Seattle City Attorney
Peter S. Holmes

June 3, 2016

Bob Ferguson
Washington State Attorney General
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RE: Attorney General's I-200 Opinion

Dear Mr. Ferguson:

Thank you for the opportunity to comment on your pending opinion regarding whether race and sex-conscious measures in public contracting are permitted under I-200, now codified at RCW 49.60.400. The City of Seattle has a strong policy of working to ensure that its contracting policies and procedures create a level playing field, do not enable discrimination, and ensure that women and minority businesses have the maximum practicable opportunity to participate in contracting with The City of Seattle. The Seattle City Council has expressed this policy in the Equality in Contracting Ordinance[1] and the policy is also reflected in Executive Orders by Mayor Edward B. Murray[2], and former Mayors McGinn, Nickels and Royer.[3] The Washington State legislature has also expressed this policy in several statutes, including RCW 35.22.650[4] under which first class cities must require prime contractors to actively solicit the employment of minority members and solicit bids from qualified minority businesses.

According to the Washington State Office of Minority and Women's Business Enterprises Business Plan for 2007-09, many Washington residents continue to hold misperceptions about the impact of I-200. And while numerous government agencies like The City of Seattle and private employers are striving to address the underutilization of minority and women owned businesses, some contractors and government officials have given up. We hope your opinion will clarify the legal landscape and encourage more public agencies to use both race- and sex-neutral and race- and sex-conscious measures to support robust anti-discrimination efforts in public contracting and elsewhere.

As discussed below, both the history of I-200 and the case law interpreting it demonstrate that I-200 was intended only to prohibit the "preferential treatment" that results in reverse discrimination due to race-based preferences given to less qualified

[1] SEATTLE, WA, MUNICIPAL CODE Chapter 20.42 (1985).
[2] Murray Exec. Order 2014-03.
[3] McGinn Exec. Order 2010-05; Nickels Exec. Order 01-02; Royer Exec. Order 289721.
[4] Most recently amended in 2002 c 307 Section 3, post I-200.

individuals and firms. I-200 was not intended to invalidate other affirmative action measures, such as race- and sex-conscious measures that do not result in so-called "reverse discrimination." Such programs are permitted under I-200 and when consistent with federal equal protection requirements.

I. Summary

Question 1

Does I-200 prohibit the State from implementing race- or sex-conscious measures to address significant disparities in the public contracting sector that are documented in a disparity study if it is first determined that race- and sex-neutral measures will be insufficient to address those disparities?

No. The question posed asks about race or sex-conscious *measures*; I-200 prohibits *preferences,* which in the public contracting context means race or sex-based mandatory quotas, bidding price preferences and set-asides. Race- and sex-conscious measures that do not result in a contract award to less qualified individuals or firms based solely on race are permitted. Such measures may include aspirational goals for women and minority business participation, the solicitation of women and minority businesses among all other businesses that are qualified to do the work, and training and outreach activities targeted to small, women and minority owned firms.

Question 2

Does the answer to the first question depend on whether the contracts at issue are being awarded by a state agency that receives federal funds and is therefore subject to Title VI of the federal Civil Rights Act?

No. While I-200 permits action required to be eligible for federal funds (such as compliance with the federal disadvantaged business enterprise program), it does not follow that race and sex-conscious measures are permitted only in federally-funded contracts. State agencies may also use race- and sex-conscious measures on non-federally funded contracts, so long as that does not result in reverse discrimination in violation of I-200 or otherwise violate federal equal protection law. Under federal equal protection law, race- and sex-conscious measures, including goals, are permissible subject to judicial scrutiny, and even strict scrutiny does not require exhaustion of all race-neutral measures first, just a serious good-faith effort to use them.

II. Analysis

Discrimination haunts our community, creates an uneven playing field and disparate impacts.

In Seattle, and around Washington State, women and people of color contractors suffer discrimination in several ways - structurally, institutionally, individually, and culturally. Nationally and locally, these disadvantaged businesses experience discrimination in access to education and training, credit and loans, and government and private contracts, and through implicit bias and express discrimination. A 2012 DBE Program Disparity Study for WSDOT shows that discrimination due to limited opportunities to enter construction industry networks and less favorable terms in credit, such as higher interest rates, reduces business ownership entry and success. Barriers to business entry and success for minority-owned businesses then contribute to a large efficiency loss in the overall economy. There is also significant anecdotal evidence in the WSDOT study of a "good ol' boy"[5] network in Washington that limits access and opportunities for women and people of color. Unfortunately, the Washington State Office of Financial Management's 2015-17 Agency Activity Inventory for OMWBE reports on page 6 that the percentage of contract procurement dollars state agencies and institutions spent on certified minority and women business enterprises in 2013-15 was just 0.99% versus the goal of 16% participation. We can do better.

Washington public entities have a compelling government interest in eradicating discrimination in public contracting, and a duty to act when disparities exist.

Courts and government officials recognize that one of the primary purposes of public bidding and procurement laws is to provide a fair forum for participation in publicly funded contracts, and there is a compelling government interest in doing so. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars drawn from the tax contributors of all citizens, do not serve to finance the evil of prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality op. of O'Connor, J.); *Western States Paving v. WSDOT*, 407 F.3d 989, 991 (9th Cir. 2005); *Rothe Development, Inc. v. DOD*, 107 F.Supp.3d 183, 208 (D.D.C. 2015), *appeal docketed* No. 15-5176 (D.C. Cir. June 19, 2015); see RCW 39.19.010; Seattle Municipal Code 20.42.010; 49 C.F.R 21.1. Private and public entities have a duty to combat discrimination. *See Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*, 135 S.Ct 2507 (2015) (disparate impact is actionable); *Assoc. Gen. Contractors of Cal. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991) (discrimination exists where minority availability was 49.5% but participation by dollars was only 11.1%); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990) (10.78% disparity between available minority firms and dollars awarded constitutes a prima facie case of discrimination); RCW 49.60.010 and 49.60.030 (discrimination prohibited).

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[5] BBC Research and Consulting 2012 DBE Program Disparity Study – State of Washington Department of Transportation, Appendix J. Qualitative Information from Personal Interviews, Public Hearings, and Other Meetings, p. 1.

Prior to the passage of I-200, the United States Supreme Court shifted its analysis regarding preferences and set-asides.

It is important to understand the landscape prior to I-200's passage. The United States Supreme Court's opinions regarding anti-discrimination and affirmative action programs differed, sometimes with the makeup of the Court, ranging from enthusiasm to skepticism. At first, the Supreme Court approved of affirmative action efforts, so long as they did not consist of set asides or quotas. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 311-12 (1978) (striking down fixed set aside of seats for minorities in medical school admissions but allowing race to be considered as one of several factors in making admissions decisions); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208-209 (1979) (upholding training program, where positions were divided evenly (50/50) between whites and blacks until percentage of blacks approximated their availability in the local labor market, whites were not fired to be replaced by blacks, and the program was not an absolute bar to white advancement). Then, the Court upheld a 10% set-aside in public contracting for qualified and available minority firms in *Fullilove v. Klutznick*, 448 U.S. 448, 474, 481 (1980).[6]

Four years later, though, the Court reversed and remanded a racial preference scheme for lack of evidence of discrimination. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579-80 (1984) (district court cannot displace a white employee with seniority absent a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination). Then, the Court appeared to change course again in upholding race and gender preference schemes. *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 637 (1987) (upholding the use of gender as a positive factor in choosing between an equally qualified man and woman); *U.S. v. Paradise*, 480 U.S. 149, 180 (1987) (upholding a requirement that a qualified African American be promoted for every white person promoted until blacks approximated availability in labor market). Then, the makeup of the Court changed, and the Court finally permitted race-based preferences and set-asides, so long as they passed judicial scrutiny. *Croson,* 488 U.S. at 510 (permitting local minority business set-aside program based upon race if it passes strict scrutiny but striking down local program); *Adarand*, 515 U.S. at 237 (applying strict scrutiny to mandatory MBE goals in public contracting and remanding for further analysis).

This jurisprudential history can be said to have sparked the anti-preference backlash in Washington State and other places. On the one hand, the United States Supreme Court finally and expressly approved of sex- and race-based classifications, so long as they pass judicial scrutiny. At the same time, the numerical goals and set-asides at issue in the later cases were (1) struck down in the case of *Croson* but (2) remanded in *Adarand*, emboldening opponents to prohibit them legislatively. This helped create the

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[6] *Fullilove* was later abrogated by *Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995) (clarifying that race-based preferences will be examined under strict scrutiny).

dialogue around what is affirmative action and a preference. *See Swept Under the Rug: Integrating Critical Race Theory into the Legal Debate on the Use of Race*, 6 SEATTLE J. FOR SOC. JUST. 673, 676-82 (2008); The Leadership Conference on Civil Rights Education Fund 2001, Affirmative Action (May 19, 9:21 AM), http://www.civilrights.org/resources/civilrights101/affirmaction.html.

> In Washington State,
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> of . . . significance is the movement during the late 1990s aimed at curtailing affirmative action, which culminated in Washington with the vote on I–200. Many of its proponents saw no significant difference between oppressive laws, traditions, and policies used to separate—and subjugate—based on race, such as Jim Crow laws, and race conscious policies to end racial oppression and segregation. Whether reverse discrimination was justified or necessary to reverse the effects or racial discriminatory practice of the past was hotly debated. The preference programs, it was argued, suggested to minorities that they could not compete without special help, rather than functioning as a method of overcoming historical oppression.

Parents Involved in Community Schools v. Seattle School District, No. 1, 149 Wn.2d 660, 678 (2003), *reversed on other equal protection grounds*, 551 U.S. 701 (2007) (citations omitted). This makes it important to note that preferences, quotas, and set-asides are a just one affirmative action strategy, albeit the more controversial.

> *Affirmative action refers to a wide continuum of anti-discrimination practices, and quotas, preferences, and set-asides.*
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> Because of the United States Supreme Court's "fractured opinions,"[7]
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> the term "affirmative action" [has been interpreted] as connoting intentional preferential treatment based on race alone – for example, the use of a quota system, whereby a certain portion of seats in an institution's incoming class must be set aside for racial minorities; the use of a points system, whereby an institution accords a fixed numerical advantage to an applicant because of her race; or the admission of otherwise unqualified students to an institution solely on account of their race.

Schuette v. BAMN, 134 S.Ct. 1623, 1652, n. 2 (Sotomayor, J., dissenting). But affirmative action embraces the whole spectrum of anti-discrimination efforts, not just race-specific preferences and set-asides. This is what makes the language of the RCW so significant: RCW 49.60.400 prohibits "preferential treatment." It does not ban affirmative action or other anti-discriminatory actions in their entirety, actions which can include both race-

[7] *Smith v. University of Washington, Law School*, 233 F.3d 1188, 1199 (9th Cir. 2000) (a properly designed and operated race-conscious admissions program like the one employed at the UW Law School does not violate Title VI or equal protection, but UW voluntarily discontinued the program).

neutral and race-conscious measures and strategies. As such, one must be very careful to distinguish among the different types of affirmative action and anti-discrimination measures. In particular, we must distinguish preferences, quotas and set-asides from other affirmative action activities.

The Washington State Supreme Court's interpretation of I-200's prohibition of 'preferential treatment' does not exclude race and sex-conscious measures; rather, the Court has found that only reverse discrimination is prohibited.

The Washington Supreme Court has rejected the argument that RCW 49.60.400 prohibits more than the "reverse discrimination" style of affirmative action. "Perhaps the best way to understand the distinction between affirmative action and preferences is that for a person to receive a preference, another person – whether identifiable or not – must suffer discrimination." *Parents Involved in Community Schools*, 149 Wn.2d at 677 (citations omitted). The Washington Supreme Court concluded that RCW 49.60.400 "prohibits reverse discrimination where race or gender is used by government to select a less qualified applicant over a more qualified applicant." *Parents Involved in Community Schools,* 149 Wn.2d at 689-90. Quoting the voters' pamphlet, the Washington Supreme Court found:

> The proponents of the initiative's own ballot statements provide strong support for our conclusion. The proponents included prominently a statement limiting the reach of I–200:
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> **WHAT INITIATIVE 200 *WON'T* DO**
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> Initiative 200 does not end all affirmative action programs. It prohibits *only those programs that use race or gender to select a less qualified applicant over a more deserving applicant* for a public job, contract or admission to a state college or university. *State of Washington Voters Pamphlet, General Election* 14 (Nov. 3, 1998) (Statement For I–200) (emphasis added). Given this language, an average voter would have understood that I–200 does not ban all affirmative action programs, and would only prohibit the type of affirmative action we have described as "reverse discrimination" or "stacked deck" programs.
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> Other ballot statements bolster our interpretation. The official ballot explanatory statement said in part: "The measure does not define the term 'preferential treatment,' and does not specify how continued implementation or enforcement of existing laws would be affected if this measure were approved. The effect of the proposed measure would thus depend on how its provisions was interpreted and applied." *Id.* at 16. This would have put the reasonably informed lay voter on notice that at least some "preferential treatment" may be allowed based upon interpretations and applications.
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> .....

> [T]he Statement For I–200 goes on to say "[b]ut instead of *ignoring race,* the government uses it through the use of *racial quotas, preferences and set-asides.*" *Id.* (emphasis added). Thus, the emphasis is again placed upon instances of "reverse discrimination," such as college quotas and minority set asides. The general statement, "Our Laws Should be Colorblind," certainly does not overcome the specific declaration, "It prohibits *only those that use race or gender to select a less qualified applicant over a more deserving applicant.*" *Id.*

Parents Involved in Community Schools, 149 Wn.2d at 687-88 (emphasis in original).

Because granting a preference requires a decision in favor of a less qualified individual on the basis of race, race- and sex-conscious measures, strategies, and goals are not preferences in and of themselves. Only the decision to select a specific contractor because of race over a more qualified contractor or proposal creates an issue of fact whether the I-200 reverse discrimination and anti-preference law was violated. *See Dumont v. City of Seattle*, 148 Wn.App. 850 (2009) (finding summary judgment not appropriate where white firefighter overcame rationale of management's promotion decision, establishing pretext and race-based decision-making in favor of less-qualified applicant); *Parents Involved in Community Schools*, 149 Wn.2d at 689-90 (school district's "racially cognizant tie breaker" does not promote "a less qualified applicant over a more qualified applicant" because it treats all races similarly, and citing *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 707 n. 16 (9th Cir. 1997) ("reshuffle" programs provide no advantage to the less qualified)); *Schuette*, 134 S.Ct. at 1638 (voters may determine reach of preferences and prohibit them).

With this history and these principles in mind, we turn to the questions.

Question 1

Does I-200 prohibit the State from implementing a race- or sex-conscious measure to address significant disparities in the public contracting sector that are documented in a disparity study if it is first determined that race- and sex-neutral measures will be insufficient to address those disparities?

> *In the public contracting context, race and sex-conscious strategies and measures that do not award contracts to a less qualified enterprise based on race or sex are not "preferential treatment" within the meaning of I-200.*

The analysis begins with the long-standing recognition by Washington courts that one of the primary purposes of public bidding and procurement laws is to provide a fair forum for those interested in undertaking publicly funded contracts. *See e.g. Gostovich v. City of West Richland*, 75 Wn.2d 583, 587, 452 P.2d 737 (1969), *S.W. Wash. Chapter, Nat'l Electrical Contractors Assoc. v. Pierce Co.*, 100 Wn.2d 109, 116, 667 P.2d 1092 (1983). While no Washington appellate court has interpreted I-200 in public contracting, the rationale articulated by the Washington State Supreme Court in *Parents Involved in*

Community Schools should still be applied: Under I-200, preferential treatment means reverse discrimination that results when race or gender is used by the government to select a less qualified applicant. In the public contracting context, contracts are typically awarded to the responsible bidder submitting the lowest responsive bid,[8] or, in a qualifications- or proposal-based procurement, to the contractor with the best qualifications or most suitable proposal. Applying the *Parents Involved in Community Schools* rationale to the public contract setting, prohibited preferences include mandatory goals, quotas, and set-asides and bidding price preferences for women and minority firms. But race- and sex-conscious measures are permitted if they do not result in reverse discrimination by awarding the contract on the basis of race or gender alone to a higher bidder or lesser or non-qualified bidder or contractor.

The question posed to the Attorney General is whether I-200 prohibits race- and sex-conscious measures, not preferences. There are many measures[9] that local governments and the state may use to address discrimination and the disparities in women and minority participation in public contracting without veering into the realm of prohibited preferences. I-200 should not be interpreted as preventing local governments from continuing programs designed to level the playing field, such as aspirational goals, requiring prime contractors to solicit women and minority businesses, and training and outreach targeted to small, women and minority owned businesses, and other activities to ensure that women and minority businesses have fair opportunities to submit bids and perform the work.

Question 2

Does the answer to the first question depend on whether the contracts at issue are being awarded by a state agency that receives federal funds and is therefore subject to Title VI of the federal Civil Rights Act?

As set forth in the statute, I-200 excludes from its operation "action that must be taken to establish or maintain the eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state." RCW 49.60.400. Thus, I-200 is not triggered when the use of federal funds requires particular activities. Additionally, as discussed above, public entities in Washington may use race and sex-conscious measures that do not result in reverse discrimination without violating I-200. As a result, there is no need to limit the use of such measures (*i.e.*, measures not involving reverse discrimination) to federally funded contracts or requirements.

Under federal equal protection law, race- and sex-conscious measures, including goals, are permitted, subject to the appropriate level of judicial scrutiny. And race-neutral measures that do not result in race-based classifications and decisions are subject only to "the most relaxed judicial scrutiny." *Adarand*, 515 U.S. at 212-13. "It is beyond dispute

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[8] In the low-bid context, it is not necessarily the case that, when the low bid is rejected, it is rejected on the basis of race. *Dunnet Bay Construction Company v. Borggren*, 799 F.3d 676, 692-93 (7th Cir. 2015), *petition for cert. filed*, No. 15-906 (Jan. 15, 2016) (lost low bid due to size, not race).

[9] *See* 49 C.F.R. 26.51 for non-exhaustive list of "race-neutral" strategies.

that any public entity, state or federal, has a compelling interest in assuring that public dollars drawn from the tax contributors of all citizens, do not serve to finance the evil of prejudice." *Croson*, 488 U.S. at 492 (1989) (plurality op. of O'Connor, J.). As such, the "government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." *See Western States*, 407 F.3d at 991.

Federal case law regarding the Disadvantaged Business Enterprise (DBE) program shows public agencies may use race-specific classifications and decisions to address discrimination, subject to strict scrutiny, and that this is not fatal to the analysis or the program. As the United States Supreme Court stated:

> [W]e wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." . . . The unhappy persistence of both the practice and the lingering effects of racial discrimination against minorities in this country is an unfortunate reality and government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test[.]

Adarand, 515 U.S. at 237 (1995) (citations omitted).

To be narrowly tailored, a race-based classification in public contracting should demonstrate evidence of discrimination in the contracting industry and be limited to those groups that suffered discrimination. *Assoc. Gen. Contractors of America, San Diego Chapter, Inc. v. CaDOT*, 713 F.3d 1187, 1196 (9th Cir. 2013). However, it is unnecessary to exhaust all other race- and sex-neutral measures first. In *Western States*, the court stated:

> Although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of workable race-neutral alternatives. *Grutter v. Bollinger*, 539 U.S. 306, 339, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *see also Adarand III*, 515 U.S. at 237–38, 115 S.Ct. 2097 (when undertaking narrow tailoring analysis, courts must inquire whether there was any consideration of the use of race-neutral means to increase minority business participation in government contracting.

Western States Paving v. WSDOT, 407 F.3d at 993-94 (internal quotation marks and brackets removed); *Assoc. Gen. Contractors*, 713 F.3d at 1199; *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 724 (2007) (no need to use all race-neutral means, and burden is on claimant to establish the Illinois Department of Transportation failed to maximize goal through race-neutral means first under 49 C.F.R. 26.51(b)).

While the DBE program includes race and sex-conscious elements which have survived strict scrutiny, no Washington case limits the application of race

and sex-conscious programs to DBE programs. The Washington State Attorney General's Office opinion should not limit the use of race- and sex-conscious measures in public contracting to federally funded contracts alone. Rather, local jurisdictions should be free to develop affirmative race- and sex-conscious programs so long as they are consistent equal protection law and do not result in reverse discrimination. In fact, it is our duty to address disparate outcomes in public contracting.

The City of Seattle strives to provide a fair and equitable opportunity to participate in publicly funded contracts and to eliminate disproportionate outcomes in public contracting. I-200 does not prohibit race- and sex-conscious measures and programs that do not result in reverse discrimination. We encourage you to follow the reasoning of the Washington State Supreme Court in *Parents Involved in Community Schools* and find that I-200 was not intended to eliminate all affirmative action programs in public contracting; rather it prohibits only "preferential treatment" – meaning preferences, quotas and set-asides that favor less qualified candidates solely on the basis of race or gender.

Thank you for your continued leadership on the race and social justice issues confronting our community.

Very truly yours,

Peter S. Holmes
Seattle City Attorney