

Middle Ground

Mediation allows all stakeholders an equal voice in determining a community's business and economic goals.

By Sherry J. Williams

No community wants the stigma of having gone through a *Crosby* suit, as it reflects serious racial and gender conflicts that the community has not been able to resolve for itself. As such, litigating race conscious programs should be a measure of last resort, not the first choice.

Unfortunately, numerous court challenges of minority contracting programs since the Supreme Court's landmark 1989 ruling have been a significant disincentive

to public entities that want to encourage minority and women participation in public contracting. This litigious environment exists because the stakeholders in the public contracting arena have resisted changing their business objectives, practices and solutions, as well as underlying value systems, to meet the needs of a rapidly diversifying America. Too often, litigants seek the win-lose solution of the court, which forces one party to make some

adjustments while permitting the other party to continue operations as usual. The court's decision often results in a lose-lose situation, because no one is fully satisfied with the end result.

Given the dissatisfactory outcome of litigation, other alternatives, which have a greater possibility of producing a win-win solution, should be fully considered, prior to the parties filing a lawsuit or a judge hearing a case.

One such alternative is mediation. *Mediation* gives stakeholders a viable process in coming to an agreement from which the entire community can benefit. Mediation allows all parties involved to reach their own conclusions with the guidance of a skilled facilitator trained in settling disputes with strong commercial and value-based elements. All stakeholders can be involved in the mediation and have an equal voice. The mediation allows for the most

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creative mechanisms to be used to resolve the issues of promoting and including traditionally excluded groups in an entity's contracting, without unnecessarily burdening majority contractors. In this process, all parties involved create the rules, instead of just one or two of the parties or a judge.

Issues that can be mediated include:

- Overall business and economic development goals for the community
- Private and public sector targets for minority and women participation
- Preferred procurement methods
- Technical assistance programs and who will provide them
- Banking initiatives to support contractor efforts
- Penalties for discrimination by contractors and public officials

Successful mediation requires all stakeholders involved—majority contractors, public entities and minority and women owned businesses—to change. And therein lies the challenge.

Change Isn't Easy

The three major stakeholders in the disputes over race-conscious programs all resist changing their business practices. This unwillingness to change, in fact, may well have produced the reliance on race-conscious programs in the first place. Therefore, each stakeholder's resistance to change, which can be discriminatory and non-discriminatory in nature, needs to be addressed in order to produce long-lasting and forward-looking results within a community.

The forces that drive **majority contractors** are market share and profit. Discrimination is one method, albeit an illegal and fraudulent one, of maintaining market

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share domination and maximizing profit. Because of the massive amounts of *Croson* litigation, we have become sidetracked from this reality. However, an earlier case, *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) reflects that commercial reasons, and not constitutional concerns, are the primary motivation for legal suits from contractor associations. In that case, the contractors association challenged San Francisco's minority, women and Local Business Enterprise (LBE) program. Given that the LBE program included white males, the contractors association was not particularly concerned about the race or gender of the businesses targeted by the public entity; it simply did not want the public entity setting any parameters for its members' business transactions. As such, the contractors association attempted to challenge all of the public entity's efforts to promote economic development and increase participation of traditionally excluded groups in contracting opportunities.

LBE programs are rarely challenged in *Croson* suits because the courts have agreed universally that these programs are subject to the "rationally related" scrutiny test, which only needs a reasonable explanation, such as economic

development, to survive the courts' scrutiny. This anomaly has been recognized by Supreme Court justices and federal judges and is a principal reason why many in the judiciary are not comfortable with the different standards of scrutiny.

A primary responsibility of **municipal and state governments** is to encourage business and economic development in a manner that addresses the needs of its diverse population. Many public procurement departments continue to maintain procedures and practices that are geared toward large businesses and do not reflect a business environment that is fast-changing and increasingly diverse, small and innovative. Changing these processes to the new business environment requires significant capital investments in new equipment, retraining and retooling of personnel, and strong political will to create a procurement system that is resistant to inappropriate internal and external influences. Bureaucratic inertia only exacerbates this resistance to change.

Moreover, because they have been traditionally excluded from participation, for discriminatory and non-discriminatory reasons, **minority and women contractors** have little faith in the will of public officials and majority contractors to change, and instead rely upon

remedial activities that ensure their participation.

While goals do increase minority and women participation in the entity's opportunities, they do not encourage the parties to change. In fact, some majority contractors often respond to goal programs by becoming more entrenched in their resistance to the public entity's efforts. Consequently, when public entities reach a numerical target for a sustained number of years and are pressed to remove the goal, the overwhelming tendency is for minority and women participation to drop back to pre-goal ranges, because there was no change in overall business practices or values. Without change by all the stakeholders, set asides, goals, bid preferences, management and technical assistance, contract sizing and other race-conscious or race-neutral programs have no lasting effect.

Bringing about Real Change

Developing a full-bodied approach to encourage a public entity and the community in which it operates to change in meaningful ways requires several elements:

- A well-publicized, on-going statement of commitment, from the stakeholders, to the inclusion of traditionally excluded groups in public and private sector opportunities
- Fact-finding analysis (disparity study)
- Organizational development and change management initiatives for public and private sector entities
- Group discussions amongst the stakeholders to develop common objectives and goals
- Leadership training for senior public and private officials that addresses the needs of a diverse community
- A community education program about the benefits of business

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development initiatives

- Education program for the private and public sectors about how to *quantify* the return on investment of small, minority and women contracting programs
- Integration of public and private sector race-conscious and race-neutral business development initiatives
- Penalties for discrimination and disincentives for discouraging inclusion in the business community

Toward Successful Mediation

Mediation becomes a tool in facilitating this business development initiative and resolving contractor disputes. Achieving successful mediation relies on three tools:

1. A skilled and knowledgeable mediator, who can ensure that all stakeholders have been identified and are included in the discussion. The mediator also is skilled at soliciting, in discussions and in private caucuses, the real inhibitors to an agreement between the parties. And, the mediator can ensure that agreements have a sound legal basis, so that the agreement is not subject later to unnecessary litigation.
2. A disparity study, which provides important parameters for the mediation. First, it defines whether there is a basis for race-conscious measures in an entity's contracting

program. It also identifies organizational issues within the public entity, and issues within the business community and the public at large that affect the ability of minority and women contractors to do business; and

3. Inclusion of all stakeholders, whose involvement ensures that the agreement addresses all concerns within the community. It is important that all stakeholder representatives be skilled at articulating and representing their group's interests.

The greatest benefit of successful mediation is the relationships it builds and the change it promotes while the parties work together on how they will perform and relate in the future. Communities can sustain significant business and economic development when all stakeholders, prior to any litigation, have been involved in the creation of the contracting program.

Mediation is more in keeping with the Supreme Court's holding in *Croson*. The Court fully recognized the seriousness of the impact of a finding of discrimination and the imposition of race-conscious remedies. Instead of bearing the stigma of a court battle, mediation allows the community as a whole to come together in an environment where everyone has a stake. ♦