NEW MEXICO LAW REVIEW

Volume 17
Issue 2 *Summer 1987*

Summer 1987

Set-Asides of Local Government Contracts for Minority Owned Businesses: Constitutional and State Law Issues

M. Victoria Wilson

SET-ASIDES OF LOCAL GOVERNMENT CONTRACTS FOR MINORITY OWNED BUSINESSES: CONSTITUTIONAL AND STATE LAW ISSUES

I. INTRODUCTION

Local governments receiving federal funding for certain projects must comply with regulations mandating affirmative action in awarding contracts for construction and purchasing.[1] Thus, a strong incentive exists for local governments to establish programs which set aside a percentage of the local government's contracts or contract funds for minority business enterprises. However, these "set-aside" programs raise serious constitutional issues. In addition, "set-aside" programs may conflict with a state's procurement code requiring local governments to award purchasing and construction contracts according to a competitive bidding process.

The purpose of this Comment is to analyze the constitutional and state law issues regarding set-aside programs and to discuss the requirements of a set-aside program that would violate neither the Federal Constitution nor the New Mexico Procurement Code.[2] First, the Comment will give a more detailed definition and description of two types of set-aside programs established by local governments. Next the Comment will discuss the constitutionality of these programs and identify the essential elements of a valid set-aside program. Finally, the Comment will discuss the conflict between set-aside programs and the New Mexico Procurement Code.

II. DEFINITIONS

Generally, two types of set-aside programs have been established by local governments.[3] The first type of program is a "pure" set-aside which requires a certain percentage of the total number of government contracts awarded each year to be set aside for award to minority owned businesses.[4]

1. *See* 49 C.F.R. §§ 23.64, 23.66 (1986) in which the Department of Transportation requires a local government receiving federal funds to set affirmative action goals for awarding contracts to minority owned businesses and to make good faith efforts to meet those goals.

2. N.M. STAT. ANN. §§ 13-1-28 to -199 (Repl. Pamp. 1985). § 13-1-102 requires all procurement by state or local governments, with a few exceptions, to be "achieved by competitive sealed bid." § 13-1-108 states "a contract solicited by competitive sealed bids shall be awarded with reasonable promptness by written notice to the lowest responsible bidder."

3. A review of the relevant cases reveals only two types of programs implemented by local governments. *See infra* notes 4 and 6 and accompanying text.

4. *See* Fulilove v. Klutznik, 448 U.S. 448 (1980); Associated Gen. Contractors of Cal., Inc., v. City and County of San Francisco, 619 F. Supp. 334 (D.C.N.D. Cal. 1985).

For example, a local government may require ten percent of its contracts be awarded to minority owned businesses.[5]

The second type of set-aside program, a subcontractor goal set-aside, requires all prime contractors bidding on a contract to spend a percentage of the contract price by contracting with minority owned subcontractors.[6] A variation of this type of set-aside is to require the prime contractor to submit with their bids an acceptable "affirmative action plan" for hiring minority owned subcontractors.[7] In this version, the government does not require a fixed percentage of the contract price to be spent with minority owned subcontractors. Instead, the affirmative action plan submitted with the bid is considered as one factor in awarding the contract.[8]

Although the details of each type of program differ, the basic concept is the same. In implementing each type of program, a local government is establishing an affirmative action plan for awarding purchasing and construction contracts to minority owned businesses.

III. CONSTITUTIONAL ISSUES

Both types of set-aside programs have been challenged as violating the Equal Protection Clause of the United States Constitution.[9] In *Fullilove v. Klutznik*,[10] the United States Supreme Court considered the constitutionality of a pure set-aside program established in the Public Works Employment Act of 1977.[11] Under Provision (103(f)(2)) of the Public Works Employment Act, at least ten percent of the federal funds granted for local public works projects must be used to employ minority owned businesses.[12] The Court found this provision of the Act constitutional.[13] However, the Court's decision in *Fullilove* did not fully settle the issue of the constitutionality of all set-aside programs. The decision in *Fullilove* involved only pure set-asides and did not address the validity of subcon-

5. *Fullilove*, 448 U.S. 448.

6. *See* Associated Gen. Contractors of Cal. v. San Francisco Unified School Dist., 616 F.2d 1381 (9th Cir. 1980). On a $100,000 contract, the board of education would have required the prime contractor to spend 25% of that price, $25,000, with minority owned subcontractors. *Id.*

7. *See* Appeal of Associated Sign & Post, Inc., 485 N.E.2d 917 (Ind.Ct.App. 1985). The City Human Rights Commission of Bloomington, Indiana had promulgated a regulation requiring bidders to submit acceptable affirmative action proposals in addition to their bids. *Id.* at 917.

8. *Id.* For example, if two prime contractors submit the same bid, but one has a better affirmative action plan, that bid will receive the contract award.

9. The equal protection clause of the fourteenth amendment of the Constitution states that "[n]o State shall . . . deny to any person . . . the equal protection of the laws." Persons challenging the constitutionality of set-asides claim that the government imposing the set-aside requirements is applying procurement law unequally, based on impermissible racial classifications.

10. 448 U.S. 448 (1980).

11. 42 U.S.C. § 6705 (1982).

12. Pub. L. No. 95-28, § 103, 91 Stat. 116 (1977) (codified at 42 U.S.C. § 6705(f)(2)).

13. *Fullilove*, 448 U.S. 448.

tractor goal set-asides. In addition, the Court failed to agree on an applicable standard of review.[14]

The Court was divided in its view of the constitutionality of the set-aside provision. Three Justices[15] joined in the opinion of the court validating the set-aside provision.[16] The plurality opinion[17] held that "there was a rational basis for Congress to conclude" that inequities existed in public contracting opportunities and, therefore, Congress had the power to pass legislation to remedy the inequities.[18] The set-aside provision was an acceptable means of remedying the inequities caused by past discrimination because the provision was neither underinclusive nor overinclusive.[19] The provision was not underinclusive (meaning it did not limit its benefits to a specified minority) because Congress did not seek "to give select minority groups a preferred standing," but sought to remedy effects of past discrimination by placing minority businesses on a more equal footing with non-minority businesses.[20] However, in so holding, the plurality declined to adopt a standard or "test," but simply stated that the set-aside provision survived a "most searching examination to make sure that it does not conflict with constitutional guarantees."[21]

Three Justices concurred in the result, but believed that an "intermediate" standard should be applied to determine whether the set-aside provision was substantially related to the achievement of important governmental objectives.[22] The Justices agreed with the plurality's determination that Congress' purpose for enacting the set-aside provision "was to remedy the present effects of past racial discrimination."[23] The concurring Justices then found that remedying effects of past discrimination was a "sufficiently important governmental interest to justify the use of racial classifications."[24] Finally, these Justices found the set-aside provision to be substantially related to the objective of remedying effects of past discrimination because it was carefully tailored to the governmental objective, "while at the same time avoiding stigmatization and penalizing those least able to protect themselves in the political process."[25]

Justice Powell, who concurred in the plurality opinion of the Court,

14. *See infra* text accompanying notes 13-29.
15. The three Justices were Burger, White and Powell.
16. *Fullilove*, 448 U.S. at 453.
17. For purposes of this Comment, the opinion announcing the judgment of the Court will be referred to as the "plurality" opinion.
18. *Fullilove*, 448 U.S. at 475.
19. *Id.* at 485.
20. *Id.* at 485.
21. *Id.* at 491-92.
22. *Id.* at 519. Marshall, Brennan and Blackmun joined in the concurring opinion.
23. *Id.* at 520.
24. *Id.*
25. *Id.* at 521.

wrote a separate opinion stating that "strict scrutiny" should be applied, whereby the set-aside provision must be a necessary means of furthering a compelling governmental interest.[26] According to Justice Powell, the set-aside provision passed this standard for three reasons. First, Congress had the power to pass legislation to remedy effects of past discrimination.[27] Second, Congress made adequate findings that discrimination against minority businesses in awarding public works contracts occurred in the past.[28] Finally, the set-aside program was narrowly tailored to Congress' objective of eliminating effects of past discrimination because it was a temporary measure, it included effective waiver provisions, and it had little adverse effects on innocent third parties.[29]

Three Justices dissented, believing that the set-aside provision violated the fourteenth amendment to the Constitution.[30] Justices Stewart and Rehnquist joined in an opinion stating that the set-aside provision was discrimination based on race and, therefore, was unconstitutional on its face.[31] Justice Stevens, writing a separate opinion, believed that the set-aside provision failed the strict scrutiny test under the Equal Protection Clause of the fourteenth amendment because it was not narrowly tailored.[32] Furthermore, the set-aside provision was unconstitutional because it was not justified by a characteristic, relevant to public contracting, that distinguishes minority businesses from non-minority businesses.[33]

Fullilove, with its five separate opinions, provides no definitive standard for evaluating the constitutionality of set-aside programs. However, most lower courts have adopted the following three part test based on Justice Powell's opinion in *Fullilove*.[34] First, the legislative body estab-

26. *Id.* at 496 (Powell, J., concurring).

27. *Id.* at 499.

28. *Id.* at 503-04.

29. *Id.* at 513-14.

30. Justices Stewart, Rehnquist and Stevens dissented. *Id.* at 522, 532.

31. *Id.* at 522. They stated that the government may not impose any racial classification for any reason. *Id.* at 525-27.

32. *Id.* at 552. The set-aside provision was not narrowly tailored because it raised "too many serious questions that Congress failed to answer." *Id.*

33. *Id.* at 553. Justice Stevens found only two possible bases for distinguishing minority businesses from others in society: (1) that they have been victims of discrimination in the past and (2) that they are not as able to compete in the market place as non-minorities. *Id.* Justice Stevens believed that the first basis might have justified some remedial measure but that the set-aside program was not such a remedial measure. *Id.* Furthermore, he believed that the second basis was "simply not true." *Id.* As a result, Justice Stevens concluded that Congress had failed to "discharge its duty to govern impartially." *Id.* at 554.

34. *See* Arrington v. Associated Gen. Contractors of America, 403 So.2d 893 (Ala. 1981); Southwest Wash. Chapter, Nat'l Elec. Contractors v. Pierce County, 100 Wash. 2d 109, 667 P.2d 1092 (1983); Ohio Contractors Ass'n. v. Keip, 713 F.2d 167 (6th Cir. 1983); South Fla. Chapter, Associated Gen. Contractors of America v. Metropolitan Dade County, 723 F.2d 846 (11th Cir. 1984); Associated Gen. Contractors of Cal. v. City and County of San Francisco, 619 F. Supp. 334 (N.D. Cal. 1985).

lishing the program must have the authority to implement such a program.[35] Second, the legislative body must make adequate findings of past discrimination to insure that the program remedies present effects of past discrimination.[36] Finally, the program must be narrowly tailored to insure that the set-aside program extends no further than the need to remedy discrimination.[37]

A. Local Legislative Body Must Have Authority

The plurality in *Fullilove* based its decision on its determination that Congress had the power to remedy present effects of past discrimination and seemed to suggest that local legislative bodies may not have the same power.[38] However, most courts addressing the issue have found that the local legislative body in question had the authority to establish a set-aside program.[39] In *Ohio Contractors Association v. Keip*,[40] the Sixth Circuit interpreted *Fullilove* as meaning that Congress' power to identify and remedy effects of past discrimination was unequaled, rather than exclusive.[41] By "unequaled," the Sixth Circuit meant that Congress is best equipped to establish the need for remedial legislation.[42] Thus, "although the scope of Congress' power to remedy past discrimination may be greater than that of the states," state legislatures also have power to pass remedial legislation.[43]

In *South Florida Chapter of the Associated General Contractors of America v. Metropolitan Dade County*,[44] the Eleventh Circuit adopted the

35. *Fullilove*, 448 U.S. at 498 (Powell, J., concurring). *See also South Fla. Chapter*, 723 F.2d at 851.

36. *Fullilove*, 448 U.S. at 498 (Powell, J., concurring).

37. *Id.*

38. *Id.* at 483. Both the plurality and Justice Powell relied heavily on Congress' power to determine the necessity of redressing effects of past discrimination in upholding the set-aside program. *Id.* at 473, 499-501. The plurality stated, "[h]ere we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President." *Id.* at 473. This statement implies that the outcome of a case involving a governmental body other than Congress would be different. Thus, *Fullilove*, has created some doubt regarding the power of local governmental bodies to establish set-asides. The Supreme Court of Washington stated that Justice Powell's opinion could be read as "creating a unique authority in Congress alone." *Pierce County*, 100 Wash. 2d at 206, 667 P.2d at 1099. However, the court resolved the doubt in favor of local governments, holding that a local government does have authority to establish set-asides. *Id.*

39. *See Ohio Contractors Ass'n*, 713 F.2d at 172; *South Fla. Chapter*, 723 F.2d at 852.

40. 713 F.2d 167, 172 (6th Cir. 1983). This case involved a suit by the Ohio Association of Contractors and several individual white contractors. *Id.* at 168. The contractors claimed that the Ohio law requiring state officials to set aside designated percentages of state contracts for minority businesses violated the equal protection clause of the United States Constitution. *Id.* The Sixth Circuit upheld the statute. *Id.* at 176.

41. *Id.* at 172.

42. *Id. See also South Fla. Chapter*, 723 F.2d at 852.

43. *South Fla. Chapter*, 723 F.2d at 852.

44. 723 F.2d 846 (11th Cir. 1984).

Sixth Circuit's interpretation of *Fullilove* and held that Metropolitan Dade County had the power to enact a set-aside ordinance.[45] Whether a particular political subdivision of a state, such as a city, county or school board, has the power to enact remedial legislation is a question of state law.[46] A city or county will get its power from its "home rule" charter granted by state law.[47] Other political subdivisions, such as school boards, get their power directly from state law.[48] As a result, Congress' power is not exclusive. A city, or other local governmental body, has similar power.[49]

B. Adequate Findings of Past Discrimination

The requirement that the legislative body made adequate findings of past discrimination is to insure that the legislation furthers a compelling or important governmental purpose.[50] The Supreme Court has established that remedying present effects of past discrimination is a compelling purpose.[51] However, before a legislative body can pass legislation to remedy effects of past discrimination, it must establish the need for such legislation.[52] The legislative body may not act upon general knowledge of societal discrimination.[53] Rather, the government must produce findings that it has discriminated against minority businesses in the past and that present effects of past discrimination exist.[54]

Two issues arise regarding the findings of past discrimination made by a governmental body. Most often the issue is whether the findings are adequate. In *J.A. Croson Co. v. City of Richmond*,[55] the Fourth Circuit

45. *Id.* at 852.

46. *Id.*

47. *Id.* A home rule charter allows a municipality to exercise all legislative powers and perform all functions necessary for maximum self-government not expressly denied by general state law. Apodaca v. Wilson, 86 N.M. 516, 518, 525 P.2d 876, 878 (1974).

48. *See* Associated Gen. Contractors of Cal. v. San Francisco Unified School Dist., 616 F.2d 1381, 1384 (9th Cir. 1980).

49. *South Fla. Chapter*, 723 F.2d at 852.

50. According to Powell the standard should be "compelling." *Fullilove*, 448 U.S. at 498 (Powell, J., concurring). According to Marshall, Brennan, and Blackmun, the standard should be the intermediate "important." *Id.* at 518-19 (Marshall, J., dissenting).

51. *Id.* at 499.

52. *See* Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842, 1847-48 (1986).

53. *Id.* at 1848. The Court stated, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.*

54. *Id.* In *Fullilove*, the Court stated that the evidence that Congress had gathered was sufficient to conclude that the federal government had engaged in past discrimination, "even absent any intentional discrimination or other unlawful conduct." *Fullilove*, 448 U.S. at 478. Citing *Fullilove*, the court in Associated Gen. Contractors of Cal. v. City and County of San Francisco stated that the city was not required to find that it had intentionally discriminated against minority contractors. 619 F. Supp. 334, 340 (N.D. Cal. 1985). Such a requirement would "practically preclude remedial efforts because the legislative body would not risk the liability such an admission might bring." *Id.*

55. 779 F.2d 181 (4th Cir. 1985), vacated, 106 S.Ct. 3327 (1986). Croson was the sole bidder for a city plumbing contract but was not awarded the contract because the bid did not comply with the city's subcontractor goal program. *Id.* at 182. Challenging the city's program, Croson argued

found that the findings of the city council that governmental discrimination had contributed to the low percentage of public contracts awarded to minority contractors were adequate.[56] The City of Richmond had relied on statistical evidence that, although minority groups constituted 50% of the city's population, only .67% of the city's contracts for a five-year period were awarded to minority businesses.[57] The court held that the city's determination of the need for set-asides based on the percentage of minorities in the population, rather than the percentage of minority businesses in the business community was reasonable.[58]

The Supreme Court, however, may not find that the disparity between the percentage of minorities in the general population and the percentage of contracts awarded to minority businesses is an adequate finding of discrimination to justify set-asides.[59] In *Wygant v. Jackson Board of Education*[60] the Court stated that statistical evidence of prior discrimination should involve the percentage of qualified workers in the relevant labor market.[61] The relevant labor market for set-asides is the business community, not the general population. Therefore, an adequate finding should include the disparity between the percentage of minority businesss and the percentage of non-minority businesses receiving government contracts, as well as the disparity between the percentage of minority businesses in the business community and the percentage of government contracts awarded to minorities.

Use of the more specific statistics will not necessarily result in a finding that set-asides are unnecessary. The disparity need not be as great as the disparity found in *Croson* (50% minorities in population; .67% contracts awarded to minorities).[62] The disparity found in *Fullilove* was much less (17% minorities in population; 4% minority contractors in business community).[63] Yet Justice Powell considered this disparity to be great enough to find a compelling need for the set-aside program.[64]

The second issue regarding adequate findings is whether the legislative body must produce the findings itself or whether it may rely on findings

that the program was an overextensive response to the city's findings of past discrimination and, therefore, was not narrowly tailored. *Id.* at 191. The court disagreed with Croson and stated that an effective set-aside program would "encourage minorities to enter the contracting industry and allow existing minorities to grow." *Id.*

56. *Id.* at 190-91.

57. *Id.*

58. *Id.*

59. The Supreme Court vacated the Fourth Circuit's decision in Croson, 779 F.2d 181, and remanded to the Circuit Court for further consideration in light of Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842 (1986).

60. *Id.* at 1842.

61. *Id.* at 1847.

62. *Croson*, 779 F.2d at 191.

63. *Fullilove*, 448 U.S. at 513-14 (Powell, J., concurring).

64. *Id.*

of other governmental bodies. In *Ohio Contractors*, the Sixth Circuit held the findings of the state of Ohio to be adequate.[65] The Ohio legislature made no statistical findings of its own but simply relied on previous findings of state courts and executive and legislative committees.[66] The court compared the state legislature's reliance on previous findings of other governmental bodies to Congress' reliance on findings of others in determining the need for remedial legislation.[67] In addition, the court held that the Ohio legislature did not have to state its purpose or publish findings on which it relied in the act itself when the purpose of eliminating effects of discrimination was clear without such statements.[68]

C. Program Must Be Narrowly Tailored

A set-aside program must be narrowly tailored to insure that the minority preference does not extend further than necessary to remedy effects of discrimination.[69] In his concurring opinion in *Fullilove*, Justice Powell listed five factors to be considered in determining whether a set-aside program is narrowly tailored.[70] A court reviewing a set-aside program should consider (1) the efficacy of alternative remedies, (2) the relationship between the set-aside goal and the percentage of minorities in the work force, (3) the availability of waiver provisions, (4) the planned duration of the program, and (5) the effect of the set-aside on non-minority contractors.[71] These factors are used by the courts as guidelines and are not exhaustive or exclusive.[72] Rather, courts take a "totality" approach when scrutinizing a set-aside program.[73] The program as a whole must provide an effective remedy for discrimination but must not "unnecessarily trammel" the interests of non-minority contractors.[74]

---

65. 713 F.2d at 172-73.

66. *Id.* at 170-71. The Ohio legislature considered and passed the set-aside legislation against a "backdrop" of information which made the legislators aware of the past discrimination and the need for a remedy. *Id.* at 170. This "backdrop" included awareness of several judicial determinations of the need for remedial legislation for past governmental discrimination. *Id.* It also included determinations by the executive branch of Ohio of past governmental discrimination in the form of executive orders to remedy discrimination. *Id.* The legislature also considered a study by the Ohio Department of Administrative Services showing the disparity between the number of contract payments made to minority and non-minority businesses. *Id.* at 171.

67. *Id.* at 172.

68. *Id.* at 170. The purpose and objective of the act were "absolutely clear from the text and the hearings and floor debate which preceded final enactment." *Id.*

69. *Fullilove*, 448 U.S. at 498 (Powell, J., concurring).

70. *Id.* at 510-515. Most lower courts have adopted Justice Powell's factors in considering whether a program is narrowly tailored. *See South Fla. Chapter*, 723 F.2d 846; *Pierce County*, 100 Wash. 2d 109, 667 P.2d 1092; *Croson*, 779 F.2d 181; *Arrington*, 403 So.2d 893.

71. *Fullilove*, 448 U.S. at 510-14.

72. *South Fla. Chapter*, 723 F.2d at 855. *See also City & County of San Francisco*, 619 F. Supp. at 341 (the court only considered three of the five factors).

73. *South Fla. Chapter*, 723 F.2d at 855.

74. *Ohio Contractors*, 713 F.2d at 173.

The factor usually considered most essential is the need for adequate waiver provisions.[75] A waiver provision is a procedure by which a non-minority contractor may receive a contract set aside for a minority by showing "that after good faith efforts" the set-aside requirements cannot be met.[76] Waiver provisions are most useful in subcontractor goal programs where the prime contractor is required to set aside a percentage of the subcontracts for a project for minority businesses. The non-minority contractor can use the waiver provision to receive a contract although he cannot, in good faith, meet the minority subcontractor requirement.[77]

Waiver provisions for pure set-aside programs are not as common. However, administrative review procedures, whereby the need for the set-aside program is reviewed, may be considered as serving the same purpose as waiver provisions, which is to ensure the program is narrowly tailored.[78] In *Associated General Contractors of California v.City & County of San Francisco,*[79] the district court reviewed an ordinance in which the City of San Francisco's set-aside program was subject to several levels of administrative review.[80] In addition, the rules and regulations implementing the ordinance were subject to yearly revision.[81] The district court found these provisions to be sufficient safeguards to insure the program was narrowly tailored.[82]

Similarly, in *South Florida Chapter,* the court found that the administrative procedures provided adequate safeguards.[83] The administrative procedures included several levels of administrative review to determine whether a particular contract should be set-aside for minority businesses.[84]

75. *See City & County of San Francisco,* 619 F. Supp. at 341; *Pierce County,* 100 Wash. 2d at 118, 667 P.2d at 1101. While the most essential factor is the availability of waiver provisions, the two least essential of Powell's factors are (1) the efficacy of alternative remedies and (2) that the set-aside goal is related to the percentage of minorities in the work force. *See City & County of San Francisco,* 619 F. Supp. at 341. Where a program provides adequate waiver provisions, the efficacy of alternative remedies is not an issue because the program need not be the least restrictive alternative to remedy effects of past discrimination. *Id.* In addition, adequate waiver provisions help insure that the set-aside goal is related to the percentage of minorities in the work force. As Justice Powell observed, the set-aside goal may be changed, through waiver, to reflect the percentage of minority contractors in the geographic region. *Fullilove,* 448 U.S. at 513-14. As a result, these factors are covered by the waiver provision. Therefore, the Comment will not discuss these factors further.

76. *Ohio Contractors,* 713 F.2d at 174.

77. *Id.* For example, if, after making good faith efforts to solicit minority subcontractor bids, the prime contractor is unable to receive any minority bids, then he may be eligible for a waiver.

78. *See City & County of San Francisco,* 619 F. Supp. at 341.

79. 619 F. Supp. 334 (N.D. Cal. 1985).

80. *Id.* at 341.

81. *Id.*

82. *Id.*

83. 723 F.2d at 853.

84. *Id.* The first level of review involved the County Manager suggesting which, if any, set-aside measures would be best for the contract being reviewed. *Id.* The County Manager could suggest, based on the availability of minority contractors, either a pure set-aside, subcontractor goals or no set-aside at all. *Id.* Next, the County Manager's suggestions were to be reviewed by a three member

Additionally, a set-aside could be used only upon findings that at least three qualified minority contractors were available.[85] Finally, the need for and success of the entire set-aside program was subject to annual review.[86]

Another important factor in determining whether a program is narrowly tailored is its planned duration.[87] The fact that a program is temporary insures that it will not "last longer than the discriminatory effects it is designed to eliminate."[88] The court in *City and County of San Francisco* considered the limited duration of the set-aside program to be an important factor that insured it was narrowly tailored.[89] However, at least one court has held that the lack of a specific expiration date does not invalidate a set-aside program.[90] The court in *South Florida Chapter* considered the periodic administrative reviews required by the program to be a sufficient substitute for a limited duration because they served the same purpose of insuring the program did not extend beyond its necessity.[91]

Finally, courts look to the effect the program will have on non-minorities.[92] In *Ohio Contractors Association v. Keip,* the Sixth Circuit reversed the district court's decision that the set-aside program imposed an undue burden on non-minority contractors.[93] Citing *Fullilove,* the Sixth Circuit stated that members of the majority can be required to bear some burden resulting from affirmative action programs.[94] The Sixth Circuit determined that the burden on non-minority businesses was minimal because they were not completely excluded from receiving government contracts and could bid for subcontracts awarded by minority prime con-

Contract Review Committee which was to inform the Board of County Commissioners of the advisability of the set-aside recommended by the County Manager. *Id.* Finally, the Board of County Commissioners was to review the recommendations of the County Manager and the Contract Review Committee and determine whether a set-aside would be in the best interest of the county before waiving formal bid procedures. *Id.*

85. *Id.*

86. *Id.* The Board of County Commissioners was required to annually reassess the "desirability, and viability" of the program. *Id.* at 853-54. Furthermore, the County Manager was charged with the duty of continually monitoring the program's use and reporting its findings to the Board. *Id.* These procedures were designed to insure that the program was narrowly tailored by providing the opportunity for the rules and regulations of the program to be changed. *Id.*

87. *See Fullilove,* 448 U.S. at 513 (Powell, J., concurring).

88. *Id.*

89. *City and County of San Francisco,* 619 F. Supp. at 341. *See also Fullilove,* 448 U.S. at 513 (Powell, J., concurring). Justice Powell established the importance of limited duration when he stated, "[t]he temporary nature of this remedy ensures that a race conscious program will not last longer than the discriminatory effect it is designed to eliminate." *Id.*

90. *See South Fla. Chapter,* 723 F.2d at 854.

91. *Id.*

92. *See Fullilove,* 448 U.S. at 514; *Ohio Contractors,* 713 F.2d at 172; *City and County of San Francisco,* 619 F. Supp. at 341.

93. 713 F.2d at 174.

94. *Id.* at 173. The Supreme Court recently affirmed this position in *Wygant,* 106 S.Ct. at 1850. 106 S.Ct. at 1850.

tractors.[95] The Supreme Court adopted a similar view in *Fullilove*.[96] The Court stated that the program, a pure set-aside program, imposed a slight burden on non-minorities.[97] As a result, it is unlikely that a court would find that a set-aside program would have a significant adverse effect on non-minority businesses.

D. Summary of Constitutional Issues

Certainly, set-aside program present serious constitutional problems. However, those programs are not insurmountable. With careful consideration and drafting, a local government can create a constitutional set-aside program.

This Comment has identified several means by which a local government can accomplish this. First, the local government must establish that it has the authority to implement a set-aside program. This authority will be granted by either charter or state statute.[98]

Second, the local government must produce adequate findings of past discrimination.[99] The findings should include three types of statistics.[100] The government should demonstrate a disparity between the percentage of minorities in the population and the percentage of minority businesses awarded government contracts.[101] In addition, the local government should demonstrate the disparity between the percentage of minority businesses receiving government contracts and the percentage of non-minority businesses receiving government contracts.[102] Finally, the government should demonstrate a disparity between the percentage of minority businesses in the community and the percentage of those businesses receiving government contracts.[103] Demonstrating each of these disparities will be adequate to show that the government has discriminated against minority businesses in the past and affirmative action is required to correct the effects of that discrimination.[104]

95. *Ohio Contractors*, 713 F.2d at 174.

96. 448 U.S. at 484.

97. *Id.*

98. *See supra* text accompanying notes 46-49.

99. *See Wygant*, 106 S.Ct. at 1847. In *Wygant*, the Court stated that it has "insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications" to remedy effects of discrimination. *Id.*

100. Although no court has required all three statistics to demonstrate the effects of past discrimination, a local government would be wise to produce all three because there seems to be some confusion among the courts concerning what statistic is appropriate. *See supra* text accompanying notes 55-60. Before *Wygant*, many courts considered a disparity between the percentage of minorities in the general population and the percentage of minority contractors awarded government contracts adequate. *See Croson*, 779 F.2d at 191; *City and County of San Francisco*, 619 F. Supp. at 340.

101. *See supra* text accompanying notes 55-63.

102. *Id.*

103. *Id.*

104. *Id.*

Finally, in structuring the set-aside program, the local government should take care to include measures to insure that the program is narrowly tailored to the goal of eliminating effects of past discrimination.[105] The easiest measure to include in the set-aside program is to provide for a termination date. Although this measure is easily made part of a program, it is often overlooked, to the detriment of the program.[106] Although one court has validated a program without a termination date,[107] the Supreme Court has indicated that it considers this measure to be important.[108]

Another critical measure to insure that the program is narrowly tailored is to provide waiver or review provisions by which a non-minority contractor may receive a set-aside contract under specific circumstances.[109] The type of waiver provisions that should be included in the program depends on the type of program the government wishes to establish.[110] Whichever type of program the government wishes to establish, it should be able to establish a constitutional program, if it provides waiver provisions and addresses the other factors identified above.

IV. STATE PROCUREMENT CODE ISSUES

Set-aside programs have been challenged not only on constitutional grounds but also on the ground that they violate a state procurement code.[111] The New Mexico Procurement Code requires all local public bodies to award purchase and construction contracts to the lowest responsible bidder through a competitive bidding process.[112] A set-aside program would violate this requirement because the contracts set aside for minority businesses would not be required to go to the lowest bidder.[113]

A. The Social Responsibility Concept

New Mexico courts have not addressed the legality of set-aside programs, and other jurisdictions are split on whether set-asides violate their

105. *Fullilove*, 448 U.S. at 498 (Powell, J., concurring).

106. *See* Arrington v. Associated Gen. Contractors, 403 So.2d 893, 903 (Ala. 1981). The Alabama Supreme Court considered the fact that the proposed set-aside program did not have a limited duration to be one reason the program was not narrowly tailored and, therefore, unconstitutional. *Id.*

107. *See South Fla. Chapter*, 723 F.2d at 854.

108. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (requirements of affirmative action plans under Title VII); *Fullilove*, 448 U.S. at 510, 512 (Powell, J., concurring).

109. *See supra* text accompanying notes 74-85.

110. *Id.*

111. *See City and County of San Francisco*, 619 F. Supp. 334; *Associated Gen. Contractors*, 616 F.2d 1381; *Associated Sign and Post, Inc.*, 485 N.E.2d 917; Georgia Branch, Associated Gen. Contractors of America v. City of Atlanta, 253 Ga. 397, 321 S.E.2d 325 (1984); *Arrington*, 485 So.2d 893.

112. N.M. STAT. ANN. §§ 13-1-28 to -199 (Repl. Pamp 1985). Section 13-1-102 provides that "[a]ll procurement shall be achieved by competitive sealed bid pursuant to Sections 13-1-76 to 13-1-83." *Id.*

113. *See Arrington*, 403 So.2d at 899.

competitive bidding statutes.[114] Several courts upholding the legality of set-asides have found that the definition of "responsible bidder" in the procurement statute includes "socially" responsible as well as financially responsible.[115] However, other jurisdictions have declined to adopt the concept of social responsibility and held set-asides in violation of their procurement codes.[116]

In *S.N. Nielsen Co. v. Public Building Commission of Chicago,*[117] the Illinois Supreme Court stated that the Fair Employment Practices Act of Illinois[118] established the state's antidiscriminatory policy.[119] The court further stated that adoption of an antidiscrimination policy indicated the legislature's intention that the social responsibility of the contractor should be a concern in awarding contracts.[120] Therefore, the Building Commission's affirmative action requirements did not violate the lowest responsible bidder requirement of the procurement statute.[121]

The Supreme Court of Washington adopted the social responsibility criterion in *Southwest Washington Chapter, National Electrical Contractors Association v. Pierce County.*[122] Citing *Nielsen,* the court stated that the word "responsible" indicated the legislative intent to include the social responsibility of a contractor when considering bids on public contracts.[123] As a result, an affirmative action plan which required contractors to award 12% of the contract amount to minority subcontractors did not violate the state procurement statute.[124]

Most recently, the Court of Appeals of Indiana upheld a requirement that each bidder for a public contract include in its bid a description of its affirmative action program that must be approved before the bid is accepted.[125] The court held that the affirmative action requirement did not

114. *See City of Atlanta,* 253 Ga. 397, 321 S.E.2d 325; *Arrington,* 403 So.2d 893; *Associated Sign & Post,* 485 N.E.2d 917; S.N. Nielsen Co. v. Pub. Bldg. Comm'n of Chicago, 81 Ill. 2d 290, 410 N.E.2d 40 (1980); *Pierce County,* 100 Wash. 2d 109, 667 P.2d 1092.

115. *See, e.g., Nielsen,* 81 Ill. 2d 290, 410 N.E.2d 40; *Pierce County,* 100 Wash. 2d 109, 667 P.2d 1092; *Associated Sign & Post,* 485 N.E.2d 917.

116. *See Arrington,* 403 So.2d 893; *Associated Gen. Contractors,* 616 F.2d 1381.

117. 81 Ill. 2d 290, 410 N.E.2d 40 (1980). In *Nielsen,* the Building Commission required bidders to apply its "canvassing formula" under which a bidder receives credits for the percentage of hours to be worked by minority members. *Id.* at 42. These credits operate to lower a bidder's actual bid to an "award criteria figure." *Id.* The bidder with the lowest award criteria figure receives the contract. *Id.* S.N. Nielsen Co. failed to apply the canvassing formula. *Id.* Consequently, although its bid was lowest, its award criteria figure was not. *Id.* When the Building Commission awarded the bid to another bidder, S.N. Nielsen Co. filed suit claiming that the Building Commission's decision violated ILL. REV. STAT. ch. 85, par. 1050 (1979) which required the Commission to award contracts to the lowest responsible bidder. *Id.*

118. ILL. REV. STAT. ch. 48, par. 85 (1979).

119. *Nielsen,* 81 Ill. 2d at 293, 410 N.E.2d at 43.

120. *Id.*

121. *Id.*

122. 100 Wash. 2d 109, 667 P.2d 1092 (1983).

123. *Id.* at 113, 667 P.2d at 1096.

124. *Id.*

125. *Associated Sign & Post, Inc.,* 485 N.E.2d 917.

violate the state procurement statute which required government agencies to award contracts to the lowest responsible and responsive bidders.[126] The court noted that the statute affords the government agency "wide discretion" in awarding contracts, including consideration of the social responsibility of the bidder as well as his financial responsibility.[127] The court would defer to the judgment of the agency and reverse the agency only if its decision was clearly arbitrary, corrupt or fraudulent.[128] As a result, the agency could determine, on the basis of the proposed affirmative action plan, that the lowest bidder was not the lowest responsible bidder.[129]

In each of the above cases establishing the "social responsibility" concept,[130] the court was looking at affirmative action requirements involving subcontractor goal set-asides. One court has applied the concept of social responsibility to a pure set-aside program.[131] The District Court in *City and County of San Francisco* held that an ordinance establishing a pure set-aside program did not violate the city's charter which required contracts to be awarded to the lowest reliable and responsible bidder.[132] The court stated that a home rule charter, such as the charter of the City of San Francisco, "should be liberally construed, and only when it expressly prohibits the ordinance, does it render the ordinance invalid."[133] The court then concluded that the charter did not prohibit the set-aside program because the term "responsible" was broad and not expressly or necessarily limited to work quality.[134] Thus, the City of San Francisco was authorized by its charter to interpret "responsible" as more than work quality and could require social responsibility.[135]

In reaching this conclusion, the court relied on the decisions in *Pierce County* and *Nielsen*.[136] However, reliance on these decisions appears to be misplaced because those decisions dealt only with subcontractor goal set-asides. The concept of "social responsibility" does not apply to pure set-aside programs because state procurement codes requiring contracts to be awarded to the lowest responsible bidder require the bidder, not the government, to be responsible. Therefore, when social responsibility is required, it is required only of the bidder, not of the government. How-

126. *Id.* at 923.
127. *Id.* at 923-24.
128. *Id.*
129. *Id.* at 925.
130. *Nielsen*, 81 Ill. 2d 290, 410 N.E.2d 40; *Pierce County*, 100 Wash. 2d 109, 667 P.2d 1092; *Associated Sign & Post*, 485 N.E.2d 917.
131. *City and County of San Francisco*, 619 F. Supp. 334.
132. *Id.* at 336.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 337.

ever, applying social responsibility to a pure set-aside program would require the government to exercise social responsibility by hiring a certain number or percentage of minority contractors. As a result, a pure set-aside program, which is not justified by the social responsibility concept, may violate the Procurement Code where a subcontractor goal program may not.

Several courts have refused to apply the social responsibility concept and held subcontractor goal set-aside programs in violation of competitive bidding procurement statutes.[137] In *Arrington v. Associated General Contractors*,[138] the Supreme Court of Alabama strictly construed the state competitive bidding procurement statute and held that the government's discretion in determining the lowest responsible bidder was not unlimited.[139] The court held that the government's discretion was limited to consideration of those bid requirements, or specifications, reasonably related to contract requirements or product quality.[140]

In *Associated General Contractors of California v. San Francisco Unified School District*,[141] the Associated General Contractors challenged the affirmative action policy adopted by the San Francisco Board of Education establishing a subcontractor goal program.[142] The Ninth Circuit held that the state competitive bidding statute prohibited the School Board from considering factors other than the amount of the bid, minimum financial qualifications of the bidder, and the quality of the bidder's past work.[143] In so holding, the Ninth Circuit applied an earlier decision of the California Supreme Court in *Inglewood-Los Angeles County Civic Center Authority v. Superior Court*.[144] In *Inglewood*, the court held that the term "lowest responsible bidder" did not allow the county to award a contract to the next-to-lowest bidder because he was more qualified than the lowest bidder.[145] The contract must go to the lowest bidder as long as he was qualified to do the particular work, regardless of whether the next bidder was better qualified.[146] The California Supreme Court and the Ninth Circuit construed the term "lowest responsible bidder" strictly, leaving no room for the concept of social responsibility.

137. *Associated Gen. Contractors*, 616 F.2d 1381; *Arrington*, 403 So.2d 893; *City of Atlanta*, 253 Ga. 397, 321 S.E.2d 325; M.G.M. Constr. Co. v. Alameda County, 615 F. Supp 149 (N.D. Cal. 1985).

138. 403 So.2d 893 (1981).

139. *Id.* at 898-99.

140. *Id.*

141. 616 F.2d 1381 (9th Cir. 1980).

142. *Id.* at 1383.

143. *Id.* at 1385.

144. 7 Cal. 3d 861, 500 P.2d 601, 103 Cal. Rptr. 689 (1972). *See also Associated Gen. Contractors*, 616 F.2d at 1385.

145. *Inglewood*, 7 Cal. 3d at 867, 500 P.2d at 604, 103 Cal. Rptr. at 692.

146. *Id.*

Adoption of the concept of social responsibility is critical to determining whether set-asides violate the Procurement Code. However, New Mexico courts have not yet addressed the question of whether lowest responsible bidder includes social responsibility. The New Mexico Procurement Code requires local government bodies to award contracts by competitive sealed bidding to the lowest responsible bidder.[147] A "responsible bidder" is a bidder who submits a "responsible bid" and who furnishes, when required, proof that "his financial resources, production or service facilities, personnel, service reputation and experience are adequate" to perform the contract.[148] This definition of responsible bidder does not include any reference to social responsibility. Rather, the definition lists several factors specifically, each related to skills and financial capability.[149] New Mexico courts could follow courts in other jurisdictions faced with similar statutes who have looked to the purposes of the statute to determine whether the legislature intended to include social responsibility.[150]

Some courts have held that the purposes of the lowest responsible bidder requirement allowed the government to consider the social responsibility of the bidders in determining the lowest responsible bidder.[151] For example, in *Pierce County,* the Washington Supreme Court identified two purposes of the bidding statute.[152] First, the statute was designed to protect the public from fraud, collusion, and favoritism.[153] Second, the statute provides a fair forum in which contractors may bid on public contracts.[154] The court stated that "permitting rejection of bids due to failure to meet published affirmative action requirements presents no danger of fraud, collusion, or favoritism and in fact advances the broader public interest by alleviating the effects of past discrimination."[155] In addition, the court stated that affirmative action requirements provide a fair forum for subcontractors disadvantaged by the effects of past dis-

147. N.M. STAT. ANN. §§ 13-1-102, 13-1-108 (Repl. Pamp. 1985).

148. *Id.* at § 13-1-82.

149. *Id.* The factors listed in Section 13-1-82 are similar to the factors courts in other jurisdictions have considered in determining what is a responsible bidder. For example, in *Associated Gen. Contractors,* the Ninth Circuit limited the factors to be considered to financial qualifications of the bidder and quality of the bidder's past work. *Associated Gen. Contractors,* 616 F.2d at 1385. Similarly, the Alabama Supreme Court held that, under the state's competitive bidding statute, the government's discretion in awarding contracts was limited to consideration of factors reasonably related to contract requirements or product quality. *Arrington,* 403 So.2d at 898-99.

150. *See Pierce County,* 100 Wash. 2d 109, 667 P.2d 1092; *City and County of San Francisco,* 619 F. Supp. 334; *Arrington,* 403 So.2d 893; *City of Atlanta,* 321 S.E.2d 325.

151. *Pierce County,* 100 Wash. 2d at 103, 667 P.2d at 1096; *City and County of San Francisco,* 619 F. Supp. at 337 (citing *Pierce County*).

152. *Pierce County,* 100 Wash. 2d at 203, 667 P.2d at 1096.

153. *Id.*

154. *Id.*

155. *Id.*

crimination.[156] Thus, affirmative action furthers the second purpose of the statute of providing a fair forum for public contract bidding.[157]

On the other hand, at least two courts have held that affirmative action requirements are contrary to the purposes of the competitive bidding statute.[158] In *Arrington,* the Alabama Supreme Court held that the City of Birmingham's subcontractor goal program frustrated open competitive bidding because the program deterred participation in the bidding process by imposing time consuming and costly requirements.[159] In *City of Atlanta,* the Supreme Court of Georgia stated that the purposes of the lowest responsible bidder requirement in the Atlanta City Charter were to insure that the contracts were awarded without favoritism and to obtain reasonable quality at the lowest cost.[160] The court held that the City's subcontractor goal program conflicted with these purposes of the bid requirement.[161] The courts in both *Arrington* and *City of Atlanta* limited the factors to be considered in determining the lowest responsible bidder to economic factors, skill, and quality.[162]

New Mexico courts also look to the purposes of the Procurement Code to define the government's discretion in determining the lowest responsible bidder.[163] Section 13-1-29 of the Procurement Code states that the purposes of the code are to "provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity."[164] Furthermore, the New Mexico Court of Appeals identified two purposes of the statute in *State v. New Mexico Department of Finance and Administration.*[165] The court stated that the goal of the statute was to secure goods and services for the public in accordance with specifications at the lowest cost.[166] In addition, the court recognized a secondary purpose of providing a fair forum for contractors wishing to bid on public contracts.[167] The court stated that by providing a fair forum for bidding, the state ensures that the public

156. *Id.*

157. *Id.*

158. *Arrington,* 403 So.2d at 899; *City of Atlanta,* 253 Ga. at 400, 321 S.E.2d at 328.

159. 403 So.2d at 899. The court stated that the program deterred participation in the bidding process because "the ordinance requirements are time consuming and costly to contractors." *Id.*

160. *City of Atlanta,* 253 Ga. at 400, 321 S.E.2d at 328.

161. *Id.* The court did not explain exactly how the subcontractor goal set-aside program conflicted with the purposes of the lowest bidder requirement of the city charter. *Id.*

162. *See Arrington,* 403 So.2d at 899; *City of Atlanta,* 253 Ga. at 400, 321 S.E.2d at 328.

163. State v. N.M. Dept. of Fin. and Admin., 103 N.M. 167, 170, 704 P.2d 79, 82 (Ct. App. 1985).

164. N.M. STAT. ANN. § 13-1-29 (Repl. Pamp. 1985).

165. *New Mexico Dept. of Fin.and Admin.,* 103 N.M. at 171-72, 704 P.2d at 83-84.

166. *Id.*

167. *Id.*

receives the benefits of competitive bidding.[168] However, the court did not discuss what it considers to be a fair forum, nor what it considers to be the benefits of competitive bidding. Thus, the court's statement could lead to two different conclusions regarding set-asides.

First, New Mexico courts could adopt the view that the purpose of providing a fair forum for bidding is to ensure that the public gets quality goods and services at the lowest possible cost. Affirmative action set-aside programs would raise the cost of most goods and services. Therefore, set-asides would conflict with the purposes of the procurement code. This is the position taken by the Alabama and Georgia Supreme Courts.[169] On the other hand, New Mexico courts could take the view that there are non-economic benefits to be derived from competitive bidding. A bidding forum in which minority contractors do not suffer the effects of past discrimination would be a fair forum which would support the state's antidiscrimination policy. The Illinois and Washington Supreme Courts adopted this position in *Nielsen*[170] and *Pierce County*.[171]

Whether the New Mexico courts adopt the Illinois-Washington view or the Alabama-Georgia view will depend on whether the courts look beyond economic responsibility. So far, the courts have allowed discretion to governments in determining the lowest bidder based only on economic considerations.[172] In *New Mexico Bus Sales v. Michael*,[173] the New Mexico Supreme Court held that the Board of Education of Grants did not abuse its discretion by awarding the contract to buy buses to the next-lowest bidder.[174] The court based its decision on the findings of the trial court that the lowest bidder did not meet the bid specifications, and the board of education acted reasonably and in good faith in awarding the contract to the next-lowest bidder.[175] The court discussed neither the purposes of the procurement code nor the meaning of responsible bidder.

The next case in which the court allowed the government broad discretion in determining the lowest responsible bidder was *Shed Ind., Inc. v. King*.[176] Again, the court held that the government did not abuse its discretion by awarding the contract to the next-lowest bidder because the

168. *Id.*

169. *Arrington*, 403 So.2d 893; *City of Atlanta*, 253 Ga. 397, 321 S.E.2d 325.

170. 81 Ill. 2d 290, 410 N.E.2d 40 (1980).

171. 100 Wash. 2d 109, 667 P.2d 1092 (1983).

172. *See* New Mexico Bus Sales v. Michael, 68 N.M. 223, 360 P.2d 639 (1961); Shed Industries, Inc. v. King, 95 N.M. 62, 618 P.2d 1226 (1980); State v. N.M. Dept. of Fin. & Admin., 103 N.M. 167, 704 P.2d 79 (Ct. App. 1985).

173. 68 N.M. 223, 360 P.2d 639 (1961).

174. *Id.* at 228, 360 P.2d at 644.

175. *Id.* The lowest bidder, New Mexico Bus Sales, did not meet the bid specifications because it failed to provide a one-year warranty on all materials, equipment and supplies as required by the specifications. *Id.*

176. 95 N.M. 62, 618 P.2d 1226 (1980).

lowest bidder did not conform to bid specifications.[177] In its low bid to supply portable metal classroom buildings to the state, Shed Industries failed to include loading and unloading costs.[178] As a result, Shed's bid was not in conformity with the bid specifications.[179] In upholding the government's decision to award the contract to the next-lowest bidder, the court focused on the economic hardship to the state that would result if Shed received the contract.[180] The court stated that if Shed had received the contract, the state probably would have had to pay the loading charges or bring suit to force Shed to perform at the bid price.[181] Thus, the cost of the contract would have been raised, and the purpose of the lowest responsible bidder requirement in the procurement code would have been defeated.[182]

Most recently, the court of appeals addressed the government's discretion to determine the lowest responsible bidder in *New Mexico Department of Finance*.[183] The court upheld the Department of Finance's decision to award a contract to the next-lowest bidder.[184] In doing so, the court stated that the government's discretion to determine the lowest responsible bidder includes a determination of whether the bidder's failure to comply with bid specifications materially affected the bid price.[185] The test for determining materiality of failure to respond to bid specifications was "whether the bidder received a substantial advantage or benefit not enjoyed by other bidders."[186] Consequently, the court focused on economic factors to be considered in determining the lowest responsible bidder.[187]

None of these decisions supports the argument that local governments in New Mexico should consider social responsibility in determining the lowest responsible bidder. At the same time, these decisions do not expressly limit local governments to considering only economic factors and,

177. *Id.* at 63, 618 P.2d at 1227.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. 103 N.M. 167, 704 P.2d 79 (Ct. App. 1985).
184. *Id.* at 172, 704 P.2d at 84.
185. *Id.*
816. *Id.*
186. *Id.*
187. *Id. New Mexico Bus Sales*, 68 N.M. 223, 360 P.2d 639, *Shed Industries*, 95 N.M. 62, 618 P.2d 1226, and *New Mexico Dept. of Fin. & Admin.*, 103 N.M. 167, 704 P.2d 79 were all cases where the government awarded a contract to the next-lowest bidder because the lowest bidder failed to meet bid specifications. The definition of responsible bidder was not discussed by the court in any of these cases. However, it is reasonable to infer from these cases that a contractor must meet the bid specifications to be a responsible bidder. Yet, these cases still provide little guidance as to what factors, other than economic, should be considered in determining the lowest responsible bidder.

thereby preclude local governments from considering social responsibility.

A local government in New Mexico has little guidance from the legislature in determining whether it may establish set-asides. The legislature's mandate that all government contracts be awarded to the lowest responsible bidder is qualified by the government's discretion in determining who is the lowest responsible bidder.[188] Moreover, Section 13-1-30 of the Procurement Code, which states that "compliance with federal law or regulations shall be in compliance with the Procurement Code,"[189] creates an inconsistency in application of the Procurement Code's policy. According to this section of the Code, competitive bidding prevails over affirmative action in awarding state or locally funded projects, and affirmative action prevails in awarding federally funded projects.[190] As a result, a local government is forced to implement separate programs for its contracts on the basis of whether the contracts are federally funded.

These inconsistencies created by the Procurement Code, as well as the lack of clarity of the Code, should be addressed by the legislature. However, the courts may be forced to address these issues if set-asides created by local governments are challenged. If so, the courts should adopt the social responsibility concept and uphold the set-asides for three reasons. First, the state legislature has established this state's anti-discrimination policy in the New Mexico Human Rights Act.[191] As the Illinois Supreme Court found in *Nielsen*, such a policy is evidence of the legislature's intention that a contractor's affirmative action efforts be considered when determining whether that contractor is a responsible bidder.[192]

Second, the concept of social responsibility is consistent with the purposes of the New Mexico Procurement Code. The purposes of the Procurement Code, as defined in the Code[193] and by the New Mexico Court of Appeals,[194] are to (1) provide fairness in awarding public contracts, (2) maximize the purchasing value of public funds by securing goods and services at the lowest cost, and (3) maintain a procurement system of integrity. Fairness and integrity are not strictly economic concerns. Therefore, consideration of non-economic factors such as social responsibility

188. *See New Mexico Bus Sales*, 68 N.M. 223, 360 P.2d 639; *Shed Industries*, 95 N.M. 62, 618 P.2d 1226; *New Mexico Dept. of Fin. & Admin.*, 103 N.M. 167, 704 P.2d 79.

189. N.M. STAT. ANN. § 13-1-29 (Repl. Pamp. 1985).

190. *Id.*

191. N.M. STAT. ANN. §§ 28-1-1, 28-1-9 to 28-1-14 (1978). Section 28-1-7 states that it is an unlawful discriminatory practice for an employer to refuse to hire or promote a person, who is otherwise qualified, because of "race, age, religion, color, national origin, ancestry, sex or physical or mental handicap or mental condition." *Id.*

192. 81 Ill. 2d at 293, 410 N.E.2d at 43.

193. N.M. STAT. ANN. § 13-1-29 (Repl. Pamp. 1985).

194. *New Mexico Dept. of Fin. & Admin.*, 103 N.M. at 170-71, 704 P.2d at 81-82.

will further the purposes of the Code. In *Pierce County,* the Washington Supreme Court held that set-asides furthered the purpose of that state's procurement code of providing a fair forum for awarding government contracts by remedying effects of past discrimination.[195] Set-asides further the purpose of the New Mexico Procurement Code of ensuring fairness in exactly the same way.

Finally, New Mexico courts should uphold set-asides as legal under the Procurement Code because, otherwise, local government set-aside programs will be inconsistent and arbitrarily applied. As discussed earlier,[196] the Procurement Code allows local governments to establish set-asides for federally funded projects. If set-asides in general are found to violate the Procurement Code, then local governments will be forced to implement two contracting procedures. One procedure would be for federally funded projects and would include a set-aside program. The other would be for all other projects and would not include a set-aside program. As a result, New Mexico would have, in effect, two procurement codes. This would be inconsistent with the purposes of the Procurement Code of insuring fairness and providing a procurement system of integrity and quality.[197] Furthermore, the purpose of maximizing the purchasing value of public funds[198] would be defeated by the extra cost to local governments of implementing two contracting procedures rather than one. Therefore, if presented with the question of the legality of set-asides under the Procurement Code, New Mexico courts should adopt the social responsibility concept and uphold the set-asides.

B. Summary of Procurement Code Issues

The conflict between the requirements of the Procurement Code and set-aside programs is a conflict between two strong public policies. The policy behind the competitive bidding requirement of the Procurement Code is to protect the public from favoritism in awarding contracts, and thus insure the best value for the public's money.[199] The policy behind set-asides is to remedy effects of past discrimination through affirmative action.[200] These policies conflict because affirmative action requires some sacrifice on the part of non-minorities.[201] In the case of set-asides for government contracts, the public must sacrifice low cost for affirmative

195. 100 Wash. 2d at 113, 667 P.2d at 1096.
196. *See supra* text accompanying notes 188-89.
197. N.M. STAT. ANN. § 13-1-29 (Repl. Pamp. 1985).
198. *Id.*
199. *See New Mexico Dept. of Fin. and Admin.*, 103 N.M. at 170-71, 704 P.2d at 81-82.
200. *See Fullilove,* 448 U.S. 448.
201. *Id.* at 484.

action. Thus, set-asides can exist only at the expense of competitive bidding.

Neither the legislature nor the courts of New Mexico have provided local governments with guidance in determining which policy is stronger and, thus, whether they may establish set-asides. By establishing a set-aside program, a local government may be risking suit.[202] However, the chances of winning or losing such a suit appear to be equal. Consequently, a local government may determine that the benefits of a set-aside program outweigh this risk. If so, a subcontractor goal program would be preferable over a pure set-aside program because it would more likely be supported by the social responsibility concept and, thus, upheld by the court.[203]

If the local government determines that the risk of suit is too great, it is not totally precluded from establishing some set-asides. The local government may establish a set-aside program, pursuant to federal statute and regulations, that applies only to contracts awarded on a particular federally funded project.[204] Such a set-aside program would not violate the Procurement Code.[205] Section 13-1-30(B) of the Procurement Code states that when a "procurement involves the expenditure of federal funds, the procurement shall be conducted in accordance with mandatory applicable federal law and regulations."[206] Furthermore, any conflict between the federal laws and regulations and the New Mexico Procurement Code shall be resolved in favor of the federal laws.[207] As a result, if federal regulations require a local government to set-aside contracts for minority contractors or set minority subcontractor goals, then such set-asides will not violate the New Mexico Procurement Code.

V. CONCLUSION

A local government wishing to establish a set-aside program should be aware of two issues. First, the local government should be aware of the constitutional implications of a set-aside program. The Supreme Court's decision in *Fullilove v. Klutznik* establishes that properly structured set-

202. The Associated General Contractors, a union-like association representing contractors, might file a suit seeking declaratory and injunctive relief from a set-aside ordinance established by a local government. *See City and County of San Francisco*, 619 F. Supp. 334; *Arrington*, 403 So.2d 893; *City of Atlanta*, 253 Ga. 397, 321 S.E.2d 325; *Associated General Contractors*, 616 F.2d 1381; *South Florida Chapter*, 723 F.2d 846. Another possible plaintiff would be a contractor who submits the lowest bid on a project but is denied the contract through application of a set-aside program. *See Associated Sign & Post, Inc.*, 485 N.E.2d 917; *M.G.M. Constr. Co.*, 615 F. Supp. 149; *Nielsen*, 81 Ill. 2d 290, 410 N.E.2d 40.

203. *See supra* text accompanying notes 129-36.

204. N.M. STAT. ANN. § 13-1-30 (Repl. Pamp. 1985).

205. *Id.*

206. *Id.*

207. *Id.*

asides are constitutional.[208] A local government can establish a constitutional set-aside program by following the guidelines set forth in Justice Powell's opinion in *Fullilove*.[209]

The second issue which a local government must consider is whether a set-aside program violates the lowest responsible bidder requirement of the New Mexico Procurement Code.[210] A pure set-aside program potentially violates the Procurement Code because it creates the possibility that a bidder other than the lowest bidder will receive the contract. However, at least subcontractor goal set-asides might not violate the Procurement Code if social responsibility is a factor in determining the overall responsibility of a bidder.[211] Such an interpretation of the Procurement Code would be consistent with the purposes of the Code and the anti-discrimination policy of the state of New Mexico.

M. VICTORIA WILSON

208. 448 U.S. 448 (1980).
209. *Id.* at 496.
210. N.M. STAT. ANN. § 13-1-108 (Cum. Supp. 1987).
211. *See supra* text accompanying notes 127-34.