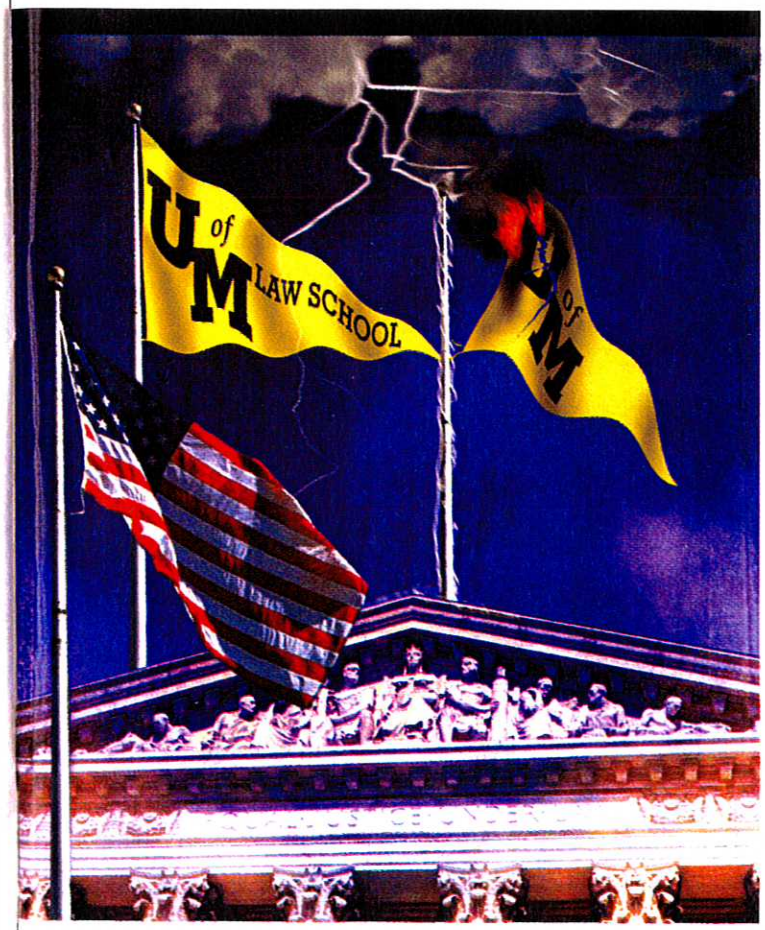
Wins & Losses

The Supreme Court calls for flexibility and individualized review in public education.



By Sherry J. Williams, Esq.

On June 23, 2003, the U.S. Supreme Court handed down a pair of decisions in *Grutter v. Bollinger*, No. 02-241 and *Gratz v. Bollinger*, No. 02-516, upholding overall affirmative action in public education. *Grutter v. Bollinger*, the Univerity of Michigan Law School's affirmative action program was upheld; in *Gratz v. Bollinger*, the University of Michigan Undergraduate School's affirmative action program was struck down.

These two cases shed light on this conservative court's viewpoints on affirmative action. And contrary to many fears, the Court has instituted standards that shake us from our comfort zones and force us to implement affirmative action plans as originally intended. Gone are the days of rote attainment of goal programs, regardless of their real benefit to minorities and women or their correction of the institutionalized discrimination they are intended to remedy.

This article will not be a case summary, but instead will look at the implications of the decisions on organizations trying to determine how to adjust their processes, including procurement, in light of the Court's holdings.

As it relates to procurement, these cases have the most application to public sector entities. In *Grutter v. Bollinger*, Justice O'Connor, writing the opinion for the Court, consistently refers to the importance of *public education* (emphasis added). "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."

More than universities, government has a special responsibility to protect the rights of all citizens within its jurisdiction. In recent times, the public sector, in light of many challenges to its goal-based programs, has abdicated much of its responsibility to its diverse citizenry, which includes commercial entities, by taking a defensive approach to issues of inclusion. Further, public sector entities have begun to emulate the private sector supplier diversity programs. This is troubling because the two sectors have different missions. The mission of a corporation is driven by a profit motive. The mission of the government is to balance the rights of all of its diverse citizens. Note the Court's language when discussing the university's responsibility toward its citizens, and then apply the logic to

public entities:

"In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools 'cannot be effective in isolation from the individuals and institutions with which the law interacts.'...Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."

Understanding the university's mission and responsibility in executing its mission, the Court held that the Law School had a compelling interest in attaining a diverse student body and that the Court has "never held that *the only governmental use of race that can survive strict scrutiny is remedying past discrimination*," (emphasis added).

This holding is critical to public sector entities who have shied away from their overriding mission of protecting access to all of the rights and benefits of its citizens. The zealousness of protecting individual rights has been replaced with a willingness to bend to the demands of those who have the most money to fight legal battles. As such, the rights of the minorities in this country are being drowned out. Democracy is not doing its duty of controlling unfettered capitalism to ensure that all citizens have the opportunity to be included in America's great riches.

Public entities' limited attempts to include minorities and women in their procurement processes contradict their mission. In *Grutter*, the Court states that "[t]he Law School's education judgment that such diversity is essential to its educational mission *is one to which we defer*," (emphasis added). So what would have happened if public entities had been serious all these years about emphatically protecting the interest of all of its citizens, instead of using goal-based programs as a concession tool to quiet the minority voice? And, is the fact that public entities have been too easily swayed on this issue further evidence of the depth of the institutional issues that governments have avoided addressing during the entire existence of goal-based programs?

What about *Richmond v. Croson*? In *Grutter*, the Court essentially applied the tenets of *Richmond v. Croson* to public education. Using the Court's logic, public entities cannot hide behind *Croson* either. Public entities still have the responsibility to maintain the openness and integrity of their institutions. If public entities had carried out their mission, as the Law School did, the Court may have deferred to public entities in *Croson* as the Court did in *Grutter*. Unfortunately, public entities have fallen prey to the weaknesses outlined in the *Gratz* case. That is, public entities have attempted to address very difficult issues with a thoughtless adherence to and implementation of goal-based programs that do not fix anything and may hurt minorities and women, because of bureaucratic unwillingness to address the "administrative" difficulties of implementing these programs properly and completely. If tax increases and tax cuts were treated as cavalierly! Thank goodness that the Court said this is not good enough! Public entities will have to do it right or not do it at all.

But what is doing it right? Here are the key principles that the Court applied to public education. For those who are familiar with the *Croson* case, you will find that the principles are quite similar:

- Race must be used in a "flexible, nonmechanical way."
- Each application review must be highly individualized.
- All applicants admitted should be qualified.
- Race-neutral alternatives should be considered in good faith. "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative."
- Race-conscious programs must be limited in duration. Periodic reviews should be performed to determine whether there is a continuing need for race-based remedies.

Flexibility and individualized reviews are themes repeated throughout both cases. Regarding flexibility of goals, the Court noted that the Law School did not use a mandated goal and that actual participation varied from year to year. In procurement, this equates to the Court's mandate of flexible aspirational goals. Further, it supports a policy and practice of estab-

lishing project-by-project goals on contracts, based on the availability of minorities and women for a particular opportunity.

In terms of the individualized reviews, the Law School considered a student's application "holistically," looking at how the individual would enhance the student population of the law school. In contracting, this individualized view would require public entities to look at the bids, not simply in terms of price and qualifications, but also from the perspective of the benefit to the economic development objectives of the public entity and the furtherance of the public entity's overall mission. Said another way, it forces the public entity to look at the sincerity of the bidder's inclusion of minorities and females in a way that benefits all of the citizens to which the public entity is responsible.

Sounds a lot like *Croson*? So those public entities that have been losing *Croson* cases or avoiding the issue altogether by choosing not to reach out to minorities and women should read these two cases very carefully and ask themselves a few questions: 1) Have we protected the rights of all of our citizens? 2) Have we protected our democratic ideals? 3) Have we let money do most of the talking? Leaders have to lead, no matter how difficult or complex or uncomfortable it is. The University of Michigan Law School won its lawsuit because its leaders were not afraid to lead and they attempted to implement affirmative action the right way. The U.S. Supreme Court applauded the schools for zealously fighting to protect their mission of educating students regardless of race and gender. Public officials—take note and take heed.

Sherry J. Williams, Esq. is vice president of D.J. Miller & Associates, Inc. in Atlanta, Georgia. She has provided project management, procurement and legal analysis in disparity studies for more than 30 public entities. Williams is also certified in general mediation.