

The policy is entitled "City Commission Policy No. 600-12" of the City of Grand Rapids, the subject of which is an "Equal Business Opportunity-Construction Policy." The policy's stated purpose is to "ensure non-discrimination in the performance and administration of City contracting and subcontracting" and to provide "access and equal opportunity to do business with the City." The policy applies to contractors submitting bids to the City of Grand Rapids or to others, regarding construction projects of \$10,000 or more, financed in whole or in part with city, state, or federal funding, unless otherwise regulated.² The policy further provides that "Administrative Guidelines" shall be promulgated to implement the construction policy and shall be used in the "interpretation and application of this Policy."

The administrative guidelines promulgated pursuant to the construction policy contain various sections; however, you have expressed a specific concern about section 5.1(A)(1), regarding bid discounts for contractors who utilize particular subcontractors (Administrative Guidelines for Equal Business Opportunity-Construction Policy ("Guidelines"), Section 1.1(A)(1).)³

² Art 1, § 26(4) provides an exception for actions that must be taken to maintain eligibility for federal programs or federal funding that is not addressed in this opinion because the policy also applies to city- and state-financed projects.

³ "Bid discounts" are defined as a "business incentive practice allowing an original bid to be reduced by a certain percentage for having engaged in activities that embrace the Mission Statement and Sustainability Vision Statement of the City with regard to diversity, strong economy, enriched lives, partnerships and regional equity and balanced with nature." (Guidelines, Section 2.1(2).) "The discounted bid will be used in the selection process for the project and the recommendation for award. However, the original bid amount will be the basis for contract award." (Guidelines, Section 5.1(A)(1).) Section 5.1(A) of the guidelines authorizes another type of bid discount, where a contractor may receive a 5% bid discount by bidding as a joint venture with an approved DBE. (Guidelines, Section 5.1(A)(2).) The analysis set forth in this opinion applies with equal force to that bid discount process.

Section 5.1, ELIGIBILITY FOR BID DISCOUNTS, provides in relevant part:

A. Diversity

1. Supplier Diversity: Construction bids may be discounted when *certified DBE*, subcontractor participation is voluntarily obtained by a contractor on a City construction project. Once a bid has been received and opened, the City Engineering Department shall apply a discount to bids based on the original bid amount and the percent of *certified DBE* subcontractor participation reported in the bid documents. The discounted bid will be used in the selection process for the project and the recommendation for award. . . . [Guidelines, Section 5.1(A)(1); emphasis added.]

A "DBE" is defined as a "Disadvantaged Business Enterprise," which means:

[A] business concern, which is at least 51% owned by one or more socially and economically disadvantaged individuals (as defined by the U.S. Small Business Administration), or in the case of any publicly owned business, at least 51% of the stock is owned by one or more socially and economically disadvantaged individuals; and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

For purposes of these Guidelines, DBEs may be further identified as minority, women and non-minority/women business enterprises.
[Guidelines, Section 2.1(10); emphasis in original.]⁴

City officials advise that the City elected to define and identify a "DBE" by using the federal regulations set forth in 13 CFR 124.103-124.104, regarding the Small Business Administration (SBA), and 49 CFR 26.61-26.73 and 26.81-26.91, pertaining to the United States Department of Transportation.

The SBA defines "socially disadvantaged individuals" in the following way:

(a) General. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within

⁴ The Guidelines then further define the terms "Minority," "Minority Business Enterprise (MBE)," "Women Business Enterprise (WBE)," and "Non-MWBE," which is a "business concern that is not a MBE or WBE." (Guidelines, Section 2.1(16)-(19).)

American society because of their identities as members of groups and without regard to their individual qualities. . . .

(b) Members of designated groups. (1) *There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans . . . ; Asian Pacific Americans . . . ; Subcontinent Asian Americans . . . ; and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. . . .* [13 CFR 124.103(a) – (b) (emphasis added).]

13 CFR 124.103(c) provides that individuals *not* belonging to one of the identified groups "must establish individual social disadvantage by a preponderance of the evidence." The SBA defines "economically disadvantaged individuals" as "*socially disadvantaged individuals* whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 CFR 124.104(a) (emphasis added). Thus, to be accorded a designation as "economically disadvantaged," a person must first show that he or she is "socially disadvantaged."

49 CFR Part 26 are regulations promulgated by the United States Department of Transportation for implementing the participation by DBEs in financial assistance programs. 49 CFR 26.67(a)(1) establishes "certification standards" and "what rules determine social and economic disadvantage" by providing:

(a) Presumption of disadvantage. (1) You must *rebuttably presume* that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, *are socially and economically disadvantaged individuals*. [Emphasis added.]

Although this language gives the appearance of according a presumption of economic disadvantage to women and minorities, under the regulation those individuals must submit a notarized statement that their personal net worth does not exceed \$750,000. 49 CFR 26.67(a)(2)(i).

49 CFR 26.67(d) provides that with respect to firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged, "a case-by-case determination" must be made regarding "whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. . . . [T]he applicant firm has the burden of demonstrating . . . by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged." 49 CFR 26.67(d).⁵

The guidelines set forth a graduated scale of discounts ranging from 1% to 5% based on the percentage of DBE participation in the bid (Guidelines, Section 5.1(A)(1)(a)):

<u>Certified DBE Subcontractor Participation</u>	<u>Discount Percentage</u>
1.0 - 2.5%	1.0%
2.51 - 5.0%	1.5%

⁵ The Guidelines refer to a "Certified DBE." "Certified" or "Certification" is defined as "[t]he process designated agencies utilize to determine whether businesses meet eligibility criteria as bonafide" DBEs, MBEs or WBEs. (Guidelines, Section 2.1(4).) Similarly, "Qualified As Certified" means the process whereby the Equal Opportunity Department verifies businesses are certified by designated agencies to be a bonafide DBE, MBE or WBE." (Guidelines, Section 2.1(24).) City officials confirmed that the City's Equal Opportunity Department does not "certify" subcontractors as DBEs. Rather, the Department verifies whether a subcontractor has received DBE certification from a designated agency – the Michigan Department of Transportation, other state United States Department of Transportation certification programs, or the SBA, which agencies utilize the rebuttable presumption based on race and sex for DBE certification. Although the City does not perform the certification, the City incorporates the presumption in favor of women and minorities by adopting the definitions of DBE from these other sources.

5.01 - 7.5%	2.0%
7.51 – 10.0%	2.5%
10.01 – 15.0%	3.0%
15.01 – 18.0%	4.0%
18.01%+	5.0%

Thus, the City's guidelines, by using the selected definitions, provide that a contractor may receive a bid discount by using DBEs owned or operated by "women," "Black Americans," "Hispanic Americans," "Native Americans," and persons of other listed ethnic groups, who are "rebuttably presum[ed]" to be "socially disadvantaged individuals."⁶ Under the guidelines, the amount of the discount is directly related to the percentage of DBE subcontractor participation, i.e. the percentage of the total dollar value of the contract work that will be performed by DBEs. The greater the percentage of DBE participation, the higher the bid discount will be. For purposes of selecting the lowest bidder to receive award of the contract, the higher the bid discount, the lower will be the price of the bid used to select the low bidder, thereby favoring those bidders using DBEs.⁷

Accordingly, the guidelines provide an advantage to contractors who make greater use of DBE subcontractors, compared to contractors who make less or no use of DBE subcontractors. Eligibility of a subcontractor to become a DBE relies on definitions

⁶ The fact that women and minorities are not accorded a presumption of economic disadvantage is of no consequence in light of the definition of "economically disadvantaged individual," which first requires that an individual be socially disadvantaged. An individual who cannot prove social disadvantage necessarily fails to prove economic disadvantage.

⁷ The guidelines provide that in cases where bids, including discounted bids, are the same, the "recommended award shall be the bid with the lowest original bid amount; however, the City reserves the right to award a contract in the City's best interest, and therefore, may select a bidder other than the lowest." (Guidelines, Section 5.2(B).)

of "socially and economically disadvantaged" that rebuttably presume that women, certain racial and ethnic minorities, and persons of certain national origin are socially disadvantaged, while all other socially and economically disadvantaged persons must prove that status by a preponderance of the evidence. The question is whether this policy constitutes "preferential treatment" in public contracting on account of race, ethnicity, national origin, or sex in violation of art 1, § 26.

In November 2006, the people of Michigan voted on a proposed amendment to the State Constitution, commonly known as Proposal 06-2 or Proposal 2. The amendment passed by a margin of 58% to 42%.⁸ Proposal 2, now Const 1963, art 1, § 26, provides in relevant part:

(2) The state shall not *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.*

(3) *For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in subsection 1. [Emphasis added.]*

This section took effect on December 23, 2006, and applies to actions taken after its effective date.⁹ Accordingly, by its plain language, art 1, § 26 applies to the policy adopted by the City of Grand Rapids on January 23, 2007.

⁸ See <http://miboecfr.nictusa.com/election/results/06GEN/90000002.html>.

⁹ See Const 1963, art 12, § 2, and art 1, § 26(8).

There are three rules for construing constitutional provisions. As stated by the Michigan Supreme Court in *Wayne County v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004), the rule of common understanding constitutes the first rule of constitutional construction:

[T]he primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified.

This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification. But if the constitution employs technical or legal terms of art, "we are to construe those words in their technical, legal sense."

The second rule is that, to clarify the meaning of a constitutional provision where the meaning may be questioned, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered. *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). If the constitutional language is clear, however, reliance on extrinsic evidence is inappropriate. *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 362; 604 NW2d 330 (2000). Finally, under the third rule for construing a constitutional provision, "wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does." *Traverse City School Dist*, 384 Mich at 406.

Art 1, § 26 states that a city "shall not *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 contracting." (Emphasis added.) These terms are not

ambiguous and can be understood in a common sense.¹⁰ To "discriminate against" means to "make a difference in treatment" that is unfavorable to the person or group.¹¹ "Preferential treatment" may be defined as "showing preference" in the treatment of a person or group.¹² The word "preference" can be commonly understood to mean "the act, fact, or principle of giving advantages to some over others."¹³ Notably, this meaning is consistent with the technical or legal definitions that have been accorded the term "preference."¹⁴ The term "treatment" is self-explanatory but can be understood as how something or someone is handled or dealt with.¹⁵ Thus, the term "preferential treatment" as used in art 1, § 26 can be understood as the act or fact of giving a favorable advantage to one person or group over others based on race, sex, color, ethnicity, or national origin. By using the terms "discriminate against" and "grant preferential treatment to," art 1, § 26 prohibits both the prejudicial treatment of a person and its counterpart – the favorable

¹⁰ It is appropriate to consult dictionary definitions existing at the time the people ratified a constitutional amendment in order to determine the common meaning of the terms adopted. See, e.g., *Studier v Michigan Public School Employees' Retirement Bd*, 472 Mich 642, 653; 698 NW2d 350 (2005).

¹¹ See <http://www.m-w.com/dictionary/discriminate>. See also *Merriam-Webster's Collegiate Dictionary*, 11th Edition (2003), p 358, "discriminate" means "to make a difference in treatment or favor on a basis other than individual merit <in favor of your friends> <against a certain nationality>."

¹² See <http://www.m-w.com/dictionary/preferential>. See also *Merriam-Webster's Collegiate Dictionary*, 11th Edition (2003), p 979, "preferential" means "showing preference."

¹³ See <http://www.m-w.com/dictionary/preference>. See also *Merriam-Webster's Collegiate Dictionary*, 11th Edition (2003), p 979, "preference" means "the act, fact, or principle of giving advantages to some over others."

¹⁴ See *Black's Law Dictionary*, 8th Ed, p 1217, "preference" means "[t]he act of favoring one person or thing over another; the person or thing so favored." Courts have associated the term "preference" or "preferential treatment" with the conferring of an advantage. See, e.g., *Grutter v Bollinger*, 539 US 306; 123 S Ct 2325; 156 L Ed 2d 304 (2003); *Regents of Univ of Cal v Bakke*, 438 US 265; 98 S Ct 2733; 57 L Ed 2d 750 (1978); *Lewis v Michigan*, 464 Mich 781, 783; 629 NW2d 868 (2001).

¹⁵ See <http://www.m-w.com/dictionary/treating>. See also *Merriam-Webster's Collegiate Dictionary*, 11th Edition (2003), p 1333, "treatment" means "the act or manner or an instance of treating someone or something."

treatment of a person or group – on account of these classifications. The meaning of this language is clear; therefore, there is no need to examine the circumstances surrounding the adoption of this constitutional provision or the purpose sought to be accomplished. *Traverse City School Dist*, 384 Mich at 405. See also *National Pride at Work v Governor*, 2007 Mich App LEXIS 240; ___ Mich App ___; ___ NW2d ___ (2007). Moreover, this interpretation does not create constitutional invalidity. *Traverse City School Dist*, 384 Mich at 406.

While the City's process does not establish a "quota" or participation "goal" as those terms are commonly understood, the policy does "discriminate against, [and] grant preferential treatment to, [an] individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public contracting." Const 1963, art 1, § 26.

That is, the bid discount process gives a benefit to the bidder by granting a bid discount based on the percentage of participation by subcontractors that qualify as DBEs – defined in terms of race, sex, ethnicity, and national origin. Where a bidder successfully obtains a contract as a result of a discount, both the bidder and its DBE subcontractors will receive the financial benefit of the contract, while other bidders and their non-DBE subcontractors will be denied the financial benefit of the contract. It is the status of the subcontractors as DBEs that will be relied upon to confer the favorable treatment of the bid discount.

The bid discount provision grants an advantage or "preference" based on race, sex, ethnicity, and national origin to minority- and women-owned subcontractors, who are entitled to a presumption that they are socially disadvantaged for purposes of acquiring DBE status. The ability of socially and economically disadvantaged persons to qualify their business as a DBE is expressly related to their membership in one of the designated groups. For DBEs, the City accords women and minorities the presumption that they are socially disadvantaged, while all other socially and economically disadvantaged persons must bear the burden of proving their status by a preponderance of the evidence.¹⁶ Although it is possible that a non-minority/non-women-owned subcontractor could qualify as a DBE under the guidelines and incorporated definitions, the presumption in favor of women and the designated minorities and ethnic groups forces these individuals to compete for such status on an *unequal* basis. These are the kinds of preferences that art 1, § 26 prohibits. Consequently, insofar as the policy provides a bid discount based on the DBE status of subcontractors, the City's policy as implemented by the Administrative Guidelines violates the plain language of art 1, § 26 and is unconstitutional.

¹⁶ Indeed, the term "socially and economically disadvantaged" is not race-neutral because of the underlying rebuttable presumptions. See *Rothe Dev Corp v United States DOD*, 324 F Supp 2d 840, 844 (D Tex 2004), rev'd on other grounds 413 F3d 1327 (CA 10, 2005); *Sherbrooke Turf, Inc v Minn Dep't of Transp*, 345 F3d 964, 969 (CA 8, 2003) (holding that although the program confers benefits on "socially and economically disadvantaged" individuals, a term which is race-neutral, strict scrutiny applies because the statute presumes minorities are in that class).

This conclusion is consistent with the decisions by California courts interpreting Cal Const, art 1, § 31, after which Proposal 2 was modeled.¹⁷ Section 31 contains a prohibition identical to Const 1963, art 1, § 26(2) that "[t]he state shall not 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 contracting." Cal Const, art 1, § 31(a).

In *Hi-Voltage Wire Works, Inc v City of San Jose*, 12 P3d 1068 (2000), the California Supreme Court interpreted this prohibition against "discrimination" and granting "preferential treatment" in the operation of public contracting and accorded these terms their plain and ordinary meaning: "'Discriminate' means 'to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*)' . . . 'preferential' means giving 'preference,' which is 'a giving of priority or advantage to one person . . . over others.'" *Hi-Voltage Wire Works*, 12 P3d at 1082 (internal citations omitted). The *Hi-Voltage* Court thereafter struck down the City of San Jose's contracting program that required contractors bidding on city projects to utilize a specified percentage of minority or women subcontractors.

The Court concluded that this program violated the plain language of Cal Const, art 1, § 31. The Court observed that the participation component authorized or encouraged "what amount[ed] to discriminatory quotas or set-asides, or at least race and sex-conscious numerical goals." *Hi-Voltage, Inc*, 12 P3d at 1084. "A participation goal

¹⁷ See Citizens Research Council of Michigan, Report 343, Statewide Issues on the November General Election Ballot, Proposal 2006-02: Michigan Civil Rights Initiative, September 2006, p 13.

differs from a quota or set-aside only in degree; by whatever label, it remains 'a line drawn on the basis of race and ethnic status' as well as sex." *Hi-Voltage, Inc*, 12 P3d at 1084 (internal citations omitted). The Court concluded that such a goal ran "counter to the express intent . . . of Proposition 209." *Hi-Voltage, Inc*, 12 P3d at 1084. See also *Connerly v State Personnel Bd*, 112 Cal Rptr 2d 5 (Cal App, 2001), where the California Court of Appeals invalidated several state statutory schemes as according preferential treatment in violation of Cal Const, art 1, § 31. The City of Grand Rapids' bid discount process also confers specific benefits on the basis of an impermissible classification like the policy of the City of San Jose; consequently the rationale set forth in *Hi Voltage, Inc*, persuasively supports the determination that the City's policy is unconstitutional.¹⁸

It must be recognized that programs according race- and sex-based preferences in contracting have been upheld as constitutional under equal protection principles.¹⁹ By adopting Const 1963, art 1, § 26, however, the people chose to prohibit both discrimination disfavoring and preferential treatment favoring persons or groups based on race, sex, color, ethnicity, and national origin. In other words, except under limited

¹⁸ The *Hi-Voltage Court* also addressed whether the City of San Jose's outreach program for women and minority subcontractors was constitutional. While the Court concluded that San Jose's outreach program was unconstitutional, the Court observed that not all outreach programs would be unlawful. Programs available to all on an equal basis would be constitutional: "Plainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification." *Hi-Voltage*, 12 P3d at 1085, citing *Domar Electric, Inc v City of Los Angeles*, 885 P2d 934 (1994) as an example of an outreach program not predicated on impermissible factors. Although the City of Grand Rapids' construction policy does contain an outreach component, you have not asked about it and those provisions are therefore not addressed in this opinion.

¹⁹ See, e.g., *Western States Paving Co v Washington State Dep't of Transportation*, 407 F3d 983 (CA 9, 2005); *Sherbrooke Turf, Inc*, 345 F3d 964; *Adarand Constructors, Inc v Slater*, 228 F3d 1147, 1155 (CA 10, 2000).

circumstances,²⁰ Michigan treats all individuals equally in the areas of public contracting, education, and employment.

Const 1963, art 1, § 26 thus may be harmonized with the federal and state Equal Protection Clauses, which similarly prohibit such discrimination. See *Washington v Davis*, 426 US 229, 239; 96 S Ct 2040; 48 L Ed 2d 597 (1976); *United States v Virginia*, 518 US 515; 116 S Ct 2264; 135 L Ed 2d 735 (1996).²¹ While the Equal Protection Clause has been interpreted as permitting states to consider race or sex in fashioning a remedy to address the effects of past discrimination, see *Wygant v Jackson Bd of Education*, 476 US 267; 274 106 S Ct 1842; 90 L Ed 2d 260 (1986), and *Adarand Constructors, Inc v Pena*, 515 US 200, 236-237; 115 S Ct 2097; 132 L Ed 2d 158 (1995), a state is not required to do so. See *Shaw v Reno*, 509 US 630, 654; 113 S Ct 2816; 125 L Ed 2d 511 (1993) ("in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits and what it requires");

²⁰ Art 1, § 26 does provide certain exceptions to its application:

(4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

Section 26 also specifies that federal law or the federal Constitution prevails over any part of art 1, § 26 in conflict with those laws. Const 1963, art 1, § 26(7). This opinion does not address any effect these exceptions might have on the City's program in the absence of specific facts or circumstances upon which to analyze the exceptions' application.

²¹ The Equal Protection Clause of the Michigan Constitution, Const 1963, art 1, § 2, is to be interpreted coextensively with the federal Equal Protection Clause, US Const, Am XIV. *Harvey v State*, 469 Mich 1, 6; 664 NW2d 767 (2003); *Crego v Coleman*, 463 Mich 248, 258-259; 615 NW2d 218 (2000); *Vargo v Sauer*, 457 Mich 49, 60; 576 NW2d 656 (1998); *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996), (the Michigan and United States Equal Protection Clauses offer similar protection).

Hi-Voltage, Inc, 12 P3d at 1087. Indeed, as the Ninth Circuit Court of Appeals observed in upholding the constitutionality of Cal Const, art 1, § 31, "[t]hat the Constitution permits the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether." *Coalition for Economic Equity v Wilson*, 122 F3d 692, 708 (CA 9, 1997) cert den 522 US 963; 118 S Ct 397; 139 L Ed 2d 310 (1997) (emphasis deleted). See also *Coalition to Defend Affirmative Action v Granholm*, 473 F3d 237, 248 (CA 6, 2006) (discussing the relationship between the Equal Protection Clause and art 1, § 26). Here, as in California, the people have chosen to ban preferences altogether.

It is important to emphasize, however, that this does not mean that the City of Grand Rapids is barred from pursuing its policies of ensuring nondiscrimination and equal opportunities within the contracting process. It must do so, however, employing race- and sex-neutral means. See, e.g., *Hi-Voltage, Inc*, 12 P3d at 1085 (observing that Cal Const, art 1, § 31 was not meant to prohibit the dissemination of information about public employment, education, and contracting where it is not predicated on an impermissible classification.)²² For example, if the City wished to retain a bid discount process, it could amend the definition of a DBE to include only those individuals or firms that demonstrate "economic disadvantage," a criterion that can be determined through application of race-neutral and sex-neutral financial or economic factors.²³ By amending

²² Indeed, the United States Supreme Court has encouraged universities to move away from the use of race and sex preferences in admissions policies. See *Grutter*, 539 US at 342 ("Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.").

²³ California instituted an economic incentive program for businesses based solely on economic factors. See Cal Gov Code §§ 14837-14838.

the definition of who qualifies as a DBE to preclude reliance on race and sex or any of the other impermissible classifications, the City could continue to offer this economic incentive.

It is my opinion, therefore, that Const 1963, art 1, § 26 prohibits the implementation or application of the City of Grand Rapids' bid discount process set forth in Section 5.1(A)(1) of the Administrative Guidelines promulgated pursuant to City Policy 600-12 because the process grants preferential treatment to persons or groups based on race, sex, color, ethnicity, or national origin. Art 1, § 26 does not, however, prohibit the City from maintaining a bid discount process as long as the City amends the process to remove reliance on the unconstitutional factors of race, sex, color, ethnicity, or national origin.

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Att.

Const 1963, art 1, § 26:

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not 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.

(2) The state shall not 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.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

(4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan anti-discrimination law.

(7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

(8) This section applies only to action taken after the effective date of this section.

(9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

History: Add. Init., approved Nov. 7, 2006, Eff. Dec. 23, 2006