



City of Pensacola

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Office of
City Attorney

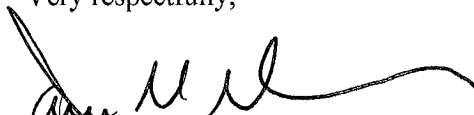
MEMORANDUM

To: City Council
Date: June 17, 2011
Re: Proposed Disparity Study

Council President DeWeese has asked that a memorandum be prepared to frame the discussion on the commissioning of the subject study from a legal perspective. As an aid to your decision making I submit the following bullet points:

- Any race-based program is presumptively unconstitutional in violation of the Equal Protection clause of the U. S. Constitution.
- The basic purpose of a disparity study is to establish if discrimination has occurred that supports the establishment of a program to award contracts and procure goods and services for the City utilizing race-based remedies. If so, to what group and in what percentage. If supported the study should identify what remedies are available to address the disparity.
- The seminal case on the utilization of a disparity study is *J.A. Croson Company v. City of Richmond (1989)*. The essence of the *Croson* decision is that state and local governments cannot use race as a criteria for awarding contracts or making purchasing decisions unless the use of race was specifically intended to remedy identified, past discrimination.
- *Croson* and subsequent cases recognized the utility of the statistics utilized in a disparity study as a method of identifying the type of discriminatory exclusion that would justify the implementation of a Minority Business Enterprise (MBE) program.
- Our Federal Circuit has not upheld a MBE program in the last two decades.
- Since the February 17, 2009 study by MGT, the Fourth Circuit case of *Rowe v. Tippett* has upheld an MBE program based on quantitative and qualitative evidence of disparities in a state transportation program. The MGT disparity study was accepted, along with other evidence, as evidence of disparities.
- The legal consequences of implementing a disparity study range from no exposure to being the defendant in a lengthy lawsuit.
- Some courts have denied qualified immunity to elected officials implementing a MBE program on the basis that the law clearly prohibits such programs, absent detailed factual findings that survive strict judicial scrutiny and implement narrowly tailored remedies utilizing race based criteria as a last resort.

Very respectfully,



James M. Messer
City Attorney