally sound in *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161 (1994) [*Domar I*] *and Domar Electric, Inc. v. City of Los Angeles*, 41 Cal. App. 4th 810 (1995) [*Domar II*]. Op. 97-2 at 19.[4]

The 1997 Opinion also noted developing litigation with respect to the impact of Proposition 209 on the City of San Jose's contracting program, *Hi-Voltage Wire Works, Inc. v. City of San Jose*, which was pending in Santa Clara Superior Court at the time. The City Attorney acknowledged that the case was in its early stages, but indicated that it would keep the City informed of developments. Op. 97-2 at 26. *Hi-Voltage* ultimately reached the California Supreme Court, which held San Jose's program to be unconstitutional under Proposition 209. *Hi-Voltage, supra,* 24 Cal. 4th at 562-64.

At the time *Hi-Voltage* was decided, San Jose's program had both mandatory participation and outreach components. The program set a "participation goal" based on the availability of MBEs and WBEs to perform the work. Prime contractors were required, when bidding on jobs, to either meet subcontractor participation goals or demonstrate that they had engaged in specific outreach efforts. Failure to do so would result in a bid being deemed non-responsive. *Id.* at 542. The *Hi-Voltage* court found that race and gender-conscious participation or outreach requirements ran afoul of Proposition 209 because they essentially amounted to an illegal "preference" for MBEs and WBEs. As the court stated:

> The City's Program essentially places on a contractor the burden of disproving a negative. Without any prima facia proof of past misconduct, a contractor must establish its responsibility as a bidder by showing it does not discriminate on an impermissible basis in its subcontracting. As with any requirement utilizing preferences, this completely inverts the normal procedures for making discriminatory claims... Furthermore, a contractor may show nondiscrimination only in the manner designated by the City, either according to a fixed participation goal or by prescribed outreach to MBE's and WBE's. In other words, it can only prove

[4] Although the *Domar* decisions were issued prior to Proposition 209, the ultimate finding that the Los Angeles program was race/gender-neutral may still have significant relevance here, as the SCOPe program, discussed below, is a less aggressive version of the Los Angeles program.

> it does not discriminate against minorities and women by discriminating or granting preferences in their favor. *Id.* at 563-64.

Such preferences, the *Hi-Voltage* court found, plainly violated Proposition 209's prohibition on race and gender-based affirmative action programs. However, the court was careful to point out that race and gender-*neutral* programs remained constitutionally permissible:

> Although we find the City's outreach option unconstitutional under section 31, we acknowledge that outreach may assume many forms, not all of which would be unlawful. Our holding is necessarily limited to the form at issue here, which requires prime contractors to notify, solicit, and negotiate with MBE/WBE subcontractors as well as justify rejection of their bids. Plainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification. *Id.* at 565.

While *Hi-Voltage* remains the last word from the California Supreme Court with respect to race and gender-conscious programs in public contracting, the First District Court of Appeal recently considered a different aspect of the issue in *Coral Construction, Inc. v. City and County of San Francisco*, 149 Cal. App. 4th 1218 (2007), which has been the subject of much public interest and commentary. The effect of the *Coral Construction* decision is discussed at length below.

C. Effect of the *Coral Construction* Decision

In *Coral Construction*, the First District Court of Appeal considered whether and under what circumstances federal equal protection principles might nullify Proposition 209 in the context of public contracting programs. *Coral Construction* involved a challenge against San Francisco's Equal Opportunity in contracting program, which gave discounts to bids submitted by certified MBEs and WBEs. The program also required prime contractors to either reach specified participation levels by minority or woman-owned subcontractors, or document good faith efforts to do so. *Id.* at 1228. Thus, key aspects of the San Francisco program were similar to the program struck down in *Hi-Voltage*. Seeking to distinguish the cases, however, San Francisco defended its program by arguing that Proposition 209 did not apply because it was preempted by federal law, or to the extent it was not preempted, its program fell within the "federal funding" exception to Proposition 209. *Id.* 1225.

The *Coral Construction* court first dealt with the City's argument that its program fell within Proposition 209's exception for programs required to "establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State." Cal. Const. Art I, section 31(e). San Francisco argued that it fell within the federal funding exception to Proposition 209 because it received grants from various federal agencies which required compliance with Title VI of the Civil Rights Act of 1964 and implementing regulations. *Coral Construction* at 1231. The *Coral Construction* court disagreed, finding that San Francisco had

failed to establish that it stood to lose dollars under any particular federal program or regulation if it did not implement race-based measures. *Id.* at 1234. Furthermore, even if San Francisco had shown that it fell within a federal program or regulation requiring race-based measures (which it had not), it would still need to proffer "'substantial evidence of the type of past discrimination that triggers the federal regulation's requirement for current race-based measures'." *Id., citing C & C Construction, supra*, 122 Cal. App. 4th at 298. San Francisco had failed to make this showing.[5]

Although the federal funding exception to Proposition 209 did not apply, the court ultimately agreed with San Francisco's argument that where federal equal protection principles conflict with the requirements of Proposition 209, federal law will govern. *Coral Construction* held that the federal Equal Protection Clause itself may *require* the use of race or gender-based programs to remedy identified discrimination in specific instances. *Id.* at 1246-50.

The *Coral Construction* court found that, under federal equal protection principles, government bodies have an *affirmative obligation* to remedy the ongoing effects of intentional discrimination within their jurisdictions:

> Indeed, state actors have a 'constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination....' [*citing Wygnant v. Jackson Board of Education*, 467 U.S. 267, 291 (1986); emphasis in original]. Stated a little differently, 'the State has the power to eradicate racial discrimination and its effect in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself. *Coral Construction* at 1248, citing *Croson, supra,* 488 U.S. at 518.

Although Proposition 209 generally prohibits preferential treatment on the basis of race or gender, federal Equal Protection and Supremacy Clause principles permit –and indeed require - race/gender-conscious programs where discrimination is so severe that race/gender-neutral programs will not suffice to rectify the problem. As the *Coral Construction* court stated:

> If a city or other political subdivision were found to have engaged in intentional discrimination such that some type of race-based remedial program was *necessary* under the federal Constitution,

[5] There has been some suggestion by City staff and members of the public that because the City of San Diego receives federal funding it is exempt from the provisions of Proposition 209. As this discussion of *Coral Construction* suggests, the federal funding exception has been interpreted very narrowly. The exception will only apply where the City can demonstrate that it will lose federal dollars under a specific federal program or regulation if it fails to implement race-based measures. Even in such a case, the City would only be exempt from the provisions of Proposition 209 with respect to that particular federal program or regulation. At a recent forum with community leaders, several participants suggested that a breakdown of which City contracts involve federal funding would be beneficial to ascertaining the potential of Proposition 209's federal funding exception. Compilation of such data could be useful, and should include the total amount of federal funding by contracting area and by federal program.

> the supremacy clause as well as [Proposition 209] dictate that federal law prevails. *Id.* at 1250.

Put another way, where a public entity has intentionally discriminated, "use of a race-conscious or race-specific remedy necessarily follows as the only, or at least the most likely means of rectifying the resulting injury..." *Id.* at 1249, *citing Hi-Voltage, supra,* 24 Cal. 4th at 568.

However, the availability of reliable data demonstrating the need for the program was a key to the *Coral Construction* court's finding. The City of San Francisco had presented evidence that it had been both an active and passive participant in the past discrimination that its current program was intended to address - evidence which the court found lacking in *Hi-Voltage*:

> [U]nlike the City of San Jose, here the City has argued vigorously that the record backing the current ordinance presents the extreme case that mandates a narrowly tailored racial preference program to root out intentional discrimination in public contracting in San Francisco. *Id.* at 1250. [6]

Although the *Coral Construction* court found that it did not have sufficient evidence before it to determine whether or not San Francisco's race and gender-conscious program was constitutionally required under federal equal protection principles, it found that the trial court had erred by failing to consider the issue. It therefore ordered the case remanded for further findings concerning the extent and severity of discrimination by the City of San Francisco in public contracting. *Id.* at 1251. However, on August 22, 2007, the California Supreme Court granted review of *Coral Construction*. Thus, a final, binding statewide ruling on the principles underlying *Coral Construction* will likely be issued in the coming months.

In sum, public contracting programs that are race/gender-neutral will not run afoul of Proposition 209 or federal equal protection principles. *Coral Construction* suggests that in some cases, when intentional discrimination is sufficiently severe that race/gender neutral problems will not suffice to rectify the problem, race/gender-conscious programs may be required notwithstanding Proposition 209.

D. The City's EOC Program: Historical Overview and Current Status

1. 1993 Injunction and 1995 Disparity Study

In the 1970's, the City of San Diego instituted affirmative action programs designed to increase representation of minorities and women in the City's workforce and in City contracting. The contracting program included mandatory participation goals for MBEs and WBEs in all City

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[6] The *Coral* court noted in Footnote 17 of the opinion, "Significantly, unlike the current situation, the City of San Jose *conceded* that its program was not constitutionally required... Moreover, its disparity study was not part of the record, and thus the court had no way to measure the fit between the remedy and the goal of eliminating the disparity." *Coral* at 1249 (emphasis in original).

contracts. In 1985, in response to advice from the City Attorney, the contracting program was revised so that participation levels become voluntary and also to conform to competitive bidding requirements set forth in the City Charter. See Resolution No. R-262633, adopted March 4, 1985. In 1992, in response to the *Croson* decision, the City Council voted to commission a disparity study to comply with the requirement that its race/gender-conscious program be instituted in response to evidence of intentional discrimination. The selection process for a consultant to perform the disparity study began in 1993.

Meanwhile, in the late 1980's, City staff began enforcing the MBE and WBE goals by recommending rejection of all bids when the lowest responsible bidder failed to meet those goals. Op. San Diego City Att'y No. 96-2 (1996) [Op.96-2]. The practice was challenged by the Association of General Contractors (AGC) in federal court in *Associated General Contractors of America, San Diego Chapter, Inc. v. City of San Diego*, No. 93-1152 (S.D. Cal. 1993).

In an opinion by Judge Judith M. Keep, the Southern District court struck down the City's MBE/WBE program as constitutionally infirm in the absence of particularized evidence of intentional discrimination. The court issued a preliminary injunction prohibiting the City from enforcing the MBE/WBE program; the injunction was later made permanent. In response to Judge Keep's ruling, the City Council rescinded Resolution No. R-26233 on November 29, 1993. It bears noting here that Judge Keep's ruling predated the completion of the comprehensive disparity study that was then under contemplation.

The consulting firm selected to perform the disparity study, DEGA/TMS, forwarded a report to the City Manager in 1995. The four-volume study included a historical analysis of discrimination in the San Diego marketplace, statistics regarding availability and utilization rates of minority and woman-owned business, anecdotal evidence, and final recommendations. City of San Diego MBE/WBE Predicate Study Report, dated May 5, 1995 [Disparity Study], Vol. I, p.2. The Disparity Study analyzed relevant U.S. Supreme Court precedent and ultimately determined that, under *Croson*, "the City of San Diego ha[d] a sound legal basis for implementing a narrowly-tailored and progressive *race and gender-conscious* program to ensure that fair and equitable participation by minority and women-owned businesses is achieved." *Id.* at p. 4 (emphasis supplied).

In sum, the Disparity Study found that while the former MBE/WBE program had been successful in improving utilization rates, discrimination in the San Diego marketplace and economic inequality persisted such that complete abandonment of race/gender-based measures threatened to result in backward progress:

> The City of San Diego's former MBE/WBE Program for inclusion of minorities and women was very effective as evidenced by its high utilization rates for minority and women firms. However, as evidenced by the findings, the clear message of all the quantitative data gathered for this study is that *substantial disparity* continues to exist in the San Diego marketplace. The analysis of availability of sources of capital, income, wealth, home ownership rates and occupational/industrial distributions of employment and self-

> employment showed the existence of *gross disparities* for race and gender in ways that apparently adversely affect MBE/WBE formation, growth, and participation. Additionally, in examining the history of the City of San Diego as well as the affidavits and surveys of individual minority and women business owners in San Diego, it was found that the great majority of MBE/WBEs have positively identified the negative effects of discrimination on their business. *Id.* at p. 5 (emphasis supplied) .

A key point in the Disparity Study was that the City had experienced a "dramatic and immediate reduction" in MBE/WBE participation levels after the MBE/WBE program was enjoined. *Id.* at p. 5-6. The Disparity Study acknowledged that there were many factors that might have contributed to low participation levels in the absence of a race/gender-conscious program, including: financial barriers to entry such as discrimination in the banking industry, lack of start-up capital, and difficulty complying with City insurance and bonding requirements; lack of access to established social networks; and depressed availability of MBE/WBE firms due to historical discrimination.[7] *Id.* at p. 12-20.

In spite of obstacles to growth, the Disparity Study found that availability of MBE/WBE firms generally exceeded utilization, particularly in the construction industry, "a finding *Croson* indicated 'may constitute prima facia proof of a pattern of discrimination.'" *Id.* at p. 10. With respect to construction, the Disparity Study found that after the MBE/WBE program was enjoined, participation levels dropped for MBEs from 15.8% to 4.1% and for WBEs from 9.2% to 6.6% in the second half of 1994. The total amount of contract awards dropped for MBEs from 17.03% in FY 1993 to 8.9% in FY 1994, and for WBEs from 8.9% in FY 1993 to 7.5% in FY 1994. *Id.* at 46. The Disparity Study noted that, without some type of affirmative action, the numbers were likely to decrease even further:

> These results coupled with findings in the overall marketplace, clearly suggest that the effects of discrimination in San Diego are not only continuing, ***but absent some adjustments in operations, City dollars will continue to find their way into direct, as well as, passive support of discrimination***. *Id.*

Finally, the 1995 Disparity Study made specific recommendations to the City for re-instituting its MBE/WBE program with certain revisions. The Disparity Study suggested a multi-faceted approach, including:

- Re-instituting annual participation goals for MBEs/WBEs;
- Enhancing Equal Opportunity staff and technical resources;

[7] With respect to this last point, the Disparity Study cautioned against relying too heavily on low availability levels to explain the substantial disparity in participation. As the study put it: "One result [of past discrimination] may manifest itself as a depressed availability pool of MBEs/WBEs. Subsequent use of that depressed availability pool as the basis from which to set utilization goals would compound the historical injustice that produced it." Disparity Study, p. 38.

- Developing a combination financing and bonding program in cooperation with private lenders and sureties;

- Implementing effective diversity training programs;

- Implementing a comprehensive contract tracking system, which would: (1) track prime and subcontractor participation in terms of awards, as well as final payment, broken down by gender and ethnicity; and (2) provide a mechanism whereby the City could maintain a database of available MBEs and WBEs, which could be used to alert firms to bidding opportunities;

- Requiring confirmation of final payment and expenditures with fiscal accounting records; and

- Increasing aggressiveness in sanctioning firms for failing to comply with the City's program. *Id.* at 74-49.

The City Manager forwarded the Disparity Study to the City Attorney and requested an analysis as to whether it provided sufficient evidence to justify a race/gender-conscious program under *Croson* and its progeny. In its 1996 Opinion, the City Attorney ultimately concluded that the Disparity Study did not provide such evidence. Op. 96-2, p. 1. The City Attorney criticized the Disparity Study as using flawed methodology to arrive at its statistical conclusions, failing to adequately consider non-discriminatory rationales for low participation levels, and for failing to acknowledge the City's recent strides in enacting anti-discrimination legislation and other efforts. Op. 96-2, p.11. Because the Disparity Study did "not show sufficient evidence of intentional race or gender discrimination" in City contracting, the City Attorney advised the City to abandon race/gender-conscious efforts and instead focus on developing "non-preferential" outreach programs. Op. 96-2, p. 1.[8]

After the passage of Proposition 209, the City Attorney issued its 1997 Opinion (discussed above), which specifically addressed the impact of the new Constitutional Amendment on the City's existing laws and programs. Once again, the City Attorney advised the City to adopt a race/gender-neutral approach to address disparities in the City's workforce and contracting. See discussion, infra, pp. 6-8. Against this historical backdrop, the City's existing equal opportunity laws and programs are described below.

[8] Because the 1996 opinion was issued prior to the November election, Proposition 209 did not factor into the City Attorney's analysis.

2. Overview of Existing Law and Current Programs

a. Existing Law.

The San Diego Municipal Code (SDMC) contains several provisions regarding equal opportunity in the context of employment and City contracting.

Sections 22.2701, *et seq.*, establish the framework for the City's current Equal Employment Opportunity Outreach program. The overall objective of the program is: "to ensure that contractors doing business with or receiving funds from the City will not engage in unlawful discriminatory employment practices prohibited by State and Federal law." SDMC section 22.2701. A key component of the program is that City contracts[9] must include a non-discrimination clause, which prohibits any contractor from illegally discriminating against any employee or prospective employee, and requires prime contractors to ensure compliance by their subcontractors. SDCMC section 22.2704.

In addition, contractors are required to submit certain documentation to the City, including a Work Force Report showing the gender and ethnic breakdown of the contractor's work force by occupational category. In some cases, when a Work Force Report raises equal opportunity concerns, the City may require the contractor to submit an Equal Opportunity Plan, which must be approved prior to final contract award. SDMC section 22.2705(b). The Municipal Code expressly provides that any Equal Opportunity Plan approved by the City "shall not include quotas, goals, or timetables for increasing women and minority employment and will not require terminating or laying off existing employees." SDMC section 22.2705(c).

The City is also required to conduct periodic reviews of approved Equal Employment Opportunity Plans to ensure compliance, and may recommend termination of a contract or debarment for failure to comply with a Plan and/or as a sanction for unlawful discrimination. SDMC section 22.2707.

The Municipal Code also contains a division entitled, "Nondiscrimination in Contracting," sections 22.3501 *et seq.*, which prohibits discrimination in the bidding and contracting process. Section 22.3504 states the City's policy:

> ... not to accept bids or proposals from, nor to engage in business with any business firm that has discriminated on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, disability, or any other form of unlawful discrimination in its solicitation, selection, hiring, or treatment of another business.

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[9] Certain contracts are generally exempt from the provisions of the Equal Employment Opportunity program, including: (1) contracts with contractors or subcontractors who have done less than $10,000 worth of business with City in the preceding 12 months or have less than 15 employees, (2) contracts with other public entities, (3) contracts with nonprofit organizations, and (4) some emergency contracts, provided a written or partial waiver is granted by the City. SDMC section 22.2703.

Procedures for filing discrimination complaints, hearings and appeals, and available remedies are set forth in Sections 22.3505 through 22.3511. Sections 22.3512 through 22.3514 contain additional mandatory language for City contracts and bids, which prohibits discriminatory practices and requires compliance with City requests for information concerning subcontractors, vendors, and suppliers.

Finally, Municipal Code section 26.16 establishes a Citizens Equal Opportunity Commission [CEOC], which is intended to advise City departments as to "the progress being made in the Equal Opportunity Program adopted by the Council." SDMC section 26.16(a). Section 26.16 sets forth procedures for selecting Commissioners and describes the responsibilities of the CEOC, which include monitoring and providing recommendations regarding amendments to the City's Equal Opportunity Program and submitting quarterly written progress reports to the Rules Committee. At present, there are several vacancies on the CEOC.

In addition to the Municipal Code provisions, the City Council has adopted Council Policy 300-10, which sets forth the City's general Equal Opportunity policy. Council Policy 300-10 provides that the City Council "is committed to an Equal Opportunity Program pursuant to applicable State and Federal laws and guidelines..." and that "the City has extended this commitment even further to have as the City's goal that the representation of women and minorities in the City's work force achieve parity with the ethnic and sex composition of the population of the City of San Diego." CP 300-10 (1). Council Policy 300-10 further provides that City staff provide semi-annual reports "detailing [Equal Opportunity] goals, progress, and strategies" to the City Council for review and approval by the Rules Committee, and establishes an Equal Opportunity Commission to monitor the City's Equal Opportunity programs and progress. CP 300-10 (8).

Council Policy 300-10 has not been amended since 1986. In light of the many substantial developments in the law since that time, which have been highlighted above, as well as changes in San Diego's socio-economic landscape and increasing public concern in this area, the City Council may wish to consider updating the policy to conform to current law and marketplace realities.

b. Current Programs.

***i.* SCOPe.**

The City currently administers several programs under the umbrella of the EOC. Perhaps garnering the most public concern is the Subcontractor Outreach Program [SCOPe], which was established in 2000 with the goal of "maximizing subcontracting opportunities for all qualified and available firms." Subcontracting Outreach Program Summary [SCOPe Summary], Introduction, p. 2. SCOPe applies to City-funded construction projects of greater than $250,000 in value. It sets mandatory subcontractor participation goals; failure to list subcontractors and subcontracting amounts sufficient to meet mandatory goals results in a bid being rejected as non-responsive. *Id.* These goals, however, can be met by subcontracting with any firm. There is no requirement to subcontract to minority or women-owned firms.

SCOPe also sets advisory participation levels for disadvantaged business enterprises (DBEs)[10] and disabled veteran business enterprises (DVBEs), and asks bidders to include data on minority participation. Failure to meet the advisory participation levels does not constitute a basis for disqualification from the contract. *Id.* at § IV, p. 5.

SCOPe awards bidders points for documentation of various race/gender-neutral outreach efforts, with a maximum of one hundred points. The documentation verifies that the "bidder made subcontracting opportunities available to a broad base of qualified subcontractors, negotiated in good faith with interested subcontractors, and did not reject any bid for unlawful discriminatory reasons." *Id.* at § IV, p. 6. Any bidder who fails to achieve at least eighty out of one hundred points is disqualified from receipt of the public contract, but achieving or failing to achieve advisory participation levels does not result in the addition or loss of any points. *Id.* at §IV, pp.6-7.

SCOPe also requires bidders to be prepared to submit five years' worth of documentation regarding participation levels of DBEs and DVBEs among its subcontractors. *Id.* at §IV, p. 5. It does not specifically require information regarding the gender or racial breakdown of subcontractors. Finally, SCOPe nominally requires contractors to submit a "Final Summary Report" within 15 days of completion of the contract, which should include information regarding actual subcontractor activity. *Id.* at §IX, p. 10. According to the Mayor's Staff report of August 1, 2007 to the Rules Committee, this requirement has never been enforced, and the City has never received Final Summary Reports. However, the Director of the City's Purchasing and Contracting Department has stated his intention to begin enforcement of this requirement.

In 2003, the effectiveness of SCOPe was called into question by a City Manager Report [CMR] No. 03-163. According to the report, SCOPe had since its inception "brought limited increases in participation on City construction contracts at considerable cost." CMR No. 03-163, p.2. The report claimed that SCOPe had cost the City $4 million dollars with limited success compared to other programs, such as the Minor Construction program (discussed below). *Id.* The report also indicated that SCOPe lacked aspects of more effective programs, such as the one administered by the City of Los Angeles, which explicitly included advisory levels for MBEs and WBEs, was backed by a larger staff, and was generally strictly enforced. *Id.* at pp. 3-11. Notwithstanding this criticism, the City Manager recommended continuing SCOPe (with possible modifications) for projects not covered by other programs, as "no viable alternative to SCOPe ha[d] been identified" by staff or the construction community. *Id.* at 19.

The City Manager issued a follow-up report in 2004, CMR No. 04-183, in which it proposed adoption of a redlined version of the SCOPe Summary. The redline included references to MBEs and WBEs, and also incorporated procedures for monitoring substitution of contractors (a concept taken from the Los Angeles program). CMR No. 04-183, Attachment 1. The 2004 report also noted that compliance with SCOPe had increased among contractors and

[10] DBEs are defined as any "certified business which is at least fifty-one percent (51%) owned and operated by one or more socially and economically disadvantaged individuals and whose management and daily operation is controlled by qualifying part(ies)..." SCOPe Summary, § III, p. 3.

that the cost to the City of administering the program had significantly decreased. *Id.* at 3. The modifications to SCOPe recommended in the 2004 report were never adopted by the City Council.

At present, the effectiveness of SCOPe is still the subject of some debate, as discussed below.

ii. Minor Construction Program

The City also administers a Minor Construction Program [MCP], which pairs small and emerging business with construction projects of $250,000 or less. According to the 2003 City Manager's Report, the MCP was fairly successful in its early stages, resulting in $850,000 worth of awards to small business from July 2002 to December 2002. Of that $850,000, more than $500,000 was awarded to DBEs. CMR No. 03-163, p. 14. In 2003, the Rules Committee considered raising the dollar threshold for the MCP from $250,000 to $500,000, but the City Manager advised against this due to staffing limitations and concerns about the ability of small firms to handle more complex projects. *Id.* at p. 14. The Engineering and General Contractors Association [EGCA] has implemented a training program in conjunction with MCP, which is intended to provide small businesses with guidance concerning the bid process and best practices in the construction industry. *Id.* at 15.

In recent years, according to the City's Purchasing and Contracting Department, changes to City policies, such as increased use of design-build and general requirements contracts, have diverted construction dollars away from MCP.

iii. Mentor-Protégé Program

The Mentor-Protégé Program, which commenced in 2001, pairs major construction companies with small and disadvantaged businesses in order to provide training opportunities and build industry relationships. As stated in the 2006 Executive Summary, the program is "a deliberate effort to address and subsequently overcome barriers that typically inhibit or restrict the success of emerging, small, minority and woman-owned construction companies..." Mayor's Report to Council, No. 07-135 (August 1, 2007) [RTC 07-135], Attachment 2, p.9. According to the Executive Summary, the program has resulted in increased contract awards and income to several "protégé" companies. *Id.* at pp. 10-12. The program has graduated just three firms since its inception, with five others currently enrolled.

iv. Small/Local Business Programs.

In recent years, a suggestion has been made to adopt a program awarding bid preferences to small and/or local business enterprises as a method of increasing diversity in City contracts. In the 2003 City Manager's Report, City staff suggested a pilot program whereby the City would award 5% bid preferences to small or locally-owned contractors and subcontractors for projects between $250,000 and $1,000,000. CMR No. 03-163. The pilot program, which was apparently opposed by the AGC, was never implemented.

3. Mayor's Report on Effectiveness of Current Programs

a. Statistics

On August 1, 2007, the Rules Committee heard presentations from the Mayor, Interim Chief Operating Officer Jay Goldstone, and the Office of the Independent Budget Analyst [IBA] concerning the effectiveness of the City's current equal opportunity laws and programs. The Mayor reported that the City's performance in this area was nothing short of "abysmal." Mr. Goldstone summarized a written Report to Council from the Mayor's staff, dated August 1, 2007, regarding the status of the City's EOC program. The report showed extreme disparities in the award of construction projects in FY 2007, with non-minorities receiving over 96% of total prime contract dollars and 92% of total subcontract dollars. The breakdown by minority group was presented as follows:

Construction Awards by Ethnicity, 7/01/06 – 6/15/07

Contracts	**AfricanAmerican** **$** #	**Asian Pacific** **$** #	**Caucasian** **$** #	**Hispanic** **$** #	**Total** **$** #
Prime Contracts	0	$162,571 1	$44,179,684 40	$1, 654,018 2	$45,996,273 43
Sub Contracts	$110,000 1	$289,323 2	$10, 189,688 71	$483,100 7	$11,072,091 81

No data was presented regarding the gender breakdown of firms. Nor was data regarding MBE or WBE participation in non-construction contracts (totaling 80% of the City's total contract dollars) made available.[11] RTC 07-135, Attachment 1, p.8.

The report also acknowledged that the requirement to submit Final Summary Reports pursuant to SCOPe was not being enforced, and that there was "no excuse" for the City's failure to collect and/or disseminate statistical data for FY 2006 and 2007 contracts. RTC 07-135, pp. 3, 6. To rectify the problem, the report recommended a number of action steps, including enforcement of SCOPe documentation requirements, the presentation of statistical information to City Council in October 2007, and other initiatives. RTC 07-135, pp. 3-6. City staff has since indicated that it intends to require submission of Final Summary Reports on a going-forward basis.

[11] At the August 2, 2007 hearing, personnel from the City's Purchasing and Contracting Department indicated that it would make data regarding non-construction contracts available subsequent to the hearing. As of the date of this memorandum, the City Attorney has not yet received the non-construction contract data.

The IBA also presented a report, dated August 1, 2007, which provided an overview of relevant law and noted several deficiencies in the City's existing EOC program. For example, the IBA noted: the unavailability of statistics to track EOC performance for FY 2006 and 2007; the lack of status reports from the CEOC in recent years; the lack of comprehensive status reports from the EOC to City Council since 2002; and the need for updating Council Policy 300-10 in light of recent developments in the law. IBA Report, August 1, 2007, pp. 1-4. The IBA also presented examples of effective programs in other jurisdictions, and provided a series of recommendations for improving the City's program status. *Id.* at pp. 4-8.

b. Anecdotal Evidence.

Although time constraints prevented the City Attorney from conducting a comprehensive investigation into anecdotal evidence of intentional discrimination by the City (or its prime contractors), public comment at the August 1, 2007 Rules Committee hearing indicates that minority and woman-owned businesses are continuing to experience the ongoing effects of discrimination in San Diego. Among numerous individual anecdotes, at least one citizen at that hearing indicated that her professional children have relocated to other cities, despite having grown up in San Diego, because they perceive San Diego to be unfriendly to minority businesses. This particular anecdote may be significant because, if it represents a typical story, it may indicate that the perception of San Diego is so negative that it could lead to a decline in the availability and willingness of minority-owned firms to compete for City contracting dollars.

The City Attorney's investigation thus far revealed that at least one minority or woman-owned subcontractor experienced a sharp decline in communications from prime contractors regarding bid opportunities after the passage of Proposition 209. In addition, the investigation revealed a general reluctance among minority/women-owned firms to offer anecdotal evidence to this office because of a perceived culture that allegedly would punish such behavior with a denial of contracting dollars.

As indicated by the *Coral Construction* decision, anecdotal evidence is an important factor in court determinations regarding the presence of active or passive discrimination. Thus, any disparity study commissioned by the City should include a comprehensive discussion of anecdotal evidence (e.g., witness interviews, surveys results, etc.) in addition to statistical analysis. A far more extensive effort to compile and study such evidence is needed.

II. Application of Legal Analysis to San Diego's Equal Opportunity Policies and Programs

While the current information discussed above tends to lead strongly toward the conclusion that the City is a participant in egregious discrimination, more information, in the form of a comprehensive new disparity study, is needed to determine whether a race/gender-conscious remedy is constitutionally prescribed. Such a study should be conducted without delay. In the meantime, the City should bolster its race/gender-neutral efforts to alleviate existing discrimination.

A. While the Data Currently Available Shows Alarming Disparities in City Contracting, More Information is Needed to Determine Whether the City's Contracting Practices Would Be Found to Include Discrimination That Makes Race/Gender-Based Measures Constitutionally Necessary Under *Coral Construction*.

Although the available data is inadequate to allow a definitive conclusion on this question, the evidence that is available strongly suggests that there is an ongoing historical pattern of discrimination in San Diego that rises to the level of that contemplated by the court in *Coral Construction,* that current programs are woefully inadequate to remedy this discrimination, and that discrimination is more severe now than it was when the issue was last comprehensively studied in the mid-1990's. Race/gender-conscious remedies may be, based on the apparent failure of race/gender-neutral programs, the only way to effectively address the problem. However, as will be discussed further below, more information is needed to build a factual record of discrimination to ensure that any race/gender-conscious program adopted by San Diego would withstand legal challenge.

As a preliminary matter, it is important to note that the *Coral Construction* court did not make a determination regarding whether the City of San Francisco had presented sufficient evidence to necessitate a race/gender-conscious program under federal equal protection principles. Rather, the *Coral Construction* court found that the trial court had erred in failing to consider the issue. Because the Court of Appeals did not have enough evidence before it to make a determination, it remanded the case for further findings regarding the level of discrimination in the San Francisco construction industry. *Coral Construction, supra,* 149 Cal. App. 4th at 1250. The key point in *Coral Construction* was that the court decided, *as a matter of law*, that there could be circumstances where evidence shows discrimination to be so severe that a governmental body is *required* to implement a race/gender-conscious remedial program.[12] In such cases, the court found, the federal Equal Protection Clause trumps Proposition 209's express prohibition on race/gender-based preferences. *Id.* at 1249-50.

While the *Coral Construction* court did not itself adjudicate the type and amount of evidence necessary to trigger race/gender-conscious measures, *Croson* and its progeny are instructive. In *Croson*, the Court discussed the level of evidence sufficient to justify race/gender-based remedial programs under a strict scrutiny analysis. As a threshold matter, the Court held that there had to be specific evidence of discrimination *in the locality and industry targeted* in order to satisfy the compelling state interest prong of strict scrutiny. *Croson, supra,* 488 U.S. 469 at 504-05.

Had the City of Richmond properly identified market-specific discrimination (which it had not), the Court held that it would have been justified in adopting remedial programs, whether the City had actively discriminated itself or had acted as a "passive" participant by permitting public funds to flow to private wrongdoers. *Croson* at 492. *See also Monterey Mechanical,*

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[12] The *Coral Construction* court noted, for example, that where discrimination is "intentional" and has been perpetrated "by the State itself," race/gender-conscious measures are required. 149 Cal. App. 4th at 1248. The question of what other types of findings might be sufficiently severe to require such remedies thus naturally follows.

supra, 125 F.3d at 713 ("[f]or a racial classification to survive strict scrutiny... it must be a narrowly tailored remedy for past discrimination, active or passive, by the governmental entity making the classification").

With respect to the *quality* of evidence required, the *Croson* court held that gross statistical disparities (provided they related to the specific field or industry targeted) could create an inference of discrimination[13] sufficient to trigger an obligation to remediate. Under such circumstances, the Court held, a governmental body would be justified in enacting remedial measures to rectify the discrimination. In extreme cases, "some form of narrowly tailored racial preference might be necessary..." *Croson, supra,* 488 U.S. at 509. To justify race/gender-based measures under strict scrutiny, disparities must be drawn between availability and participation levels in the particular locality and industry targeted.

The statistical data currently available to the City of San Diego with respect to discrimination in contracting consists of: (1) the statistical findings in the 1995 Disparity Study, and (2) any statistical data compiled by City staff since 1995 regarding the race and gender breakdown of City contractors and/or subcontractors.[14] As discussed above, the City has acknowledged its failure to compile this type of statistical data in recent years. At the August 1, 2007 Rules Committee hearing, City staff presented data regarding the racial breakdown of FY 2007 construction contractors and subcontractors only. Again, construction contracts comprise only 20% of the City's total contracting dollars. In addition, no data was made available regarding the gender breakdown of contractors in any category. City staff did indicate that such data would be made available to the Rules Committee beginning in October 2007, but it is unclear how comprehensive that data is expected to be.

The available data shows gross under-representation of minority firms in City construction contracting. By any measure, $44,174,684 out of $45,996,273 construction dollars going to non-minority firms in FY 2007 is an alarming statistic. Compared with statistics presented in the 1995 Disparity Study, this demonstrates that absolutely no progress has been made in increasing diversity among the City's construction contractors in recent years. Arguably worse was the complete absence of participation by African-American prime contractors in City construction projects last year, assuming at least *some* availability.[15] Without data regarding the gender breakdown of construction contractors, there is no way of knowing whether gender diversity numbers are similarly dismal.

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[13] Where a government body knows that a practice will have a discriminatory result, but engages in that practice anyway, this may contribute significantly to an inference of discriminatory intent. *Columbus Bd. of Educ. v. Penick,* 443 U.S. 449, 465 (1979) However, statistical disparities *without more* do not establish a constitutional violation. Plaintiffs must also show that a governmental body acted with "discriminatory intent or purpose." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 265 (1977). Discriminatory intent "implies that the decisionmaker selected or reaffirmed a course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *L. Tarango Trucking v. County of Contra Costa*, 181 F. Supp. 2d 1017, 1023 (N.D. Cal. 2001).

[14] While the City also has access to general census information and statistics compiled by other jurisdictions, such data is not likely to be considered particularly probative under *Croson* and subsequent case law.

[15] At the August 1, 2007 Rules Committee hearing, City staff did not present any statistics regarding availability of minority or women-owned firms in any industry. We are aware of no reliable current data on this question.

While extreme statistical disparities may create an inference of discrimination under *Croson*, the data currently available would likely not be sufficient to defend a race-based program in court *without corresponding statistics regarding availability in relevant markets.* At most, the City may have sufficient evidence to support a race-conscious program in the *construction* field. Even in that case, the City would still need to make some comparison between availability and utilization. The City does not have sufficient data to justify a gender-conscious program in construction, or a race/gender-conscious program in any other area, without further information. In addition, as will be discussed further below, a court is not likely to consider statistics presented in a 12 year-old disparity study sufficient to support a race/gender-conscious program in 2007.

In sum, without adequate data, the City is unable to assess disparity rates in order to determine whether it has been an active or passive participant in intentional discrimination such that race/gender-conscious measures may be constitutionally required under *Coral Construction*. Continued "willful blindness" to the numbers is not a tenable solution. In the current situation, where historical discrimination is well established, and current information, albeit limited, indicates that discrimination continues wholly unabated, the City cannot prevent discrimination by remaining willfully ignorant. On these facts, the collection of data to determine compliance with the City's obligation to refrain from actively or passively supporting discrimination is a constitutional mandate – the "*sine qua non* of intelligent, appropriate legislative and administrative action." *Connerly*, *supra*, 92 Cal. App. 4th at 46.

B. In Order to Determine Whether There is Evidence of Discrimination Necessitating Race/Gender-Based Remedies Under *Coral Construction*, the City Should Commission A New Disparity Study, or At Least Supplement Currently Available Data, to Assess Current Marketplace Realities, Availability of Minority and Woman-Owned Enterprises, and Utilization Rates.

In order to determine whether discrimination in San Diego is so severe that federal equal protection principles require a race/gender-conscious program, the City needs to seek: (1) evidence of active or passive discrimination by the City in the particular industry or field targeted; (2) evidence that the race/gender-conscious program is narrowly tailored to remedy the ongoing effects of that discrimination; and (3) evidence that race/gender-neutral alternatives would not suffice to rectify the problem. *See Croson, supra*, 488 U.S. at 505-07; *Coral Construction, supra,* 149 Cal. App. 4th at 1249-50. In all likelihood, the only reliable way to make this showing would be to commission a new disparity study, based on current marketplace realities, availability, and utilization rates.

In *Coral Construction,* the court's analysis turned largely on evidence regarding the comprehensive disparity study commissioned by the City of San Francisco in 2003. In addition to statistical data, the San Francisco disparity study included anecdotal evidence regarding discriminatory conduct by city staff. The consultant commissioned to conduct the study, in cooperation with the city, also conducted a series of public hearings at which 134 people testified regarding continuing discrimination in the marketplace. *Id.* at 1229-30. Based on this evidence, the City of San Francisco had determined that it was "actively discriminating against women and

minority groups in its contracting, and was passively participating in private sector discrimination." *Id.* at 1230. The court contrasted the evidence presented by San Francisco with that presented by the City of San Jose in *High-Voltage*, noting in particular San Jose's failure to introduce a disparity study:

> Significantly, unlike the current situation, the City of San Jose *conceded* that its program was not constitutionally required. [Citations omitted.] Moreover, its disparity study was not part of the record, and thus the court had no way to measure the fit between the remedy and the goal of eliminating the disparity. *Id.* at 1249, n. 17 (emphasis in original).

The *Coral Construction* court did not opine on precisely how recent a disparity study should be to justify existing race/gender-based programs. Presumably, under *Croson* and its progeny, a disparity study would need to contain *current* data in order to justify *current* programs. At least one court has found, for example, that a 9 year-old disparity study would not be sufficient to demonstrate present discrimination requiring race/gender-conscious measures. *L. Tarango Trucking v. County of Contra Costa*, 181 F. Supp. 2d 1017, 1031 (N.D. Cal. 2001).

In *Tarango*, minority and woman-owned businesses sued Contra Costa County for alleged equal protection violations in public contracting. Plaintiffs alleged that the county had discriminated by failing to enforce its affirmative action and outreach programs, and neglecting to collect data regarding the race and gender breakdown of county contractors. *Id.* at 1031. The *Tarango* court found that plaintiffs failed to demonstrate an equal protection violation because there was insufficient evidence of continuing discrimination in public contracting. *Id.* The *Tarango* court pointed to the absence of evidence regarding availability versus utilization rates, and noted that the county's 9 year-old disparity study had little relevance to current programs:

> Plaintiffs have not demonstrated that the County's contracting policies have a disparate impact on women-owned and minority-owned contractors. It is true that the meager information that is available suggests that the County awards a low absolute number of contracts to women-owned and minority-owned contractors. There is no accurate data, however, on the number of women-owned and minority-owned contractors who are qualified to do business with the County...
>
> The only availability data that was presented at trial was from a 1992 study by the National Economic Research Associates, Inc. ('NERA')... Even if the NERA report had set forth accurate availability statistics for 1992, the Court is not persuaded that those statistics accurately reflect the *current* availability, nearly ten years later, of women-owned and minority-owned contractors who are qualified to do business with the County. *Id.* 1032 (emphasis in original).

To summarize, a comprehensive disparity study, which compares availability to utilization in specific industries, appears to be a critical factor in determining whether there is discrimination sufficient to trigger race/gender-based measures under *Coral Construction*. In order to best devise a remedial program that both addresses the apparently alarming disparity and also will be defensible in court, the City of San Diego must commission a new study to comprehensively document discrimination in the specific industries.

C. The Post-Proposition 209 Drop in Participation Rates is Relevant to This Analysis, As It Shows That Race/Gender-Neutral Alternatives Have *Not Been Effective* to Remedy Discrimination in San Diego Public Contracting.

There is no doubt that the elimination of MBE/WBE programs took a severe toll on San Diego's progress with respect to diversity in public contracting. As discussed above, the 1995 Disparity Study indicated a sharp decline in MBE/WBE participation after the City's MBE/WBE program was enjoined by Judge Keep in 1994. The numbers bear repeating: In construction, the Disparity Study noted a precipitous drop from 15.8% MBE participation in the second half of 1993 to 4.1% MBE participation in the second half of 1994. WBE participation in construction dropped from 9.2% to 6.6% in the same period of time. Today, MBE participation in construction continues to languish at 4.0% for prime contractors. Without current data regarding WBE participation, we cannot determine whether those numbers have remained equally troubling.

As noted above, the City Attorney's Office initially discouraged the City from re-instituting race/gender-conscious programs after Proposition 209 became law. The City's failure to re-institute such programs likely contributed in substantial part to the dismal numbers presented at the August 1, 2007 Rules Committee hearing.[16] What the limited data available shows is that, in the absence of race/gender-conscious programs, MBE and WBE participation in San Diego contracting has dropped dramatically. If a newly instituted race/gender-conscious program became the subject of court testing, the City may be able to rely on this data to demonstrate that race/gender-neutral alternatives have *not been effective* to remedy the ongoing effects of past discrimination. This would bolster any claim that the City was justified in instituting race/gender-conscious programs under *Coral Construction*.

D. The City Would Best Insulate Itself From Legal Challenge to Newly Instituted Race/Gender-Conscious Preference and/or Outreach Programs By Supplementing Current Data With a New Disparity Study.

In order to best insulate the City from a legal challenge should it choose to re-institute race/gender-conscious outreach and/or preference programs, the City Attorney makes the following recommendations:

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[16] San Diego's experience with respect to the post-Proposition 209 drop in MBE/WBE participation is not unique. A recent report issued by the Discrimination Research Center, a think tank located in Berkeley, California, found that MBE participation rates decreased significantly throughout the state after the passage of Proposition 209. "Free to Compete?: Measuring the Impact of Proposition 209 on Minority Business Enterprises" (August 2006), Executive Summary, p.2.

The City must first commission a new disparity study based on current marketplace realities, availability, and utilization rates. A comprehensive disparity study is the best way to determine whether there is discrimination severe enough that race/gender-based measures are constitutionally required under *Coral Construction*. If a cross-industry study would be cost-prohibitive, then the City should consider a narrow study geared toward those industries it most wishes to target (e.g., where discrimination is perceived to be most severe, where the City anticipates most contracting activity in coming years, etc.).

At a minimum, the City must at least supplement the data presented at the August 1, 2007 Rules Committee hearing. Under *Croson* and its progeny, the City needs to demonstrate discrimination in the *specific locality and industry targeted* in order to determine whether there is a compelling state interest in race/gender-conscious remedial programs. Again, courts have given little weight to low participation rates absent some comparison to availability in the relevant market.[17]

With respect to outreach, the same recommendations apply to the extent that MBEs/WBEs are treated differently from other firms. Nothing prevents the City from requiring broad-based outreach efforts or from setting advisory goals for MBEs/WBEs along with other categories (like the Los Angeles program), provided there is no penalty for failure to reach those goals.

It also bears noting that while race/gender-conscious programs deserve serious consideration in light of current information, more aggressive race/gender-neutral programs need not await a new disparity study. The authors of the 1995 Disparity Study made numerous race/gender-neutral recommendations. In general, these are not currently in place. For example:

- The 1995 Disparity Study recommended enhancing Equal Opportunity staff and technical resources. Current staffing is at its lowest level in years.

- The 1995 Disparity Study also recommended that the City pursue a public/private partnership to create financing and bonding opportunities for emerging firms. No such program is in place.

- The 1995 Disparity Study recommended a comprehensive contract tracking system that would include a database of available MBEs and WBEs. Consensus opinion expressed at the August 1, 2007 Rules Committee meeting was that the City's data collection and maintenance practices in this area are sorely lacking.

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[17] So, for example, if the City wished to determine whether it needed a race/gender-conscious preference program for construction contracts, it would need to supplement the statistics presented at the August 1, 2007 hearing with: (1) statistics regarding participation rates for WBEs, and (2) statistics regarding availability of both MBE and WBE firms in the San Diego construction market. If the City wished to implement race/gender-conscious programs in other areas, it would need to compile statistics comparing availability and utilization rates in the relevant markets.

- Last, the 1995 Disparity Study recommended aggressive enforcement of the City's programs. Yet, despite substantial evidence that discrimination regularly occurs, actual enforcement is practically non-existent.

All of these race/gender-neutral recommendations from the 1995 Disparity Study could be implemented even under Proposition 209, if the City were willing to devote even modest staff resources to implementing them. In addition, SCOPe could be bolstered to more closely follow successful programs, such as the Los Angeles model, in order to improve the effectiveness of the City's outreach efforts. For example, SCOPe could be revised to expressly include anticipated participation levels for MBEs and WBEs (in addition to DBEs, DVBEs, and OBEs), and be enforced more stringently. Finally, the filling of numerous current vacancies on the Citizens Equal Opportunity Commission would enhance the City's ability to solicit and consider new ideas in these areas.

CONCLUSION

In *Coral Construction*, the First District Court of Appeal held that in cases where intentional discrimination by a governmental body is sufficiently severe, race/gender-based measures may be necessary to remedy the discrimination. In such cases, Proposition 209's express prohibition against race/gender-based measures is trumped by the federal Equal Protection Clause. In order to fall within the exception to Proposition 209 articulated by *Coral Construction*, the City of San Diego needs to determine whether it is (or has been) an active or passive participant in intentional discrimination. In order to assess its legal obligations, the City needs current data regarding availability and utilization rates in specific industries.

The data currently available shows alarming disparities. Should it fail to take any action, the City's long-standing tolerance of intolerable disparities may well leave the City vulnerable to a finding of discriminatory intent in violation of the federal Equal Protection Clause. The City would best insulate itself from such a legal challenge by aggressively seeking evidence of both the causes and potential remedies to the current situation, and aggressively implementing such remedies. These remedies may need to be race/gender-conscious. If so, the City can enhance its ability to defend any newly instituted race/gender-conscious program by basing any such program on a new disparity study or, at least, current statistics regarding availability and utilization rates in relevant markets.

In the meantime, nothing prevents the City from implementing race/gender-neutral recommendations (such as those outlined in the 1995 Disparity Study) or outreach programs that have proven effective in other jurisdictions, without further delay.

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