METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

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Legal Opinion 2008-03

To: Karl F. Dean, Mayor
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Randy Foster District 27 Councilmember
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Date: March 14, 2008

You requested a comprehensive legal analysis of Ordinance No. BL2008-161 to answer the following question:

QUESTION

Is Ordinance No. BL2008-161 that would provide a Procurement Nondiscrimination Program for the Metropolitan Government legally necessary and, if so, is the ordinance drafted to meet Constitutional standards.

ANSWER

Yes, based upon the disparity study examining the procurement practices of the Metropolitan Government, the Metropolitan Government has become a passive participant in unlawful discrimination. The Metropolitan Government engaged Griffin & Strong, P.C., to conduct a disparity study examining the procurement practices of the Metropolitan Government. The disparity study showed statistically significant underutilization of women and minorities in Metropolitan Government procurement and contracting for construction, professional services, and goods and services. The disparity study demonstrated evidence of discriminatory barriers to participation in the procurement and contracting process by minority and women owned firms in the Nashville Metropolitan Area and indicated that the Metropolitan Government had become a passive participant in unlawful discrimination.

Griffin & Strong recommended that the Metropolitan Government adopt a comprehensive nondiscrimination in purchasing program to address the barriers to minority and women owned business participation in its procurement and contracting activities. Courts have held that local governments have a compelling interest in remedying past and present discrimination within their borders. The Metropolitan Government has a compelling interest in ensuring that minority and women owned business enterprises are not

discriminated against and that the government is not a passive participant in private schemes of discrimination.

It is the opinion of the Department of Law that Ordinance No. BL2008-161 is narrowly tailored to remedy the effects of the discriminatory barriers identified in the disparity study and will withstand a Constitutional challenge.

I. FACTUAL BACKGROUND

In 2003, the Metropolitan Government competitively selected Griffin & Strong, P.C., to conduct a comprehensive disparity study of the procurement practices of the Metropolitan Government. In its "Disparity Study Final Report," dated December 15, 2004, Griffin & Strong, P.C., concluded, *inter alia*, that:

- Its study produced significant data that suggests that disparities in purchasing, as between white male owned firms and minority and women owned firms, continue to exist in Metropolitan Government purchasing.
- Its study showed statistically significant underutilization for the study period by Metropolitan Government purchasing in the areas of construction prime contracting, professional services prime contracting, goods and services prime contracting, and professional services subcontracting.
- During the purchasing practices and policies review, substantial institutional barriers were observed, which inhibit the ability of minority and women owed businesses to compete effectively for business with Metro.
- The regression analysis study indicates that the underutilization of minority and women owned firms could be correlated to ethnicity and gender.

(*See*, *Disparity Study Final Report*, pages 204 – 206.)

Griffin & Strong also concluded in the 2004 Disparity Study Final Report, as follows:

> Based on the totality of the findings of this study, Griffin and Strong, P.C. research team concludes that this study demonstrates evidence of discriminatory barriers to participation by minority and women owned firms in the Nashville Metropolitan Area. Therefore, it is recommended that Metro address the documented barriers to minority and women owned business participation in its procurement and contracting activities.

(*See*, *Disparity Study Final Report*, page 206.)

As a result of its disparity study findings, Griffin & Strong recommended that Metropolitan Government adopt a comprehensive program that included the following components:

- Adoption of a comprehensive nondiscrimination in purchasing and contracting policy.
- Development of a comprehensive nondiscrimination in purchasing and contracting program.
- Modification of the Metropolitan Government's prompt payment procedures to ensure timely payments by prime contractors to subcontractors.
- Maintenance of an accurate small business database.
- Implementation of procedures to ensure that minority and women businesses receive timely notice of solicitations.
- Establishing adherence to the nondiscrimination policy as a required evaluation factor in procurements.
- Inclusion of a standard provision in procurements requiring contractors to adhere to their committed levels of minority and women owned business participation when their contract amounts are increased due to change orders or other changes.

(*See, Disparity Study Final Report*, pages 207-212.)

Subsequent to the disparity study, Griffin & Strong conducted a Private Sector Analysis and collected anecdotal evidence through public hearings held on discrimination in the Metro Nashville marketplace and Metro Nashville contracting practices. Griffin & Strong provided a Public Hearing Report, with a summary, which indicated that several categories of discriminatory treatment were alleged in the sworn testimony of the witnesses.[1] Griffin & Strong also conducted an analysis of private sector discrimination in the Nashville Metropolitan Statistical Area ("MSA"), and provided an "Examination of Private Sector Discrimination" report, which concluded as follows:

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[1] Griffin & Strong provided the following summary in its Public Hearing Report:

> **Summary**
> The following general categories of discriminatory treatment were alleged in the sworn testimony of the witnesses:
> 1. Denial of opportunities to bid
> 2. Customer end user discrimination
> 3. Violations of the public accommodations provisions of the Civil Rights Act of 1964
> 4. Predatory business practices
> 5. Stereotypical attitudes
> 6. Disparate treatment
> 7. Discrimination in payments

> The PUMS[2] data show that M/WOBEs earn less than their White male counterparts. Additionally, minority individuals are less likely to be self-employed in the Nashville MSA. Building permit data show that M/WOBEs are less utilized in the private sector than in the public sector, which is an indication that unless there is action on the part of the public sector, majority primes tend not to utilize minority owned firms. Census data show that minority firm size tends to be smaller compared to the size of non-minority firms. Additionally, the loan denial rates for minority owned firms are much higher than for non-minority firms.

(*Examination of Private Sector Discrimination*, page 40.)

In its May 15, 2007 Policy Recommendations, Griffin & Strong concluded as follows:

> The totality of the findings of the 2005 disparity study, the private sector discrimination analysis and the public hearings on marketplace discrimination give the Metropolitan Government of Nashville and Davidson County **a strong basis in evidence to conclude that public and private discrimination continue to affect the marketplace in the Nashville MSA**. The Metropolitan Government has an interest in ensuring that minority and women-owned business enterprises are not discriminated against and that the government is not a passive participant in private schemes of discrimination. Consequently, we are recommending **narrowly tailored, specific actions be taken by Metro**."

(*May 15, 2007 Policy Recommendations*, page 3, emphasis added.)

The Recommendations set forth in the December 15, 2004 Disparity Study Final Report are essentially the same as the recommendations that are outlined in the May 15, 2007 Policy Recommendations. [*See, December 15, 2004 Disparity Study Final Report,* pages 207-212; *May 15, 2007 Policy Recommendations*, pages 3-9].

II. NONDISCRIMINATION PROGRAM – ORDINANCE BL2008-161

Highlights of the Procurement Nondiscrimination Program, Ordinance BL2008-161, which will add a new section to the Procurement Code of the Metropolitan Government, are:

Public Hearing Report, page 12.

[2] PUMS refers to the "Census 2000 Public Use Microdata Sample." *See, Examination of Private Sector Discrimination*, page 2.

1. Office of Minority and Women Business Assistance is created and given responsibility for administering the program.

2. Benchmarks will be established for each category of underutilized groups within a procurement category (using UNSPSC codes).

3. Vendors will be required to show Good Faith Efforts to utilize minority and women owned businesses. If a vendor selected for an intent to award has failed to demonstrate Good Faith Efforts, the bid or proposal will be rejected.

4. After 24 months of using Benchmarks and Good Faith Efforts, Goals may be established for underutilized groups within a procurement category if underutilization is still demonstrated.

5. Goals are adopted upon recommendation of the Business Assistance Office and agreement by the Purchasing Agent, the Directors of Finance and Law, and approval of a resolution of the Metropolitan Council.

6. Continual monitoring and Goals will be terminate when underutilization ceases for an underutilized group within a procurement category. In any event, a Goal terminates after two (2) years.

7. Small and Disadvantage considerations are unchanged in the Procurement Code and will continue.

III. LEGAL STANDARD APPLICABLE TO RACE CONSCIOUS PROGRAMS

Governmental programs that utilize racial classifications are subject to strict judicial scrutiny. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-494 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). To survive strict scrutiny, a race-based program must serve a compelling governmental interest and be narrowly tailored to achieve that interest. *Croson*, 488 U.S. at 493-494; *Adarand Constructors, Inc. v. Pena*, 515 U.S. at 227.

"[L]ocal governments have a compelling interest in remedying identified past and present discrimination within their borders." *Concrete Works of Colorado, Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994). *See*, *Croson*, 488 U.S. at 492, 509 (Plurality opinion). A city may enact a race-conscious program to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a passive participant in a system of racial exclusion practiced by elements of the local industry. *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1001-1002 (3rd Cir. 1993); *Croson*, 488 U.S. at 492, 509.

> Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative

> steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

See, *Croson*, 488 U.S. at 492.

A governmental entity is justified in adopting a race-conscious program when there is a "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 500, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986). *See*, *Associated General Contractors of Ohio v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) ("There is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. However, to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination. Rather, the Supreme Court has told us that the state bears the burden of demonstrating a 'strong basis in evidence for its conclusion that remedial action was necessary' by proving either that the state itself discriminated in the past or was a passive participant in private industry's discriminatory practices.") (Citations omitted.)

In *Croson*, a plurality of the Supreme Court indicated that statistical evidence may be used to establish that a compelling interest exists for the implementation of a race-based program:

> Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

488 U.S. at 509, citations omitted.

While appropriate statistical evidence may be utilized to demonstrate that a compelling interest exists for the enactment of a race conscious program, anecdotal evidence alone would not support the adoption of a race-based program. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000) ("Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not").

The following factors are considered in determining whether a race conscious program is narrowly tailored to meet a compelling governmental interest:

> There are six factors commonly considered in the narrow tailoring analysis: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship of the stated numerical goals to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification.

Rothe Development Corporation v. U.S. Department of Defense, 262 F.3d 1306, 1331 (Fed. Cir. 2001) (Citations omitted.)

CONCLUSION

It is the opinion of the Department of Law that a court is likely to find that the Metropolitan Government has been a participant in passive discrimination resulting in exclusion of minorities and women from economic opportunities within the business community. Further, it is the opinion of the Department of Law that Ordinance No. BL2008-161 is narrowly tailored to meet a compelling interest of the Metropolitan Government to rectify the exclusion of minorities and women and would survive a Constitutional challenge.

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF NASHVILLE AND
DAVIDSON COUNTY

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Approved By:

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cc: Vice Mayor Diane Neighbors
The Honorable Randy Foster
Members of the Metropolitan Council