

New Business

7/24/18.

**INTERNAL
OPERATIONS
STANDING
COMMITTEE**



CITY OF DETROIT
LAW DEPARTMENT

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Date: July 18, 2018

To: Honorable City Council

From: Law Department

Re: Law Department Notification of Emergency Procurement of Legal Services Pursuant to
City Ordinance 18-5-21, Marathon Petroleum v City of Detroit

The Law Department has submitted a privileged and confidential memorandum regarding the above referenced subject matter. Please submit this item for referral so that Council may consider any action that is necessary.

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July 20, 2018

Detroit City Council
2 Woodward Avenue, Suite 1340
Detroit MI 48226

RE: Minority or Gender Procurement Preferences

Honorable City Council:

Your Honorable Body, through Council President Brenda Jones, has requested a memo regarding preferential contracting by the City. The Detroit City Council has questioned why other municipalities, such as Pittsburgh or Indianapolis, can implement race or gender based preferences in municipal contracting while Detroit appears to lag behind these cities in such preferences.

In the past, Detroit, by ordinance, had a more aggressive policy of race or gender based preferences in municipal contracting. That ordinance was clearly vulnerable following the Supreme Court's decision in *City of Richmond v J. A. Croson Co.*, 488 US 469; 109 S Ct 706 (1989). *Croson* led directly to the outlawing of Detroit's minority preference ordinance, Ordinance 559-H, in *Arrow Office Supply Co. v Detroit*, 826 F Supp 1072 (ED MI 1993).

Taken alone, the *Croson* ruling need not be fatal to race or gender conscious preferences as demonstrated by several municipalities that have cautiously ventured forth with affirmative action efforts tailored to meet the evidentiary standards promulgated in *Croson*. In Michigan, however, the 2006 anti-affirmative action amendment to the Michigan constitution explicitly bars contracting preferences based on race or gender. Const 1963, art 1, § 26. This provision, which has been upheld by the Supreme Court, makes it highly unlikely that any Michigan municipality can legally implement race-conscious contracting programs.

SHORT ANSWER

The 1989 Supreme Court decision in *Croson* effectively doomed Detroit's minority set aside ordinance, as ultimately borne out by the *Arrow Office Supply* decision in 1993. Although some municipalities in other states have re-enacted race conscious municipal contracting ordinances, the Michigan Constitution imposes an insurmountable barrier to any such program in Detroit

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ANALYSIS

RICHMOND V CROSON DECISION

In *Croson*, the United States Supreme Court ruled that a Richmond, Virginia affirmative action program for minority contractors was unlawful under the equal protection clause of the United States Constitution. The Supreme Court held that race conscious programs, even those administered for remedial rather than discriminatory purposes, must be reviewed under the strict scrutiny standard. *Id.*, 488 US at 493-494. Under this two-pronged standard, the municipality must demonstrate a compelling governmental interest and a narrowly tailored remedy. In *Croson*, the Supreme Court held that Richmond met neither prong of the standard.

Richmond's Minority Business Utilization Plan required municipal prime contractors to subcontract at least 30% of the dollar value of municipal contracts to minority business enterprises (MBE). *Croson, supra*, at 478. An MBE was defined as any business with majority ownership by African Americans, Hispanic, Native American, and other minorities. *Id.* The plan was not limited to Richmond based disadvantaged businesses; any MBE could enjoy its benefits, even if not located in the Richmond area. *Id.*

Richmond offered evidence of discrimination to justify the use of racial classifications in municipal contracting. It contrasted the percentage of contracts awarded to minority contractors (0.67%) with the percentage of the minority population in Richmond (50%). *Croson, supra*, at 479. Richmond also cited evidence demonstrating low or non-existent levels of minority membership in various local contractors' associations. *Id.*, at 480.

The Court found that Richmond failed to establish a compelling state interest because the statistics relied upon to establish discrimination were too generalized. *Croson, supra*, at 505. Further, the plan was not narrowly tailored. The Court ruled the plan was over-inclusive as it benefitted groups as to which there was no evidence of past discrimination and Richmond failed to consider race-neutral means of increasing minority business participation in city contracting. *Id.*, at 506-507.

CROSON'S IMPACT ON DETROIT

In February, 1984, five years before the *Croson* decision, Detroit enacted Ordinance 559-H for the purpose of remedying "the present effects of past discrimination." The ordinance created sheltered market programs for the award of city contracts to minority and women owned businesses. The ordinance also created a minority business subcontractor program. The ordinance established percentage



goals for the award of municipal contracts to minority owned businesses and women owned businesses.

The enactment of this ordinance was preceded by hearings before City Council that detailed decades of discrimination in contracting. Among the facts cited to justify race conscious remedies was the fact that since 1974 only 3% of Detroit's contracts had been awarded to minority businesses in spite of the fact that Detroit's population was then 63% black.

After the Supreme Court's decision in *Croson*, a challenge to Detroit's ordinance was inevitable. Detroit's factual predicates for race sensitive contracting were similar to those unsuccessfully advanced by Richmond in *Croson*. Not surprisingly, in *Arrow Office Supply Co v City of Detroit*, 826 F Supp 1072 (ED MI 1993), the court held that "Ordinance 559-H must be held unlawfully discriminatory under well settled law . . ." *Id.*, at 1076.

Detroit currently has a race-neutral program offering favored status based on "Detroit based" operations. Those favored categories are Detroit Based Business (DBB), Detroit Based Small Business (DBSB), Detroit Based Micro Business (DBMB), Detroit Headquartered Business (DHB), and Detroit Resident Business (DRB). 1984 Detroit City Code Section 18-5-1. Depending on the nature and extent of a business's investment in Detroit, the size of the business, and the contract amount, equalization points are awarded to bidders. 1984 Detroit City Code Section 18-5-12.

The purchasing ordinance gives targeted businesses equalization factors when bidding for City Contracts. It does not establish or mandate goals or percentages for targeted businesses. In addition, the Finance Director has authority to limit bidding for certain contracts to Detroit Based Businesses, Detroit Based Small Businesses, and Detroit Based Micro Businesses. Sections 18-5-12(d), 18-5-13(a)(1), 1984 Detroit City Code.

Executive orders augment the ordinance. Executive Order No 2014-5, notes that the "goal of this Administration is to award thirty percent (30%) of the total dollar value of City contracts to Detroit Headquartered Businesses and Detroit-Based Businesses." (See Executive Order No 2014-5, Mayor Michael Duggan, August 22, 2014, p 1.) The Order urges departments and agencies to encourage these businesses to participate in the bidding process. *Id.*, at 2.

Executive Order No 2014-3, provides for the certification of businesses by the Human Rights Department. (See Executive Order No 2014-3, Mayor Michael Duggan, April 16, 2014.) The Order requires the Human Rights Department (now known as the Department of Civil Rights, Inclusion and Opportunity) to develop guidelines for the certification of business entities as Detroit Headquartered Business, Detroit Based Businesses, Detroit Based Small Business, Minority Owned



Business Enterprises, and Woman Owned Business Enterprise. *Id.*, at 1. Unlike Executive Order No 2014-5, this Order states no goal or percentage target and explicitly states, “It is important to note that the certification process for Minority Owned Businesses and Women Owned Businesses is not a set-aside or quota program for the award of City contracts.” *Id.*, at 2.

POST-CROSON PREFERENCES IN OTHER MUNICIPALITIES

Council members correctly note that some cities, such as Pittsburgh, Indianapolis, and Dayton, have reinstated race conscious contracting preferences. These ordinances or programs have not yet been successfully challenged under the equal protection clause of the federal constitution. *Croson* did not absolutely bar preferences in municipal contracting. Rather, it held that a compelling state interest was not demonstrated by generalized data that contrasted the percentage of minority population in a jurisdiction with the percentage of contracts awarded to minority contractors. This was precisely the sort of data that supported Detroit’s Ordinance 559-H.

Croson requires jurisdictions to demonstrate a compelling state interest by comparing the percentage of qualified disadvantaged contractors with the percentage of contracts awarded to such contractors. This ratio must be specific to defined goods or services for a particular geographic region.¹ Generalized data demonstrating racial disparity is insufficient.

Pittsburgh and other cities must prepare detailed “disparity studies” designed to address the evidentiary shortcomings attacked in *Croson*. Indeed, Pittsburgh provides by ordinance that its responsible agency “shall update its minority-owned and women-owned business disparity studies pursuant to established Supreme Court precedent at *City of Richmond, Va v J.A. Croson, Co.*, 488 U.S. 469 (1989) in 2012 and every five (5) years thereafter.” Section 177A.04(e), Pittsburgh Code of Ordinances.

Notably, none of these cities is located in Michigan. The reason for the absence of post-*Croson* affirmative action programs in Michigan is found in the state’s constitution which was amended by referendum after *Croson*.

¹ The equation for this computation is: Disparity Ratio = use of disadvantaged firms/available qualified disadvantaged firms. See *Contracting Barriers and Factors Affecting Minority Business Enterprises*, Minority Business Development Agency, U.S. Department of Commerce, December 2016, p 4. Use and availability must be “specific to well defined geographic and product markets.” *Id.* A result of .80 or less is evidence of “substantial disparity” generally deemed sufficient to warrant preferences. *Id.*



MICHIGAN CONSTITUTIONAL AMENDMENT OF 2006

Croson's evidentiary restrictions are not Detroit's only barrier to implementation of race or gender based preferences. Neither Indiana, Ohio, nor Pennsylvania has a state constitutional provision barring race or gender based affirmative action as was enacted by referendum in Michigan in November 2006. That amendment states as follows:

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district 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.

(2) 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.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1. Const 1963, art 1, § 26.

The U.S. Supreme Court upheld the constitutionality of this amendment in *Schuette v Coalition to Defend Affirmative Action*, 572 U S 291 (2014). So long as this provision remains in the Michigan Constitution, it clearly bars the type of programs undertaken in other cities. Unlike the jurisdictions referred to by Council, Detroit cannot reinstitute race or gender based preferences merely by undertaking more refined and detailed studies of contracting disparities. *Croson* is not Detroit's only obstacle.



To: Honorable Detroit City Council

Date: July 20, 2018

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CONCLUSION

The 1989 Supreme Court decision in *Croson* signaled an end to Detroit's affirmative action ordinance, as ultimately borne out by the *Arrow Office Supply* decision in 1993. Although other municipalities have restructured race or gender procurement preferences to address the deficiencies outlined in *Croson*, the anti-affirmative action amendment to the Michigan Constitution bars such programs here.

Respectfully submitted,

Sharon Blackmon
Senior Assistant Corporation Counsel
Municipal Section

Concur:

Tonja R. Long
Supervising Assistant Corporation Counsel
Municipal Section

Approved:

Lawrence García
Corporation Counsel

Alton James
Chairperson
Lauren Hood, MCD
Vice Chair/Secretary

City of Detroit
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Brenda Goss Andrews
Lisa Whitmore Davis
David Esparza, AIA, LEED
Gregory Pawlowski
Frederick E. Russell, Jr.
Angy Webb

July 23, 2018

HONORABLE CITY COUNCIL

RE: Vacancy on the City Planning Commission created by the resignation of Lesley Carr Fairrow (REQUESTING REPLACEMENT)

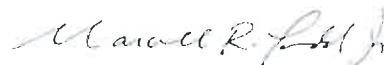
Lelsley Carr Fairrow after 11 years and four terms of serving on the City Planning Commission has resigned her appointment, creating a vacancy in the Commission. During her tenure she has been both an at-large appointee an appointee of District 5. The majority of her tenure was spent as the chair of the Commission with last few months serving as the Vice Chair/Secretary.

Below please find a chart detailing the status of City Planning Commission appointments.

Commissioner	District	Term
Alton James Chairperson	3	2018 - 2021
Lauren Hood Vice Chair/Secretary	5	2016 - 2019
Brenda Goss Andrews	At-large (Ayers) resides in 2	2016 - 2019
David Esparza, AIA, LEED	6	2017 - 2020
Lisa Whitmore Davis	4	2017 - 2020
Frederick E. Russell, Jr.	1	2018 - 2021
Angy Webb	7	2018 - 2021
Gregory Pawlowski	2	2017 - 2020
VACANT	At-large (Jones)	2016 - 2019

The staff of the Commission respectfully requests that City Council take the appropriate steps to fill the vacancy. Should you have any questions or require any additional information staff is available to address your inquiries.

Respectfully submitted,



Marcell R. Todd, Jr., Director

Cc: Maurice D. Cox, Director, P&DD
Arthur Jemison, Group Executive
Lawrence Garcia, Corp. Counsel

CITY CLERK 2018 JUL 28 AM 10:50

Alton James
Chairperson
Lauren Hood, MCD
Vice Chair/Secretary

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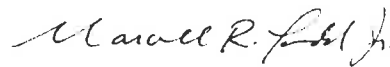
HONORABLE CITY COUNCIL

RE: City Planning Commission election of officer (INFORMATIONAL REPORT)

Now former Commissioner of Lesley Carr Fairrow was serving as the Vice Chair/Secretary of the City Planning Commission at the time of her resignation. As a result the Commission held a special election of officers in order to fill the position. Commissioner Lauren Hood, District 5, was elected to serve in that capacity and joins Alton James, District 3, who is the Chair of the Commission.

Should you have any questions or require any additional information staff is available to address your inquiries.

Respectfully submitted,



Marcell R. Todd, Jr., Director

Cc: Maurice D. Cox, Director, P&DD
Arthur Jemison, Group Executive
Lawrence Garcia, Corp. Counsel



City of Detroit

CITY COUNCIL

GABE LELAND
COUNCIL MEMBER

MEMORANDUM

TO: David Whitaker, Legislative Policy Division
Marcell Todd, City Planning Commission

FROM: Gabe Leland
Councilman District 7

DATE: July 18, 2018

RE: Request for Board of Ethics opinion

I am requesting the Legislative Policy Division to solicit an opinion from the Board of Ethics to determine whether a City Planning Commission staff member, operating in a volunteer capacity, could advise the Citizen Advisory Council and be in compliance with the ordinance.

Cc: Janice Winfrey, City Clerk
Stephanie Grimes-Washington, City Council Liason