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Connect Proposition 209 Dots to Secure Government Funds

by Michael A. Gregg

In 1996, California voters approved Proposition 209, which amended the Constitution to make it unlawful for the state to "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting." California Constitution Article I, Section 31.

Although Proposition 209 makes it unlawful for the state to grant "preferential treatment" to any individual or group based on the above characteristics, it does not ban all affirmative action employment programs.

By its terms, Proposition 209 applies only to employment decisions of the "state," which includes "the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state." California Constitution Article I, Section 3(f).

However, private employers, especially those who contract with the state, should be mindful that their actions could be considered "state action" under a number of theories, subjecting them to a Proposition 209. *Everett-Dicko v. Ogden Entertainment Services Inc.*, 36 Fed,Appx. 245 (2002).

Proposition 209 provides for exceptions to the ban on preferential treatment when necessary for any of the following reasons:

- Because qualifications based on sex are bona fide and reasonably necessary.
- To comply with a court order in force as of the effective date of the proposition.
- To keep the state or local government eligible to receive money from the federal government.
- To comply with federal law or the U.S. Constitution.

This article will focus on the third exception—involving eligibility for government funds—and examine which programs violate Proposition 209 and which do not.

In *Hi-Voltage Wire Works Inc. v. City of San Jose*, 24 Cal.4th 537 (2000), the California Supreme Court said "discriminate" means "to make distinctions in treatment; show partiality (in favor of) or prejudice (against)." "Preferential" means "a giving of priority or advantages to one person ... over others."

The affirmative action program at issue in *Hi-Voltage Wire Works* was established by San Jose to encourage minority business enterprises and women business enterprises to participate in public work projects. For each contract, the city required general contractors to fulfill an outreach for participation component.

To fulfill the outreach component, a contractor was required to provide notice or solicitation letters to at least four minority or women business enterprise firms. The contractor was also required to attempt to contact each enterprise to determine its interest in participating in the project—and, if any firm expressed interest, the contractor was required to negotiate in good faith, to not unjustifiably reject these bids and to specify the reasons for rejecting any bids.

With respect to the participation component, the city determined the number of minority/women business enterprise subcontractors that would be expected for each project absent discrimination. If the contractor included a sufficient

number of these subcontractors in its bid, this would satisfy the participation component and no documentation of outreach was required. A bid failing to satisfy either the outreach or participation component was automatically rejected. The court in *Hi-Voltage Wire Works* held that this program violated Proposition 209.

Likewise, in Connerly v. State Personnel Board, 92 Cal.App.4th 16 (2001), a state appeal court held that the affirmative action statutes concerning state lottery, professional bond services, state civil service, community colleges and state contracting violated Proposition 209. The state lottery program, Government Code Section 8880.56, imposed upon the California State Lottery Commission and its director an "affirmative duty" of maximizing the level of participation of "socially and economically disadvantaged small business concerns" in the procurement of goods and services.

The commission was required to adopt proposal evaluation procedures, criteria and contract terms that increased participation by "socially and economically disadvantaged small business concerns." "Socially and economically disadvantaged" included racial, ethnic and gender classifications but excluded white men. Although people excluded from the definition could be included if found by the commission to be disadvantaged, this was insufficient to overcome Proposition 209.

The professional bond services program involved Government Code Section 16850 through 16857, which established minority/women business enterprises "participation goals" for professional bond service contracts. When the services of an underwriter were obtained, the awarding department was required to deliver notice to all minority/ women business enterprises listed with the department and other qualified minority/women enterprises known to the department, but not other business enterprises.

All bidders were also required to certify their awareness of the awarding department's participation goals for minority/women business enterprises. In addition, bidders were required to identify the enterprises that would be used to fulfill the participation goals, and these subcontractors could not be later substituted unless certain statutory exceptions were met. The court in Hi-Voltage Wire Works held that this program violated Proposition 209.

The state civil service program, Government Code Sections 19790 through 19799, required the establishment of goals and timetables designed to overcome underutilization of minorities and women. Management and supervisors were required to take all positive action necessary to achieve these goals. The Connerly court held that these provisions violated Proposition 209 but that portions of the statute dealing with data collection did not.

As with the state contracting program, Public Contract Code Sections 10115 through 10115.15, the court noted that data collection may indicate prior discrimination practices, the need to evaluate the hiring criteria to ensure that they are job related and to not arbitrarily exclude members of the underutilized group, and may indicate the need for inclusive outreach efforts. *Connerly.*

The community college program, Education Code Sections 87100 through 87107, required educational agencies to adopt and implement plans for increasing the number of women and minority persons at all levels and established hiring goals and timetables for its implementation. The program also established a fund, which was available for the purpose of enabling community colleges to meet the goal that the work force reflect proportionately the adult population of the state, with the express intent that by 1992-1993, 30 percent of all new hires would be ethnic minorities. Funding priority was given to districts that made reasonable progress in achieving these goals. The court held that this program violated Proposition 209.

In *Hi-Voltage Wire Works,* the court acknowledged that "outreach may assume many forms, not all of which would be unlawful. Therefore, outreach or recruitment efforts which are designed to broaden the pool of potential applicants without reliance on an impermissible race or gender classification are not constitutionally forbidden." *Connerly.*

However, this may not provide clear guidance on permissible affirmative action programs. In her concerning opinion in *Hi-Voltage Wire Works*, Justin Joyce Kennard provided a specific example of what she believed to be acceptable.

A program that "impose[s] an obligation on the prime contractor to engage in reasonable, good faith outreach to all types of subcontractor enterprises in a community, like the outreach program upheld by this court prior to the adoption of Proposition 209 in *Domar Electric Inc. v. City of Los Angeles* [citations omitted], represents another example of a permissible affirmative action outreach program that does not discriminate against or grant preferential treatment on the basis of race or gender." *Hi-Voltage Wire Works.*

Domar Electric involved an executive directive issued by the mayor of Los Angeles in 1989, which declared it a policy of the city "to provide Minority Business Enterprises, ... Women Business Enterprises ... *and all other business enterprises* an equal opportunity to participate in the performance of all city contracts." *Domar Electric Inc. v. City of Los Angeles,* 9 Cal.4th 161 (1994).

Contracting agencies of the city were directed to evaluate the good faith efforts made by bidders in their outreach to minority/women business enterprises and "other business enterprises" according to nine factors. Based on the directive, the Los Angeles Board of Public Works considered the bidder's efforts to identify and select specific work for subcontracting out to minority/women business enterprises and other business enterprises. Among others, the board also considered a bidder's efforts to conduct advertising, follow initial solicitations and to negotiate in good faith with interested subcontractors.

Although the board provided estimates of the level of minority/women business enterprise participation that might be achieved for each bid, failure to meet this participation level did not disqualify the bidder from consideration. Kennard's opinion indicates her view that inclusive race-based participation goals are acceptable as long as not mandatory.

As noted above, Proposition 209 provides for exceptions to the ban on preferential treatment. One such exception applies when necessary to maintain the state or local government's eligibility to receive money from the federal government. To qualify for this exception, the action is acceptable on if it must

be taken to establish or maintain eligibility. *C&C Construction Inc. v. Sacramento Municipal Utility District,* 122 Cal.App.4th 284 (2004). Eligibility to maintain federal funding cannot simply allow the action, but must require it. Prior adjudication that the program is necessary to maintain federal funding is not required but must be supported by substantial evidence.

Certain federal laws require entities receiving federal funds to establish and implement specific affirmative action programs, some of which may encompass race-based measures. Entities receiving federal funds should be mindful of these requirements to ensure compliance with federal law and Proposition 209.