CHAPTER 2.
Legal Issues for Race- and Gender-based Programs

Madison and other cities adopted minority and women business programs for public contracting in the 1970s and 1980s. In 1989, the U.S. Supreme Court established substantial limitations on the ability of state and local governments to have MBE programs or any other programs benefitting a group based on race. Legal restrictions also apply to gender-conscious programs.

The 1989 U.S. Supreme Court decision in City of *Richmond v. J.A. Croson Company*[1] held there are only certain limited permissible reasons for a local government to have a race-conscious program, and set specific conditions for such programs:

1. A city such as Madison must establish and thoroughly examine evidence to determine whether there is a *compelling governmental interest* in remedying specific past identified discrimination or its present effects; and
2. A city must also ensure that any program adopted is *narrowly tailored* to achieve the goal of remedying the identified discrimination.

These two requirements must both be satisfied to meet the U.S. Supreme Court's *strict scrutiny* standard of review for race-conscious programs. Many cities, including Madison, eliminated their MBE programs after the *Croson* decision. Appendix B discusses how courts have applied the strict scrutiny standard when evaluating the legality of race-conscious programs.[2]

Disparity studies examine whether there is a disparity between the utilization and availability of minority- and women-owned firms in a city's contracting, which is key information in determining whether there is evidence that race or gender discrimination affects a city's contracting. Because the U.S. Supreme Court held that a city could take action if it had become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, local marketplace conditions are also examined.

There are a number of factors used to determine whether a program is narrowly tailored, including consideration of whether workable "race-neutral measures," such as the City's SBE Program, are sufficient to remedy the identified discrimination. This is a reason why the study team analyzed whether or not there was underutilization of minority- and women-owned firms in City contracting with the SBE Program in place. The study team examined other neutral measures as well.

Cities not meeting the standard for defensible MBE programs can still enact small business assistance programs as long as race or gender is not considered in the eligibility for the program or as a factor in the award of contracts. Madison's SBE Program is one example of a neutral measure.

Madison also follows state and federal requirements to apply MBE/WBE or DBE programs for certain state- or federally-funded contracts. Analysis of these programs was not part of the study.

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[1] *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). *See* Appendix B for thorough discussion of the legal issues.

[2] Certain Federal Courts of Appeal, although not the Seventh Circuit, apply the "intermediate scrutiny" standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.