

DBE ENTERPRISES



FEBRUARY 2003 ISSUE 2

Is The Tide Turning? Affirmative Action Programs Upheld

By Colette Holt, August 2002

Over the last several months, four courts have rejected legal challenges to affirmative action efforts. Perhaps the tide is turning. Time will tell, as appeals and new challenges are likely. COMTO's newsletter will keep you posted on future developments in the law.

Adarand Constructors, Inc. v. Mineta, 2001 (Adarand VIII)
The Supreme Court dismissed Adarand Constructor's challenge to the constitutionality of the US DOT's Disadvantaged Business Enterprise (DBE) Program. Both the trial court and the court of appeals had upheld the Program, enacted to comply with Adarand. The justices very belatedly conceded that they had taken the wrong case to decide this major issue. Adarand had changed the nature of its claim between the filing of the complaint before the trial court and its petition to the Supreme Court from one against the grant portion of the DBE Program administered by state and local governments to that applicable to direct federal contracting. Because neither court below had considered this issue nor addressed Adarand's standing to prosecute such a challenge, the appeal was rejected as "improvidently granted," a very unusual occurrence for the Court.

Sherbrooke Turf, Inc. v. Minnesota Department of Transportation
Shortly after Adarand's petition was dismissed, the federal district court upheld the constitutionality of the Minnesota Department of Transportation's (MnDOT) DBE Program for federally assisted highway projects. The Program adopted pre-Adarand had been successfully challenged by the same large, majority-owned landscaping subcontractor. In response, MnDOT commissioned a study, to which this author was counsel, to meet the requirements of Adarand v. Pena and the new regulations contained in 49 CFR Part 26. Based upon that study, MnDOT set an overall DBE goal of 11.6 %.

Both facially and as applied, the court held that MnDOT's Program is constitutional. Congress met its legal burdens in enacting the DBE Program's legislation, and did MnDOT in complying with the regulations. Its Program is flexible, applies reasonable goals and does not restrict in any meaningful way the plaintiff's ability to compete for subcontracts. There is no independent burden on a recipient of federal funds to prove that the regulations comport with Croson's strict scrutiny standards applicable to state and local contracts. *Gross Seed Co. v. Nebraska Department of Roads*

In a challenge to Nebraska's DBE Program, the district judge likewise upheld its Program. The court found that the "federal government's evidence is sufficient to demonstrate past discrimination does exist in the construction industry . . . [and] in individual areas, such as

★ DBE Advocate ★

Rocci Lueck

Executive Administrator

Association of Women Contractors

Ms. Lueck joined the Association of Women Contractors (AWC) in 1998. Prior to that she had worked in that capacity for the American Subcontractors Association (ASA) and serves as the construction market specialist at Deluxe Corporation.

Question: In your opinion, what is the biggest challenge facing the AWC?

Response: AWC needs to create a bigger footprint in the business landscape of Minnesota. We need to get our message out to a broader audience and convey our plans for improving opportunities for women within the industry. In many ways we are starting to do this well. Our members are making the connections with groups and politicians.

Question: What is the easiest or most positive aspect of the AWC?

Response: The most positive aspect of AWC is the environment it maintains where women are taking control of businesses and facing all of the challenges of their choices. It is exciting and encouraging to see women get this far and want to give back via this association. The generosity of information is incredible.

Question: How do you see your role or characterize your contribution to the association?

Response: My role is one of the information/message "traffic manager." I work to ensure the flow of information in a clear and prompt manner. I also suggest and facilitate the development of alternative revenue streams for the association.

Question: What have you learned during your time with AWC?

Response: If there is a will, there is a way. I have seen this quote come to life again and again as the members of AWC compete in a very competitive male dominated industry.

Aside from her work with AWC and ASA Ms. Lueck is a small business owner herself.

highway construction." The statute is narrowly tailored because Congress examined evidence that race-neutral measures would not entirely remedy discrimination; the program would sunset unless reauthorized; grant recipients must set annual overall goals to reflect "market conditions that would be achieved if discrimination was lacking; and the provisions for "good faith efforts" relieved the burden on contractors. Finally, there is no need for a grant recipient to independently prove that its program meets strict scrutiny.

Klaver Construction Co., Inc. v. Kansas Department of Transportation

Tide Turning? continued on page 2

Yet another challenge to the DBE Program brought by the same attorneys yielded the same result, but for a different reason. This time, the court held that the plaintiff did not have standing to bring the suit, because the injury it suffered- diminished competitiveness vis a vis DBEs- is not caused by the presumptions of social disadvantage based upon race and gender. "The presumptions create no bar to Klaver's participation in the DBE program because the program also includes an alternative method of demonstrating disadvantaged status that is open to Klaver and all contractors, regardless of the race and gender of the individuals who own and control those companies....Individual determinations of social and economic disadvantage are provided for in 49 C.F.R. § 26.67(d)....Even if the rebuttable presumption...was removed, the TEA-21 DBE program would still exist as a small business program for socially and economically disadvantaged business owners with a personal net worth of less than \$750,000....The existence of non-discriminatory criteria constitutes an independent cause that severs any causal nexus between the allegedly wrongful conduct and the plaintiff's injury...there is little possibility that a company such as Klaver could be injured by being required to compete against firms that are not truly disadvantaged."

Colette Holt represents public agencies and private firms on issues related to civil rights, employment issues, public contracting and affirmative action. Ms. Holt received her B.A. in Philosophy from Yale University and her J.D. from the University of Chicago Law School. Contact her via holtlaw@ameritech.net.

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MEDA Training Sessions

February 13: A rider Bennett/MEDA Series Session How to Pay Your Employees and Yourself.
 Salary vs. distribution/draw/options

Benefits: possibilities/legal constraints Paying sales staff: salary, draw, or commission?

Location: Rider Bennett conference room, 333 7th St. E., 19th floor. Time: 3:30 p.m.

Registration, 3:45 - 5:30p.m. Session cost; \$25, parking included.

February 27th: A Special MEDA Session Lower Your Expenses!

In a working session, Paul Wirtz of Expense reduction Associates, Inc. will show you how to add thousands of dollars to your bottom line without cutting out the things you need to run your business. You don't want to miss this opportunity!

Location: New York Life Insurance, 3600 Minnesota Drive Suite 100, Edina. Time 1:00 to 5:00 p.m. Cost: \$35, materials provided.

For information call Tim Wagner at 612-259-6579

Contractors/Consultants	Total Contract Amount	Total Paid to Date	DBE Paid to Date	(1) DBE % Actual to Date	(2) DBE % Total Contract Value	Target DBE % Goal
Minnesota Transit Constructors (MnTC)	303,152,083	191,772,415	27,542,613	14.36%	9.09%	15%
Other Contractors	5,725,923	4,882,687	712,609	14.59%	12.45%	
O'Brien Kreitzberg (OBK) (3)	14,411,331	9,467,541	2,116,259	22.35%	14.68%	15%
Marsh	545,000	305,000	82,105	26.92%	15.07%	5%
Other Consultants	31,198,410	26,041,368	842,756	3.24%	2.70%	
SUB-TOTAL:	355,032,747	232,469,011	31,296,342	13.46%	8.28%	
Other Commitments *	70,862,751	69,088,572	N/A	N/A	N/A	N/A
TOTAL:	425,895,498	301,557,583	N/A	N/A	N/A	N/A

* ROW, Cooperative Agreements, Other Direct Costs, etc. (1) Calculates DBE percentage based upon DBE dollars expended vs. contract dollars paid to-date (actuals). (2) Calculates DBE percentage based upon DBE dollars expended vs. total contract value.