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CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC. v. CITY OF PHILADELPHIA 91 E 3d 586 (3d Cir. 1996).

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I. FACTS

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court's judgment declaring that the City's set-aside program for black construction contractors, Chapter 17-500[1] violated the equal protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors).[2]

The preamble to Chapter 17-500 set forth general legislative findings, including the percentage of minorities in Philadelphia. The legislature found that "[a] pattern of past and present racial, sexual and economic discrimination have unfairly limited the ability of Minority and Female Owned Businesses to compete for an equitable share of such contracts with the City of Philadelphia"; that the citizens of Philadelphia are committed to the eradication of such discrimination; that goals for minority and female owned businesses would help eradicate the manifestations of discrimination.[3] The preamble to the 1987 ordinance, which extended the life of the program, included the finding that economic parity with majority businesses had not yet been reached.[4]

Chapter 17-500 seeks to increase the participation of "disadvantaged business enterprises" (DBEs) in city contracting.[5] DBEs are defined as those business at least 51% owned by "socially and economically disadvantaged" persons.[6] "Socially and economically disadvantaged persons" are "individuals who have . . . been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group of differential treatment because of their handicap without regard to their individual qualities, and 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 business area who are not socially disadvantaged."[7] This definition "includes only individuals who are both the victims of prejudice based on status and economically deprived."[8] Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, per § 17-501(11)(a), but businesses that have received more than $5 million in City contracts are rebuttably presumed not to be DBEs.[9] Chapter 17-500 sets the participation goals of: 15% for racial minorities, 10% for women, and 2% for handicapped.[10] These perecentages include the dollars received by DBE subcontractors as well as the monies granted to DBE prime contractors.[11]

Two different strategies are authorized to achieve the program's goals.[12] When there are sufficient DBE's qualified to perform a city contract to ensure competitive bidding, a contract can be let on a sheltered market basis — i.e., only DBE's will be permitted to bid.[13] In other instances, the contract will be let on a non-sheltered basis — i.e., any firm may bid — with the goals requirements being met through subcontracting.[14] Because the sheltered market strategy has seldom been used, the Ordinance's participation goals have been achieved almost entirely by insisting that bidding prime contractors subcontract work to DBE's in accordance with the goals.[15] Chapter 17-500 is, therefore, essentially a subcontracting set-aside program.[16]

When the goals are to be achieved by imposing subcontracting requirements, each would-be prime contractor must submit a "Schedule for Participation" of DBEs or a "Request for Waiver."[17] A schedule lists the participating DBE subcontractors and the dollar value of their services, whereas a waiver is a way to avoid the DBE requirements.[18] The Request for Waiver lists the DBEs they have commitments from and contains a statement that the contractor has made a good faith effort to enlist DBEs but has failed to meet the goals for the contract.[19]

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[1] Phila. Code § 17-500 et. seq.

[2] *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 91 F.3d 586, 590-91 (3d Cir. 1996).

[3] *Contractors*, 91 F.3d at 591.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* (quoting Phila. Code § 17-501(11).

[8] *Id.*

[9] *Id.* at 591-92.

[10] *Id.* at 592.

[11] *Id.* The 1982 Ordinance created the Minority Business Enterprise Council (MBEC) to oversee the program. *Id.* The MBEC also had the power to recommend exemptions from Chapter 17-500's requirements. *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

Compliance with the Chapter 17-500's goals is to be considered "an element of responsiveness" of the bid when an agency awards a contract.[20] When at least one bidding contractor submits a satisfactory Schedule for Participation, it is presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the "lowest responsible, responsive contractor" who is granted a Waiver and proposes the highest level of DBE participation at a reasonable price recieves the contract.[21] The presumption can be rebutted by noncomplying bidders.[22]

II. HOLDING

After trial, the United States District Court issued a permanent injunction against the enforcement of the ordinance.[23] The United States Court of Appeals for the 3rd Circuit affirmed the decision of the United States District Court for the Eastern District of Philadelphia.[24] Writing for a unanimous Court, Judge Stapleton held that the city failed to demonstrate race-based discrimination on the part of general contractors or local trade associations.As to the city, the set aside program was not narrowly tailored to address such past discrimination even if it could be shown.[25]

III. ANALYSIS/APPLICATION

In evaluating the Philadelphia program, the United States Court of Appeals applied the strict scrutiny test articulated in *Wygant*[26] and *Croson.*[27] Wygant held that parties challenging a race-based preference can succeed by showing either (1) that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) that there is no strong basis in evidence for the conclusions the race-based discrimination existed and that the remedy chosen was necessary.[28] Croson held that municipal, race-based, affirmative action programs, when challenged on equal protection grounds, must be subjected to strict scrutiny review.[29]

In *Croson,* the Supreme Court stated that, in order to pass the strict scrutiny test, a minority set-aside program must be justified by a compelling government interest and narrowly tailored to accomplish a remedial purpose.[30] The strict scrutiny test requires that the City must specifically identify the discrimination giving rise to the compelling state interest in a race-based classification.[31] Over the course of the litigation, the city pointed to three distinct forms of discrimination, discrimination by prime contractors in the awarding of subcontracts, discrimination by contractor associations in admitting members, and discrimination by the City in awarding of prime contracts.[32]

The Contractors Court found no firm evidence of discrimination in regard to the prime contractors or contractor associations.[33] To show discrimination by the city, at trial, it relied upon a study by Dr. Andrew Brimmer.[34] According to Brimmer's analysis,"black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction."[35] He arrived at that figure by calculating a disparity index of 22.5 for black construction firms.[36]According to Dr. Brimmer, the smaller the index figure, the greater the inference of discrimination.[37] He concluded that such a large disparity was attributable to the city's discrimination against black contractors.[38]

In certain circumstances, a disparity index of 22.5 can constitute a strong basis in evidence for inferring the existence of discrimination.[39] The district court, however, rejected Dr. Brimmer's conclusion for three reasons: it did not take into account whether the black construction firms were qualified and willing to perform City contracts; it used mixed statistical data from different sources; and it did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects.[40] The Court of Appeals dismissed the District

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[20] *Id.* at 593.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 586.

[25] *Id.*

[26] *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986).

[27] *City of Richmond v. J.A. Croson Company,* 488 U.S. 469 (1989).

[28] *Wygant,* 476 U.S. at 277.

[29] *Croson,* 488 U.S. at 470.

[30] *Id.*

[31] *Contractors,* 91 F.3d at 599.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 602.

[37] Disparity index formula: ($ to MBE's / $ on all prime contracts) x 100 / (# MBE's / total # of contractors) = Index.

[38] *Contractors,* 91 F.3d at 595.

[39] *See Associated General Contractors of Cal. v. Coalition for Economic Equity,* 950 F.2d 1401, 1414 (9th Cir. 1991) (finding disparity equivalent to index of 22.4 sufficient to raise inference of discrimination), cert. denied, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992); *Cone Corp. v. Hillsborough County,* 908 F.2d 908, 916 (11th Cir.) (finding disparity equivalent to index of approximately 50 sufficient to make a prima facie case), cert. denied, 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d. 528 (1990).

[40] *Contractors,* 91 F.3d at 602-03.

Court's first two contentions and said the third was a close call.[41] They did not decide on the third contention, however, because they found that the program was not narrowly tailored to remedy the discrimination, assuming they could find discrimination.[42]

To the extent that the evidence suggests racial discrimination has occurred, it suggests that the City discriminated against black prime contractors capable of bidding on prime City construction contracts.[43] To be constitutionally permissible, the program must be narrowly tailored to address the discrimination shown, i.e., the remedy chosen must have been made necessary by that discrimination.[44] Consequently, in so far as the program affects the subcontracting market, it is not narrowly tailored to address discrimination by the City in the market for prime contracts.[45]

The District Court found, and the record supports, that prior to adopting Chapter 17-500, the City Council never attempted to determine the scope of the injury it was allegedly seeking to remedy.[46] The legislative history suggested that the benchmarks for the program were derived solely from the general population of minorities and women in Philadelphia.[47] The Third Curcuit concluded that the City was never able to provide an evidentiary basis from which to conclude that the 15% set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts.[48] The Brimmer Study actually suggested that, at most, only 0.7% of the construction firms qualified to perform City-financed prime contracts in the pre-ordinance period were black construction firms.[49]

In finding that the Richmond program was not narrowly tailored, the Croson Court considered it significant that the race-neutral remedial alternatives were available and the City did not consider using these means to increase minority business participation in City contracting.[50] The district court here, likewise, found that there were race-neutral alternatives that would likely contribute to the alleviation of the perceived problem.[51] The Court considered such alternatives important as their use would reduce the hardship to non-minority contractors.[52] The Third Curcuit concluded that there was ample support for the finding that alternatives to race-based preferences were available at the time the legislation was passed that would have been race neutral or, at least, less burdensome to non-minority contractors.[53]

IV. CONCLUSION

In *Hunter v. Regents of the University of California,*[54] the U.S. District Court stated that in Contractors, the Third Circuit based its holding on an intepretation of Croson previously rejected by the District Court in California.[55] They claimed that because the Supreme Court stated that strict scrutiny is not "strict in theory, but fatal in fact," there must be other constitutional means of race-conscious decisionmaking besides simply remedying past discrimination.[56]

The Hunter Court seems to assume that the application of strict scrutiny review is fatal to affirmative action programs. Strict scrutiny review, however, only requires legislators and policy-makers to more carefully craft programs which attempt to redress discrimination. The program, according to Contractors, must specifically address demonstrated discrimination. Additionally, Contractors suggests that race-neutral alternatives must be considered.

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[41] *Id.* at 599.
[42] *Id.* at 605.
[43] *Id.* at 606.
[44] *Id.* at 605 (quoting Croson, 488 U.S. at 510).
[45] *Id.* at 606.
[46] *Contractors,* 893 F.Supp. at 444 note 23.
[47] *Id.* at 445.
[48] *Contractors,* 91 F.3d at 607.
[49] *Id.*
[50] *Contractors,* 91 F.3d at 608.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 609.
[54] *Hunter v. Regents of the University of California,* 1997 WL 429051 (C.D. Cal.). To be reported at: 971 F.Supp. 1316 (C.D.Cal 1997).
[55] *Hunter,* 1997 WL 429051 at 9.
[56] *Id.*