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THE CROSON DECISION MANDATES THAT SET-ASIDE PROGRAMS BE TOOLS OF BUSINESS DEVELOPMENT

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In the landmark decision of *City of Richmond v. J.A. Croson Company*,[1] the Supreme Court established stringent new standards for non-federal public purchasing set-asides which are explicitly race-conscious. These standards principally impose three requirements:

—First, the jurisdiction or agency implementing a race-conscious set-aside *must have discriminated* against minority-owned businesses. There must be a *shortfall* in minority business activity compared to what would have existed in the absence of discrimination, and the agency or jurisdiction's policies or practices must be at least partially responsible for that shortfall.

—Second, the remedy chosen to eliminate the shortfall—the purchasing set-aside—must be *narrowly tailored* to match the discrimination. The program must be limited to minority groups adversely affected, sectors or industries where discrimination occurred, and a time period or quantity required to overcome the estimated shortfall.

—Third, the design of the remedial actions undertaken—the specific provision of the set-aside program—must be *logically related* to the problem at hand. That is, they must be efficient and effective tools for developing minority business to eliminate the shortfall; in particular, they must be superior to race-neutral approaches to achieving this end.

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[1] 109 S. Ct. 706 (1989).

This article discusses the analyses a jurisdiction or agency might undertake to demonstrate that its set-aside program meets these requirements. In doing so, the article suggests that meeting these standards is feasible and, accordingly, that agencies and jurisdictions need not abandon race-conscious programs in reaction to the *Croson* decision. However, to meet the standards, race-conscious programs must be effective tools of minority business development, not merely means of redistributing government sales from one ethnic group to another. Since more than a few set-aside programs do not consistently conform to the principle that business development is their role, many programs will require substantial modifications before they meet the standards. The article develops this general conclusion by examining each of the three requirements in turn.

I. DOCUMENTING DISCRIMINATION

The first requirement is that the jurisdiction or agency implementing a set-aside program must be shown to have discriminated against minority-owned businesses.

Prior to the *Croson* decision, many agencies and jurisdictions implementing race-conscious set-aside programs had done so without developing a detailed public record to document discrimination in their locality and the role of their agency or jurisdiction in it. Instead, they had relied upon common knowledge and widely-recognized patterns, both local[2] and national.[3]

[2] For example, in the *Croson* case, as part of the record supporting the set-aside program, the city cited the following statement by Henry Marsh, a member of the City Council:

> I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.
>
> I think the situation involved in the City of Richmond is the same. . .I think the question of whether or not remedial action is required is not open to question.

Id. at 743 n.5 (Marshall, J., dissenting).

[3] For example, in arguing in favor of the Richmond set-aside, Justice Marshall cited extensive Congressional hearings on the problems of minority businesses nationwide. *Id.* at 743 nn. 2 & 3. Similarly, the historical prevalence of discrimination against minorities in the construction industry is so well established that the Supreme Court in 1979 was prompted to note: "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers v. Weber, 443 U.S. 193, 198 n.1 (1979). "Judicial notice" refers to a fact so well known and universally accepted that it may be assumed in the deliberations of the court without being explicitly introduced into evidence.

Although agencies or jurisdictions now are required to document local problems of discrimination,[4] the process is not difficult, but it is tedious and time-consuming. It typically involves collection on the public record of a large number of anecdotes recounting specific incidents of discrimination and describing in detail precisely how the discrimination was exercised. Detail is important not only to give credibility to the record, but also to provide information necessary to ensure that

[4] While the majority decision in *Croson* clearly identifies *local* evidence as the most relevant, it remains advisable to place national information in the record as well. National studies and data may be more detailed, more rigorous, or more numerous than what can be generated locally. Among the national studies which might be cited concerning minority business in general are: Ando, *An Analysis of the Formation and Failure Rates of Minority-Owned Firms*, 15 REV. BLACK POL. ECON. 51 (1986); BLACK BUSINESS ENTERPRISE (R. Bailey ed. 1971); Bell, *Why Few Ghetto Firms Are Making It*, BUSINESS WEEK, Feb. 16, 1987, at 86; CHEN, U.S. MINORITY BUSINESS DEVELOPMENT AGENCY, U.S. DEPARTMENT OF COMMERCE, MINORITY BUSINESS TODAY: PROBLEMS AND THEIR CAUSES (1982); CHEN AND STEVENS, MINORITY BUSINESS DEVELOPMENT AGENCY, U.S. DEPARTMENT OF COMMERCE, MINORITY-OWNED BUS. PROBLEMS AND OPPORTUNITIES: A 1984 UPDATE (1984); CITIZENS' COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION TO OPEN THE DOORS OF JOB OPPORTUNITY (1984); Fratoe, *A Sociological Analysis of Minority Business*, 15 REV. BLACK POL. ECON. 5 (1986); I. LIGHT, ETHNIC ENTERPRISE IN AMERICA; BUSINESS AND WELFARE AMONG CHINESE, JAPANESE, AND BLACKS (1972); Maultesby, *A Look at the Problem of Minorities as Business People*, 3 ENTERPRISE 20 (1983); Morganthaler, *Black Entrepreneurs Face Huge Hurdles in Places Like Miami*, Wall St. J., May 17, 1988, at A1, col. 3; O'Hare, *Best Metros for Black Businesses*, 9 AMERICAN DEMOGRAPHICS 38 (1987); Ong, *Factors Influencing the Size of the Black Business Community*, 11 REV. BLACK POL. ECON. 313 (1981); N. SCARBOROUGH & T. ZIMMERER, EFFECTIVE SMALL BUSINESS MANAGEMENT (1984); Scott, *Financial Performance of Minority-versus Nonminority-Owned Businesses*, 21 J. SMALL BUS. MGMT. 42 (1983); Sims, *The Impact of State and Local Regulations on Minority Business Development*, THE URBAN INSTITUTE (1987); SWINTON AND HANDY, U.S. MINORITY BUS. DEVELOPMENT AGENCY, U.S. DEPARTMENT OF COMMERCE, THE DETERMINANTS OF BLACK-OWNED BUSINESSES: A PRELIMINARY ANALYSIS (1983); ENSURING MINORITY SUCCESS IN BUSINESS, (Thompson and DiTomaso eds. forthcoming); U.S. MINORITY BUS. DEVELOPMENT AGENCY, U.S. DEPARTMENT OF COMMERCE, MINORITY BUSINESS DEVELOPMENT (1980); U.S. SMALL BUSINESS ADMINISTRATION, SMALL BUSINESS INCUBATORS: NEW DIRECTIONS FOR LOCAL ECONOMIC DEVELOPMENT (1986); Van Fleet and Van Fleet, *Entrepreneurship and Black Capitalism*, 10 AM. J. SMALL BUS. 31 (1985).

Among national studies discussing minorities' experience in the construction industry are: ANDERSON, THE NEGRO IN THE CONSTRUCTION INDUSTRY (1964); DAY AND GREEN, *Equal Employment Opportunity Compliance*, in THE MCGRAW HILL CONSTRUCTION BUSINESS HANDBOOK 20 (R. Cushman ed. 1978); I. DUBINSKY, REFORM IN TRADE UNION DISCRIMINATION IN THE CONSTRUCTION INDUSTRY (1973); H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1976); L. KNACK, *Labor Relations and their Effect on Employment Procedures*, in HANDBOOK OF CONSTRUCTION MANAGEMENT AND ORGANIZATION 588 (J. Bonny and J. Frein eds. 1980); Payton, *Redressing the Exclusion of and Discrimination Against Black Workers in the Skilled Construction Trades*, 27 HOW. L.J. 1397 (1984); and U.S. GENERAL ACCOUNTING OFFICE, THE DAVIS BACON ACT SHOULD BE REPEALED (1979).

specific provisions of the set-aside program are "tightly tailored" and "logically related" to the problems identified.[5]

To meet the standards enunciated in *Croson* it is sufficient, at a minimum, to document that prevailing business practices in the local area, or within a particular industry of interest (such as construction), exercise discrimination against minority enterprises, and that the agency or jurisdiction implementing the set-aside program was a passive participant in those prevailing arrangements. It is not necessary to demonstrate that the agency or jurisdiction itself actively engaged in discriminatory practices, although evidence of active involvement would, of course, strengthen the case. It appears that this requirement would be met, for example, if construction prime contractors in a local area routinely declined to give work to minority subcontractors[6] and a local jurisdiction or agency then routinely purchases construction services from these prime contractors; the agency or jurisdiction itself need not have refused to work with minority contractors, and the refusal to deal with minority subcontractors need not have occurred under contracts of the agency or jurisdiction.

II. ESTIMATING THE SHORTFALL ASSOCIATED WITH DISCRIMINATION

While anecdotal evidence of the type discussed in the previous section can help to establish the local presence of discrimination, Justice O'Connor's opinion suggests that statistical evidence of a prevailing pattern of discrimination is also convincing, if not more so. At the same time, such statistical evidence is necessary to establish the magnitude of the local shortfall in minority business activity associated with the discrimination. A "logical stopping point" for the set-aside program can then be established at the point where that estimated shortfall has been erased.

The discussion of shortfall analysis in the *Croson* decision is explicitly developed by analogy to well-established procedures for estimating minority shortfalls in employment under Title VII of the Civil Rights Act of 1964.[7] In cases of alleged discrimination in hiring, for example, data from widely-accepted public sources (such as the Federal Census of Population) are used to estimate a minority proportion among potential applicants for employment. That proportion is applied to the hiring decisions being disputed to generate a count of expected minority representation among persons hired; and the difference between the actual minority representation and this expected representation is the shortfall which is attributed to discrimination and subject to remedial action.[8] Justice O'Connor's opinion in *Croson* suggests that an analogous procedure in relation to public purchasing would start by determining the minority proportion among firms available to provide the goods or services being purchased. The gap between that proportion and the proportion of contracts, or contract dollars, actually awarded to minority firms would then be the shortfall subject to remediation by purchasing set-asides.

One difficulty in implementing such a procedure arises from the paucity of data on minority businesses. For analyses of employment discrimination, detailed population counts are available for specific occupations, or levels of worker qualifications, such as high school graduates, for even fairly small geographical areas. Moreover, although detailed estimates for workers are generated only once per decade, by the Federal Census of Population, considerable labor market information, such as unemployment rates, is available more frequently. For specialized pools of workers, such as the nationwide pool of persons with a Ph.D. in physics, several *ad hoc* sources of current information are available. In contrast, the only data set on minority businesses which is available across the nation is the Census Bureau's Survey of Minority-Owned Business Enterprises.[9] For purposes of estimating the number of

[5] Speaking for the majority in *Croson*, Justice O'Connor minimized the importance of generally conclusive statements, such as that of Councilmember Marsh, *supra* note 2. She wrote, "A government actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists." 109 S. Ct. at 725.

[6] Indeed, even discrimination against minority employees is sufficient to justify establishing a minority purchasing set-aside. B. GOLDSTEIN, NAACP LEGAL DEFENSE AND EDUCATION FUND, THE ESTABLISHMENT OF MINORITY BUSINESS SET-ASIDES AFTER CITY OF RICHMOND V. CROSON (1989).

[7] Civil Rights Act of 1964, *amended by*, 42 U.S.C. §§ 2000e-2000e(17) (1982); *see generally* 109 S. Ct. at 723-28.

[8] Obviously, this description emphasizes the general principles of this approach and should not be construed to incorporate all refinements appropriate to analysis in a specific case.

[9] U.S. BUREAU OF THE CENSUS, No. MB82-1, 1982 SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES, MINORITY-OWNED BUSINESSES, BLACK (1985); U.S. BUREAU OF THE CENSUS, No.MB82-2, 1982 SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES, MINORITY-OWNED BUSINESSES, HISPANIC (1986); and U.S. BUREAU OF THE CENSUS, No. MB82-3, 1982 SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES, MINORITY-OWNED BUSINESSES, ASIAN AMERICANS, AMERICAN INDIAN, OTHER (1986).

minority firms available in one locality at a particular moment to provide a specific good or service, this data set is deficient in at least four important ways:

—First, *recency*. The latest survey was conducted in 1982.[10] The population of small businesses is highly dynamic, with many firms being founded each year and many others ceasing operation.[11] Moreover, only limited research exists on the process of firms' formation and dissolution—particularly for minority firms—and therefore few well-established procedures are available for updating these estimates. It is less than ideal to estimate the number of minority firms in 1990 based on data from seven or more years earlier.

—Second, *level of detail*. The Census Bureau's counts of minority firms are published only in terms of nine broad categories (agricultural, forestry, and fishing; mining; construction; manufacturing; transportation and public utilities; wholesale trade; retail trade; finance, insurance, and real estate; and selected services). Published survey results do not report, for example, how many firms within the construction industry are available as paving contractors, or how many firms within the retail industry sell janitorial supplies.

—Third, *completeness*. While the Census Bureau uses several ingenious approaches to make survey coverage as complete as possible, it recognizes that it misses some unknown number of firms. Also, the survey does not even systematically cover incorporated businesses other than Subchapter "S" corporations.[12]

[10] A new survey was conducted in the summer of 1989, based on minority firms identified in the Economic Census of 1987, but its results are not expected to be available until 1990 or later. Earlier parallel surveys were conducted in 1969, 1972, and 1977.

[11] D. BIRCH, JOB CREATION IN AMERICA: HOW OUR SMALLEST COMPANIES PUT THE MOST PEOPLE TO WORK (1987); Bendick and Egan, *Transfer Payment Diversion for Small Business Development: British and French Experience*, 40 INDUS. & LAB. REL. REV. 528 (1987).

[12] Methodological details concerning what firms are included and excluded are presented in the introductory sections of the reports, *see supra* note 9.

Because of the limitations on these data, it will generally be appropriate that analyses developing counts for the purposes of meeting the *Croson* standards supplement estimates from the Survey of Minority-Owned Business Enterprises with a variety of *ad hoc* sources. Such sources include *Black Enterprise's* list of the nation's 100 largest black-owned firms, directories of minority vendors generated by public agencies such as the Department of Defense, membership lists of minority trade associations, and the representation of minority workers in occupations closely linked to types of firms (*e.g.*, minority architects might be used as a proxy to minority-owned architectural firms). Brimmer, *Widening Horizons of Black Businesses*, 12 BLACK ENTERPRISE 140 (1982).

—Fourth, *availability for local areas*. Data are published from the survey only for local areas with 250 or more minority-owned firms.[13] Thus, in the state of Maryland, for example, data are published only for the city of Baltimore.[14]

These practical difficulties in developing the number of minority firms are compounded by an important conceptual complication. To focus exclusively on the number of minority firms which are actually operating ignores the very circumstance which a set-aside exists to address. Because discrimination prevented minority firms from obtaining work, the number of these firms is less than would prevail in the absence of discrimination. Conceptually, the data which are relevant in establishing the extent of shortfall reflects the number of minority firms that would be available in the absence of discrimination.[15] That would include both firms which do exist and those which do not exist but would have if markets had been open to them. In analyses of the labor market, potential workers who do not seek employment but who would do so if employment prospects were better are labelled "discouraged workers." By analogy, minority firms which do not exist but would have existed if discrimination had not hindered their business opportu-

[13] For jurisdictions with fewer than 250 minority firms, the Census Bureau has unpublished data parallel to that appearing in the published reports. These data can be provided by the Bureau fairly promptly, so long as the number of firms in the jurisdictions is sufficient to avoid release of confidential information. Extraction of other sorts of information from the Survey requires the Bureau to make special computer runs and therefore tends to require six months or more of waiting time and costs of perhaps $5,000 or more.

[14] It is important to determine the appropriate geographical extent of the pool of firms considered available. For some goods and services, only firms currently operating in a local area may be relevant vendors, and the concept that the goal of a set-aside is to offset local discrimination reinforces the appropriateness of a local focus. In many industries, however, the market for firms is not tightly limited geographically, and restriction to local minority firms may be inappropriate. For example, many construction firms undertake projects at locations remote from their headquarters, and some stationery supply firms sell nationwide via mail order.

[15] While this discussion is phrased in terms of the *number* of minority firms, parallel considerations arise with respect to the *size* and *capabilities* of these firms. Within each industry or product line, the average minority firm is typically more limited in size, resources, and experience than its non-minority counterpart. Thus, some might argue that a simple count of the number of minority firms over-estimates the number capable of performing on certain public contracts, particularly larger ones. But to the extent that these differences reflect discriminatory difficulties in obtaining work, it would be inappropriate to adjust estimates of availability of minority firms on this basis.

nities, might be labelled "deterred firms."

Unfortunately, while the concept of deterred firms is clear, development has barely begun on rigorous analytical procedures for generating shortfall estimates which include the firms. Accordingly, while it is appropriate for jurisdictions or agencies analyzing their set-aside programs to firmly embrace the concept of deterred enterprises, they must be bold in utilizing *ad hoc* procedures to implement it.[16] They should expect that resultant analyses would estimate a population of minority enterprises substantially larger than published counts from the 1982 Census of Minority Business Enterprises.

III. TARGETING THE REMEDY TO OFFSET THE DISCRIMINATION

Once the extent of the shortfall has been established, the second requirement requires the remedy chosen to eliminate the shortfall—the purchasing set-aside—to be narrowly tailored to offset the discrimination. One aspect of this requirement is that set-asides can cover only minority groups shown to have been adversely affected by the discrimination which sparked creation of the program. Prior to the *Croson* decision, the practice in many programs was routinely to adopt some standard definition of minority groups in describing the range of eligibility for set-asides; for example, in Richmond, program eligibility was extended to all businesses that were at least fifty-one percent owned and controlled by citizens of the United States who were Black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut. That practice was rejected by Justice O'Connor, who pointed out that no evidence was of-

[16] One approach would build from the fact that set-aside programs often have resulted in expanding the number and size of minority firms. *See, e.g.*, Bates, *Black Political Empowerment*, Focus, forthcoming. This experience might be quantified to suggest the potential level of minority enterprise in a non-discriminatory environment. An alternative approach might estimate the extent of deterred firms by comparing population-to-firm ratios for minority and non-minority groups. Justice O'Connor specifically rejected use of an unsubstantiated assumption that, absent discrimination, minority and non-minority persons would become business owners at the same rate. However, in discussing data analyses of employment discrimination in the same section, she drew a distinction between unacceptable analyses (which assumed that the entire population was eligible to perform skilled jobs) and acceptable analyses (which restricted estimates of the available labor pool to persons who possessed appropriate credentials). 109 S. Ct. at 725-26. One might infer from this distinction that more sophisticated population-to-firm ratio analyses, taking account of differences in factors other than discrimination which might affect minority rates of business ownership, might be acceptable in estimating an expected level of minority business activity.

fered to prove that groups such as Aleuts had been discriminated against in the construction industry in the Richmond area. Accordingly, in establishing race-conscious set-aside programs, agencies and jurisdictions need to match their rules for eligibility to the range of groups whose experience of discrimination has been explicitly documented.

A corollary to the same principle would require that a set-aside program cover only sectors or industries where discrimination has been present. Thus, in documenting the presence of discrimination, it may be necessary to obtain testimony from minority business owners whose firms provide a range of goods and services. The more directly discrimination is established for a particular product line, the stronger the justification for applying set-aside to procurement for that good or service. Thus, for example, if discrimination is documented in the purchase of pants for prison inmates, it might be reasonable to assume that similar discrimination would apply in the purchasing of shoes—particularly if purchasing is done using similar procedures by the same agency. It would be risky to assume, however, that discrimination documented in the purchase of clothing justifies procurement set-asides for construction and professional services. Instead, specific documentation of discrimination in these sectors would be appropriate.

Another implication of the "narrow tailoring" requirement is that a set-aside program should operate only for the time period or numerical quantity required to overcome the estimated shortfall in minority business activity. As noted, once the level of minority business representation reaches that level expected in the absence of discrimination, the program will have reached its "logical stopping point."

However, confusion can arise in conjunction with this principle. Consider the analogous concept in the context of employment discrimination. Suppose that a city undertakes an affirmative action program to eliminate under-representation of minorities on its police force. Suppose, further, that an analysis of the local labor market estimates that minorities constitute thirty-five percent of persons possessing the relevant qualifications of age, education, residence, etc., to be hired as police officers. Thus, a thirty-five percent level of minority representation among police officers could be promulgated as the "end goal" of the affirmative action program—the program's logical stopping point. At the same time, however, the city might select another figure—for example, fifty percent—as an "implementing ratio" for the affirmative

action program; that is, the city might establish a goal where fifty percent of all new officers hired into the department each year should be minority, until the end goal is reached. An implementing ratio higher than the end goal might be selected to arrive more quickly at the end goal, or it might be selected to offset effects elsewhere in the system (e.g., a higher rate of minority attrition) which might make the end goal otherwise impossible to achieve.

In the context of purchasing set-asides, the proportion of purchases in a period which goes to minority firms is analogous to the implementing ratio in the above employment example, *not* to the end goal. This implies, for example, that if ten percent of construction contractors in a locality are expected to be minority, a minority set-aside of twenty percent of construction contracts might be defensible.

Similarly, confusion can arise in determining when the effects of discrimination have been eliminated and the set-aside should be discontinued. One might suppose that this point is reached as soon as actual minority business participation matches the level of expected minority participation. But if discriminatory practices continue in the industry within the locality (for example, if minority firms continue to face discrimination in competing for privately-funded contracts), or if minority firms remain less experienced and less able to compete (reflecting past difficulties in obtaining orders), then minority participation might not be expected to remain at that level if the set-aside were terminated. It would be inappropriate to end the program at that point because, while the implementing ratio had temporarily achieved the level of expected minority business activity, the end goal was not permanently achieved.

IV. "GRADUATION" AND A PLAN TO PREPARE FIRMS FOR IT

It might seem that the confusion of end goals and implementing ratios is merely that—a technical confusion. In more than a few set-aside programs, however, it is symptomatic of more important conceptual weaknesses which reflect the programs' origins. In reaction to decades of experience in which white political leaders steered public contracts toward their ethnic allies, some set-aside programs were developed with little more intent than reversing this process.

In the *Croson* decision, the Supreme Court has withdrawn constitutional support from programs which reflect such "simple racial politics."[17] Instead, set-aside programs and their key provisions must be logically related to eliminating the shortfall in minority business activity attributable to discrimination. Set-asides must be efficient, effective, state-of-the-art instruments of minority business development. Their goal must be to produce stronger and more numerous minority-owned businesses capable of competing, in the long run, outside a sheltered market. This is the last of the three requirements listed at the start of this article.

More than anything else, one characteristic of a set-aside program marks it as embodying this business development orientation: a requirement that firms participating in the program eventually "graduate" from program eligibility. The prospect of eventually competing in the open market shifts the entire focus of the program. When a firm faces eventual graduation, the major benefit to a firm from receiving a contract under a set-aside program is not the short-term revenues from the contract itself. Rather, it is the opportunity to strengthen the firm—to develop a track record, enhance staff experience, or expand its scale of operations—so that it can more effectively compete for future contracts not covered by set asides. To avoid firms' focusing on the short-run revenues which set-aside programs provide, firms must not be allowed to depend on the set-aside program for their long-term markets.[18]

A graduation requirement might be imposed in a variety of different forms; for example, through a limit on the number of contracts or total value of contracts obtained through the program, a limit on the number of years of eligibility, or a gradually increasing requirement to match program contracts with contracts obtained elsewhere. Furthermore, imposition of a graduation requirement should not mean that a typical firm's passage through a set-aside program must be rapid. Strong businesses take a number of years to develop, often three to five years or more for newly-formed enterprises, and perhaps a similar pe-

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[17] Goldstein, *supra* note 6, at 5.

[18] On the tendency of some set-aside programs to evolve into providers of long-term sheltered markets for a limited number of firms, *see* King, *Economic Development Aspects of a Public Policy Program: Section 8(a) Contracts*, 11 REV. BLACK POL. ECON. 337 (1981); Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 GEO. WASH. L. REV. 61 (1980); U.S. COMMISSION OF CIVIL RIGHTS, SELECTED AFFIRMATIVE ACTION TOPICS (2 vols. 1985); and U.S. GENERAL ACCOUNTING OFFICE, Publ. No. GAO/RCED-89-78, FEDERAL-AID HIGHWAY CONTRACTS AWARDED TO MINORITY- AND WOMEN-OWNED BUSINESSES (1981).

riod for ongoing firms undergoing a major expansion or transformation. The Federal 8(a) set-aside program now allows a firm to participate for nine years, including a development stage of four years and a transitional stage of five years. Similarly extended participation would not be inappropriate in non-federal set-aside programs.

Equally important as the graduation requirement itself is an organized process for ensuring that when graduation arrives, firms will be ready for it. Ideally, at the time each firm begins participating in a set-aside program, program staff and the management of the firm should jointly develop a plan for the firm's long term development. In this process, the firm's development objectives should be made explicit; barriers to development should be catalogued and means selected to overcome each barrier; and specific assignments and timetables should be agreed upon by both firm and program staff.

This development plan would typically parallel and expand the firm's own internal business plan. As with the firm's own business plan, the plan itself need not be elaborate. Nor need it be adhered to rigidly; it should evolve as events unfold, a process requiring periodic updating. But unless an explicit process is established for initial planning and periodic review of progress, long-term development often receives low priority, and too often graduation arrives with firms little better prepared than before their participation began. A mandatory planning and review process serves to ensure that a set-aside program's objective of business development is reflected in daily operations.

V. ADDRESSING THREE COMMON BARRIERS TO BUSINESS SURVIVAL AND GROWTH

What aspects of business operations need to be addressed in these development plans? Each firm will have unique development needs. Equally, each locality will have a different business environment and set of business assistance institutions, and different ethnic groups face different business development problems and opportunities.[19] Therefore, it would be fruitless to search for a ready-made model of business development assistance to be implemented in all localities. Instead, the

[19] Allen, *Minority Business Performance*, FOCUS (forthcoming); Bendick and Egan, Business Development and Community Development in the Inner City: Lessons from Four Cities, (June 1989) (paper presented at Conference on Community-Based Economic Development, The New School for Social Research); Light, *supra* note 4; Scarborough and Zimmerer, *supra* note 4.

is of each set-aside program should review the characteristics of participating in the program, local business conditions, and assistance institutions. The analysis should then develop an ap- h tailored to these local circumstances.

Nevertheless, three categories of issues in business development) basic and universal that virtually any credible business develop- oriented set-aside program must address them in some manner. ypical firms participating in a race-conscious minority program, ıost important type of business development assistance is manage- :ounseling and training. On average, minority-owned enterprises un by owners and operators who have less education and experi- than their non-minority counterparts.[20] Many of the firms operate :han efficiently in areas such as accounting and financial systems, ions with banks and other sources of finance, strategic planning, ınnel management, marketing, inventory control, and compliance tax and regulatory requirements. The strengthening of manage- t is particularly important when a small firm rapidly expands to lle new, larger contracts obtained under a procurement set-aside.

Assistance can be delivered in a variety of formats, formal or in- ıal, including classroom training for managers, one-on-one consul- ons, on-site advisors located in business incubator buildings, and tor relationships between firms being developed and established en- rises.[21] Receipt of this assistance by firms participating in the set- e program might be mandatory or voluntary. It might be provided the agency or jurisdiction implementing the purchasing set-aside,[22] hat agency might arrange for it to be obtained from such special- l organizations as small business development centers, training pro-

[20] Bates, *supra* note 16; Bendick and Egan, *supra* note 11; and Hisrich and Brush, *Charactics of the Minority Entrepreneurship*, 24 J. SMALL BUS. RESEARCH 1 (1986).

[21] *See, e.g.*, AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES, NATIONAL LL BUSINESS TRAINING NETWORK, SMALL BUSINESS TRAINING: MODELS FOR COMMUNITY OWTH (1983); Campbell and Allen, *The Small Business Incubator Industry: Micro Level Eco- ic Development*, 1 ECON. DEV. Q. 178 (1987); Larson, *Management Assistance for the Small ..lessman: A Joint Program of the SBA and the University*, 12 J. SMALL BUS. MGMT. 34 74); Mescon, *The Entrepreneurial Institute: Education and Training for Minority Small Bus- s Owners*, 25 J. SMALL BUS. MGMT. 61 (1987); and U.S. CONFERENCE OF MAYORS, MINORITY SINESS DEVELOPMENT: A MAYOR'S HANDBOOK (undated).

[22] For example, contracts awarded under a procurement set-aside might be assigned to a hly experienced purchasing agent who is given a reduced work load and instructed to monitor plier firms closely and advise and assist them.

grams run by local colleges, or the Service Core of Retired Executives (SCORE). But many of the firms participating in race-conscious procurement set-aside programs require this sort of assistance to prepare for survival once their eligibility for set-asides ends. Therefore, a set-aside program seeking affirmation under *Croson* standards would seem obliged to make provision for this sort of business development assistance.

The second common type of business development assistance which firms require is financing. Small businesses, in general, often encounter difficulty in raising adequate financing for their operations, and minority business owners often bear even further handicaps. Typically, minority entrepreneurs have only limited personal resources to invest in their enterprises, few personal contacts with private sources of financing, and enterprises too small to raise money through public offerings. This makes minority entrepreneurs highly dependent on bank financing. In that arena, however, they are handicapped by limited personal assets to use as loan collateral as well as possible discrimination, either explicit or subtle.[23] Yet all firms need money to start and operate, and firms expanding under procurement set-aside programs generally require expanded financial resources.

In light of these circumstances, the *Croson* requirements that suggest procurement set-aside programs be oriented toward business development seem to imply that programs need to address problems of business finance. In some localities, the issue might be approached by efforts to reduce explicit discrimination on the part of conventional lenders. In other circumstances, the staff of procurement set-asides might serve as "door-openers" for their client firms. In still other circumstances, agencies or jurisdictions implementing procurement set-asides might establish their own loan funds or loan guarantee programs. The appropriateness of each approach will vary by the specific nature of the financing problems which firms encounter. That, in turn,

[23] Bates, *supra* note 16; Chen, *supra* note 4; Chen and Stevens, *supra* note 4; Looya, CREATIVE ASSOCIATES, CREDIT AND THE SMALL BORROWER: BRIDGING THE GAP BETWEEN BORROWERS, LENDING PROGRAMS, AND FUNDING SOURCES (1984); *Meeting the Credit Needs of Minority Communities: Hearings, Committee on Banking, Finance, and Urban Affairs*, 96th Cong., 2d Sess., May 29, 1980, U.S. House of Representatives (1980); Minority Enterprise and General Small Business Problems: Hearings, Committee on Small Business, 99th Cong. 1st sess., Sept. 8, 1986, U.S. House of Representatives; Minority Business Development Agency (1980); U.S. SMALL BUSINESS ADMINISTRATION, THE STATE OF SMALL BUSINESS (1986).

implies that a review of the business financing situation in a local area, and proposals for ameliorating the financing problems of firms participating in the set-aside program, must be included in any analysis seeking to justify a set-aside program in relation to *Croson* standards.

The third and final category of business development problems commonly encountered by minority firms participating in set-aside programs might be labeled "difficulties in business operations."[24] These difficulties tend to be highly varied, in part, because many are specific to particular industries. However, when these difficulties constrain the development of a substantial number of firms participating in a procurement set-aside program, the logic of the *Croson* decision requires that they be addressed. For example:

—In the construction industry in many localities, minority-owned firms encounter great difficulty in obtaining bonding. Procurement set-aside programs might address this problem on behalf of their participating firms by promoting access to conventional bonding sources; by subsidizing the cost of insurance, bonding, and other prerequisites to participation in public contracts; or by seeking modifications in the bonding requirements typically imposed in the locality.

—Because minority firms tend to be smaller in scale than their non-minority counterparts, they tend to be precluded from bidding on larger public contracts. To reduce this barrier, a public agency might subdivide a larger procurement into a series of smaller procurements, each feasible for modest-sized firms to handle.

—In some localities and industries, larger established firms which might be willing to utilize smaller minority firms as subcontractors have difficulty identifying small firms seeking such relationships. Where this problem arises, agencies or jurisdictions operating procurement set-aside programs might operate or support clearinghouses or other systems for information exchange to facilitate the development of these relationships.

—Many of the complaints concerning discrimination in public procurement involve problems which arise during the bidding process. These include failure to notify minority firms

[24] *See* Chen, *supra* note 4; Chen and Stevens, *supra* note 4; Simms, *supra* note 4; and U.S. SMALL BUSINESS ADMINISTRATION, *supra* note 23.

of opportunities to bid, provision of special assistance or insider information to favored bidders, establishing unnecessary or unusual prerequisites for bidding to preclude minority firms, and biased evaluations of bids. To overcome these problems, agencies or jurisdictions might review their bidding processes to ensure that they are conducted in an open and impartial fashion (for example, ensuring that procurements are widely advertised, non-traditional bidders are actively recruited and encouraged, assistance in bid preparation is made widely available, clear and reasonable standards are established for bid evaluation, and an accessible awards appeals process is available).

—Long delays between when work is performed and when contractors are paid can create major cash flow problems for many firms. Agencies or jurisdictions might ease this problem for their minority contractors by ensuring prompt payment of contractors' invoices.

VI. THE ROLE OF RACE-NEUTRAL APPROACHES

Some readers may be surprised to find the business development issues examined in the previous section raised in the context of justifying a procurement set-aside program. After all, it is sometimes suggested that if such problems were effectively dealt with through race-neutral means, then race-conscious remedies would be unnecessary. The *Croson* decision partially echoes that sentiment by holding that race-conscious procurement set-asides may be implemented only where they are superior to race-neutral approaches in eliminating the discrimination-based shortfall in minority business activity.[25]

Agencies and jurisdictions seeking to defend their procurement set-aside programs should address the issues raised by this holding in two ways. First, they should point out that when race-neutral initiatives to enhance business development are implemented, it is typically the stronger, better-prepared firms which take most advantage of them. For example, when managerial training is offered to all comers, managers who have extensive prior training tend to enroll at disproportionate rates; when public procurements are split into smaller packages so that smaller firms can bid on them, bids tend to be won by firms which are

[25] 109 S. Ct. at 729-30.

small but experienced. As has been noted throughout this paper, minority firms tend to be weaker than their non-minority counterparts on virtually every aspect of their operations, including the education and experience of their operators, the financial resources to which they have access, and the size and scope of the firm. In practice, these firms often receive less than proportionate benefits from business development initiatives which are open both to them and to non-minority firms. Thus, while race-neutral approaches may promote the development of some minority firms, they could just as well widen the gap between minority and non-minority firms as narrow it.

Second, minority business development often works best when race-neutral and race-conscious approaches are implemented simultaneously. Thus, while the *Croson* holding implies that the two approaches should be considered alternatives, they can more usefully be considered complements. Minority business development initiatives should include both race-neutral and race-conscious approaches and benefit from the synergy between them.

Suppose that a minority-owned firm receives a contract under a procurement set-aside and simultaneously receives assistance in obtaining working capital and counseling to improve its managerial practices. The contract creates the need for working capital, and production to fulfill the contract provides the opportunity to put counseling suggestions and classroom training into practice. Simultaneously, adequate financing and improved managerial practices increase the probability that the firm will perform successfully under the contract. That, in turn, increases the probability that it will develop a track record useful in future marketing for unsheltered contracts. Through coordinated implementation of race-conscious and race-neutral initiatives, the business development objective which *Croson* imposes on procurement set-aside programs will have been advanced efficiently. Thus, race-conscious procurement set-aside programs which incorporate appropriate race-neutral approaches, in ways such as those discussed in the previous section can meet the *Croson* requirement that they be superior to race-neutral approaches.

CONCLUSION

The *Croson* decision subjects public, non-federal, race-conscious procurement set-aside programs to a rigorous set of standards. Each program must have a rationale arising from specific, documented, local

problems of discrimination. The magnitude of the program must be linked to quantitative estimates of minority under-representation in business activity. The program must be targeted to groups and industries where the discrimination operated. Every aspect of the program must be selected to promote minority business development. Race-neutral approaches must be utilized where appropriate.

This article has suggested ways in which these standards can be met. However, to implement these suggestions, some programs may have to undergo extensive revisions, particularly to strengthen the business development aspect of their operations. For many agencies and jurisdictions, justifying their set-aside programs against the standards established by *Croson* will require more than developing an *ex post* study rationalizing current program practices. Instead, it will require serious analysis and rebuilding from the ground up.