APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 21, 1978
CERTIORARI GRANTED MAY 21, 1979

TABLE OF CONTENTS

Contents

WITNESSES

DOCKET ENTRIES — UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, *FULLILOVE, H. EARL ET AL. v. KREPS, JUANITA ET AL.*

77 Civil 5786 Judge Werker

Date	Proceedings
1-30-77	Filed complaint and issued summons.
1-30-77	Hearing begun and concluded on TRO Denied. Hearing on Preliminary Injunction on 12-2-77 at 10 A.M.
1-30-77	Hearing begun 11-30-77 and concluded 12-2-77. To be submitted Everything by 5 P.M. 12-5-77. Judge's Decision Reserved.
12-5-77	Filed plaintiffs' post trial memorandum.
12-6-77	Filed defendants' affidavit in further support of Government's opposition to consolidation of the trial with the hearing on plaintiffs' motion for preliminary injunction or in the alternative in support of the Government's motion for continuance of such trial.
12-6-77	Filed defendant Kreps' post-hearing memo of law.
12-6-77	Filed affidavit of M.L. Banner of Civil Rights Div. of Atlantic Regional Office of the Economic Develop. Adm.
12-7-77	Filed defendant (City of N.Y.) memo of law in opposition to plaintiffs' motion for injunction and declaratory judgment.

Docket Entries — United States District Court, Southern District of New York

12-9-77	Filed defendant (Kreps) reply memorandum.
12-19-77	Filed letter to Judge Werker from Dep't of Justice dated 12-6-77.
12-20-77	Filed plaintiffs SCO with TRO. Ret. 12-2-77.
12-20-77	Filed plaintiffs' memo of law in support of application for a TRO and preliminary injunction.
12-20-77	Filed affidavit of Anthony J. Sulvetta.
12-20-77	Filed defendant N.Y. State memo of law in opposition to plaintiffs' motion for injunction and declaratory relief.
12-21-77	Filed MEMORANDUM DECISION #46692. The court holds that defendants have sustained their burden of establishing the constitutionality of the MBE requirement. Plaintiffs' request for a preliminary injunction and declaratory relief is denied, the Secretary of Commerce's motion for a directed verdict is granted and the complaint is dismissed in its entirety Werker, J. m n
12-28-77	Filed JUDGMENT AND ORDER that defendants have judgment against plaintiffs dismissing the complaint — Clerk m n
1-13-78	Filed plaintiffs' notice of appeal to the USCA from the final order and judgment entered 12-19-77. Copies sent to:

Docket Entries — United States District Court, Southern District of New York

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DOCKET ENTRIES—UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, *FULLILOVE, H. EARL ET AL. v. KREPS, JUANITA ET AL.*

78-6011

Date	Proceedings
1-23-78	Filed copies of docket entries and notice of appeal.
1-23-78	Received docket fee.
1-23-78	Robert Fink, Robert A. Kennedy and Robert G. Beniach filed Form p/s.
1-23-78	Robert Fink, Robert A. Kennedy and Robert G. Beniach filed Form p/s.
1-25-78	Filed scheduling order #1 (CAMP).
2-3-78	Filed motion for a preference and expedited appeal, appellants.
2-10-78	Filed scheduling order #2.
2-14-78	Filed record (Original papers of district court.)
2-17-78	Filed affidavit in opposition to motion to expedite appeal, appellee, pfs.
3-16-78	Filed brief, appellant, pfs.
3-16-78	Filed joint appendix, pfs.
3-16-78	Filed exhibit volumes, pfs, appellant (4cc).

Docket Entries — United States Court of Appeals for the Second Circuit

3-16-78	Filed opinion volume, pfs, appellant (4cc).
3-30-78	Filed scheduling order #3, CAMP.
4-17-78	Filed brief, appellee, p/s.
4-19-78	Filed brief, appellee (NYS) pfs.
4-26-78	Filed motion for leave to appear on behalf of Amici Curiae, the Anti-Defamation league of B'nai B'rith, the Mid-America Legal Foundation, and The Committee on Academic Nondiscrimination and Integrity.
5-2-78	Filed order granting motion for leave to file a brief amicus curiae on behalf of the Anti-Defamation League, etc.
5-2-78	Filed brief, amicus curiae (Anti-Defamation League, etc.), pfs.
5-4-78	Filed reply brief, appellant, pfs.
5-4-78	Filed first supplemental record (original papers of district court).
5-25-78	Argument heard (By: Oakes, CJ, Mehrtens, Blumenfeld, DJJ).
9-22-78	Judgment affirmed: (Blumenfeld, D.J.).
9-22-78	Filed judgment.
10-3-78	Filed itemized and verified bill of costs, appellee, pfs (U.S.).

Docket Entries – United States Court of Appeals for the Second Circuit

10-13-78	Issued mandate (opinion, judgment and statement of costs).
12-28-78	Filed notice of filing of petition for certiorari (S.C. #78-1007).
2-14-79	Original record returned to district court.
2-14-79	First supplemental record returned to district court.
5-29-79	Certified copy of order granting petition for writ of certiorari to Supreme Court filed (S.C. #78-1007).

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Plaintiffs,

-against-

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION and BOARD OF EDUCATION OF THE CITY OF NEW YORK and HEALTH AND HOSPITAL CORPORATION,

Defendants.

JURISDICTION AND VENUE

1. This action arises out of the Public Works Employment Act of 1977, 42 U.S.C. §6701, *et. seq.* (hereinafter referred to as "The Act") and alleges violations of the Constitution of the United States and Amendments Five and Fourteen thereto, the

Civil Rights Act of 1866 and 1964, 42 U.S.C. §§1981, 1983, 1985, Title VI, §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d and Title VII, §701 of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* The amount in controversy exceeds Ten Thousand ($10,000) Dollars exclusive of interest and costs. This Court has jurisdiction under 28 U.S.C. §§1331 and 1343.

2. Venue is properly laid in the Southern District of New York under 28 U.S.C. §§1391(b), 1392(a) and §1402(a)(1).

THE PARTIES

3. Plaintiff Building Trades Employers Association of the City of New York (hereinafter referred to as "BTEA") is an unincorporated association formed and organized under the laws of the State of New York with a principal place of business at 711 Third Avenue, New York, New York. "BTEA" is comprised of over 650 member firms and entities of both general contractors and specialty subcontractors many of which engage in and perform construction work on contracts let by the State and City of New York and their various agencies and departments.

4. Plaintiff General Contractors Association of New York, Inc., (hereinafter referred to as "GCA") is a corporation duly formed and organized under the laws of the State of New York with a principal place of business at 60 East 42nd Street, New York, New York. "GCA" is comprised of over 100 members, many of which engage in and perform construction work on contracts let by the State and City of New York and their various agencies and departments.

5. Plaintiff Trustees of the New York Building and Construction Industry Board of Urban Affairs Fund (hereinafter referred to as "Board of Urban Affairs") was created on or about the 25th day of April, 1969 by the execution of a trust agreement among plaintiffs BTEA, GCA and the Building and

Construction Trades Council of Greater New York [an unincorporated labor organization comprised of 110 unions in the building and construction industry with a principal place of business at 441 Lexington Avenue, New York, New York], one of the purposes of which, is to assist in the relations between minority groups and unions.

6. Plaintiff General Building Contractors of New York State, Inc., (hereinafter referred to as "GBC") is a not-for-profit corporation duly formed and organized under the laws of the State of New York. "GBC" is comprised of members which are building contractors located in New York City, Long Island, Westchester and the greater New York area, and many of which engage in and perform construction work on contracts let by the State and City of New York and their various agencies and departments.

7. Plaintiff Shore Air Conditioning Co., Inc., (hereinafter referred to as "Shore") is a corporation duly formed and organized under the laws of the State of New York with a principal place of business at 102-02 43rd Avenue, Corona, New York. Shore is a mechanical contractor who performs heating, ventilating and air-conditioning work.

8. Defendant Juanita Kreps (hereinafter referred to as "The Secretary") is the duly qualified and acting Secretary of Commerce of the United States of America, and under and by virtue of the Public Works Employment Act of 1977, 42 U.S.C. §6701, *et. seq.*, is charged with the administration thereof.

9. Defendant the State of New York, is a potential grantee under such Act, and upon information and belief, its agents, servants and employees are charged with the responsibility of the administration thereof at the grantee level.

10. Defendant the City of New York, is a municipality and a potential grantee under such Act, and upon information and

belief, its agents, servants and employees are charged with the responsibility of the administration thereof at the grantee level.

PUBLIC WORKS EMPLOYMENT ACT OF 1977

11. The Public Works Employment Act of 1977, 42 U.S.C. §6701, *et. seq.* authorizes the Secretary to make grants of monies to any State or local government for construction, demolition, renovation, repair or other improvement of local public works projects. Such construction demolition, renovation, repair or other improvement of local public works projects is required by the Act (42 U.S.C. §6705(e)(1)) to be performed by contract awarded by competitive bidding and not by any department, agency, or instrumentality of any State or local government, unless the Secretary affirmatively finds that some other method is in the public interest.

12. Upon information and belief, monetary grants pursuant to the Act have been, are being and will continue to be made to the State and City of New York and, in accordance with such grants, contracts have been, are, and will continue to be awarded pursuant thereto, and the Secretary has not made an affirmative finding in the public interest to the contrary.

13. Plaintiffs and their members and each of them have been, are, and will continue to bid on such projects funded pursuant to the provisions of the Act.

14. Section 103(f)(2) of said Act, 42 U.S.C. §6705(f)(2) provides that no grant shall be made pursuant to the Act, unless satisfactory assurance is given to the Secretary that at least ten percent (10%) of the amount of each grant shall be expended for Minority Business Enterprises. A Minority Business Enterprise is defined by this Section as a business at least 50 per centum of which, or a publicly owned business, at least 51 per centum of

the stock of which, is owned by minority group members defined as Negro, Spanish-speaking, Oriental, Indian, Eskimo or Aleut citizens of the United States.

15 A grantee under the Act, which must be a State or local government unit, may apply for a waiver of the 10% minority business enterprise requirement, but there are no statutory or regulatory means by which contractors, subcontractors, or unions may request such waiver.

16. Under Section 103(f)(2) of the Act, the Secretary has required and is continuing and upon information and belief will continue to require assurances from all grantees and upon information and belief, the Defendants Governor and Mayor of the State and City of New York, respectively, and their duly authorized representatives and delegates have given and are continuing and will continue to give assurances that at least 10% of the monies of said grant will go to Minority Business Enterprises.

17. As a result of the foregoing, plaintiffs and their members who have direct and or prime contracts with the City and or State of New York and each of them are suffering immediate, threatened, distinct and palpable competitive injury in that plaintiffs and their members and each of them have already and will continue to be forced and coerced to contract out work which they and each of them would normally have performed themselves, and have been and will be forced and coerced to seek out subcontractors and or material suppliers not on the basis of a competitive bidding standard but merely on the basis of the statutory minority classifications and quotas.

18. As a result of the foregoing plaintiffs and their members many of which have subcontracts with general and or prime contractors of the City and or State of New York, and each of them are suffering immediate, threatened, distinct and palable

competitive injury in that plaintiffs and their members and each of them have already and will continue to be excluded and preempted, in whole or in part, from participating in the awarding of subcontracts by prime and or general contractors not on the basis of competitive bidding standards but merely on the basis of statutory minority classifications and quotas.

19. Specific examples of the aforesaid injuries are as follows:

plaintiff Shore was the low bidder on the following contracts:

(1) Contract No. HHC-104, Project No. 2373001 let by the New York City Health and Hospitals Corp. for renovation of Harlem Hospital "K" Building, which contract was funded under the Act and the Bidding documents of which required designation of a Minority Business Enterprise ("MBE") pursuant to the Act. Plaintiff Shore's bid has been declared non-responsive because of the disputed legitimacy of the MBE named in Shore's bidding documents. As a result thereof, upon information and belief, such contract will be awarded to the second lowest bidder at an increased contract amount of $84,974, solely by reason of Shore's alleged failure to comply with Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2).

(2) Contract No. PW 116 let by the New York City Department of Parks which contract was funded under the Act and the bidding documents of which require designation of an MBE. Plaintiff Shore's bid has been declared non-responsive because of its failure to designate an MBE as required by section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2). Upon information and belief, that contract will or has been awarded to the fourth lowest bidder.

(3) Contract No. PW-124 let by the New York City Department of Public Works for renovation of the Brooklyn

Communication Office, which contract was funded under the Act and the bidding documents of which required designation of an MBE. Plaintiff Shore's bid, upon information and belief, is about to be declared non-responsive because of the disputed legitimacy of the MBE named in Shore's bidding documents. As a result thereof, upon information and belief, such contract will be awarded to a higher bidder at an increased contract amount, solely by reason of Shore's alleged failure to comply with Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2).

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

20. Plaintiffs repeat and reiterate paragraphs 1 through 19 with the same force and effect as if herein stated.

21. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is unconstitutional, void and unenforceable by reason of its violation of the fifth amendment to the United States Constitution.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

22. Plaintiffs repeat and reiterate paragraphs 1 through 21 with the same force and effect as if herein stated.

23. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is unconstitutional, void and unenforceable by reason of its violation of the fourteenth amendment to the United States Constitution.

THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS

24. Plaintiffs repeat and reiterate paragraphs 1 through 23 with the same force and effect as if herein stated.

25. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is illegal, void and unenforceable in that it violates the provisions of 42 U.S.C. §1981 and deprives these plaintiffs of their right to make and enforce contracts, contrary to and in violation thereof as aforesaid.

FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

26. Plaintiffs repeat and reiterate paragraphs 1 through 25 with the same force and effect as if herein stated.

27. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is illegal, void and unenforceable in that it violates the provisions of 42 U.S.C. §1983 and deprives these plaintiffs of their rights, privileges and immunities secured by the Constitution and laws of the United States, contrary to and in violation thereof as aforesaid.

FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

28. Plaintiffs repeat and reiterate paragraphs 1 through 27 with the same force and effect as if herein stated.

29. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is illegal, void and unenforceable in that it violates the provisions of 42 U.S.C. §1985 and deprives these plaintiffs of equal protection of the laws, and of equal privileges and immunities under the laws, contrary to and in violation thereof as aforesaid.

SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

30. Plaintiffs repeat and reiterate paragraphs 1 through 29 with the same force and effect as if herein stated.

31. Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is illegal, void and unenforceable in that it violates the provisions of Title VI, §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d and excludes these plaintiffs on the ground of race and color from participation in, and or the receipt of benefits of, in whole or in part, programs and or activities receiving Federal financial assistance, and subjects these plaintiffs to discrimination under those programs and activities all contrary to and in violation thereof as aforesaid.

SEVENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

32. Plaintiffs repeat and reiterate paragraphs 1 through 31 with the same force and effect as if herein stated.

33. Section 103(f)(2), 42 U.S.C. §6705(f)(2) is illegal, void and unenforceable in that it violates the provisions of Title VII, §701 *et seq.* of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.* and discriminates against individuals with respect to these plaintiffs' and their members', terms, conditions and privileges of employment because of their race and color, and it limits, segregates and classifies these plaintiffs and their members in a manner which has, does and will continue to deprive and tend to deprive them of employment opportunity because of these plaintiffs' and their members' race and color contrary to and in violation thereof as aforesaid.

TEMPORARY AND PERMANENT INJUNCTIVE RELIEF NECESSARY AND PROPER

34. The enforcement of that portion of the Act requiring the expenditure of funds for Minority Business Enterprises, and the regulations promulgated thereunder will work unusual and irreparable hardship and burden upon these plaintiffs in that the said Act, by the imposition of such quotas, deprives and will

continue to deprive plaintiffs and other non-minority businesses of the opportunity, in whole or in part, to participate in the economic and social benefits of the funds granted under said Act, for which plaintiffs have no adequate remedy at law.

35. Such irreparable injury includes the wrongful, arbitrary and capricious discrimination and classification, and pattern of discrimination by defendants, and deprivation and future deprivation, in whole or in part, of the opportunity to participate in the economic and social benefits available under said Act.

TEMPORARY RESTRAINING ORDER NECESSARY AND PROPER

36. Bidding under the Act for the City of New York contracts is scheduled to be held as follows:

(i) Contract No. THW-122-IV let by the Division of Highway Operations until December 1, 1977 at 11:00 A.M. and Building Renovation Work at the Bronx (Spec. No. 618A-74 75 and 14-77 78), Brooklyn (Spec. No. 560A-74 75) and Staten Island (Spec. No. 13-77 78) let by the Board of Education, until December 1, 1977 at 2:00 P.M.,

(ii) Contract No. 7 let by Division of Public Structures for rehabilitation of heating system at New York City House of Detention for Men at Rikers Island until December 8, 1977 at 2:30 P.M.,

(iii) Contract No. 5, let by Division of Public Structures for telephone raceway system at the Queens House of Detention for Men, until December 13, 1977 at 2:30 P.M.,

(iv) Federal Public Works Project No. BHE 102 let by the Board of Education at various colleges of the City University of New York, until December 2, 1977 at 2:30 P.M.,

(v) EDA Project No. 112, Contract No. 3802 let by the Department of Ports and Terminals for additions to LCL Building, Howland Hook Marine Terminal, Staten Island, until December 5, 1977 at 3:00 P.M.,

(vi) EDA Project No. 114, Contract No. 3804 let by the Department of Ports and Terminals until December 6, 1977 at 12:00 noon.

Plaintiffs and its members will be irreparably harmed if the enforcement of the 10% minority business enterprise quota is not enjoined in connection with the bidding on the aforesaid projects. Plaintiffs will forever lose and be deprived of, in whole or in part, the opportunity to participate in these projects and will be deprived, in whole or in part, of the economic and social benefits available thereunder.

37. The attorneys for plaintiffs have contacted the United States Attorney for the Southern District of New York, the Attorney General of the State of New York and the Corporation Counsel for the City of New York and have advised them that plaintiffs will apply to this Court for a Temporary Restraining Order. In view of the immediate pendency of the bidding on the aforesaid project, plaintiffs will suffer irreparable harm by the delay that would be encountered in giving the defendants further notice of this Temporary Restraining Order.

WHEREFORE, plaintiffs pray for judgment as follows:

1. That a temporary restraining order issue restraining and enjoining the defendant Secretary, her agents, servants, employees and all persons in active concert with her from enforcing that part of the Act which requires, as a condition, to the funding thereunder that at least ten per cent of each project grant be expended for minority business enterprises, and enjoining and restraining the State of New York, the City of

New York, their agents, servants, employees and all persons in active concert with them from enforcing that part of the Act, which contains the 10% minority business enterprise requirement as a condition thereto to the funding thereunder, and enjoining all defendants from enforcing any portion of any contract, agreement or bid containing the 10% minority business enterprise requirement.

2. That a preliminary injunction issue restraining and enjoining the defendant Secretary, her agents, servants, employees and all persons in active concert with her from enforcing that part of the Act which requires, as a condition, to the funding thereunder that at least ten per cent of each project grant be expended for minority business enterprises, and enjoining and restraining the State of New York, the City of New York, their agents, servants, employees and all persons in active concert with them from enforcing that part of the Act which contains the 10% minority business enterprise requirement as a condition thereto to the funding thereunder, and enjoining all defendants from enforcing any portion of any contract, agreement or bid containing the 10% minority business enterprise requirement.

3. That upon a final hearing upon the merits, a permanent injunction issue restraining and enjoining the defendant Secretary, her agents, servants, employees and all persons in active concert with her from enforcing that part of the Act which requires, as a condition to the funding thereunder, that at least ten per cent of each project grant be expended for minority business enterprises, and enjoining and restraining the State of New York, the City of New York, their agents, servants, employees and all persons in active concert with them from enforcing that part of the Act which contains the 10% minority business enterprise requirement as a condition thereto to the funding thereunder, and enjoining all defendants from enforcing any portion of any contract, agreement or bid containing the 10% minority business enterprise requirement.

4. That a declaratory judgment issue that Section 103(f)(2) of the Act, 42 U.S.C. §6705(f)(2) is unconstitutional, illegal void and unenforceable.

5. That plaintiffs receive all costs and expenses incurred in the prosecution of this action together with reasonable attorneys' fees and;

6. That plaintiffs receive such order, further and additional relief as to the Court may seem just and equitable.

DATED: November 30, 1977

DORAN, COLLERAN, O'HARA & DUNNE, P.C.

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ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINING ORDER DATED NOVEMBER 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

Upon reading and filing the annexed affidavits of ISAAC BERMAN, sworn to November 30th, 1977 and JAMES DOOLEY, sworn to November 29th, 1977, with the exhibits annexed thereto and the complaint in this action, let defendants, Juanita Kreps, Secretary of Commerce of The United States of America, The State of New York and The City of New York, show cause before the Hon. Henry F. Werker, one of the Judges of this Court, in Room 318, of the United States Courthouse, Foley Square, New York, New York, at 10:00 a.m. on December 2nd, 1977, or as soon thereafter as counsel can be heard why an order should not be made pursuant to Rule 65 of the Federal Rules of Civil Procedure, preliminarily enjoining said federal defendant, pending the final determination of this action, from enforcing that part of the Public Works Employment Act of 1977 which requires, as a condition for receiving federal funding, that at least 10% of each project funded under said act be expended for minority business enterprises and enjoining said defendants who are grantees under the Public Works Employment Act of 1977 from enforcing that portion of any of their contracts which contains a minority business enterprise requirement pursuant to the provisions of said Act, and

It appearing that several contracts for projects funded under the Public Works Employment Act of 1977 and containing a requirement pursuant to said Act that certain percentages of the work under said contracts be allocated to minority business enterprises are scheduled for imminent letting by the City of New York at various times during the month of December, 1977, and that the letting of these contracts with such minority

HFW

Order to Show Cause with Temporary Restraining Order Dated November 30, 1977

business enterprise requirements will cause irreparable injury to plaintiffs and their members before a hearing on the merits can be had, it is

ORDERED, that pending this Court's hearing and determination of plaintiffs' motion for a preliminary injunction those defendants who are grantees under the Public Works Employment Act of 1977 are hereby restrained from requiring as a condition to the award of any such contract that the bidders on said contracts name and designate in their bids a minority business enterprise, and from enforcing on contracts let or to be let that portion of the Act which requires minority business enterprise participation in contracts funded under the Act, and it is further

HFW

ORDERED, that pending this Court's hearing and determination of plaintiff's motion for a preliminary injunction the Secretary of Commerce, her agents, servants, employees and all persons or agencies acting in concert with her are hereby restrained from cancelling, withdrawing or revoking any grants heretofore made or hereafter to be made under the Act and from refusing to disburse monies to grantees under the Act by reason of any non-compliance with the MBE provisions of the Act, and it is further

ORDERED, that plaintiffs or any one of them post a bond or other security in the amount of $ for the payment of such costs and damages as may be incurred or suffered by the above-named defendants if it is subsequently determined that they were wrongfully restrained or enjoined, and it is further

ORDERED, that, sufficient reason appearing therefor, a copy of this Order, and the papers upon which it is granted, and plaintiff's bond or statement of other security be personally served upon the defendant by personal service on or before 5

Order to Show Cause with Temporary Restraining Order Dated November 30, 1977

p.m. December 1, 1977, and that such service be deemed good and sufficient service thereof.

Dated: New York, New York
November 30, 1977

Issued: 5:30 P.M.

s/ Henry F. Werker
U.S.D.J.

AFFIDAVIT OF ISAAC BERMAN SWORN TO NOVEMBER 30, 1977 IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMANN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR I. GAFFNEY, as President of BUILDING TRADES EMPLOYERS ASSOCIATION; GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC.; THE GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC.; and SHORE AIR-CONDITIONING CO., INC.,

Plaintiffs,

-against-

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA; THE STATE OF NEW YORK and THE CITY OF NEW YORK,

Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ISAAC BERMAN, being duly sworn, deposes and says:

1. I am the President of Shore Air-Conditioning Co., Inc. ("Shore"), one of the plaintiffs in the above-entitled action and

as such I am fully familiar with all of the facts and circumstances hereinafter set forth.

2. Shore, a New York corporation, is a fully experienced mechanical contractor specializing in heating, ventilating and air-conditioning work and has, to date, performed numerous contracts let by the City of New York through its various agencies.

3. This affidavit is made in support of plaintiffs' application for a temporary restraining order and preliminary injunction as set forth in the complaint herein.

4. On or about November 9, 1977 Shore, pursuant to advertisement therefor, submitted to the New York City Health and Hospitals Corporation ("Health and Hospitals Corporation") a bid in the sum of $1,380,000 for the performance of the heating, ventilating and air-conditioning work on the Harlem Hospital "K" Building renovation job in the City, County and State of New York.

5. The funds for the aforesaid job have been derived through a grant from the federal government pursuant to the provisions of the Public Works Employment Act of 1977, hereinafter referred to as the "Act".

6. Pursuant to the terms and provisions of the Act, Health and Hospitals Corporation, as a grantee under the Act, required in its bidding documents for the aforesaid job that each bidder name and designate a minority business enterprise ("MBE") which the bidder would use in the performance of the contract in the event said bidder were awarded the contract.

7. Shore, in its bid to the Health and Hospitals Corporation, named Aircontrol Industries, Inc. ("Aircontrol") as

its designated MBE subcontractor to perform the sheet metal work on the aforesaid job in the event Shore was the low bidder. Said MBE qualified in all respects with the provisions of the Act and all rules, regulations and guidelines issued pursuant thereto.

8. Shore's bid of $1,380,000 was the low bid on the aforesaid contract.

9. Subsequent to the receipt of Shore's bid, Health and Hospitals Corporation, without cause or justification, determined that Shore's designated MBE, Aircontrol, was not a *bona fide* MBE as required by the Act and, on November 22, 1977, declared Shore's bid to be "not responsive" and awarded the aforesaid contract to the second low bidder whose bid was approximately $85,000 greater than Shore's. On information and belief, Health and Hospitals Corporation will shortly enter into a formal contract for the aforesaid job with the second low bidder.

10. That by reason of the inclusion of the 10% MBE requirements of the Act in the bidding documents for the aforesaid job and by reason of the arbitrary, capricious and unreasonable implementation of said requirements, Shore will lose and be deprived of the award of said job and of the anticipated profits connected therewith unless the enforcement of the MBE requirements of the Act are immediately enjoined.

11. In addition to the foregoing, the following jobs, which are funded under the Act and the bidding documents for which contain the MBE requirement prescribed by the Act, have been advertised for letting in the very near future:

> Harlem Hospital — Elimination of new nurses residences, boiler plant Health and Hospitals Corporation Project No. 23-76-003;

Affidavit of Isaac Berman Sworn to November 30, 1977 in Support of Motion

Bronx House of Detention, City of New York General Services Administration Division of Public Structures;

Heating work, Rikers Island House of Detention City of New York General Services Administration;

Food Warehouse City of New York Department of Ports and Terminals;

Brooklyn Academy of Music, City of New York General Services Administration, Division of Public Structures.

12. That by reason of the MBE provisions of the Act being included in the bidding documents for the above-mentioned jobs and also by reason of the refusal of the New York City Office of Minority Business Enterprise to certify Aircontrol as a *bona fide* MBE, Shore has been prevented and excluded from submitting bids on the above-mentioned jobs.

13. That unless the enforcement of the MBE provisions of the Act is immediately restrained and enjoined, Shore will suffer immediate and irreparable damage by reason of its not being able to bid said work because of its inability to comply with the MBE bidding requirement and to qualify as a responsive bidder.

14. If the enforcement of the 10% MBE provisions of the Act is not enjoined, Shore will be irreparably damaged in connection with any work that it does bid in that it will be required to (a) subcontract work to MBEs, which work it would ordinarily perform with its own forces and not subcontract out; (b) enter into subcontracts with subcontractors other than those of its own choosing and chosen solely by reason of their being MBEs; and (c) increase the amount of its bids to cover the risk and the cost of unexpected contingencies which would not be

Affidavit of Isaac Berman Sworn to November 30, 1977 in Support of Motion

present if the MBE provisions of the Act were not required by the bid document for such work.

15. Based on the foregoing, your deponent respectfully requests that the preliminary restraining order and injunctive relief requested in the complaint herein be granted.

16. This application is brought on by order to show cause in order that a prompt and immediate determination may be had so as to prevent the defendants' continued violation of plaintiffs constitutional rights and because of the imminent nature of defendants' acts of letting and awarding various contracts. It is in the public interest as well as plaintiffs' that the matters alleged in the complaint and in this affidavit be promptly brought before the court for determination.

s Isaac Berman
Isaac Berman

Sworn to November 30, 1977

AFFIDAVIT OF JAMES J. DOOLEY SWORN TO NOVEMBER 29, 1977 IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JAMES J. DOOLEY, being duly sworn, deposes and says:

1. I am the acting Executive Director of The New York Building and Construction Industry Board of Urban Affairs Fund ("BUA"), one of the plaintiffs herein and as such I am fully familiar with the following facts.

2. The BUA represents and is comprised of members of the construction industry in the greater New York City area many of whom perform work as prime contractors and many more of whom perform work as subcontractors on construction work let by the City and State of New York. It should also be noted that many of the firms represented by the BUA are entities which qualify as minority business enterprises ("MBE") under the Public Works Employment Act of 1977 (the "Act").

3. Annexed hereto as Exhibit "A" is a list of the contracts about to be let by the various agencies of the City of New York which are funded under the Act and the bidding documents for which contain the requirement that the bidders name and designate an MBE which will perform a designated percentage of the work under said contracts.

4. If the enforcement of the MBE provisions of the Act is not immediately enjoined, members of the BUA and members of the construction industry at large, many of whom will be bidders

Affidavit of James J. Dooley Sworn to November 29, 1977 in Support of Motion

on the work listed in Exhibit A, will be irreparably harmed and damaged in that they will be required to (a) subcontract work which they would ordinarily perform with their own forces and not subcontract; (b) enter into subcontracts with subcontractors other than those of their own choosing and other than those with whom a long standing relationship of trust and confidence has been established; (c) assume substantial risks in being required to hire MBEs which are unknown to them and whose ability to adequately perform the work is questionable; and (d) alter their bidding and pricing procedures in various other respects, all to the end of complying with the unconstitutional MBE provisions of the Act.

5. If the enforcement of the MBE provisions of the Act is not enjoined, members of the BUA and members of the construction industry at large who normally perform work as subcontractors to prime contractors with the City of New York and the State of New York will be irreparably harmed in that they will not be awarded such subcontract work by said prime contractors because a preference must be given to MBEs by said prime contractors in order for them to qualify as responsible bidders on contracts funded under the Act. As a result, the work which, but for the MBE requirement of the Act, would normally be given to said subcontractors will be forever lost to them, all because of the preferential treatment of MBEs as required by the Act. The loss of this work could very well cause the financial ruin of many long-established subcontractors who will be deprived of work solely because they are not MBEs.

6. By reason of the foregoing, it is respectfully requested that the temporary and permanent injunctive relief requested in the complaint herein be granted.

s/ James J. Dooley
James J. Dooley

Sworn to November 29, 1977

EXHIBIT A — LIST OF CITY OF NEW YORK AGENCY CONTRACTS ANNEXED TO FOREGOING AFFIDAVIT

CITY CONTRACTS TO BE AWARDED UNDER PUBLIC WORKS ACT PART II

DEPARTMENT	JOB & LOCATION	VALUE
November 30		
Department of Environmental Protection	DWR-115 80th St., Sewers and Street Reconstruction	$ 887,233
December 1		
Department of Transportation (Division of Highways Operations)	THW-122-IV Painting of Various Waterway Bridges Manhattan & Staten Island	1,966,127
Board of Education	BE-136 Miscellaneous upgrading work at PS 133, DeWitt Clinton HS, Bx.	1,878,541
	BE-136 Miscellaneous upgrading work at PS 35 Brooklyn	1,713,000
	BE-135 Miscellaneous upgrading at Curtis HS, Staten Island	398,857
December 2		
Board of Higher Education	BHE-102 Renovation of Lehman, Queens, Bronx Community and Staten Is. Colleges	1,021,335
December 5		
Dept. of Transportation Bureau of Ferry and General Aviation Oper.	TFA-104 Reconstruction of Ferry Racks St. George Transportation Terminal, Staten Island	2,100,000

Exhibit A Annexed to Foregoing Affidavit

Division of Highways Operations	THW-109-1 St. Reconstruction in McDonald Ave. from Cortelyou Rd. to Ave. X, Shell Road, etc., Brooklyn	6,334,242
Dept. of Parks & Terminals	EDA-112 Improvement to Howland Hook Marine Terminal, Staten Island (two awards same day on this project)	4,545,000
December 6		
Department of Ports and Terminals	EDA-114 Expansion and improvement of existing Krasdale Foods Warehouse at Hunts Point, Bronx (two awards same day on this project)	$4,200,000
December 7		
Dept. of Transportation (Division of Highways Operation)	THW-122-V Painting of various Waterway Bridges Brooklyn & Queens	1,966,127
December 8		
Dept. of Genl. Services (Division of Public Structures)	PW-121 Miscellaneous Rehabilitation and up-grading in various correctional institutions City-wide (two contracts to be awarded)	1,097,812
December 9		
Dept. of Genl. Services (Division of Public Structures)	PW-115 Surrogate's Court Rehabilitation, Exterior and Conversion of Municipal Reference & Research Center, Improved access for the Handicapped in three city-owned buildings, city-wide (several contracts to be awarded)	1,370,850

Exhibit A Annexed to Foregoing Affidavit

December 13		
New York City Health and Hospitals Corp	HHC-105 Improvements for access of the Handicapped in various municipal hospitals-city wide	1,881,495
Dept of Genl Services	PW-121 Miscellaneous rehabilitation and upgrading in various correctional institutions. city wide (Three contracts to be awarded)	1,097,812
December 15		
Dept of Genl Services (Division of Public Structures)	PW-121 Miscellaneous rehabilitation and upgrading in various correctional institutions. city wide	1,097,812
December 20		
Dept of Genl Services (Division of Public Structures)	PW-102 Miscellaneous Rehabilitation and renovation work in the Brooklyn Academy of music Brooklyn	2,385,680

AFFIDAVIT OF ROBERT G. BENISCH SWORN TO NOVEMBER 30, 1977 IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT G. BENISCH, being duly sworn, deposes and says:

1. I am a member of the firm of Berman, Paley, Goldstein & Berman, one of the attorneys for the plaintiffs herein. I make this affidavit for purposes of demonstrating compliance with Rule 65 of the Federal Rules of Civil Procedure.

2. On November 29, 1977 at or about 3:00 in the afternoon, I personally contacted by telephone Theodore Gilbert, Esq., Assistant Corporation Counsel for the City of New York and George Zukerman, Assistant Attorney General and Chief of the Civil Rights Bureau of the Office of the Attorney General of the State of New York and I caused to be contacted by telephone William Tendy, Chief Assistant United States Attorney and advised said persons that this action would be commenced by the filing of the complaint during the afternoon of Wednesday, November 30, 1977 and that in connection with said action an application for a temporary restraining order would be made to the court. I believe that based upon this notice the requisites of Rule 65 have been complied with.

3. As indicated in the accompanying affidavits of Isaac Berman and James J. Dooley, the defendants herein are about to engage in activities which will result in the violation of plaintiffs' constitutional rights and immediate and irreparable

Affidavit of Robert G. Benisch Sworn to November 30, 1977 in Support of Motion

harm to them should the contemplated activity not be enjoined forthwith.

4. This application for a temporary restraining order is brought on by order to show cause in order that a prompt and immediate determination be obtained and the contemplated illegal acts of defendants be enjoined.

5. No previous application for the relief sought in this action has heretofore been made.

s Robert G. Benisch
Robert G. Benisch

Sworn to November 30, 1977

AFFIDAVIT OF ANTHONY J. SULVETTA SWORN TO DECEMBER 1, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5786 (HFW)

H. Earl Fullilove, et al.

Plaintiffs,

v.

Juanita Kreps, Secretary of Commerce of the United States of America; State of New York and City of New York

Defendants.

District of Columbia:

I, Anthony J. Sulvetta, depose and say as follows:

1. Affiant holds four degrees from the George Washington University, Washington, D.C., — Bachelor of Arts Degree in Government Studies (1966), Master of Arts Degree in Economics (1968), Master of Philosophy Degree (1970), and Doctor of Philosophy Degree in Economics (1976).

2. Affiant has worked in the area of economic development and economic research for more than 13 years. A significant portion of this work has dealt with public works and countercyclical employment generation. Affiant currently serves as Chief, Program Analysis Division, Economic Development Administration, holding management responsibility for a staff of 24 professionals, 4 clerical assistants, and approximately 30 contractor personnel engaged in evaluative research of the

effectiveness of countercyclical employment programs, urban and rural economic development investments, economic policy development and program design, economic adjustment assistance, and institutional development and planning capacity. Affiant earlier served as: (1) a general associate for the consulting firm of Linton, Mields, and Coston, Inc., supervising staff of up to eight professionals in economic research studies, including an evaluation of the Public Works Impact Program; (2) as an economist with the Economic Development Administration, supervising subordinate staff in a variety of economic impact studies; and (3) as an economist with Sterling Institute (consultants), supervising staff of three professionals in preparing materials for experimental economics program.

3. Relevant recent publications authored or co-authored by affiant include: "*Public Works: Economic Development and Employment Stabilization* (1977); *An Examination of Factors Affecting the Employment Impact of an Accelerated Public Works Program* (doctoral dissertation, 1976); *Alleviating Unemployment Through Accelerated Public Works in the United States: An Historical Perspective* (1976); and *An Evaluation of the Public Works Impact Program (PWIP)* (1975).

4. Affiant is informed that pursuant to the Public Works Employment Act of 1976 (Public Law 94-369, 90 Stat. 99) (July 22, 1976), as amended by Public Law 95-28, 91 Stat. 116 (May 13, 1977), 42 U.S.C. [illegible]-6710; and the regulations and procedures promulgated to implement said Act, that as of September 30, 1977 there are 8591 approved Round II LPW Grants nationwide, 45 Round II LPW Grants awarded to the State of New York, and 83 Round II LPW Grants awarded to the City of New York in the total amounts of approximately $4 billion, $42,119,000, and $193,838,646, respectively. (Annexed hereto as "Exhibit A" is the list of approved projects for the State of New York and the City of New York).

5. Annexed hereto as "Exhibit B": is a true copy of excerpts from *County Business Patterns, United States,* U.S. Department of Commerce, Bureau of the Census (1974) and *County Business Patterns, New York,* (1975) U.S. Department of Commerce, Bureau of the Census, reflecting the minimum number of construction contractors available in the United States, the State of New York and the City of New York.

6. Affiant states that based on methodological techniques and information sources discussed in following sections, the estimated project employment and cost characteristics for the 83 Local Public Works projects awarded to the City of New York and the 45 Local Public Works projects awarded to the State of New York and the 8591 approved local Public Works grants nationwide are as follows:

(a) Estimated Employment Generation

(1) City of New York Projects. The City of New York Projects, involving total construction costs of $196,497,729 will generate approximately:

5039 direct jobs (construction person years);

1618 indirect jobs (person years);

11987 - 13499 induced jobs (person years);

for an estimated total of 18644 to 20156 person years of employment. Direct on-site construction employment will involve approximately 6,348,842 hours of employment, the equivalent of a full year of employment for 5039 construction workers. Based on EDA's past experience with the Public Works Impact Program, the average period of worker employment duration on a public works project lasted for less than one month (about 155.8 hours) which translates into approximately

40,750 workers to be employed directly on this project activity. Estimates of indirect jobs associated with contractor construction-industry related expenditures, computed below, indicate that an estimated 1618 jobs (person years) will be generated in construction-related industries. Induced employment effects, employment and income effects associated with spending patterns of construction-related employees and their employers for goods and services, are estimated to be between 18644 and 20156 person years of employment. Estimates of the numbers of individual workers to be employed in indirect and induced jobs, comparable to those associated with direct on-site construction employment, can not be reliably estimated.

(2) State of New York Projects.

The Local Public Works projects in the State of New York, involving total construction costs of $45,089,500, will generate approximately:

1156 direct jobs (construction person years);

371 indirect jobs (person years);

2570-3097 induced jobs (person years);

for an estimated total of 4277 to 4624 person years of employment. Direct on-site construction employment will involve approximately 1,456,842 hours of employment, the equivalent of a full year of employment for 1156 construction workers. Based on EDA's past experience with the Public Works Impact Program, the average period of worker employment duration on a public works project lasted for less than one month (about 155.8 hours) which translates into approximately 9351 workers to be employed directly on the 45 project activities in the State of New York. Estimates of indirect jobs associated

with contractor construction-related expenditures, computed below, indicate that an estimated 371 jobs (person years) will be generated in construction related industries. Induced employment effects, employment and income effects associated with spending patterns of construction-related employees and their employers for goods and services, are estimated to be between 4277 and 4624 person years of employment. Estimates of the numbers of individual workers to be employed in indirect and induced jobs, comparable to those associated with direct on-site construction employment, can not be reliably estimated.

(3) United States Local Public Works Projects.

The Local Public Works projects nationally, involving total construction costs of $5,011,125,948, (which includes total LPW funds and contributions by grantees) will generate approximately:

128,500 direct jobs (construction person years);

41,249 indirect jobs (person years);

305,701 - 344,251 induced jobs (person years);

for an estimated total 475,450 to 514,000 person years of employment. Direct on-site construction employment will involve approximately 161,909,479 hours of employment, the equivalent of a full year of employment for 128,500 construction workers. Based on EDA's past experience with the Public Works Impact Program, the average period of worker employment duration on a public works project lasted for less than one month (about 155.8 hours) which translates into approximately 1,039,214 workers to be employed directly on the 8,591 project activities in the United States. Estimates of indirect jobs associated with contractor construction-industry related expenditures, computed below, indicate that an estimated 41,249

jobs (person years) will be generated in construction-related industries. Induced employment effects, employment and income effects associated with spending patterns of construction-related employees and their employers for goods and services, are estimated to be between 305,701 and 344,251 person years of employment. Estimates of the numbers of individual workers to be employed in indirect and induced jobs, comparable to those associated with direct on-site construction employment, can not be reliably estimated.

7. The methodological procedures and information sources used in deriving the above estimates are as follows:

(a) Employment Estimates

Direct on-site construction employment estimates were developed using the results of a recent study conducted by the Rand Corporation, titled *Regional Cycles and Employment Effects of Public Works Investments* (Rand Publication Number R-2052-EDA, January, 1977), along with construction cost indexes published by the Engineering News Record (ENR). Rand estimated that for each billion dollars of public works contract expenditures in 1974, 42,067,620 hours of direct on-site employment would be generated. Equivalently, each hour of employment costs $23.77 in wages, materials, overhead, and other directly related construction costs. In order to correct this figure to reflect current construction costs, the average of the national 1974-1977 rates of change in the ENR Building Cost Index (30.3%) and the ENR Construction Cost Index (30.1%), i.e., 30.2%, was used as follows:

$$\frac{\$1,000,000,000}{(1.302)\ (\$23.77)} = 32,310,000 \text{ hours}$$

indicating that an expenditure of one billion dollars at 1977 cost

levels would result in 32,310,000 hours of on-site construction employment. Since the New York City projects involve a total cost of $196,497,729, total on-site employment to be generated by this project was estimated in the following manner:

$$\frac{\$196,497,729}{\$1,000,000,000} \times 32,310,000 = 6,348,842$$

In addition, Rand determined that the average construction worker worked approximately 1,260 hours per year. Hence, 6,348,842 hours divided by 1,260 hours provides an estimate of 5039 worker-years of on-site construction employment. As previously indicated, a study undertaken by the Economic Development Administration (*Evaluation of the Public Works Impact Program (PWIP), Final Report*, January, 1975, p. 70) estimated that the average duration of employment by a worker on a public works project was approximately 155.8 hours. Thus the Rand-derived estimate of 6,348,842 hours of employment divided by 155.8 hours per job indicates that approximately 40,750 individual workers may be directly provided employment opportunities on the project over the duration of overall project construction activities. The Rand study also estimated that for each direct construction job created (defined as 1,260 hours of employment), approximately 0.321 indirect jobs (man-years of employment in construction-related industries) will be generated. Specifically, Rand found that 10,725 indirect and 33,387 direct jobs were generated per billion dollars of public works construction expenditures. Hence, 10,725 divided by 33,387 equals 0.321. Applying this figure to the 5039 direct jobs cited above provides an estimate of 1618 indirect construction-related jobs. (Rand study, Table S-2.) Induced and indirect employment that related to employment and income effects associated with worker and contractor expenditure patterns was estimated by Rand to be 2.7 to 3.0 jobs per direct construction

job, e.g., that for every direct job, an additional 2.7 to 3.0 jobs (man-years of employment) will be generated elsewhere in the economy. Overall, for the project under consideration, involving a total cost of $196,497,729, between 18644 and 20156 total jobs (person-years of employment) direct, indirect and induced are estimated to be generated.

(2) State of New York Projects.

The 45 projects in the State of New York involve a total cost of $45,089,500, total on-site employment to be generated by these projects was estimated in the following manner:

$$\frac{\$45,089,500}{\$1,000,000,000} \times 32,310,000 = 1,456,842$$

In addition, Rand determined that the average construction worker worked approximately 1,260 hours per year. Hence, 1,456,842 hours divided by 1,260 hours provides an estimate of 1156 worker-years of on-site construction employment. As previously indicated, a study undertaken by the Economic Development Administration (Evaluation of the Public Works Impact Program (PWIP), Final Report, January, 1975, p. 70) estimated that the average duration of employment by a worker on a public works project was approximately 155.8 hours. Thus, the Rand-derived estimate of 1,456,842 hours of employment divided by 155.8 hours per job indicates that approximately 9351 individual workers may be directly provided employment opportunities on the 45 projects over the duration of overall project construction activities. The Rand study also estimated that for each direct construction job created (defined as 1,260 hours of employment), approximately 0.321 indirect jobs (man-years of employment in construction-related industries) will be generated. Specifically, Rand found that 10,725 indirect and 33,387 direct jobs were generated per billion dollars of public

works construction expenditures. Hence, 10,725 divided by 33,387 equals 0.321. Applying this figure to the 1156 direct jobs cited above provides an estimate of 371 indirect construction-related jobs. (Rand study, Table S-2.) Induced and indirect employment — that related to employment and income effects associated with worker and contractor expenditure patterns — was also estimated by Rand to be 2.7 to 3.0 jobs per direct construction job, e.g., that for every direct job, an additional 2.7 to 3.0 jobs (man-years of employment) will be generated elsewhere in the economy. Overall, for the 45 projects under consideration, involving a total cost of $45,089,500 between 4277 and 4624 total jobs (worker-years of employment) — direct, indirect and induced — are estimated to be generated.

(3) United States Local Public Works Projects.

The 8,591 LPW projects in the United States involve a total cost of $5,011,125,948, total on-site employment to be generated by these projects was estimated in the following manner:

$$\frac{\$5,011,125,948}{\$1,000,000,000} \times 32,310,000 = 161,909,479 \text{ hours}$$

In addition, Rand determined that the average construction worker worked approximately 1,260 hours per year. Hence, 161,909,479 hours divided by 1,260 hours provides an estimate of 128,500 worker-years of on-site construction employment. As previously indicated, a study undertaken by the Economic Development Administration (*Evaluation of the Public Works Impact Program (PWIP), Final Report*, January, 1975, p. 70) estimated that the average duration of employment by a worker on a public works project was approximately 155.8 hours. Thus, the Rand-derived estimate of 161,909,479 hours of employment divided by 155.8 hours per job indicates that approximately 1,039,214 individual workers may be directly provided

employment opportunities on the 8,591 projects over the duration of overall project construction activities. The Rand study also estimated that for each direct construction job created (defined as 1,260 hours of employment), approximately 0.321 indirect jobs (man-years of employment in construction-related industries) will be generated. Specifically, Rand found that 10,725 indirect and 33,387 direct jobs were generated per billion dollars of public works construction expenditures. Hence, 10,725 divided by 33,387 equals 0.321. Applying this figure to the 128,500 direct jobs cited above provides an estimate of 41,249 indirect construction-related jobs. (Rand study, Table S-2.) Induced and indirect employment – that related to employment and income effects associated with worker and contractor expenditure patterns – was also estimated by Rand to be 2.7 to 3.0 jobs per direct construction job, e.g., that for every direct job, an additional 2.7 to 3.0 jobs (man-years of employment) will be generated elsewhere in the economy. Overall, for the 8,591 projects under consideration, involving a total cost of $5,011,125,948, between 475,450 and 514,000 total jobs (person-years of employment) – direct, indirect and induced – are estimated to be generated.

(b) Construction Cost Implications

Effects of delaying construction activities can be estimated using information published in the *Engineering News Record* (ENR). ENR publishes two general, widely used construction cost indexes based on data obtained in 20 large cities. (See attached Exhibit C). ENR estimates that construction costs will increase nationally between 9.4% and 9.3%, as measured by their Construction Cost Index and Building Cost Index, respectively, between December 1976 and December 1977 (See attached "Exhibit D" for appropriate computational bases.) Using an unweighted average of these two indexes, the 1976-1977 national

annual rates of increase of construction costs is estimated to be 9.35% (average of 9.3% and 9.4%).

(1) City of New York Projects.

Assuming the rate of construction cost increase remains constant, a one-year delay would increase construction costs for the City of New York projects by approximately an additional $18,372,538; a two-year delay would increase construction costs by approximately an additional $38,462,908.

(2) State of New York Projects.

Similarly, a one-year delay would increase construction costs for the 45 State of New York projects by approximately an additional $4,215,868; a two-year delay would increase construction costs by approximately an additional $8,825,920.

(3) United States LPW Projects.

Similarly, a one-year delay would increase construction costs for the 8,591 United States Local Public Works projects by approximately an additional $469 million; a two-year delay would increase construction costs by approximately an additional $981 million.

8. The most recent unemployment data for the United States indicates 6,872,000 unemployed workers for the month of October 1977, of which 549,000 were construction-associated workers. The overall unemployment rate in October 1977 was 7.0%, compared to an estimated 12.2% for the construction industry. (Source: Bureau of Labor Statistics)

Affidavit of Anthony J. Sulvetta Sworn to December 1, 1977

s Anthony J. Sulvetta
Anthony J. Sulvetta, Chief
Program Analysis Division
Economic Development Administration

Sworn to December 1, 1977

AFFIDAVIT OF MARY C. DALY SWORN TO DECEMBER 5, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MARY C. DALY, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and as such I am familiar with the above-captioned matter.

2. I submit this affidavit in further support of the Federal Government's opposition to the consolidation of the trial in the instant matter with the hearing on plaintiffs' motion for a preliminary injunction or in the alternative in support of the Government's motion for a continuance of such trial.

3. The instant case was filed on Wednesday, November 30, 1977. Plaintiffs' served a copy of a complaint and their order to show cause papers on this office that afternoon. At 4:00 p.m. that same day the Court conducted a hearing on plaintiffs' application for temporary restraining order and announced, in denying the temporary restraining order, that a hearing would be held on Friday, December 2, 1977 at 10:00 a.m. on plaintiffs' motion for a preliminary injunction. The Court also announced that it would treat that hearing on Friday, December 2, 1977 as a hearing on the merits of the case.

4. On the present state of the record the Federal Government submits that plaintiffs have not proved a case

sufficient to warrant the granting of preliminary relief or to save them from having their case dismissed. We further submit that Section 103(f)(2) of the Public Works Employment Act is constitutional for the reasons advanced in our memoranda of law and argued at the December 2 hearing.

5. Between the filing of the Complaint and the hearing on plaintiffs' application for a TRO and the trial on December 2, the Government had at best one full working day to gather evidence, locate witnesses and submit a memorandum of law. In the extraordinarily abbreviated time between the date the Complaint was filed and the hearing, the Government did not have sufficient opportunity for full investigation and discovery. Accordingly, if this Court refuses to dismiss the complaint the Secretary respectfully requests the Court to allow it to offer additional evidence. In particular, the Government is presently seeking persons to testify about the following topics:

(a) The MBE Waiver program, its procedures, requirements and standards, and its application in the State of New York, the City of New York and to the Round II grants in issue.

(b) The availability of competent Minority Business Enterprises in the various construction specialties of raw and finish material supply fields relevant to the grants and contracts in issue, as well as generally.

(c) The responsiveness and competitiveness of the bidders bidding in competition with the contractor testifying on behalf of the plaintiffs.

(d) The procedures which would need to be followed to readvertise and rebid any contracts if the MBE requirements of §103(f)(2) of the PWEA were enjoined.

the extended time requirements of such readvertising and rebidding, and the resulting delay in the start of construction.

(e) The bids submitted in competition with those of witnesses DiMenna and LoCurto and plaintiff, Shore Air Conditioning Company.

(f) The status as member of plaintiff charter of the Associated General Contractors of America, Inc. of witnesses DiMenna and LoCurto and plaintiff Shore Air Conditioning Company and their compliance with Section 103(f)(2).

(g) The availability, competency and competitiveness of bona fide MBEs in various construction specialties and raw and finish material supply fields.

(h) Discrimination on the basis of race and national origin in the construction industry.

5. For the Court's information and in connection with the argument set forth at page 14 of the Government's post-hearing memorandum of law, I am annexing hereto a copy of the complaints in the following cases: *Montana Contractors Ass'n. v. Secretary of Commerce, Ohio Contractors Ass'n. v. Economic Development Administration* and *Florida East Coast Chapter of Associated General Contractors v. Secretary of Commerce.*

s/ Mary C. Daly
MARY C. DALY

Sworn to December 5, 1977.

AFFIDAVIT OF M. L. BANNER SWORN TO DECEMBER 5, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

I, M.L. Banner, being duly sworn, depose and say that I am the Chief of the Civil Rights Division of the Atlantic Regional Office of the Economic Development Administration and have held that position since May of 1974.

Affiant is responsible for the supervision of all Civil Rights Specialists who review all requests for waiver of the ten percent minority business enterprise provision of the Public Works Employment Act of 1977, P.L. 95-28.

Affiant instructed Civil Rights Specialists not to grant any waivers of the 10% minority business enterprise requirement which were submitted with the original project application unless the Applicant submitted information on the size of the minority population in the project area, the availability of minority enterprise in the reasonable trade area from which contractors, subcontractors and suppliers will be drawn for the project, the efforts the grantee and prime contractors have exerted to enlist minority firms and other relevant facts that might further the request.

A waiver request would be considered at any time, pre-bid or post-bid, provided that the proper documentation was submitted with the request.

Affiant instructed the Civil Rights Specialists under his supervision to instruct each applicant requesting a waiver that the above referenced documentation was required to support any waiver request and, that the waiver request would be considered at any time, pre-bid or post-bid, as aforesaid.

Affidavit of M. L. Banner Sworn to December 5, 1977

Affiant, based on knowledge and belief, understands that all instructions have been followed by the Civil Rights Specialists under his supervision.

Affiant further states that according to the records maintained in his office no requests for waivers were submitted by either the City of New York or the State of New York. If a request had been submitted, the Applicant would have been told that a waiver could be granted at such time as the Applicant submitted the required information as aforesaid.

s/ M. L. Banner
M. L. Banner, Chief
Civil Rights Division

Sworn to December 5, 1977.

TRANSCRIPT OF PROCEEDINGS BEFORE HON. HENRY F. WERKER, D.J. DATED DECEMBER 2, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

Before: HON. HENRY F. WERKER, D.J.

New York, December 2, 1977;
11:00 A.M.

APPEARANCES:

BERMAN PALEY GOLDSTEIN & BERMAN, ESQ.,
Attorneys for Plaintiffs;
By: Robert G. Benisch, Esq., of Counsel.

DORAN, COLLERAN, O'HARA, POLLIO & DUNNE, P.C.,
Co-Counsel of Plaintiffs;
BY: Stephen J. Smirti, Jr., Esq., of Counsel.

FRENCH, FINK, MARKLE & McCALLION, ESQS.,
BY: Robert J. Fink, Esq., of Counsel.

ROBERT F. FISKE, JR., United States Attorney for the Southern District of New York;
BY: Gaines Gwathmey, Esq.,
Mary E. Daley, Esq.,
Gerald Hartman, Esq.,
Assistant U.S. Attorney,

[2] CORPORATION COUNSEL FOR THE CITY OF NEW YORK
By: Theodore Gilbert, Esq.,
Nathan Ratner, Esq., Assistant Corporation Counsel.

Transcript of Proceedings

LOUIS J. LEFKOWITZ, ESQ.,
Corporation Counsel of the State of New York;

By: Dominick Tuminaro, Esq.,
Arnold Fleischer, Esq.,
Assistant Attorney General.

[3] (Case called.)

THE COURT: Good morning.

MR. BENISCH: Good morning, your Honor.

The plaintiffs are here today prepared to proceed pursuant to the Court's direction of last Wednesday, and we are placing before the Court certain evidence which we believe will be an aid to the Court in determining this matter.

I would like at the outset to advise the Court that the Health & Hospitals Corporation, the Board of Higher Education of the City of New York and the Board of Education of the City of New York were served with the papers in this action yesterday.

I have and I will file copies of the receipts of service. We have brought those defendants in.

MR. GILBERT: I have not been informed or been requested by either of those agencies to appear for them as of this morning.

MR. BENISCH: While we are on that subject, your Honor, it is my understanding, although perhaps Mr. Gilbert can enlighten me, that the Board of Education of the City of New York is a City agency.

MR. GILBERT: They are not a City agency. If the Board of Education has been served, we will [4] appear for them.

As to the Hospital Corporation and the Board of Higher Education, I cannot make that representation at this time.

MR. BENISCH: All right.

THE COURT: All right.

MR. BENISCH: Would you wish me to proceed to offer in evidence certain documents?

THE COURT: Sure.

MR. BENISCH: All right.

Your Honor, I would like to offer as Plaintiffs' Exhibit I the copy of the document entitled EDA Minority Business Enterprise Technical Bulletin, which I believe is published by the Federal Economic Development Administration of the Department of Commerce.

I will distribute this to counsel.

MR. GWATHMEY: The government has no objection to the admissibility of this document.

THE COURT: Have you indicated somewhere in the document as to what you want me to look at?

MR. BENISCH: Your Honor, if the Court please, I think perhaps the —

THE COURT: In other words, I am not going to plough through reams of papers to find out that you have [5] one paragraph in there that I am supposed to read.

MR. BENISCH: I will be happy to do that, your Honor. I will mark it.

THE COURT: And let your adversaries know what you are marking.

MR. BENISCH: Yes.

Specifically, in Exhibit 1, to be marked, I am referring to Paragraph IV on page 10, and the pages which follow that paragraph, and the sub-paragraph entitled "Determination of Bonafide Minority Business Enterprise," which is under sub-paragraph II.

That begins at page 2 of the document.

THE COURT: Are there any objections from anyone else?

MR. GILBERT: No objection, your Honor.

MR. TUMINARO: No, your Honor.

THE COURT: It may be received.

(Plaintiffs' Exhibit 1 received in evidence.)

MR. BENISCH: I would like to offer Plaintiffs' Exhibit 2, a document entitled Guidelines For 10 Per Cent Minority Business Participation in LPW Grants. I believe, your Honor, that this again is a document put out by the Department of Commerce of the United States. I will [6] note that on the copy that I am offering it is the only one I have, and it has been underscored. At this point I would like to indicate —

MR. GWATHMEY: Excuse me. I have a clean copy.

I believe the document will be part of a package of material that we would file with our memorandum of law. If you have a problem with copies, you can await the arrival of the memorandum of law, which should be here shortly.

MR. BENISCH: Let's deem the clean copy marked.

MR. GWATHMEY: No objection. You can take the copy out of the material that I have already supplied to you. It is probably in there.

MR. BENISCH: The next exhibit that I would like to offer is the notice to bidders, which is the standard bid language which is being presently inserted into contracts let by the various agencies of the City of New York. This is the standard language, it is a sample and it is in blank because it has not been pertaining to any particular job.

MR. GILBERT: I have no objection, your Honor.

MR. GWATHMEY: Inasfar as the City is prepared [7] to stipulate that these are in fact the suggested provisions in the proposal, the government has no objection to them either.

MR BENISCH: They are not suggested. There [sic] are the provisions that the City is putting into its contracts and which are being submitted to the bidders.

MR. GILBERT: I will concede to that.

THE COURT: We will amend your statement to that extent. They are what the City insists be in the bids, is that correct?

MR. GILBERT: Yes. They are part of our bid documents.

THE COURT: Fine.

It may be received as Plaintiffs' Exhibit 3.

2 is the other document which we deemed marked in evidence, until you get us a clean copy.

Now, this is 3.

(Plaintiffs' Exhibit 3 received in evidence.)

MR. BENISCH: I will hand up a clean copy of Exhibit 2.

THE COURT: All right.

(Plaintiffs' Exhibit 2 received in evidence.)

[8] MR. BENISCH: I would now like to offer as Exhibit 4 the list of Public Works Projects submitted to the Economic Development Administration for Funding under Round 2 of the Local Public Works Capital Development and Investment Program. That is the Act that is before this Court -- by the City of New York -- which I am advised constitutes the list of projects which has been approved for Federal Funding under Round 2 of the Act.

MR. GILBERT: Yes. I supplied the document, your Honor.

THE COURT: Yes.

MR. GWATHMEY: Again, based on the representation of the City of New York, we have no objection to the admissiblity of the document.

THE COURT: All right.

MR. TUMINARO: No objection, your Honor.

(Plaintiffs' Exhibit 4 received in evidence.)

MR. BENISCH: Your Honor, at this point I would like to call to the stand Mr. Nicholas DiMenna.

[9]NICHOLAS DI MENNA, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BENISCH:

Q. By whom are you employed, sir? A. I am employed by a construction company called Nicholas Di Menna & Sons.

Q. What's your capacity with that company? A. I am a vice-president.

Q. For how long a period of time have you worked for that company? A. Since 1963.

Q. Is that company engaged in the general contracting business? A. Yes.

Q. Personally yourself, do you hold any degrees or professional licenses? A. I have a degree in Economics from Manhattan College.

Q. All right.

Are you a professional engineer? A. No.

Q. Will you tell the Court, please, in general what Di Menna & Sons does, the type of work that they do? [10]

A. We are basically sewer contractors and we do most of our work here in New York City for the Department of Water Resources and we also do work for the Department of Highways.

Q. Do you also do some State work? A. No. We have worked in Connecticut, but we don't do any State work.

Q. That is the State of New York? A. Right.

Q. For how long a period has the DiMenna Company been in existence doing work for the City of New York? A. Since approximately 1930.

Q. Can you give us some idea, in the last five years, of the annual volume of work that you perform in the construction field? A. Well, normally in a normal time we would do 5 million dollars worth of work a year. But, the last two years we have done something less than that because of the economic problems of New York City.

Q. In other words, there has been less work? A. Yes.

Q. All right.

Has the DiMenna [sic] submitted any bids on jobs which are funded under the Public Works Employment Act [11] of 1977? A. Yes.

Q. Will you identify those jobs, please? A. Do you want the list of all the jobs that I bid?

Q. No. I will withdraw the question.

Have you been a low bidder on any of the jobs? A. Yes. We have been a low bidder on two jobs.

Q. Which jobs? A. One job was DWR 128, which was a construction of a regulator at the MacCombs Dam Bridge for approximately $296,000. We were awarded that job.

Q. What agency is that for? A. That's the Department of Water Resources.

Q. Was there a requirement in that contract? A. Yes.

Q. Was it MBE? A. About $36,000.

Q. When I refer to MBE it is the Minority Business Enterprise, under the Act.

What about the second job that you were a low bidder on? A. That was for the Department of Water Resources. [12] That was on 80th Street in Queens.

Q. How much was that job? A. That was $898,000.

Q. Was there an MBE requirement in the bidding documents for that job? A. Yes. There was. Do you want the amount?

Q. Yes. A. $88,700.

Q. Has the DiMenna Company or is the DiMenna Company also in the process of working up and preparing a bid for any jobs to be let? A. Yes.

Q. By the City of New York? A. Yes.

Q. Do those jobs or job contain an MBE requirement? A. Yes. It is one specifically that we are bidding, DWR 120, the Storm and Sanitary Sewers on 129th Street in Queens, and the requirement for the Minority Business Enterprise is $527,000.

Q. What is the amount that the engineers estimate on that job? A. They don't give you the engineers' estimate. But, they – I think the amount of the grant, if this is [13] supposed to be 10 per cent, it should be around $5,270,000.

Q. In connection with that Queens job, which you are going to bid – by the way, what is the letting date as scheduled? A. December 13th.

Q. For that contract? A. December 13th.

Q. That is a week from Monday? A. No. A week from this coming Tuesday, I believe.

Q. All right.

Are you personally involved in the preparation of the bid for that contract? A. Yes. I actually am the head of the bidding team and all the bids are prepared under my auspices.

Q. What, if anything, does that contract or the bidding documents for that contract provide with respect to naming and designating a minority business enterprise for the performance of work under that contract?

MR. GWATHMEY: Objection. If the contract is available, I think the document can speak for itself.

MR. BENISCH: The problem we have here, your Honor, is that there are one set of bidding documents and Mr. Di Menna has advised me that his estimators – who are currently working on the contract -- must utilize [14] those documents. I do not have the contract book here today.

THE WITNESS: I have it here. But, I need it. You cannot keep it.

MR. BENISCH: Excuse me. I misspoke.

Q. Are these the bidding documents? A. Yes. Right here. Do you want the section that applies?

Q. First, the document, which you hand me here, is the bid document for the job which you are going to bid on December 13th? A. Correct.

MR. BENISCH: I would like to offer this as Exhibit 5, your Honor.

MR. GWATHMEY: May I have a look at it, please?

Are you offering this document in the entirety or just with respect to a specific passage of it, which we could direct our attention to?

MR. BENISCH: I am offering it with respect to those portions, the specifications which deal with the MBE appointments.

MR. GWATHMEY: Would you get the witness to identify those and then in those circumstances we could have a meeting or voir dire or stipulate to the ad-[15]missibility of the document or object to it?

MR. BENISCH: With the Court's permission.

THE COURT: Yes.

MR. BENISCH: Perhaps we should have it marked for identification.

THE COURT: All right.

(Plaintiffs' Exhibit 5 marked for identification.)

Q. Mr. DiMenna, will you identify or indicate in Exhibit 5 for identification which portions of that document refer to the MBE requirements on that job, and indicate the page numbers if possible? A. Yes. They are basically 5 through 13, Addendum 6. Those are these pages right here. I also have copies of them that I made up.

Q. Are there any other pages in here which relate to MBEs? A. I think there is another one that corrects the form for the MBE. That's back here. But, all that does is eliminate some of the information that we have to fill in concerning the MBE. Basically, this is it.

MR. BENISCH: For purposes of this offer I would limit the offer for Exhibit 5 to the pages indicated by Mr. DiMenna, which are pages 5 through 17 [16] of an addendum No. 6 in this book.

MR. GWATHMEY: May I have Plaintiffs' Exhibit 3, just for the purposes of comparing whether this is exactly the same thing.

(Pause.)

MR. GWATHMEY: No objection, your Honor.

MR. BENISCH: May I have it marked?

THE COURT: Yes. It is received.

(Plaintiffs' Exhibit 5 received in evidence.)

Q. Mr. DiMenna, will you indicate to the Court, please, what the bidding documents provide with respect to the MBE

requirements for the contractor on that job, that is, the Queens job to be let on December 13th? A. Right. They require that you sub out to a minority business enterprise approximately, at least $527,000 worth of work, or to a minority vendor.

Q. All right.

That is an organization that qualifies as a minority business enterprise? A. Right.

Q. Can you tell us generally and briefly what work is encompassed in this contract? In other words, what is the contract for, what are you going to build? [17] A. It is basically a monolithic sewer, a flattop reinforced concrete sewer, which is basically in the shape of a box. You excavate down 20 feet on the average depth, and you put in about 589 feet of a double-barrel, I think 15 x 8 sewer, and then there is another monolithic sewer, a couple of thousand feet of that. I think it is 8 x 8 foot 6. Then you backfill and then you restore the roads and the streets and the curbs and sidewalks.

Q. The monolithic sewer is being put or installed in an existing street? A. Yes. It is built in place. In other words, you dig down and put in the steel and you pour the concrete in place.

Q. It is within the alignment of an existing roadway? A. Yes.

Q. What portions, sir, of the work encompassed in this contract — if any — which you ordinarily sub out in the normal course of your business? A. The only work that we would sub out would be the restoration of the streets and the curbs and the sidewalks.

Q. Are you going to do that? Are you going to [18] sub out that work on this job? Are you planning to do that? A. Yes.

Q. Are you planning to incorporate into your bid prices the price, a subcontractor who is going to ultimately perform that street restoration work, if the DiMenna Company is the low bidder and awarded this contract? A. Yes. We are going to sub it out.

Q. Does your bid reflect that fact? A. It will reflect that fact.

Q. Is this type of work, which you have performed on other jobs as well? A. Yes.

Q. The street restoration work? A. We normally always sub out the street restoration work. We never do it ourselves.

Q. Do you have certain firms which you generally contact with respect to getting a price for performance of this street restoration work? A. Yes.

Q. What firms are they, sir? A. There is Willis Point; Mascalli; Eden Wald; Ariola (Phonetic). There are a few others that I [19] cannot remember.

Q. Are these firms generally known to be asphalt people? A. Yes. Highway contractors, yes.

Q. Because the restoration work you are concerned with is repaving the streets when you finish installing the sewers, is that correct? A. Yes.

Q. Have you been able to solicit prices from those subcontractors, the subcontractors that you named? Are each of them outfits which you have dealt with in the past on other jobs? A. Yes.

Q. Have you had satisfactory experiences with those outfits? A. Absolutely.

Q. Have you gotten reasonable prices from those outfits?

MR. GWATHMEY: Objection, your Honor. Mr. Benisch is leading the witness. It is perfectly all right for the background information, but in questions like this, I do not think it is proper.

THE COURT: I will sustain it.

Q. Will you tell the Court or describe to the [20] Court the criteria?

THE COURT: Mr. Benisch, when you get right down to the brass tacks of it, he has dealt with these people and he hired them as subcontractors. I don't have to know whether the prices have been reasonable or unreasonable. That is for some other body to determine when they accepted the bid, the low bid.

Q. Mr. DiMenna, have you been able to solicit prices from those subcontractors on this job? A. No. I am not going to.

Q. Why? A. Because in this particular job the only way I can comply with that requirement, the minority business enterprise, is to sub out that work to a minority subcontractor.

Q. All right. A. All the other work we will be doing a hundred per cent ourselves. It is impractical to sub out any of the other work.

THE COURT: I will ask Mr. DiMenna, do you supply the cement? Do you supply the shoring for the ditches and so forth and so on yourself?

THE WITNESS: No. We buy the concrete.

THE COURT: This area of the contract work is [21] not the only area?

THE WITNESS: It is –

THE COURT: As I see, the statute applies not only to work to be performed but also to suppliers, does it not?

THE WITNESS: Yes, your Honor.

THE COURT: MBE could be either one?

THE WITNESS: Yes. There are only four cement contractors, I mean four cement suppliers in New York. None of them are minority concrete suppliers.

THE COURT: That's what I wanted to find out.

THE WITNESS: The same with reinforcing steel. There are no minority reinforcing steel suppliers.

Q. None that qualified as MBE? A. Right.

Q. Are there any other items of substantial material —

THE COURT: Lumber?

THE WITNESS: Yes. On this job it will basically be steel sheeting.

Q. Are there any qualified MBEs who supply and furnish steel sheeting? A. Not unless Bethelehem Steel just recently sold their stock.

[22] Q. Who do you buy steel sheeting from? A. Normally from either Bethlehem Steel or Skyline or Stanhope or Foster.

Q. Is it fair to state, Mr. DeMenna, [sic] that there is no item of material supplied under this contract which you can reasonably let out or contract with in MBE?

MR. GWATHMEY: Objection. That is leading.

THE COURT: I will permit him to answer it. We don't have a jury here, you know.

A. There are other items, but they are so small. There is no way that there would be enough to comply with the $527,000.

Q. All right.

With respect to the street restoration work, are you going to let that out to a MBE? A. Yes.

Q. Where did you obtain the MBEs? A. Well, he had — when all that started, he has given me some prices on other jobs that I have bid on.

Q. Do you have a price from him on this job? A. No. Not yet.

Q. Do you know this MBE? Have you worked with him before? A. Never. No.

[23] Q. In the ordinary course of things, would you, but for the MBE requirement of the contract, want to work with this MBE who you are talking about? A. No. Because his prices have always been about 15 per cent higher than the other prices that I have received.

Q. Have you in the past, however, had occasions on other jobs to solicit prices be it from subcontractors or material suppliers, prices from companies, which would qualify as

MBE? A. Yes. In fact, we have used minority — a job we have right now, the reconstruction of the Harlem River Seawall, and one of my main suppliers is Mogoia Construction. He is a minority business enterprise, yes. He has about $400,000 worth of work with us.

Q. Is the DiMenna Company a member of the General Contractors Association of New York? A. Yes, they are.

MR. BENISCH: I have no further questions of this witness, your Honor.

THE COURT: All right. Gentlemen, do you have any cross-examination?

MR. GWATHMEY: May I have a minute to go over my notes?

[24] THE COURT: All right.

(Pause.)

MR. GWATHMEY: As a preliminary matter, I would like to move to strike the entire testimony as completely irrelevant. I do not know how it bears upon the issues put before this Court in any way. He has not alleged that he has been harmed in any way by the operation of this statute. I do not see where it takes us to have this material in the record.

THE COURT: I will deny your motion. I will retain the material on the record.

CROSS EXAMINATION

BY MR. GWATHMEY:

Q. Mr. DiMenna, I believe that you testified that your annual volume of work over the last five years was in the

neighborhood of $5,000,000 with the exception of the last two years, which it was slightly below that? A. Yes. Right.

Q. Can you give us a more specific figure as to the last two years? A. Well, I think that this year we will probably do about 3 million worth of work, and the year before that was approximately 2-1 2 million.

Q. Is your business exclusively with the govern-[25] ments of the City and the State of New York or one of those organizations? A. It has been exclusively with New York City, with their various agencies, and also with some towns in Connecticut.

Q. Have you worked on any other project where the money, which was supplied for construction of the project, was Federally-funded? A. Well, in the past we have done New York City jobs where they were all funded by New York City. I would say, I couldn't give you a percentage, but I would say the great majority of the jobs were Federally-funded. The only jobs we have had for the last two years have been Federally-funded.

Q. You testified, I think, that you were a l › bidder on two contracts? A. Yes.

Q. And that in both of those circumstances you procured minority subcontractors? A. No. Actually, I supplied — I mean, I am hiring a minority vendor.

Q. I see.

On the first contract which was DWR 128, did you seek out from a variety of companies bids for the services [26] which ultimately the minority vendor supplied to you? A. On that one, which is basically a construction of a tide date regulator, and we would not sub out any of the work on that at all. So, there was no reason to get prices from other subcontractors. That we will do all ourselves. In order to comply with that, we

are going to buy the mechanical equipment through Minority Construction Supply Company, which is not the way we normally would do it. In other words, normally we would buy that material from Coldwell-Wilcox in Connecticut. Instead, Minority Construction Supply Company is going to buy the equipment from them and we will buy it from Minority Construction Supply and pay about $5000 more than we normally would pay.

Q. When you submitted your bid to the City of New York, more specifically to the Department of Water Resources — A. Yes.

Q. — did your bid reflect that? A. Yes. It did.

Q. With respect to the Second Department of Water Resources contract, could you explain what aspects of that contract were performed by MBE? A. On that job we are also going to buy some pipe, [27] reinforced concrete pipe and soldier beams through Minority Construction Supply Company. We also, by the way, always use Brotherhood Minority Patrol, which are our watchmen and security on the jobs. The Minority Construct [sic] Supply Company, we are going to buy the concrete pipe, some of the concrete pipe from them and some of the, probably the soldier beams. That is not our normal supplier for those items. Again, the Minority Supply Company will go to our formal suppliers and buy the materials from them and then sell them to us.

Q. Again, in the bid which was submitted to the Department of Water Resources, your bid reflected that fact in the event that you were going to have to pay any price for those commodities? A. That's correct.

Q. You testified with respect to DWR 120? A. Yes.

Q. You are contemplating using a minority enterprise concern to do certain work on the sidewall? A. The paving work primarily, yes.

Q. Have you entered into negotiations with that company? A. Not yet.

Q. As of this stage? [28] A. No.

Q. You have not. Have you conferred with them as to what their price will be? A. Usually with the subcontractors we don't get the prices till about three days before the bid time. In other words, they have only been out for maybe two or three days. They have to go down and look at the job and put their bid together. That will take time. They will submit prices to us, probably I would say next Thursday or Friday.

Q. You delivered them a copy of the plan? A. They usually buy it themselves.

Q. How is it that they realize that you are bidding as a prime contractor on this particular job? A. No. 1, in the Brown letters it is listed. They list all the purchases of all the plans and the specs. They have quoted me in the past on some of the highway work. They know that I am going to be bidding this job. I will call them up.

Q. Directing your attention to the past, do you recall when the first time was that they quoted you on a job? A. Well, it was when the first jobs came out, which would be about maybe three weeks ago.

[29] Q. That's the first time that they quoted you a bid on any project to your knowledge? A. Yes. Right.

Q. When you — A. That particular company.

Q. When you referred to these jobs, you are referring to jobs which have developed under the present Act, the Public Works Employment Act of 1977? A. Yes.

Q. What was the project three weeks ago that they quoted you a bid on? A. Well, I know there was one a couple of weeks ago. On Bell Boulevard we got a quotation from them.

We got a quotation from them on Baisley Boulevard, which was a monolithic sewer in Queens.

Q. Did you submit a bid on the work? A. Yes. I did.

Q. Were you successful in that bid? A. No.

Q. You were not? A. I think I was fourth.

Q. Did your bid incorporate the bid which you in turn had received from this MBE for work on the monolithic sewer? [30] A. Yes. It did.

Q. Can you remember any other instances other than this one that you have described some two weeks ago on the monolithic sewer concerning a particular MBE? A. That was —

MR. BENISCH: Objection to a further line of questioning here. It is going beyond the subject covered on direct examination. We are getting into contracts which the witness has not testified to on direct examination. We are getting into contracts which the witness has not testified to on direct.

THE COURT: I am not going to limit you to specific contracts. I will let him go ahead for a short while.

A. Do you want me to continue on that job?

Q. Yes. A. That was also a monolithic sewer as this job here is, and we had the same problem there as we do on this job in that we were unable to give any subcontractor – you know – we couldn't buy any of the materials from any minority, like for instance the Minority Construction Supply Company in this particular instance, because it was a monolithic sewer, which we are pouring in place, which we do ourselves. That job, like [31] this job, the only thing we could sub out was the highway work.

Q. You say that you weren't successful on that job two weeks ago? Do you know who was successful? A. Catapano, Andrew Catapano.

Q. Did they have MBE participation in their project, to your knowledge? A. How would I know that? I am not privy to their bidding documents. I just hear the amount that is read off. I am sure, if they got the award they would have had to have been.

Q. With respect to this job two weeks ago, did you ask anybody else for bids on it to perform the work? A. Yes. We had about three other, three or four other highway contractors that gave us bids on that. They were all lower.

Q. They were all lower. You did not submit those bids because of the fact that this was a Minority Business Enterprise, and you accepted their bid? A. Right.

Q. Did your price that you quoted to get the contract reflect that additional cost? A. It had to.

MR. BENISCH: Objection. I do not believe [32] that the contract that they are referring to was gotten by the DiMenna Company, if I am not mistaken.

MR. GWATHMEY: I did not mean to indicate that it was.

Q. How many MBEs did you get bids from in that particular instance? A. I think two. But, I am not all that sure. There are not that many Minority Business Enterprises that do highway work. I mean of that nature and that size.

Q. If you got, that would make a total of three? A. Pardon?

Q. If you got two others, that would make a total of three? A. I meant two in total.

Q. All right.

Presumably, since you testified before that one, that all were lower than the one you ultimately selected, why didn't you select the one that was lower than this one? A. I still —

Q. Than the MBE? A. I picked the lowest MBE, but he was — the lowest MBE was higher than the other regular contractors.

[33] Q. Did you have any other contract between the one we have been discussing and the one that you testified about, to wit, DWR — I am sorry, DWR 120? A. 120, that's the one.

Q. That's the current one? A. Yes. That's the one we are going to bid on on December 13th.

Q. Have you had any other contracts on which you sought MBE participation, other than the one you testified to just recently? A. The one we got, the DWR 115. That was 80th Street in Queens. That was combined sewers, grading and paving. That was basically a sewer pipe job.

Q. How long have you been associated with DiMenna & Company or DiMenna & Sons? A. Since 1963.

Q. In 1963 what was your job? A. My job?

Q. Yes. A. I was a carpenter's helper.

Q. When did you become an executive officer or a managerial employee of some type with the company? A. I would say I went out of the field and into the office about maybe 1968 or 1969. I don't really [34] remember.

Q. During the period that you have been a managerial employee, can you testify for us as to the instances in which you have had — withdrawn.

Can you testify for us of the instances in which you have let or sublet contracts to Minority Business Enterprises?

MR. BENISCH: Objection, your Honor. We are now going way back and we are beyond the scope of direct.

THE COURT: I will sustain it.

Q. During the business down-turn, which you have referred to, was it necessary for your company to lay off any employees? A. Yes. We went from a company that primarily hired about 150 people to a company that hired about 30 to 40 people.

Q. Are you familiar with the racial composition of the work force of your company? A. Absolutely.

MR. BENISCH: Objection, your Honor. We are getting now into racial compositions, which is not covered by the Act. The Act is talking about Minority Business Enterprises.

THE COURT: Yes. Sustained.

[35] Q. With respect to, I believe, the three contracts that you have testified to, where you had dealings with MBEs, could you state what efforts you made to determine what companies there were available that qualified as Minority Business Enterprises? A. Yes. In the specs there is, they tell you if you call — I believe it is the Department of Commerce — no, the Office of Minority Business Enterprises, which is headed up by Mr. Hudnell, they will give you a list of MBEs. We did, and they sent us a list of approximately 140. I called 70 and my brother called 70. In fact, that's where we got the Minority Supply Company from, we got it from that list.

Q. Out of the 140 that you telephoned, how many affirmative responses did you get with respect to your request for a response to your proposal? A. Three.

MR. GWATHMEY: I have nothing further, your Honor.

THE COURT: Mr. Gilbert, do you have any questions?

MR. GILBERT: Yes, your Honor.

[36] CROSS EXAMINATION

BY MR. GILBERT

Q. Mr. DiMenna, absent of contracts or contract proposals that required your company to use Minority Business Enterprises, how many Minority Business Enterprises has your company utilized? A. In what time frame? In the last year we used two. We used, before this requirement we have the job, the reconstruction of the Harlem River Seawall, which was not in this job. We had Brotherhood Minority Patrol, which did the security. We had Magoia Construction, which is doing the paving and the sidewalks.

Q. That's on that one job? A. Yes. That's the only job we have.

Q. Prior to that during the history of your company, how many minority business enterprises have you used?

THE COURT: In the history of the company?

MR. BENISCH: Objection.

THE COURT: He is not that old. During the last five years, maybe.

Q. During the time you have been connected with the company in an executive capacity or five years.

THE COURT: The last five years.

Q. Would you answer his Honor's question?

[37] MR. BENISCH: Objection to the question, your Honor.

THE COURT: No.

A. The last five years, I will have to think. I would say two.

Q. That's the two you referred to? A. Yes.

Q. All right. A. Not including these jobs that we just got.

Q. I understand that. That's the two on that one seawall job. During that five-year period, could you tell us approximately how many contracts were jobs your company performed. A. In the last five years?

Q. Yes. A. Well —

THE COURT: Your best estimate.

THE WITNESS: Yes.

A. I am trying to do that. I would say that it was maybe five or six.

THE COURT: In the last five years?

THE WITNESS: Yes. We are a small company. We usually bid jobs that are in the range of four to five million dollars. If we get one, five million dollar [38] job, that's it.

THE COURT: For the year. All right.

Q. Can you tell us, or the job, not funded by the local public works program, but the seawall what the dollar amount of your contracts would be with the minorities — A. The dollar amount?

Q. Yes. Could you tell us? A. It is between 300 and 400 thousand dollars.

Q. Could you tell us the gross amount of your contracts during the five-year period? A. The gross amount? It is rough. I would say —

Q. Approximately. A. 20 million. I do not know.

Q. During this same period? A. Maybe less. 17 to 20 million.

Q. During this same five-year period could you tell us the dollar amount, approximately, of all your subcontracts? A. Oh, boy. No way. I would be giving you a ridiculous answer. I couldn't —

THE COURT: I will sustain my own objection to that question.

MR. GILBERT: No further questions.

[39] MR. TUMINARO: I have no questions.

REDIRECT EXAMINATION

BY MR. BENISCH:

Q. With respect to the pipe supply, the tidegate supplier when one of the jobs — the McCombs Dam Bridge.

I believe you testified that he is acting more or less as a broker between your company and the company Coldwell-Wilcox? A. Correct.

Q. Is that supplier doing any work at all with respect to the acquisition of that pipe, those tidegates? A. I am sure that he will process the purchase order end, which we gave him. I would imagine that most of the stuff that he would do would be paperwork. To what extent —

THE COURT: Is the supplier the manufacturer?

THE WITNESS: The supplier that we — Coldwell-Wilcox —

THE COURT: They are the manufacturer?

THE WITNESS: They usually manufacture. Some of the stuff they have independent people doing some, and then they package them.

THE COURT: Your current supplier, however, has no facilities for this, is that right?

[40] THE WITNESS: That's right. No. Yes. He does not do anything.

THE COURT: He does not manufacture anything?

THE WITNESS: No.

THE COURT: All right.

BY MR. BENISCH:

Q. He is simply a go-between, between you and the manufacturer? A. Yes.

Q. Was it your testimony that were it not for the MBE requirements in that contract, you would not be operating in that fashion? A. I would go directly to Coldwell-Wilcox.

Q. With respect to the contract, which you are about to bid on on December 13th, will you tell the Court what if any effect the MBE requirement of that contract is having on your bidding procedures? A. In that particular one, I will be unable to use my normal highway contractors that I have a great respect for. We cooperate and we work together on a job.

I am going to have to hire someone that I never worked with before in my life.

THE COURT: This is completely repetitious. I will cut you off if you continue in this way. We [41] understand what the picture is.

Q. On the job which you are about to bid on, I believe you testified that there was a 500 — 27,000 requirement.

I believe you said that there was $27,000 requirement.

Does the specifying of that figure in the bid in any way inhibit your operations, your normal operations with respect to obtaining prices or shopping prices with your subs, if you are the low bidder? A. Absolutely.

MR. GILBERT: Objection.

THE COURT: I will sustain it.

Q. Will you tell the Court what if any impact or effect the designation of the specific MBE price has in your contract on your business operation?

THE COURT: It's been asked and answered. If I were you, sir, I would sit down and let this witness go. You are not going to prove through his mouth the general overall picture. As I read him, he is a rather specialized general contractor. Unless you have something that's very vital, I would release the witness.

MR. BENISCH: Your Honor, I believe if I could just get an answer to that question.

[42] THE COURT: I said that he cannot answer it.

MR. BENISCH: I have nothing further.

MR. GWATHMEY: Nothing further, your Honor.

MR. GILBERT: Your Honor, I had one question.

THE COURT: I said that before and you asked 20 questions. The witness is excused.

(Witness excused.)

MR. BENISCH: The plaintiffs call Mr. Frank LoCurto.

[43] FRANK LoCURTO, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BENISCH:

Q. By whom are you employed A. Frank Mascali Construction Co., Inc.

Q. Will you tell the Court generally the type of work that the Mascali Company performs? A. We are primarily highway contractors in heavy construction, and we own two asphalt plants, which means we are in the paving business also.

Q. For how long a period of time have you been involved in the construction business with the Mascali Company? A. 28 years.

Q. Were you involved prior to that time with any other company? A. With the City of New York for one year.

Q. What is your present position with the Mascali Company? A. I am the president of the company.

Q. How long have you held that position? A. 11 years.

Q. Do you have any licenses or degrees? [44] A. Yes. I have a Bachelor of Civil Engineering out of the College of the City of New York. I am a professional engineer licensed by the State of New York to practice engineering in this State.

Q. Can you tell me, sir, the approximate annual volume of business that the Mascali Company has performed in the last five years? A. Well, we are averaging somewheres between 15 and 20 million per year with the exception of the two bad years.

Q. Which were what years? A. 1974 and 1975, I believe.

Q. But, for the year 1976, did you average that amount? A. In 1976, yes. Yes, we did.

Q. Has the Mascali Company bid on contracts let by the City of New York which contain a MBE requirement? A. Yes. We have.

Q. Has the company obtained or been the low bidder on any of those jobs? A. We have been the low bidder on five contracts.

Q. Have you been awarded any of those jobs? A. None. We have been notified on three that we have participated a low bid, verbally notified on the other [44] two. But no awards have been made yet.

Q. Are there any Act-funded jobs which the Mascali Company is presently preparing bids for? A. Yes.

Q. Which jobs are those? A. There was one job going in this Monday, which is Monday, December 5th, and that job would be the McDonald Avenue job in Brooklyn.

Q. Would you describe to the Court generally what that job entails, what work it is? A. It is a street job basically. It involves the replacement of the curbs and the sidewalks and the excavation of the street bed itself, including the removal of trolley tracks and restoring the concrete base and resurfacing it with asphalt and any peripheral work or anything that goes along with the contract.

Q. I am showing you a document and I ask you if you can identify that, please. It is a copy. A. It is a portion of the bid documents of the job that is to be let Monday, December 5th, which is McDonald Avenue.

Q. Is that portion which you have before you the portion of the bid specifications, the bid documents which pertains to the MBE requirements on that job? [46] A. Yes. They are.

MR. BENISCH: May we offer that as Exhibit 6?

THE COURT: Is there any objection?

MR. GWATHMEY: May I look at it, your Honor, please.

(Pause.)

MR. GWATHMEY: With the notation that it is a partial document, we don't have any objection to it. It does not purport to be the entire document.

THE COURT: It is only with respect to the MBE. I will receive it.

(Plaintiffs' Exhibit 6 received in evidence.)

Q. With respect to this McDonald Avenue job, which you are bidding on, there is an MBE requirement, is there not, in the bid documents? A. Yes. There is.

Q. What is your company going to do with respect to complying with those MBE requirements? A. Well, I am entertaining a series of MBE companies at the present time, and I will have to use one of the MBEs that I have not used on other contracts that I have been successful with.

Q. What type or what aspect of the work on this [47] McDonald Avenue job lends itself to being subbed out?

MR. GILBERT: Objection.

THE COURT: I will let him answer that.

A. Normally, in a job of this nature there are water mains which is a specialty item in our firm. So we will sub-contract that work out.

Q. Could you find a qualified MBE firm to do that? A. Not to date, no.

Q. What other? A. Secondly, there is the planting of trees, which usually goes to a landscaper, and thirdly, the highly specialized work, which is the electrical work. The reason I say that it is highly specialized is because, as it is electrical work it is specialized to begin with. But there are so many electrical contractors in the City of New York that are not interested, or they are not geared to do the work in the streets. In other words, they can, let's say, wire up a building or possibly do plant work, but we are now physically working in the streets of New York where we are installing conduits for street lighting and conduits and cables to activate fire alarms, and also traffic signalization. This, within the electrical field, is supposedly highly specialized so that there are only four or five contractors that [48] we do business with.

Q. Are any of those contractors MBE? A. No.

Q. Are there any MBEs to your knowledge who would be capable of performing that electrical work that you are talking about, to your knowledge?

MR. GILBERT: Objection.

THE COURT: Ask him if he has a list of MBEs.

Q. Have you obtained a list of electrical contractors who qualify as MBEs from any source? A. I have gotten them just like any other contractor, from the office of Minority Business Enterprises, and I have a list in our possession.

Q. Have you so listed the MBEs on that list? A. The entire 143?

Q. Have you received any affirmative response regarding this work on this job for any of those MBEs? A. We did get quite a bit of response and interviewed quite a few people and we showed them the plans and the specifications and the requirements. They declined to give us a quote, only because it was beyond their facility or beyond their acapabilities [sic].

MR. GWATHMEY: Objection, your Honor. That is hearsay. I move to have it stricken.

[49] THE COURT: It is his opinion.

THE WITNESS: It is not my opinion, your Honor. It is what they told me.

THE COURT: If it is what they told you, then you cannot say it. It must be stricken.

MR. BENISCH: All right.

Q. What other aspects of the job, the MacDonald Avenue job work, are you going to entertain or use for purposes of complying with the MBE? A. Excuse me. Would you repeat the question?

Q. What other aspects of the McDonald Avenue job work are you going to utilize for purposes of complying with the MBE requirements of the bid? A. Generally our firm performs with the exception of those subcontract items that I have spelled out, we perform each and every one of the items on the contract. There are times when we sublet sidewalk and curbs, that is the installation of the street curbs and the sidewalks.

Q. Do you have —

THE COURT: Let him finish the answer.

A. I am presently only — I then look to sublet some sidewalks and curbs, which I have done in the past, only because the sidewalk and curbs are, they are the time-[50]consuming work, the time-consuming portions of the contract. Naturally, our company takes pride in trying to always finish jobs way ahead of schedule, so we ask for — we supplement our forces with the subletting of the sidewalks and the curbs.

Q. Are you going to do that on this job? A. On this job, I am proposing to do that, yes.

Q. By the way, what is the MBE requirement on this McDonald Avenue job, which you are bidding on Monday? A. It is around $329,000, if I remember that figure correctly. 329,000.

Q. It is close enough.

MR. BENISCH: It is 329,381.

THE COURT: I am sure that it is not going to make an iota of difference.

Q. Have you or does the company or has the company had other instances where it sublet out your sidewalk and curb work on other jobs? A. Yes.

Q. Do you have certain contractors who you traditionally used to perform that subcontract work? A. Yes. Over the past 10 years I have used primarily two excellent sidewalk and curb contractors.

Q. Have you an established business relationship [51] with them? A. Yes.

Q. Are they capable and qualified contractors? A. They are qualified. They are reliable and they perform work in a satisfactory manner.

Q. Would you use them on this job? A. Absolutely. For this job, I would, yes.

Q. Are you going to use them? A. No.

Q. Why not? A. Since I have to sublet $329,000 worth of work to MBE, it is impossible to sublet any work in the asphalt paving field. The reason for that is because there are non-existent, no MBEs that can qualify to do the asphalt work. If they were, they would become general contractors just like us. Our company has been in business next year 50 years.

MR. GILBERT: I will move to strike that testimony. It is conjectural.

THE COURT: It may be stricken.

Q. My question to you, sir, is why are you not going to use your usual subcontractors?

THE COURT: The curb and sidewalk.

Q. On the McDonald Avenue job. [52] A. I am not going to use my regular sidewalk and curb people because I intend to sub this work out to a MBE.

Q. What is the basis of your intention, is it the requirement of the contract? A. Because of the requirement of the contract. The only way that I can comply with this contract is, I found, this is the only area that I can sub out because the other area, the other items of work are impossible to sub out.

Q. Have you solicited any MBEs with respect to the performance of this work, solicited prices from? A. Performance of which work?

Q. The curb and sidewalk. A. Yes.

Q. Have you obtained prices from them? A. No.

Q. When will you normally, in the course of business, obtain prices from this fellow, this MBE? A. I do not think that I will ever get prices from them. I will use my prices — were the best that I can do, and if I am successful like the other five that I have where I have used MBEs and I have no firm quotation on them — when the time comes I will award them the contract [53] based on agreements that I have made with these MBEs.

Q. Are you going to subcontract or pay this MBE for the curb and sidewalk work $329,000? A. I have to pay a minimum of that much. I have to spend a minimum of $329,000.

Q. Does 329,000 cover, or is it a reasonable cost of performing the sidewalk and curb work on the contract? A. No. It is not. I think on this particular job — and we have not thumbed it up — I have not spoken to the engineers. I suspect that the sidewalks and curbs could possibly be a greater amount that the $329,000.

Q. Have you solicited in the past any MBEs in the past — and I am speaking about in the last three or four years — have you had occasion on jobs which you have bid to solicit funds which would qualify as MBEs under the Act, to perform work on the various contracts? A. Do you mean contractors who would be termed as MBEs now, but say four or five years ago were not?

Q. Yes. A. Yes. I think that Nick mentioned the same contractor we used, which is the Brotherhood Patrol Service. Magoia. I have used them. I have also had [54] quite a bit of work with L.B.Griffin. Lou Griffin is an excavator, and I used him repeatedly. But at the time I did not use Mr. Griffin because he was a minority or whatever — but his price was right and he knew what he was doing.

Q. Is that the determining factor with respect to who you subcontracted the work out to, for the price? A. Of course. You get the lowest qualified man that can perform the contract, absolutely.

Q. Is the Mascali Company, as the result of the MBE requirements in this contract on McDonald Avenue, being required to pass over its normal non-MBE contractors in bidding its job here? A. Absolutely.

MR. GWATHMEY: Objection. Leading, your Honor.

THE COURT: I will let him answer it. It is fairly obvious from what's gone on before.

MR. BENISCH: Nothing further, your Honor.

THE COURT: Cross-examination, please.

(Pause.)

THE COURT: This hearing is going to take six months if we do it at this pace. When I say cross-examination, I do not want you to waste time.

[55] CROSS EXAMINATION

BY MR. GWATHMEY:

Q. I believe you testified that you were the low bidder on five contracts but none of those contracts have been awarded yet? A. Yes.

Q. It was still awaiting the return of the bids on those? A. I do not understand the question.

Q. Your bids are still under consideration on those contracts? A. On three they notified me in writing that I precipitated the low bid, and that they intended to award. But no award has been made on any of the five.

Q. In each of those contracts you have participation by a MBE? A. Yes, I do.

Q. In each of those contracts the participation of the MBEs is reflected in your contract price, is that correct? A. Yes.

Q. With respect to the electricians that you spoke to, approximately how many came in to talk to you? A. There is one electrical contractor that was [56] fairly interested in first

coming into the streets. There are no Minority Business Enterprises at the present time who are electricians and who can perform work in the streets of New York. There are none. There was one — Electroque, I believe that was it — considering submitting a price to us. I tried to entertain them. I have also experienced a very serious problem in the electrical field, where out of the five or six contractors that are presently doing this type of work, four of them are in Chapter XI.

Q. Are you aware of the regulations under the Act which permit the grantee to seek an exemption on the basis of the fact that — A. Yes, I am.

Q. Did you make any effort to get in touch with any of the grantees on these particular contracts? A. I talked to the Highway Department through the General Contractors Association, and I understand it was denied or refused.

Q. Who exactly did you speak to with respect to your request that you seek an exemption or that the grantees seek an exemption in this particular case, and what did you say to that person? A. At the particular time?

[57] THE COURT: Please, this is irrelevant.

MR. BENISCH: Objection, your Honor, that is irrelevant.

MR. GWATHMEY: Your Honor, I asked him a question and he said that he spoke to someone in the General Contractors Association, and then he offered either a hearsay response or an opinion that his application was denied.

MR. BENISCH: Objection to the initial question. I move that it be stricken.

THE COURT: I am only saying that this last question is completely irrelevant. Let's get on with it, please.

Q. With respect to the sidewalk work, which you are presently attending the contract at to a Minority Business Enterprise on the upcoming McDonald Street Project, does your bid presently reflect the fact that you may experience some increased costs as the result of that? A. Well, I am going to answer that question by what has happened already. I have at the present time, I am being considered for five contracts. I have used five minorities and I am low. None of any of these jobs that I have, have I gotten a firm quotation from an MBE. They were not, either not capable, only because of the [58] extraordinary type of work that it is. It is very unusual. They have not been exposed to it. As the result of it, when I insisted on getting prices — and a beautiful example is the Wherewind (phonetic) in Manhattan. Generally my subcontractors give me a price for sidewalk as maybe $1.50 or $1.65 per square foot. It is a question. Since there is a tremendous volume of sidewalks, when we are talking about two or three pennies per square foot, we are talking about a considerable sum of money because the volume is great. You are talking about three or four hundred thousand square feet.

In order for me to prepare a bid, I try to get a firm quotation from my MBEs. I have not been able to get a firm quotation. In one particular case, Hannibal Demolition-Construction, which I have used, has not laid sidewalk now in ten years. He has lost touch. He does not know, he did not know what the union requirements were, he did not know where he can dump the concrete. That is initially when you replace it. He was not cognizant of many factors involved that would precipitate a price. One lad gave me a price of .32. It is obvious, we know that it is worse [sic] between $1.50 and $1.60. The man gives me a .32 price, so it is obvious that he could not even buy the concrete for that price. So, I am getting [59] concerned.

Another lad comes in and gives me a price of $40.50 square foot. Where do I fit?

What do I do? So, I plug in somewheres between $1.50 and $1.60, which is what we have been doing for the last two or three years, with a slight escalation cost of maybe concrete or labor or rates, depending on the time of the year.

This is what I have done with the five contracts that I have precipitated. There [sic] are really my numbers. I am asking the Minority Business Enterprise to accept those.

I hope he can come out right. I know I can do it with that, and make money. But, I don't know if he can do it. So, therefore, I have to give him an open-end contract and say, "Go out there and try and if you fall on your face I will come in and help you."

Q. You, in fact, have given open contracts with respect to these five bids that you presently established a low bid for? A. Yes.

Q. It is your intention to do the same thing with respect to the 6th bid that we are talking about? A. Yes. I could get hurt in the future if they [60] fall on their faces. I do not know. I have to do it in order to survive.

MR. GILBERT: Your Honor, I move to strike what could happen.

THE COURT: Yes. Just answer the question.

THE WITNESS: All right.

Q. I really don't believe that you have answered the question. The question was, whether your bid price reflected any

anticipated increase in cost, which you thought you might incur as the result of these contracts? A. No. On the five contracts that I have bid, no. I used as a cost the cost that my firm

THE COURT: We have been all through this.

MR. GWATHMEY: Nothing further, your Honor.

THE COURT: Mr. Gilbert, do you have any questions of this witness?

CROSS EXAMINATION

BY MR. GILBERT:

Q. Sir, over a five-year period, outside of the contracts that you have bid on that were funded by the local Federal Public Works Act, could you tell us approximately how many jobs you have obtained over a five-year period? A. I would say about 125 jobs. We average about 25 or 30 jobs a year.

[61] Q. Could you tell me the gross, approximately the gross value of those jobs? A. It has to be in the vicinity of 60 to 80 million.

Q. Could you tell me in the same five-year period, again absent of the local Federal Public Works jobs, how many subcontractors you have used approximately? A. How many subcontractors?

Q. Correct. A. That is a very a difficult question. I am just guessing. Rather than just guess, it is difficult, unless I refer back to the

I do not see how I can answer that. How many subcontractors, 10 or 15 maybe. That's purely a guess.

Q. Out of the 10 to 15, again absent the Minority Business Programs, how many minority contractors have you used? A. About four or five.

Q. Could you tell us the dollar value, approximately, of your subcontracts during this five-year period of time? A. This is purely a guess. I am guessing at 15 or 20 million, maybe.

Q. During the same period of time, could you tell [62] us the dollar value of the minority contractors that you employed? A. There is one very unusual job, but I would have to say very close to about 40 per cent of that, which would be of the, which would be about five to seven million dollars.

Q. Thank you.

THE COURT: All right.

MR. TUMUNARO [sic]: I have no questions.

REDIRECT EXAMINATION

BY MR. BENISCH:

Q. The outbids which you said were in Chapter XI, the electrical contractors, were they MBEs or none? A. None MBEs.

Q. Are you a member of the General Contractors? A. Yes, I am.

Q. The Mascali Company? A. Yes. Frank Mascali Construction.

MR. BENISCH: Nothing further.

THE COURT: I would like to know how much more you have?

MR. BENISCH. Your Honor, I do not believe that I have any more. This will constitute the offer, the testimonial phase. I have one more offer of proof, which [63] I would hand up now, which is a list from Mr. Hudnell's office of the Minority Business Enterprises maintained by the office of Minority Business Enterprises and the City of New York.

THE COURT: Is there any problem with that?

THE COURT: We will mark that as Exhibit 7.

(Plaintiffs' Exhibit 7 received in evidence.)

THE COURT: Do you gentlemen have any witnesses?

MR. TUMINARO: Your Honor, had [sic] the Commissioner, but he had to go to a luncheon appointment. We have not had a chance for the United States Attorney to confer with him. I am afraid that that is basically the situation. We had him here in the courtroom this morning. He left at about one hour ago. I am not sure if

THE COURT: He has an early lunch. I have another matter which we started yesterday that I would like to get on this afternoon. How long do you anticipate that the Commissioner might take? Is he going to be back this afternoon?

MR. TUMINARO: He said that he might be able to get back down here. Mr. Gwathmey has not had a chance to [64] talk to him yet, as I said.

THE COURT: That is what we will call tough.

MR. TUMINARO: It is tough on one day's notice, your Honor.

THE COURT: That's true. I am under the same gun, you know.

MR. TUMINARO: We appreciate that.

THE COURT: I would suggest that we get the Commissioner back here at 3 o'clock this afternoon.

MR. GWATHMEY: Your Honor, I would like to say that there are a variety of documentary exhibits which we would like to get in which are presently unavailable to us. In the space of the day that we have had, we simply have not been able to put our hands on them.

THE COURT: When will you be able to?

MR. GWATHMEY: I am sure that they will be here next week some time.

MR. TUMINARO: Is it possible to have an adjournment at this point until Monday? I do not know your [sic] schedule is like, your Honor. That would make things a lot easier for everybody.

MR. BENISCH: Your Honor, I have the application for the temporary restraining order, the preliminary injunction pending. As the witnesses indicated this [65] morning, there is a job going to be bid on Monday.

MR. GWATHMEY: Your Honor, I think that I can address the appropriateness of the injunctive relief in these circumstances quite adequately. We have a billion dollar Federal

statute here, which the plaintiffs are asking you to enjoin the operation of on the basis of testimony by two witnesses, which, as I understand it, does not allege that they have been damaged in any way by the operation of this statute. They seem to be saying that they object to the fact —

THE COURT: From what they have said, it is pretty well indicated that the public may have been injured by it.

MR. BENISCH: The taxpayers.

MR. GWATHMEY: I think that it is clear that the government is free to spend its money the way it wants to.

THE COURT: The government is nothing but the people of these United States. I hope that some day, some United States Attorneys will find that out.

MR. GWATHMEY: I understand that, your Honor. I think if the legislators will determine that they wish to expend its money in its [sic] way, then that's a legitimate goal. That in fact is precisely the situation.

[66] THE COURT: It is not a legitimate goal in my opinion to incorporate a Welfare program in a Works Project. I am going to be in recess in this matter until 3 o'clock. I will expect to see you back here. Tell me where you are then. Tell me what your problems are with your documents, whether you can get them and where you can get them and so forth and so on.

MR. BENISCH: Your Honor, are the defendants going to produce Mr. McNamara as a witness or not?

MR. TUMINARO: We will try to produce him. I do not say that we can tell you that right now. We will try to get Mr. McNamara here at 3 o'clock. But, beyond that, I cannot say that he is going to be here at 3 o'clock. I have to locate him.

THE COURT: How does the Commissioner like working on Saturdays? Can you bring him in here tomorrow morning? Think about that. All right.

(Time noted: 12:30 p.m.)

[67] THE COURT: I am sorry to keep you gentlemen waiting. We had some fairly important business to do on the otherside.

MR. GWATHMEY: Your Honor, I would like to make a brief argument in support of the motion by the Government to dismiss the application by the plaintiffs for a preliminary injunction in this proceeding.

THE COURT: All right.

MR. GWATHMEY: I think it is imperative to begin consideration of such a motion with the discussion of what plaintiffs have shown in terms of irreparable injury or injury in fact here. We have had two witnesses who have appeared in this proceeding, on [sic] of whom testified to the effect that he had a number of contracts on which he had passed through his increased costs to the government of the United States. The second witness in the proceeding testified that he had achieved the low bid in five contracts under the program and statute here in issue, and further testified that as yet he has experienced no damage and in reality doesn't anticipate, can not anticipate with certainty, any damage in this proceeding. This is a Federal Statute designed to pump into the economy some four billion dollars in federal funds on an expetited [sic] basis.

[68] The purposes of the statue [sic] are stated in the legislative history, and they are to alleviate unemployment in the country, a problem which Congress deemed to be of critical

importance throughout the legislative term and to stimulate the economic growth in the industry in general and the contruction [sic] industry in particular.

A further factor was to build vitally needed or needed public works projects which had been sitting idle for a number of years. The objective of the statute which was passed by an overwelming majority was to alleviate social ills rapidly.

Accordingly, Congress got the expetiting [sic] procedures. Any delay which causes those expetiting [sic] procedures to be put over obviously functions as a great detriment to the public interest.

Moreover, funds allocated under this program, unless construction begins in the project for which they are allocated within the ninety days, are subject to recall. They are also subject to recall if construction or work on the project does not begin by December 31st, 1977.

Now this program as I have described it could be compared to the welfare statutes of the '30's which the Court is well familiar with. We can conceive no congressional or no constitutional infermity [sic] in any statute which is [69] based on the premise that it is designed to alleviate social ills. We note in passing that this statute does contain provisions which are designed to prevent the gross waste of money.

First of all, there is a provision which governs the pass through of certain expenses in the circumstance where a minority contractor does no more than act as an agent for a supplier to the prime contractor. I believe we heard an instance of a possible application of that, here today, although the facts weren't developed sufficiently to warrant any such conclusion. But there is a provision expressly in the regulations under the

statute which says that where the minority business does no more than act as an agent in getting whatever it is that is to be supplied to the prime contractor, then the only thing that is attributable to the MBE expense level is the amount of commission which he can legitimately charge on that.

A second factor which the regulations contain is the design to prevent the waste of money as the provision which allows the Secretary to waive the application of the ten percent minority set aside.

In the circumstance where there is a finding that no minority is available to perform the work which the prime contractor is attemting [sic] to perform, there are[70] procedures set out for the granting of the project to make application for that. They are adequately described in the papers by the parties here, I believe.

I wish to reemphasise [sic] however that in an application for a preliminary injunction the weighing of the public interest and in this case the public interest which we consider to be compelling against the showing in this case of a private interest, which in fact is no showing at all, but even if it were we would agrue [sic] it would not be sufficient to overcome the public interest, is something which the Court has to address very seriously before entereing [sic] into any preliminary injunctions. I just would like to briefly move on to a discussion of the constitutionality of the ten percent minority set aside in addition.

The legislative history —

THE COURT: As I understand it this is contained in your papers.

MR. GWATHMEY: Yes.

Transcript of Proceedings

THE COURT: I will have to read the papers in any event.

MR. GWATHMEY: I will pass over that and I will move to the final point.

THE COURT: I understood that you had a witness.

MR. GWATHMEY: May I make one more request of you?

[71] THE COURT: I would suggest that we get the testimony on the record. Our court reporters have been working all day and I would like to give them an opportunity to go home and rest. We are going to work tomorrow too.

MR. GWATHMEY: I understand that. Before the government proceeds with a presentation of its case, it is imperative that the government realize what it is we are conducting here. Now, there has been some talk, it is unclear to the government whether there has been a consultation here of the motion for a preliminary injunction and the trial on the merits.

THE COURT: It certainly should have been made clear the other day. I have so ordered it.

MR. GWATHMEY: In the event that this is a trial on the merits if that is what your statement means —

THE COURT: It is a combination.

MR. GWATHMEY: The government has to request that this matter be adjourned for a short while. We want to make it very clear that we are not going to stipulate to any temporary restraining order against the operation of the statute here challenged. We also wish to point out that this statute is

significant and important to the government. The government has had one working day to prepare a brief which you directed that we prepare and to prepare evidence for presentation to you. The plaintiffs have had [72] an amount of time which we don't know. But we know that it is substantial. That circumstance to require us to go forward where the best we have been able to do is to talk to our witness in the hall and where we have not had the opportunity to get witnesses from Washington from the EDA, and where we desire the opportunity to present either by affidavit the testimony of those witnesses or in person, I think substantially prejudice our rights.

Accordingly we would request that we be allowed to take this matter up at some point in the future, but again we want to emphasize that we are in no way willing to consent to any temporary restraining order because we believe there is no basis for any such order in this case.

Thank you.

THE COURT: All right.

MR. TUMINARO: The State would want to joint [sic] in the motion. We have also submitted papers to the Court which I think sets forth the basis for our joining in the motion against the preliminary injunction. I would also point out of course that if injunctive relief is granted this may have nationwide impact and as such we have had ten cases.

We have had a temporary restraining order, we have not had an injunctive relief any where as far as I can tell. There is also that case in California. I will just [73] point it out to your Honor. I am sure your Honor is aware that the impact of any such ruling would have national effect.

THE COURT: You have a prospective injunction in the one in California?

MR. TUMINARO: With respect to certain contracts only, I think. I think the —

THE COURT: It is prospective, looking to the future.

MR. GWATHMEY: If I may address myself to that case. The facts I believe are that there was no money to be expended any further in California and that the injunction therefore had no effect on the operation of the statute in anyway. I have to make one more argument, your Honor.

THE COURT: This is a play on words. If I say you can't spend the money, that injunction certainly has some effect.

MR. GWATHMEY: The money had already been spent so that there was, there was no practical effect.

THE COURT: The Judge was not aware of the fact that all the money had been spent at that particular point. Obviously he wouldn't have written that if he thought that there had been.

MR. GWATHMEY: I have to move for a directed [74] verdict in the light of the fact that the plaintiff completed its case. In light of the government's position I strongly urge that that case can not make out a claim for a violation of the constitution or the statutes cited in the plaintiff's complaint.

THE COURT: All right.

MR. GWATHMEY: I request a ruling.

MR. BENISCH: Your Honor, I think it is absolutely essential that we all, particularly the Court bear in mind the particular relief that we are seeking here before this Court. The government has argued and the defendants have argued constantly that for the Court to grant any form of injunctive relief may have national repercussions, national impact. They hold up funding of four hundred billion dollars worth of work.

Examination of our papers makes it perfectly clear that the plaintiffs are not seeking to stop one job or one piece of Act-funded work. What we are seeking from the Court is relief from the implementation of the ten percent set aside provisions of the statute. We want the work if possible to go forward, we don't want to, if you will, throw a monkey wrench into the employment that will be generated by these jobs. We are simply asking-that until a full determination on the merits can be had, that the [75] status quo as it existed prior to the passage of this statute, that is free enterprise, be maintained. We are not seeking to tie up work. The other case and every case with the exception of the Pittsburgh case, and the California case, of course, but the other cases which are appended to the government's papers here, all of those cases Wyoming, Florida, New Orleans, the Court clearly decided and refused to grant the injunction on a balancing of the equities because the plaintiffs in those actions had sought to stop the letting of the work. We are not seeking that here.

The Court's decisions are clear that on a balance of the equities the Court said that we are not going to, and as in the California case, we are not going to hold up "x" number of man-years or person-years of work because we have a ten percent set aside here. But it is implicit, it is explicit in the California decision and implicit in the other decisions that the Court clearly

felt that there was some merit to the challenge of the constitutionality; but on the balance of the equities they were not going to hold up the letting of the work.

I submit for the Court to grant the relief that the plaintiffs are requesting here is not going to hold up the work. We are asking the Court to say to the State and [76] the City, go ahead and let your jobs but you can not refuse to grant and award contract [sic] based on this failure.

We are asking the Court to say to the government, you will not withhold funding of those grants. The grants have been made. The moneys will be drawn down as the projects progress. We are saying to the Court, to direct to the government, do not withhold the funding of these contracts while these contractors work and the projects are being built.

The relief we are seeking is I think significantly different from the relief that was sought in the other cases throughout the country. And I think that the way the relief is styled — it is both practical and reasonable on the balancing of the equities because I think it was manifested clear today that the two witnesses put on without question indicated that there were suppliers, or there were subcontractors who they would normally use who they can not use, to the extent of that set aside, those non-minorities, many of whom are as well disadvantaged.

In fact I believe there were a few in Chapter 11, the non-minorities. They are being denied the work as a result of this unconstitutional portion of the statute. So, we say to the Court that this case lends itself to the relief which the plaintiffs have requested here, and I just simply [77] ask the Court not to be misled by the government's brief, which in deed attempts to equate the relief requested here with holding up all the work across the country.

THE COURT: All right.

MR. GWATHMEY: In answer to that, your Honor

THE COURT: Let's get the witness on the stand. I will reserve with respect to that.

MR. HARTMAN: Your Honor, my name is Gerald Hartman, from the Justice Department in Washington. I tried four of these other cases and I think there has been a misrepresentation here. I don't think intentionally of course, but I would like to state for the record and have it reflected correctly what occurred in the other litigations. As far as the question —

THE COURT: It is not the best evidence. If you want to testify, fine, but why don't you give us a memorandum and tell us what the cases are. I will read the decision and find out.

MR. HARTMAN: The Court speaks for themselves on the decisions. They reflect that the relief sought was beyond just stopping the provision.

THE COURT: Fine.

MR. GILBERT: Your Honor, I would like to state that the Health and Hospital Corporation has been served. They have asked us to appear for them. I want the record [78] to note that. I also join in the motions made for dismissal and on behalf of my client to add an additional ground, and that is on the basis of the holding of the City of Kenosha against Bruno, 412, U.S. 507, which held there is no jurisdiction because the individual governmental representatives are not named.

THE COURT: All right.

Transcript of Proceedings

JAMES F MCNAMARA, called as a witness by the Government, being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MS. DALEY:

Q. What is your present position, sir? A. I am an Assistant Commissioner for the New York State Division of Human Rights.

Q. How long have you held that position? A. Since March of this year.

Q. What are your duties and responsibilities briefly as Assistant Commissioner? A. My primary responsibilities are to develop State programs in the area of contract compliance, and minority utilization on State work.

Q. Prior to being Assistant Commissioner, what position did you hold? [79] A. I am on leave of absence from the City of New York where I served as director of contract compliance from October 1973 until March of this year.

Q. Would you tell us please what were you [sic] duties and responsibilities as the director of contract and compliance with the City of New York? A. They were two responsibilities. The main impact of the [sic] was to encourage the employment and the training of minority group workers and related to that also to encourage the utilization wherever possible of minority contractors on City work.

Q. Prior to being the director of contract compliance by whom are you employed? A. I was employed by the City as

director of building trades training programs from sometime in 1970 until I became director of contract compliance in 1973.

Q. What were your duties and responsibilities there? A. To establish training programs to bring more minorities into the mainstream of contruction [sic].

Q. In connection with this course of employment which you have had since approximately 1972 to the present did you have occasion to familiarize yourself with minority participation in the contruction [sic] industry? A. Yes. Probably more accurately lack of participation [80] of minority contruction [sic] companies in the industry.

Q. Would you tell the Court please what conditions you observed with respect to minority participation over the past five years? A. Essentially —

MR. BENISCH: Objection to the testimony. This is irrelevant to the question at hand as to minority participation. Also, the witness has yet to be qualified as an expert as to MBE participation. I think in the first instance it is irrelevant to the issues before the Court.

THE COURT: I would say this: Having some familiarity with the question of minority employment in the contruction [sic] industry, and consequently my familiarity with Mr. Tuminaro, I feel that this subject matter is very closely related to the problem that the government or the Congress of the United States tried to solve in part by the ten percent provision. To that extent I find it to be relevant.

MR. BENISCH; Your Honor may I request the Court to limit the testimony then to whatever utilization or

underutilization of minority business enterprises Mr. McNamara is familiar with and not necessarily to employees and affirmative action. That is unions hiring people as opposed to entrepreneurial endeavors.

THE COURT: As I understand his position, his job then [81] and now to some extent is to see that employers comply with the affirmative action programs of the State and City and those involve the employment of varying percentates [sic] of the minorities.

MR. BENISCH: Workers. This, we are presenting here, is employment of business enterprises, MBEs, fifty percent of the stock of which are owned by businessmen, black or minority businessmen.

THE COURT: I understand.

MR. BENISCH: Who also must comply with the affirmative action requirements?

THE COURT: I understand that. But like Mr. DiMenna, it may be that some of the black businessmen started out as apprentice carpenters and it may be that they never had a chance to start out as apprentice carpenters. I think it is relevant. I will let him testify.

Q. Mr. McNamara, I believe the question to you was would you describe to the Court please the conditions that you have observed in the contruction [sic] industry over the past five years, with respect to minority participation therein? A. To focus on the problems of minority contractors, their problems have been manifold. It is sort of a cycle. In order for them to step forward with the series of meetings, [82] meeting the series of requirements involving bid bonds, performance bonds, insurance and so forth.

Very often although they may have the capacity to perform certain work, they are unable to overcome all of these hurdles. It gets to be a vicious cycle because the insurance companies and the banks will not cooperate with them if they don't have an established track record. They can not establish a track record if they don't get a chance to perform. So that type of programs that I have observed and been involved with particularly with the City, have largely been ineffectual. We have required that prospective general contractors refer to a list of minority contractors that our office maintained. We have asked that they make attempts to solicit them and involve them but as a matter of the fact the net results have been extremely low.

It is extraordinarily difficult to monitor that type of operation when it is a voluntary effort that doesn't lend itself to much policing or monitoring.

Q. You told us about some problems of bonding. Can you tell us about specifically about any other problems that MBE or minority owned contruction [sic] firms encounter that you have observed? A. This again I might say gets into the area of workers and minority workers. I would estimate that about two-thirds [83] of the minority firms on our listings were non-union. They operated on the fringes of the industry. We would hear of occasions when some of the minority firms could be engaged in negotiations with the union contractor but they were unable to conclude these negotiations for subcontracts because the minority contractors work force was not in the union. They were largely minority workers and in some cases the union wasn't, simply wasn't willing to accept them into membership. This added to the problems of the minority contractors in getting a fair share of the work.

Q. Can you think or are you aware of any other problems that minority contractors have encountered? A. Well again it

is not being part of the system. They are not plugged in on the information. They may not be able to get advanced drawings or may not be able to get access to take off of jobs, the preliminary plans and budget estimates.

By not having the organizations who provide that service, by not having access to this information they are further frozen out.

Q. Does New York State have any programs which are analyqous [sic] to the Public Works Employment Act under consideration here? A. Yes. The New York Legislature passed a bill about [84] a year or so ago, establishing a set aside program for minority contractors and small business. It had to do primarily with the New York State Dormitory Authority.

Q. Could you tell us please what has been the State's experience in implementing that program? A. I am sorry to say that program remains largely on the shelf because of the funding difficulties in marketing bonds. Although the law is passed, I can not tell you that it has been implemented to any serious degree because of the financial crisis.

Q. What effects if any have you observed concerning the impact of the Public Works Employment Act on minority participation in the contruction [sic] industry? A. Well, for example just from meeting yesterday with some of the State agencies involved in the program, they described it to me as the first really successful route in assuring that there will be a portion of the work going to minority contractors.

MR. BENISCH: Objection as hearsay, your Honor.

THE COURT: I will permit it.

A. According to the reports that have reached me, it also has the impact of improving the employment picture for workers. In other words, black workers, minority workers as a general rule are suffering an unemployment [85] rate of about twice the white population. When you are dealing with the program to give work to minority contractors you are almost automatically helping to attack the problem of unemployment among black and Puerto Rican workers as well.

MR. [sic] DALEY: Nothing further.

CROSS-EXAMINATION

BY MR. BENISCH:

Q. Mr. McNamara, how much experience have you had with the jobs funded under the Public Works Employment Act? What has your experience been? A. My experience is not in the awarding of them, working in the line agencies, but rather from acting as a liason [sic] and talking to some of the agencies involved.

Q. Am I correct in assuming that the primary purpose of your office is equal employment opportunity for minority persons in the labor force, these are the unions in particular, contractors? Is that correct? A. That is our primary purpose. But we have a secondary purpose of looking into discriminatory practices effecting small entrepreneurs.

Q. I take it you are testimony [sic] that you have not discovered or ascertained there to be any concerted effort on the part of the business community in this area not to [86] do business with MBEs, is that correct, sir, to your knowledge has

there been such a movement afoot? A. Only general knowledge of all the litigation going on across the breadth of the country.

Q. I am asking in this local area, are you aware, sir, of any movement afoot in the contruction [sic] industry where contractors large or small have concertedly refused to do business with MBEs, because they are minorities, do you know that for a fact? A. I am aware of Herrick Electronics suing the City of New York being unwilling to sub out his work.

Q. I am asking you whether you know of any instance where a contractor has refused to do business with an MBE?

MR. TUMINARO: You said concerted. That wasn't the question.

THE COURT: Yes.

Q. Do you know of any concerted movement in the City of New York by the contractors, non-minority contractors who refused to do business with minority contractors, are you aware of that? A. Only aware of it as a result of their asserted efforts to come into court to throw the program out.

Q. Whose concerted efforts? [87] A. Contractors Associations.

Q. This action right here? A. Specifically the action we are in court today on?

Q. You don't take this to mean that this is an effort by the construction industry to refuse to do business with minority enterprises, do you sir? The fact that the industry has brought this action? A. That certainly is a large consequence and a net effect of it, yes.

Q. The institution of this action indicates to you a concerted effort by the non-minority contractors to freeze out the MBEs, is that what you are saying? A. It has that effect, yes.

Q. Are you aware of how many members of the associations here qualify as MBEs? A. No, I don't.

Q. Are you aware of the fact that there are members of the plaintiff associations who quality as MBE? A. I am sure in every large association of employers there are one or two minority contractors who by virtue of that affiliation can be paraded out as supporting this action.

Q. I see.

Now sir, am I correct that there exists in the area of minority business enterprise, assistance shall we say, a [88] program by the Small Business Administration of the Federal Government to provide funding for minority business enterprises with respect to obtaining bid bonds and other working capital loans; are you aware of that?

MR. [sic] DALEY: Objection, your Honor. I believe this exceeds the the [sic] scope of direct examination.

MR. BENISCH: I think Mr. McNamara testified about cash flow and bonding problems.

THE COURT: Overruled.

Q. The question Mr. McNamara, and I will withdraw it, and repeat it. Are you aware of a program in the Small Business Administration of the U.S. which provides for preferred treatment to minority business enterprises in obtaining funding

or loans be it through the SBA or their banks to put finance bid bonds construction performance and payment bonds and working capital? A. Yes. I am aware that there is an SBA program but I hesitate to say that it is on going now. I understand a lot of the funds have frozen. I understand a lot of the program is undergoing reorganization and certainly from conversations I have had with some people who have solicited loans I do not get the impression that the program has produced any significant impact on contruction [sic] contractors.

Q. Are you giving us the benefit of your impression, [89] Mr. McNamara? A. My impressions, reports, conversations, meetings, etc.

Q. What did the provisions of the SBA, NBE preferences provide, if you know?

MR. [sic] DALEY: Objection, unless he can show that the witness is qualified as an attorney to answer that question.

Q. You testified that all of New York State — you testified as to what —

THE COURT: He hasn't testified as to the law. He hasn't testified as to the provisions of it. He has testified that the law was passed.

MR. BENISCH: I will withdraw the question.

THE COURT: The Court takes judicial notice of the fact that there is an SBA Act and that there is a preference provision which was subsequently enacted.

Q. All right, Mr. McNamara, with repsect [sic] to the inability of the MBEs in this area to obtain bidding documents

or contract documents, am I correct, sir, that this is a function of the letting agencies charging money to take out bid documents and the MBEs, either for one reason or another do not elect to pay the moneys to take down the bid documents to look at the work, is that correct? A. In part it is. But there are also other services, [90] reporting services that provide this kind of thing that they simply don't have the funds to subscribe to?

Q. Are they not City agencies that make a special point of advising MBE contractor groups or MBEs individually of City work that is to be let in this area? A. There are City agencies and I might add some state agencies that do have some fairly decent track records in making that effort. But they are very spotty —

MR. [sic] DALEY: Objection. He didn't let the witness finish.

A. There are some honorable exceptions to that but it is not an on-going practice in every one of the myriad State and City agencies to do that, unfortunately.

Q. But as I understand it Mr. McNamara that the City and State Agencies have to a large extent gone to and made efforts to help minority business enterprises in this area and bring them into the mainstream of the construction work here in this City, isn't that so? A. Not in any substantial or successful way.

Q. All right. This then I take it is the fault of the City agencies and the State agencies, isn't it?

MR. TUMINARO: Objection.

THE COURT: The objection is sustained.

Q. When you refer to minority businesses, which you have [91] observed over the years in your tenure as a State and City employee, what kind of business are you referring to, what are they? A. Most of my contact has been more in the construction area, construction contractors and suppliers.

Q. What do you, when you talk, when you mention the term minority businesses, what is you [sic] definition of the term as you use it, who is a minority business? A. We use the standard federal nomenclature, a firm where the majority of the company is owned by principals who are members of minority groups.

Q. I see.

In other words, the ownership is controlled by minority groups. A. Fifty percent or more minority controlled, blacks, Spanish surnames, orientals.

MR. BENISCH: I have nothing further, your Honor.

MR. [sic] DALEY: No further questions, your Honor.

THE COURT: You are excused.

(Witness excused)

MR. GWATHMEY: Your Honor, we handed you yesterday a set of exhibits or addendums to our memorandum of law which were numbered one through eleven. I have Exhibits 12 through 15 now which const'tute some of the documentary [92] evidence that I referred to earlier. I would like to hand them up to you, your Honor.

In addition a number of these exhibits are reports of governmental agencies. We would like to have them introduced into the record as evidence. I think we can facilitate it by simply going through an [sic] noting the numbers of the ones that we wish to have introduced and asking Mr. Benisch whether he will stipulate to that admissibility.

THE COURT: All right. What I would suggest we do, is we take a five minute recess and you and Mr. Benisch can go over it right here. When you are ready I will come out and we can enter them.

MR. BENISCH: Your Honor, as I said to the Court, I will hand something up which I think will be helpful and not be a burden on the Court. There has been a recent decision in the Fifth Circuit Court of Appeals in Weber against Kaiser Alluminum, [sic] the Fifth Circuit, dated November 17, 1977, which I became aware of subsequent to the preparation of plaintiff's brief. I would like to hand that up for the Court as an aid to the Court.

THE COURT: All right.

MR. BENISCH: It is too new to be cited.

THE COURT: Give them a copy.

We'll take a short recess.

(Recess)

[93] MR. GWATHMEY: Your Honor, Mr. Benisch has stipulated the admissibility of Exhibit 2, 11 and 12 to our memorandum of law. He has taken exception to our proposed offer of first Exhibit 1. The document captioned Minorities and

Women as Government Contractors, a report of the U.S. Commission of Civil Rights, dated May 17th, 1975. I would like to have marked for identification, please. I offer it in evidence also.

(Defendant's Exhibit 1 marked for evidence.)

MR. BENISCH: Your Honor, shall I address myself to my objections to this?

THE COURT: Why don't we do it this way. Why don't we know if you are objecting to all of them and then let's get on with all of them. If these are reports of governmental commissions, I am going to receive them. I think that I am permitted to do that under the rules of evidence in the Federal Court.

MR. GWATHMEY: We are additionally offering Exhibits 13, 14 and 15 to our memorandum of law, 13 being Minority Business Opportunities Committee Handbook, U.S. Department of Commerce, Office of Minority Business Enterprise. Mr. Benisch has pointed out that – I take it back.

THE COURT: All right.

MR. GWATHMEY: I offer it as Defendant's Exhibit 2.[94] I offer as Defendant's Exhibit 3 the report of the Controller General of the U.S., a document entitled Department of Defense Program to help minority run businesses get sub-contracts not working well. I note that this document is an excerpt beginning on page 19 of the publication, and although I am sure this is available to Mr. Benisch upon his application, we will undertake to submit to the Court and to him a full copy of the document if that will alleviate part of his objections to it.

THE COURT: I would submit a full copy to him.

MR. GWATHMEY: We will do that. We will later exchange it for the full copy.

THE COURT: Yes.

(Defendant's Exhibit 2 and 3 for identification.)

MR. GWATHMEY: I offer a document captioned Summary of Activities of the Committee on Small Businesses, House of Representatives, 94th Congress, November, 1976. This is also a report. Subject to the same limitation I stated with respect to the last document I will submit the full report if that is deemed necessary. However, this is a report of Congress.

(Defendant's Exhibit 4 marked for identification.)

THE COURT: Mr. Benisch, do you have any reason to doubt the authenticity of these reports?

[95] MR. BENISCH: Your Honor, with respect to Exhibits — I have only here the number 14 annexed to the brief, I am getting only a protion [sic] whereas the table of contents indicates that it goes from page 1 through 28 plus. I only get from page 19 to 20. I simply said that it is a partial offer.

THE COURT: What I would suggest is if you have similar objections with respect to any of these documents, that you be furnished with a full copy of the document, and by Monday. And if you then have the objections to the authenticity, or if you wish to submit to the Court such other portions that you would be authorized to do it, because I would accept it if you will, for instance, it is a handbook issued by Commerce or something like

that I will take whatever you send to me as being the part that you think is important as far as your case is concerned.

MR. BENISCH: Yes. With respect to Exhibit No. 1 for identification, which is the Exhibit 1 of the brief, Minorities and Women as Government Contractors, I believe under the Federal Rules of Evidence the material is objectionable, that is a government publication if the sources of the other information or the circumstances of it indicate a lack of trustworthiness. I am quoting from the Federal Rules of Evidence.

[96] THE COURT: What indicates a lack of

MR. BENISCH: The Exhibit itself in referring the Court to Page 111 of that Exhibit, states that — again your Honor, if I call the Court's attention to it — Exhibit 1 for identification consists of a 97 page document. The full document consists of a 189 pages.

THE COURT: Do you have the full document?

MR. BENISCH: Yes. Referring to the full document, pages 11, pages 111, if you please, the following language under paragraph 1 states as follows: Federal Government procedures for collecting and distributing data on minority firms and for determig [sic] their share of government contracts are inadequate and inconsistent.

Furthermore, referring over to page 78 of the offer, to the following language at the first to last paragraph on that page, I quote availability of data, nine of the ten federal agencies surveyed by the Commission reported that they had not established systems to collect relevant and reliable information on minority subcontracting. And then there is a footnote.

I am contending to this Court that the offer by its own language is suspect of trustworthiness and is nothing more than the best job that could be done under the circumstances, albeit the information was lacking and inadequate.

[97] THE COURT: That goes to the weight and that is all. I will receive it.

MR. BENISCH: All right.

THE COURT: Is [sic] there is anything else that you want to read into the record with respect to the full report other than the item that you did read?

MR. BENISCH: Between 97 and 183? Could we have the same stipulation from the government as we did with others, and that is they will offer the full document as the exhibit rather than just a partial offer?

THE COURT: All right.

MR. BENISCH: Thank you.

THE COURT: What else do we have? You are offering all the others there are as well, is that it?

MR. GWATHMEY: I am offering the ones which I stated before, to wit, 2, 11 and 12, to which plaintiffs had no objection.

THE COURT: Those are all received. Any document that is not complete we will get the complete document.

MR. GWATHMEY: Your Honor, I would like to make one more procedural change here. The brief which we submitted

to you earlier today had a mixup in the order of the pages. I would like to give this one to you for the other one.

THE COURT: I don't know if I have the other one. [98] He has it.

We believe in splitting the burdens. I carry some and my clerk carries some.

MR GWATHMEY: I would renew our motion for a directed motion at this time.

THE COURT: That would be reserved. All motions are reserved at this point. I will consider this matter fully submitted as of five o'clock on Monday.

MR. BENISCH: May the plaintiffs have until that period to respond to the State, to the defendant's brief?

THE COURT: That is what I mean. Anything that you wanted to submit, five o'clock Monday is the deadline.

MR. BENISCH: Will the Court entertain plaintiff's application for the temporary restraining order with respect to the contracts being let on Monday that were testified about today?

THE COURT: No.

MR. GWATHMEY: May we make an application for Wednesday?

THE COURT: No.

MR. GWATHMEY: To submit a post hearing memorandum?

THE COURT: No. Monday is a sufficent period of time.

MR. GWATHMEY: Thank you, your Honor.

[99] THE COURT: Good afternoon.

MR. GWATHMEY: Thank you, your Honor.

(Time noted: 5:30 p.m.)

[100] WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Nicholas DiMenna	9	24	39	
Frank LoCurto	43	55	62	

EXHIBIT INDEX

Plaintiff	Identification	In Evidence
1		5
2, 3		7
4		8
5	15	16
6		46
7		63
Defendant		
1		93
2	94	
3	94	
4	94	

PLAINTIFFS' EXHIBIT 1 — EDA MINORITY BUSINESS ENTERPRISE (MBE) TECHNICAL BULLETIN DATED OCTOBER 11, 1977

EDA Minority Business Enterprise (MBE)
Technical Bulletin
(Additional Assistance and Information Available
To Grantees and Their Contractors
In Meeting The 10% MBE Requirement)
October 11, 1977

I. Introduction

II. Grantee Project Management

1. Definition of Minority Group Member

2. Single Prime Contract Project

3. Multiple Contract Projects

4. The 40% Completion Report

5. Determination of Bona Fide Minority Business Enterprise

III. Waivers

1. Waiver Requests

2. Waiver Criteria

3. Unsatisfactory Results From Competitive Bidding

4. Excessive Price of Responsive Bidders

Plaintiffs' Exhibit 1

IV. Other Problems

1. Federal Bonding Requirements

2. Delayed Payment To MBE Subcontractors

3. State Statutes As Impediments to MBE Participation

V. Technical Assistance

1. Small Business Administration (SBA)

2. OMBE SBA Full Service Cities

3. FDA Funded Technical Assistance

4. F.W. Dodge Construction Reports

VI. Complaint Procedures

Plaintiffs' Exhibit 1

I. Introduction

As the Guidelines for Round II of the LPW Program state, EDA "ascribes a high priority to the development and support of minority business enterprises and will enforce the 10% MBE participation requirement strictly." The purpose of this bulletin is to set forth further guidelines which are to be considered in resolving problems which may arise in implementation of the MBE program. This bulletin should be used as a supplement to the Guidelines for 10% Minority Participation in LPW Grants which have already been provided.

II. Grantee Project Management

1. Definition of Minority Group Member

13 CFR 317.2 defines a minority group member as "a citizen of the United States who is Negro, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut." Further definition of these minority groups is required to clarify the many ambiguities associated with their use. Therefore, these terms shall be interpreted by EDA in the following manner:

a) Negro — An individual of the black race of African origin.

b) Spanish-speaking — An individual of a Spanish-speaking culture and origin or parentage.

c) Oriental — An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.

d) Indian -- An individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a

Plaintiffs' Exhibit 1

suitable authority in the community. (A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.)
e) Eskimo — An individual having origins in any of the original peoples of Alaska.
f) Aleut — An individual having origins in any of the original peoples of the Aleutian Islands.

2. Single Prime Contract Project

When most or all of the grant funds are to be expended through one prime construction contract, the grantee will have to rely on that contract to generate the required expenditures for MBEs. The grantee should require all bidders for the prime contract to provide for expenditures of at least 10% of the grant funds for MBEs. A requirement for expenditure of 10% of contract funds would not suffice because the successful bidder might well bid less than the full grant amount. In order to avoid confusion, that amount of MBE participation should be expressed in absolute dollar terms rather than as a percentage. Thus, if the grant is for $1 million, the invitation for bids should require spending at least $100,000 for MBEs so that the grantee will be sure of fulfilling its 10% MBE requirement regardless of the exact amount of the successful low bid.

3. Multiple Contract Projects

As stated in the guidelines, the grantee has the responsibility for planning how the 10% MBE requirement will be met when a project is to be implemented through a number of contracts. The grantee may enter into direct contracts with MBEs involving at least 10% of the grant. Otherwise, invitations for bids for those contracts which will involve subcontracts or purchase of significant supplies must include a requirement of sufficient MBE participation so that 10% of the grant funds will be spent

for MBEs. Grantees should not put off fulfillment of their 10% MBE obligation until contracts to be made late in project implementation, unless they are sure that sufficient MBE participation will occur under those later contracts.

If a grantee's initial report on Form 530 Part A does not reflect MBE participation in at least 10% of the funds to be spent under contracts already executed, EDA will ordinarily not delay issuance of the first letter of credit but will insist that the grantee demonstrate how it will expend sufficient funds in future contracts to fulfill its requirements.

4. 40% Completion Report

If a grantee's report on Form 530 Part A at 40% completion does not reflect 10% MBE expenditures through executed contracts then in force, the grantee must demonstrate how it will meet its 10% MBE obligation before EDA will issue the second letter of credit. That demonstration must ordinarily include the names of the proposed MBEs, a description of the work each will perform, and estimates of the amount of funds to be spent on each proposed contract and of the date on which each contract will be signed. If such information is not available, the grantee will have the burden of producing other information to demonstrate that it will comply with the 10% MBE requirement or that a waiver should be issued.

5. Determination of Bona Fide Minority Business Enterprise

For purposes of the LPW program, an MBE is a business at least 50% owned by minority group members or other MBEs (or, in the case of a publicly owned business, at least 51%). For example, enterprises A and B form joint venture J.V., in which they participate equally. Enterprise A is wholly owned by

Plaintiffs' Exhibit 1

minority group members, and enterprise B by non-minority group members. Enterprise A qualifies as an MBE, and since A owns 50% of J.V., the joint venture also qualifies as an MBE.

An MBE is bona fide if the minority group ownership interests are real and continuing and not created solely to meet the 10% MBE requirement. In addition, to fulfill the purpose of the 10% requirement the MBE must itself perform significant work or services or provide supplies under the contract and not act as a mere conduit. In short, the contractual relationship must also be bona fide.

EDA will generally rely upon the statements contained in form ED 530, Parts A and B, to determine whether an enterprise is an MBE and the dollar amount of its contract. However, EDA may require further information in the following circumstances:

a) The enterprise does not appear on the list of MBEs maintained by EDA at its Regional Offices.

b) Receipt of a complaint that the MBE or the contract is not bona fide. [See Section VI regarding complaints]

c) The enterprise is not wholly owned by minority group members, particularly where the minority ownership is of recent origin as in a joint venture.

The question may arise whether an MBE is bona fide. In such a case, EDA will seek to determine whether the minority group ow rs or stockholders possess control over management, interest in capital, and interest in earnings commensurate with the claimed minority ownership.

Although an enterprise may qualify as an MBE, in order for the gross amount of a contract for the purchases of services or materials from an MBE to count toward the 10% requirement, the MBE must be significantly and substantially involved in

providing the services or materials. It is the intent of EDA to allow credit for utilization of MBEs only for those contracts in which involvement constitutes a basis for strengthening the long-term and continuing participation of the MBE in the construction and related industries. On contruction contracts or subcontracts an MBE must be significantly involved in the actual performance of the contract responsibilities and work or in effectively meeting the liabilities of the contract obligation. Similarly, for the gross amount of contracts for the supply of materials and supplies to count against the 10% requirement, the MBE must be significally and substantially involved in the production of such materials and supplies or be so involved in effectively meeting the liabilities of the contract. Where an MBE acts merely as an agent or a relatively passive conduit in connection with the provision of services or materials, only the commission or fee earned by the MBE may be counted toward the 10% requirement. Even this commission or fee will not be counted if the MBE performs no substantive services and is a totally passive conduit. In determining whether the involvement of an MBE is significant and substantial, EDA will cônsider the following:

a) Industry practice.

b) Amount of control and risk retained by the MBE.

c) Whether the MBE or some other party is looked to for performance.

d) The amount of work subcontracted out by the MBE. If the subcontract or subcontracts total more than 90% of the contract entered by the MBE, the contract will not be credited towards the 10% MBE requirement.

e) Any other relevant factors.

The following examples illustrate the above principle:

a) A prime contractor enters into a contract with an MBE for electrical work. The subcontract price is $50,000. The MBE

has previously agreed to enter into a second contract with an electrical contractor which is not an MBE. The second contract is for $49,000 and assigns all responsibility for performance under the first contract to the electrical contractor. Since the MBE will itself provide no performance and the subcontract exceeds 90% of the contract, none of the $50,000 contract contributes towards the 10% requirement.

b) A manufacturer of construction materials enters into a contract with a prime contractor for delivery of materials. The contract notes that an MBE, which is an entity separate from the manufacturer, shall be the distributor. However, delivery shall be direct from the manufacturer to the prime contractor, the risk for defective products or late delivery is on the manufacturer, and payment by the prime contractor will be to the manufacturer. The distributor has some minor responsibilities based upon a separate agreement with the manufacturer, and will receive 4% of the contract price as its fee. Only the agreement between the manufacturer and the distributor is a contract with an MBE. Hence, only the minority distributor's fee of 4% of the total contract price contributes towards meeting the 10% requirement.

c) An MBE is awarded the prime contract by a grantee. Consistent with industry practice in the area, the MBE enters into subcontracts totalling 50% of the prime contract. The MBE has obtained a performance bond for the entire project, retains general control over the project site, provides coordination and supervision of the subcontractors, and is looked to by the grantee for performance on the entire prime contract. The entire prime contract contributes towards the 10% requirement.

III. Waivers

1. Waiver requests

Complete or partial waiver of the 10% MBE requirement may be requested only by the grantee. Waiver requests must be made in

writing to the Regional Office. They should contain the following information:

a) Name of the grantee.

b) Project number.

c) The specific request, i.e., for a complete waiver or a partial waiver down to a specific percentage of the grant.

d) Efforts taken to locate MBEs, including descriptions of contracts with the Office of Minority Business Enterprise, the Small Business Administration, and other referral agencies.

e) A list of each MBE contacted and the reason each was not used.

f) Assistance offered by the grantee and/or prime contractor to MBE's, such as bonding, meeting union requirements, and obtaining working capital.

g) Any additional information that the grantee believes is relevant.

2. Waiver Criteria

The waiver request will be evaluated according to the following criteria:

a) Efforts to Utilize MBEs — The most important criteria Specialists will use in evaluating waiver requests are the efforts taken by the grantee and potential contractors to locate qualified, bona fide and available MBEs whose market area includes the project location. The Specialists will confirm that information contained in the waiver request and seek additional information when necessary.

b) The Number of Available MBEs whose Market Area Includes the Project Location — To determine if MBEs are available EDA's Civil Rights Specialists will use:

i) Lists of MBEs that they have developed.

ii) When appropriate, Specialists will review project applications to find out where the project will be advertised and what specific services and supplies are required.

iii) When a project is located near the boundary of two Federal regional jurisdictions, the Specialist may contact the appropriate EDA, OMBE or SBA office responsible for the second jurisdiction for additional assistance. Specialists will also advise grantees and their prime contractors to contact additional offices when appropriate.

c) The Size of the Minority Population --- This factor is of limited significance by itself and will be used in conjunction with other criteria.

d) Additional Criteria

i) It may happen that promised MBE participation does not occur because an MBE drops out or the contract with the MBE is terminated due to failure to perform. In such situations the following additional criteria will be utilized in considering a waiver request:

A) The reasons the MBE could not perform.
B) Assistance provided by the grantee and/or prime contractor to the MBE, such as bonding, meeting union requirements, and obtaining working capital.
C) Efforts taken to obtain a substitute MBE.

ii) In a case where an enterprise previously considered to be an MBE is found not to be bona fide (see section II (6)), the Specialists will consider the following additional criteria in evaluating a waiver request:

A) Whether the grantee and or prime contractor were reasonable in believing the enterprise was an MBE.
B) Efforts taken to obtain a substitute MBE.

The Specialist will inform the grantee by telephone, usually within 2 days, whether or not the waiver has been granted. A confirming letter will follow. A denial of a waiver request will not prejudice a grantee if it later again requests a waiver.

3. Unsatisfactory Results From Competitive Bidding.

There may be occasions when competitive bidding procedures give results which are unsatisfactory to a grantee, and the grantee believes the problem is the 10% MBE requirement. A grantee who has solicited bids may find, for example, that:

a) No bids are submitted; or
b) Bids are submitted but they provide a level of MBE utilization of less than 10% of the grant.

The following questions and answers explain how such situations should be handled.

Question: What should the grantee do if it has already solicited bids for a contract, and none of the bidders promise sufficient utilization of MBE's to meet the 10% requirement, for example, where the otherwise responsive bidders promise to use only 7%, 6%, and 5% respectively.

Answer: Such bids are non responsive and therefore the grantee may negotiate for a contract if there is no legal prohibition to do so within the grantee's state or the grantee may elect to readvertise the invitation for bids. However, if the readvertisement would require EDA to extend the 90 day start of construction date and negotiation is possible under local law, and can be completed within the 90 day limit, the grantee must negotiate, unless EDA waives the 90 day requirement.

Whether the project is readvertised or negotiated, to be responsive a bidder or offeror must assure minority utilization at least equal to the highest figure received in response to the first advertised bidding request, in this example 7%. However, a waiver of the remaining 3% must first be granted by the EDA Regional Office. The partial waiver will normally be granted in such a case, provided that the Regional Office is reasonably satisfied that the non responsive bidding did not result from the failure of the grantee and the bidders to seek out MBE's or from collusion.

When negotiation is used, the following standards must be met (except for those that are prohibited by law in the grantee's state): (1) each responsible bidder must be notified of the intent to negotiate; (2) each such bidder must be given a reasonable opportunity to submit an offer or resubmit its original bid as its offer; (3) the grantee must advertise the intent to negotiate in a manner similar to that used for the invitation for bids and must accept offers from parties that have not previously submitted a bid; (4) the negotiated price must be the lowest price offered by any responsible offeror which assures minority utilization at least equal to the highest figure received in the response to the first advertised bidding request; (5) a record of oral negotiations must be made and retained for 3 years after the award of a contract; (6) offerors may amend their proposals during the course of negotiations; (7) negotiations must be conducted with all offerors within a competitive range; (8) a common cut-off

date must be announced to all offerors, at which time no further negotiations may be had and the "best and final" offer is to be in hand; (9) the contracting officer may not transmit information contained in any proposal by an offeror that may afford a potential advantage to any other offeror; and (10) auction techniques may not be utilized.

* * *

Question: What if no bids at all are received after advertising?

Answer: This situation is similar to the preceding case in which no responsive bids were received. The contract should be readvertised or negotiated under the conditions described in the previous question, with changes made to make the contract more attractive. However, a no bid situation is not a case where a waiver of the 10% MBE requirement is easily justified. There may be other reasons besides the 10% MBE requirement that could cause a no-response situation.

Since a no-response situation should be a very rare occurrence, the Regional Offices will give such cases individual treatment. It will be important to determine the cause of the lack of response. One way this will be done is by asking the grantee for the names of the contractors who considered submitting bids. A grantee will usually keep a list of those contractors who have picked up its bidding plans. Before a waiver of the 10% MBE requirement is considered, EDA will contact some of these contractors to verify that they made every feasible effort to fulfill the 10% MBE requirement but were unable to do so, and that such inability caused them not to bid.

* * *

Plaintiffs' Exhibit 1

Question: What if there is not enough time to readvertise and still meet the 90-day requirement?

Answer: State or local law may demand a minimum amount of time between advertisement and award of the contract. If this would mean that the 90 day requirement could not be met, the grantee should ordinarily negotiate for a contract if local law permits. If the grantee wishes to readvertise for bids, it must request a waiver of the 90 day requirement. Any waiver will be for the minimum amount of time necessary. The use of this sort of waiver should be restricted to special cases. Where a waiver, is not approved, the grantee shall negotiate for a contract as discussed in a previous question.

4. Excessive Price of Responsive Bidders

The grantee has three choices. It can contribute some of its own funds to the project, it can reduce the scope of the project and readvertise, or it may be able to negotiate the contract. The last possibility would require a waiver of competitive bidding requirements from the Regional Office. This will not be granted unless there is a finding that the low bid price is unreasonably high, as discussed in the next question and answer. After the waiver is granted, the following requirements must still be met:

a) Notification of an intention to negotiate and reasonable opportunity to negotiate must be offered to each responsible bidder who submitted a bid.

b) The negotiated price must be the lowest negotiated price offered by any responsible bidder and must not exceed the low bid price that resulted from advertising.

c) 10% MBE utilization must be promised. There can be no waiver of this requirement, unless the circumstances are like those discussed in the following question and answer.

* * *

Plaintiffs' Exhibit 1

Question: Should a request for waiver of the 10% requirement based on an unreasonable price asked by an MBE ever be granted?

Answer: It is possible to imagine situations where an MBE might ask a price for its product or services that is unreasonable and where, therefore, a waiver is justified. However, before a waiver request will be honored, the following determinations will be made:

a) The MBE's quote is unreasonably priced. This determination should be based on the nature of the product or service of the subcontractor, the geographical location of the site and of the subcontractor, prices of similar products or services in the relevant market area, and general business conditions in the market area. Furthermore, a subcontractor's price should not be considered unreasonable if he is merely trying to cover his costs because the price results from disadvantage which affects the MBE's costs of doing business or results from discrimination.

b) The contractor has contacted other MBEs and has no meaningful choice but to accept an unreasonably high price.

* * *

Question: What about the situation when there are bids which are responsive and therefore promise to meet the 10% requirement but they are above the project budget, and there is a bid below the project budget which requests a waiver of the 10% requirement?

Answer: A waiver of the 10% requirement cannot be granted to the bidder who bid below the project budget; only responsive bids can be awarded a contract. The grantee still has only three

choices. It can contribute some of its own funds to the project, it can reduce the scope of the project and readvertise, or it may be able to negotiate the contract.

IV. Other Problems

1. Federal Bonding Requirements

Attachment B to Office of Management and Budget Circular No. A-102 sets forth Federal bonding requirements for grant projects. If the contract under a Federal grant is for $100,000 or less, the grantee shall follow its own bonding requirements. For those contracts exceeding $100,000 for construction or facility improvement, EDA may accept the bonding requirements of the grantee, if EDA determines that the Federal Government's interests are adequately protected. If such determination has not been made, the minimum bonding requirements shall be as follows:

a) A bid guarantee from each bidder equivalent to five percent of the bid price.

b) A performance bond on the part of the contractor for 100 percent of the contract price.

c) A payment bond on the part of the contractor for 100 percent of the contract price.

d) Required bonds shall be obtained from companies holding certificates of authority as acceptable sureties.

Grantees wishing a determination that the Federal Government's interests are adequately protected by local bonding requirements, should contact their EDA Regional Office.

Plaintiffs' Exhibit 1

2. Delayed Payment to MBE Subcontractors.

Grantees and their contractors are encouraged to make every effort consistent with sound construction management to assure that minority subcontractors are paid on time. Adequate working capital is important to all subcontractors and is crucial to the success of minority subcontractors. EDA, in responding to allegations regarding slow payment, and in reviewing vouchers submitted for payment by grantees and their contractors, will seek to determine whether minority subcontractors that have performed adequately have been paid on a timely basis. The failure of an MBE to continue performance because of untimely payment will be considered by EDA in evaluating a request for a waiver of the 10% requirement.

3. State Statutes As Impediments to MBE Participation

Where the LPW grantee is a state agency or department, a county, a municipality or other governmental unit, it will probably find its contracting activities governed by state statutes.

Such statutes could, for many grantees, impede compliance with the 10 percent MBE requirement. For example, an otherwise qualified MBE subcontractor who is not licensed in the state where the project is located may not be a "responsive bidder" under state law; a multiple-prime contract law may tend to eliminate MBE participation because of fewer subcontracts; prequalification of bidders may effectively eliminate MBE access to competition; or Federal and state requirements may be incompatible with one another.

Where problems of this nature arise, the solutions may depend upon factors such as the identity of the grantee and the nature of

the project. The solutions, as do the problems, ultimately turn on state law and its interpretation. Therefore, we cannot provide definitive advice here. The questions and answers which follow will, however, suggest approaches to solving problems arising from state law. The grantee is advised to ask legal counsel for further assistance.

* * *

Question: May a grantee dispense with state competitive bidding requirements and negotiate the prime contract with one or more MBE's?

Answer: The grantee should explore whether a categorical exception to competitive bidding is available. For example, a particular public agency may be exempt from public advertising and competitive bidding under a judicial decision, or the requirement may have been held discretionary as to a particular public agency. These exceptions are typically set forth only in judicial decisions, State Attorney General's Opinions, or in a statute governing the particular public agency and not in the general public contracting or public works statutes. This discussion presupposes that the grantee has already obtained a waiver from EDA to dispense with competitive bidding pursuant to LPW Round II regulation 13 CFR 317.19(a)(1).

* * *

Question: Because state law calls for multiple prime contracts, the grantee anticipates difficulty in making up its 10 percent MBE requirement on subcontracts, should no MBE's be awarded prime contracts. What can be done?

Answer: Before drawing up specifications, check to make sure that the multiple-prime contract law applies to this grantee. In

New York State, for example, the multiple-prime law applies only to contracts on buildings. If the public works project is not construction, renovation etc. of a building, the multiple-prime contract law does not apply. Only a careful review of the statute can determine its precise scope.

* * *

Question: What can be done when the criteria for determining responsiveness to an invitation to bid are locked in by law and focus on factors like financial responsibility, bonding, and experience on the type of project under bid and do not include an MBE-participation factor?

Answer: Even where the criteria for responsiveness are contained in a statute or regulation, the provision may not apply to a particular grantee or a particular type of project, for example, where the grantee is a municipality and the criteria apply only to state contracts. Also, the criteria may be applicable only to construction projects, and the project of concern is to erect street lights, which, under state law, is considered "improvements", not "construction."

Even though the statutory criteria are applicable to a project, the statute itself or a judicial decision may make their use discretionary, not mandatory, or may permit the contracting authority to add factors tailored to the particular project. If the statute merely tells the contracting authority or a commission with oversight responsibility to promulgate responsiveness standards for each project individually, there may be sufficient latitude to incorporate the MBE-participation factor.

* * *

Question: What can be done where prospective bidders must prequalify, effectively limiting participation to contractors with

extensive experience in jobs of the kind being undertaken, and necessarily injuring the changes of MBE's of getting into the competition?

Answer: Prequalification of bidders is usually only permitted by law and not required by law. Furthermore, as with responsiveness criteria and multiple-prime contract laws, the statutory prequalification scheme may not apply to a particular grantee or a particular project. Each state statute should be reviewed to determine whether circumstances permit a grantee to dispense with prequalification and issue an open invitation to bid.

* * *

Question: What can be done when an otherwise qualified MBE has been unable to obtain the proper state license?

Answer: Expedited licensing or an easing of licensing requirements by the appropriate state authorities appear to be the most straightforward approaches, although they may not be possible. It may be important to know when the last possible time would be that a prospective awardee could be issued a license and still be eligible to receive award of the contract: when he submits his bid? when he receives award of the contract? at time of performance? when he first demands payment? The state licensing law, public contracting law, or public works law may permit some flexibility. Of course, any flexibility would need to be exercised so as not to discriminate against unlicensed non-MBE bidders.

* * *

Question: What can be done when state requirements conflict with an LPW requirement or threaten to interfere with an LPW objective?

Answer: The grantee should look for an applicable "conflicts law." Your state may have a law which resolves a conflict between Federal and state requirements in favor of the former where Federal assistance would otherwise be jeopardized. This type of provision has the effect of determining in advance which of two incompatible laws shall prevail in circumstances where compliance with both is impossible or perilous. Such provisions are to be found, if at all, in the public works, public contracting or other chapters of a state code, in an enabling act authorizing the particular or any request for Federal funding, in a state constitution, or even in a municipal charter. If all else fails, a grantee could try to find an applicable judicial decision holding that an enabling act, even without a conflicts provision, authorizes the applicant for Federal assistance to comply with the conditions attached to the Federal funding, state requirements to the contrary.

V. Technical Assistance

1. Small Business Administration (SBA)

To assist grantees in meeting the 10% requirement, EDA has funded SBA to provide surety bond guarantees, guaranteed working capital loans and marketing assistance to qualified minority firms. Following is a description of assistance available from SBA:

a) Bond Guarantees

Any contractor required to have a bid, performance, or payment bond(s) in order to obtain a contract, including but not limited to firms in construction, repair, maintenance, service, supply and janitorial work, may apply for a bond guarantee. If there are any questions as to your concern's eligibility, please contact your nearest SBA office.

Plaintiffs' Exhibit 1

The SBA can guarantee bonds for contracts up to $1,000,000; however, there is no limit to the number of bonds that can be guaranteed for any one contractor.

In consideration of the Surety Company's paying the SBA 20 percent of the gross bond premium, SBA guarantees the Surety Company up to 90 percent of any loss sustained on contracts up to $250,000 and 80 percent guarantee for those contracts in the $250,000 -- $1,000,000 range. These guarantees are subject to a $500 maximum deductible to the Surety Company regardless of the contract amount.

The contractor must make application to HIS LOCAL SURETY BOND AGENT BROKER for a specific bond by providing various background, credit and financial information required by both the Surety Company and the SBA. In order to do so, there are certain forms which must be completed, including those of the SBA.

The agent is responsible for obtaining and submitting all of the data provided by the contractor together and at one time to the Surety Company accompanied by the contractor's fees in separate checks and the agent's check for the net premium.

The Surety Company reviews data received from the agent and decides:

i) to execute the bond without SBA's Guarantee,
ii) to execute the bond only with SBA's Guarantee, or
iii) to decline the bond even with SBA's Guarantee

However, if the Surety Company decides to execute the bond on the basis of SBA's Guarantee, it prepares appropriate forms and forwards the same with supporting data (including contractor's fees) to the appropriate SBA office, requesting SBA's Guarantee.

SBA, upon receipt of the Surety Company's submission, applies its own underwriting criteria. If the decision is favorable, SBA completes, executes and returns the Guarantee Agreements to the Surety Company; otherwise, the SBA signifies its disapproval and returns the submission to the Surety Company, less the contractor's $10.00 application fee, which is not refundable.

The contractor must pay the SBA a fee of .2% ($2.00 per $1,000) of the contract amount. The contractor must also pay the Company a premium charge for the bond which is a maximum allowable of 1 1 2% ($15.00 per $1,000) on the first $250,000 of contract amount and 1% ($10.00 per $1,000) on the excess.

SBA District Offices serving your area will provide counseling to contractors in compiling the necessary data required by the Surety Company, in addition to certain financial, management and technical assistance either sought by the contractor or recommended by the Surety.

b) Working Capital Loans

The Small Business Administration may guarantee up to $500,000 ($100,000 under the Economic Opportunity Loan Program) or 90% of the total loan, whichever is less. The amount of the loan, which must be used for a specific contract, cannot exceed the cost of the material and labor needed to comply with terms of the contract.

The loans are available to construction contractors, manufacturers and service contractors who provide specific services under an assignable contract. They must have been in business for 12 months before making application and must be unable to obtain the required financial assistance without SBA's guaranty.

Plaintiffs' Exhibit 1

Eligible businesses may apply prior to or after a contract has been received. Detailed information on the bid or contract must be available at the time of the application.

c) Assistance in Identifying Minority Small Business Firms

Should you need assistance in locating minority firms to participate in the Local Public Works Program, the Small Business Administration has a marketing assistance, Minority Vendors Program, to identify and expand business opportunities for minority firms. The MVP can furnish the grantee or general contractor with a profile of minority business in any specific area. Should you need these services, please contact your local SBA office.

For additional information on the Local Public Works Program and SBA services mentioned above, contact the nearest SBA office, consult your local telephone directory under "U.S. Government" or refer to the list at the end of this bulletin. For questions that cannot be answered by your local SBA office, contact the following "special desks" in Washington:

Surety Bond Guarantees	Danny Gibb (202) 653-6933
Guaranteed Loans	Arthur Armstrong (202) 653-6574
Minority Vendors Program	Milton Wilson, Jr. (202) 653-6794

2. OMBE SBA Full Service Cities

In a number of cities EDA has funded SBA and OMBE to provide supplemental technical, financial and bonding assistance

to minority firms working on Local Public Works Projects. Grantees, contractors and minority firms are encouraged to contact the appropriate person to obtain assistance. A list of these cities as well as the name and phone number of the person who should be contacted is attached at the end of this bulletin.

3. EDA Funded Technical Assistance

EDA is providing additional assistance to grantees, prime contractors, and Minority Business Enterprises (MBEs) to maximize MBE participation in the Local Public Works program (LPW). EDA awarded six-month contracts on September 29, 1977, to the following organizations to supplement technical assistance provided by OMBE and SBA. A partial list of available services is indicated below. To request assistance, contact your local EDA Regional Office.

a) The National Association of Minority Contractors (NAMC) will assist MBEs in obtaining and fulfilling contracts. Its services include:

i) Assisting MBEs to qualify for and negotiate contracts with grantees and prime contractors, to formulate bids and estimates and to prepare construction schedules.
ii) Formulating joint-ventures and other multi-contractor arrangements.
iii) Assisting MBEs with purchasing, leasing, recordkeeping, reporting, resolving labor disputes, and related problems.

b) National Institute for Advanced Studies (NIAS) will assist grantees in securing qualified MBEs. Its services include:

i) Identifying and profiling qualified minority firms and assisting grantees in utilizing such identification materials.

ii) Planning a program to correct any MBE management and financial deficiencies.

c) Urban Development and Management Corporation will assist MBEs in bonding and financing matters. Its services include:

i) Mobilizing financial resources and surety companies for cooperation and assistance with financing and bonding.
ii) Assisting MBEs in qualifying for and negotiating finances and bonding.
iii) Utilizing electronic data processing networks to assist MBEs in controlling costs, labor, cash flow, and related items.

4. F.W. Dodge Construction Reports

To further assist grantees and contractors in meeting the 10% MBE requirement, EDA is contracting with the F.W. Dodge Company to provide detailed LPW project information to minority contractors on a timely basis. To do this, the Dodge Company has agreed to send daily construction reports on all EDA LPW projects in a specified geographic area to minority assistance groups including OMBE offices, OMBE funded organizations and SBA offices located in those areas. OMBE, SBA and minority contractor groups will disseminate these reports to their clients. The Dodge reports are issued at various stages of bidding and will provide minority contractors with needed project information such as material, service and supply requirements. In 119 cities where the Dodge Company maintains a plans center, minority contractors will be allowed to use the facility during the critical bidding process. Dodge has also agreed to identify on each report projects subject to the 10% MBE requirement. The EDA technical assistance groups will also receive copies of the Dodge reports.

Plaintiffs' Exhibit 1

VI. Complaints

Any person or organization with information indicating unjust participation by an enterprise or individuals in the MBE program or who believes that the MBE participation requirement is being improperly applied should contact the appropriate EDA grantee and provide a detailed statement of the basis for the complaint.

Upon receipt of a complaint, the grantee should attempt to resolve the issues in dispute. In the event the grantee requires assistance in reaching a determination, the grantee should contact the Civil Rights Specialist in the appropriate Regional Office.

If the complainant believes that the grantee has not satisfactorily resolved the issues raised in his complaint, he may personally contact the EDA Regional Office.

PLAINTIFFS' EXHIBIT 2 — GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION IN LPW GRANTS (DEEMED MARKED)

U.S. DEPARTMENT OF COMMERCE
Economic Development Administration

LOCAL PUBLIC WORKS PROGRAM, ROUND II

GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION IN LPW GRANTS

The 1977 amendment to the Public Works Employment Act (LPW) includes the following requirement with respect to minority business enterprise (MBE) participation:

> Section 106(f)(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprises' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

EDA Policy

EDA ascribes a high priority to the development and support of minority business enterprises and will enforce the

10% MBE participation requirement strictly. In areas with relatively high minority populations, such as large cities, EDA encourages Grantees to spend substantially more than 10% of grant funds for MBEs to make up for the lower than 10% participation which may take place in those areas with small minority populations.

Grantee Obligation

The primary obligation for carrying out the 10% MBE participation requirement rests with EDA Grantees. The grant agreement requires that the Grantee assure EDA that it will expend at least 10% of the amount of each grant it receives for *bona fide* MBEs. Since LPW projects must be performed by private contractors, the Grantee must make sure that at least 10% of the grant funds are expended for MBE contractors, subcontractors or suppliers. The Grantee and those of its contractors which will make subcontracts or purchase substantial supplies from other firms (hereinafter referred to as "prime contractors") must seek out all available *bona fide* MBEs and make every effort to use as many of them as possible on the project.

An MBE is *bona fide* if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of ownership on which the claim of minority ownership status is based. Similarly, minority participation in a joint venture must also be based on the sharing of real economic interest and must include proportionate control over management, interest in capital and interest in earnings. If the real economic interest in an enterprise or joint venture is represented by debt securities, leasehold interests,

management contracts or other interests owned or controlled by non-minority group members, EDA will analyze the enterprise or joint venture closely to make sure it is a *bona fide* MBE.

An MBE is available if the project is located in the market area of the MBE and the MBE can perform project services or supply project materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed. For example, a supplier of a heavy material such as concrete pipe would have to be located relatively close to the project because of high transportation costs, while a supplier of relatively expensive, light material could be located far from the project. The market area for any kind of services or supplies depends, therefore, on trade practices; but EDA will require that Grantees and prime contractors engage MBE's from as wide a market area as is economically feasible.

An MBE is qualified if it can perform the services or supply the materials that are needed. Grantees and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. Grantees and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is prepared to provide a 90% guarantee for the bond of any MBE participating in an LPW project. Lack of working capital will not ordinarily disqualify an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. Grantees and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.

In order to fulfill its obligation to use MBE's, every Grantee should make sure that it knows the names, addresses and

qualifications of all relevant MBE's which would include the project location in their market areas. For this reason, Grantees are urged to call or write any organization which provides minority business development or construction contract assistance in its area. In most cases, Grantees should also hold prebid conferences to which they invite interested contractors and representatives of such MBE support organizations.

Arrangements have been made through the Office of Minority Business Enterprise (OMBE), an agency in the U.S. Department of Commerce which serves as the Federal coordinator and information clearinghouse for minority-owned businesses, to provide assistance to Grantees and prime contractors in fulfilling the 10% MBE requirement. OMBE works closely with and funds numerous minority business organizations which are in regular contact with minority business contractors and suppliers. OMBE's network of 27 Construction Contractor Assistance Centers (CCAC's) specialize in services to construction-related minority firms. Besides providing their clients with technical, marketing and financial assistance, CCAC's also maintain current rosters of minority firms in their areas. A booklet listing these offices is enclosed. Grantees and contractors are also encouraged to use similar non-OMBE-funded minority business organizations for the purpose of locating appropriate minority businesses.

Grantees and prime contractors should also be aware of other support which is available from the Small Business Administration (SBA), and independent agency of the U.S. Government responsible for providing financial, management and other assistance to eligible small businesses. Through its field offices located throughout the U.S., the SBA administers programs designed to assist small and disadvantaged business firms. In addition to offering direct and guaranteed loans and surety bond guarantees for MBE's engaged in the LPW

program, the SBA also licenses venture capital groups, identifies minority businesses through its computerized Minority Vendors Program, and maintains lists of minority firms eligible to do business with the Federal Government. The SBA has Minority Small Business Specialists assigned to many of its offices throughout the country. Grantees and contractors are encouraged to contact SBA offices for help, especially in areas where there is no OMBE office, funded organization or referral agency. A list of SBA offices is also enclosed.

In addition to assuring through its contracting procedures that MBE's obtain at least 10% of the dollar value of the contracts, subcontracts and supply procurements financed by the LPW grant, the Grantee must monitor the performance of its prime contractors to make sure that their commitments to expend funds for MBE's are being fulfilled. If a shortfall occurs, EDA will suspend the first letter of credit, or refuse to issue the second letter of credit, or, in extreme cases, terminate the grant, unless the Grantee can demonstrate that the shortfall is not its fault or the fault of its prime contractor, or unless the Grantee can demonstrate that the shortfall will be made up during the remainder of the contract. Because of the seriousness of these EDA sanctions, Grantees should administer every project tightly and initiate corrective action promptly if a shortfall in MBE participation seems likely.

Contracting Requirements

LPW projects will be administered through prime contracts involving subcontracts and or procurement of substantial supplies and simple contracts which do not involve subcontracts or procurement of substantial supplies, or a combination of prime and simple contracts.

In the case of projects to be administered through one prime contract, the 10% MBE requirement would be met if the

prime contractor is an MBE or if at least 10% of the grant funds are expended for MBE subcontractors or suppliers. In the latter case, the Grantee must make sure that the prime contractor does so expend at least 10% of the grant, and the Grantee may not enter into a prime contract which does not contain an assurance that the MBE requirement will be met. Such an assurance is contained in EDA's *Supplemental General Conditions for Local Public Works Round II Projects,* which are to be made part of all prime contracts. Any such prime contract must also include a list of the names and addresses of the MBE's to be used and the amount of grant funds to be expended for each such MBE.

When prime contractors are selected through competitive bidding, the Grantee must require that each bid include a commitment to use at least 10 percent of the contract funds for MBE's. Each such bid shall also indicate the name of each MBE the bidder will use, the work to be performed by it, and the total percentage of the contract the bidder will expend in the aggregate for all such MBE's. Bids shall be considered by the Grantee to be responsive only if at least 10 percent of the contract funds are to be expended for MBE's. Within 5 days after the bid opening and after the apparent lowest responsive bidder is notified, it must submit to the Grantee the names of each MBE the bidder will use, the work to be performed by it, and the amount of contract funds to be paid to it.

EDA also encourages Grantees and prime contractors to select contractors by negotiation or by a bidding procedure limited to MBE's whenever possible under State law. Upon request, EDA will waive Federal competitive bidding requirements when Grantees determine that other contractor selection procedures constitute effective means of achieving at least 10% MBE participation.

In the case of projects involving more than one contract, the Grantee may fulfill its 10% MBE requirement in any of several

ways. Some of the contractors may themselves be MBE's for example, contracts for engineering or other professional or supervisory services, or for landscaping, accounting or guard services. Some prime contracts may be with MBE's or may contain assurances for 10% MBE participation or for more than 10% MBE participation, with appropriate supporting names and addresses of MBE subcontractors or suppliers. Other prime contracts may provide for less than 10% MBE participation. Unless the Grantee can assure 10% MBE participation by other means, the bidding procedures described above will be applicable to all selections of prime contractors through competitive bidding. Grantees administering projects involving more than one contract are also encouraged to use other contractor selection procedures where appropriate. In any event, it is the Grantee's obligation to make sure that at least 10% of the grant funds as a whole will be expended for MBE's through its own simple or prime contracts or through the subcontracts or supply contracts of its prime contractors.

Grantee Reports

In order that EDA may monitor MBE participation on a grant-by-grant basis and a nationwide basis, Grantees are required to submit several sets of reports to EDA, addressed to the appropriate Regional Director, *Attention: Civil Rights Division.*

Initial Report. Before the first letter of credit is issued, the Grantee must submit a report on Form ED-530, Part A, which sets forth:

(a) The name and address of each MBE contractor with which the Grantee has already signed a contract and which describes the work to be done or

materials to be furnished by the MBE and states the amount of contract funds to be paid to the MBE.

(b) Similar information with respect to MBE subcontractors or suppliers under any prime contract which the Grantee has already signed. The low bidding prime contractor must furnish that information to the Grantee before the prime contract can be signed.

(c) Similar information with respect to any simple or prime contract which the Grantee expects to make at a later date. Usually this information can only be an estimate. If the Grantee's estimate proves to be wrong when subsequent contracts are made and it appears that the 10% MBE requirement may not be met, the Grantee should immediately advise the appropriate EDA regiional office to determine how the possible shortfall can be accommodated.

EDA will check each report to determine whether the information on the report demonstrates that at least 10% of the grant funds will be expended for MBE's. If the report does not so demonstrate, no letter of credit will be issued. While EDA will accept the information furnished by the Grantees at face value for purposes of determining eligibility for a letter of credit, EDA will verify that information during the construction period by comparing the information on the initial Form ED-530, Part A, report with the Form ED-530, Part B, certificates which are submitted later and with the second Form ED-530, Part A,

report filed at 40% project completion. EDA will also spot-check Grantee and prime contractor compliance.

40% Completion Report. Upon completion of 40% of each project, each Grantee must submit a second report on Form ED-530, Part A, describing actual MBE participation up to that point on the basis of executed contracts and subcontracts with MBE's which are still in full force and effect, and estimating any future MBE participation on the basis of any contracts and subcontracts which the Grantee or a prime contractor expects to make with MBE's during the remainder of the project construction period.

The 40% Completion Report must demonstrate MBE participation to the extent of at least 10% of the grant funds in order for EDA to issue the second project letter of credit. If that report indicates that there will be a shortfall, EDA will not issue a second letter of credit and will consider terminating the grant, unless the Grantee can justify the shortfall in MBE participation by demonstrating that it was not the Grantee's fault or the fault of one of its prime contractors. In evaluating any such justification which claims that a MBE contractor, subcontractor or supplier was terminated for failure to perform, EDA will consider whether the Grantee and any relevant prime contractor have furnished all feasible technical assistance, including assistance with bonding and working capital, to help the MBE perform its contracts.

MBE Certifications. The Grantee must secure a statement from each minority firm participating in each project as a contractor, subcontractor or supplier, on Form ED-530, Part B, certifying that the minority firm is a *bona fide* minority business enterprise and that the minority firm has executed a binding contract to provide a specific service or material to the project for a specific dollar amount. The Grantee must secure and

submit this statement to EDA as soon as the minority firm has executed a binding contract. EDA will spot-check such certificates to make sure that the participating MBE is *bona fide*.

Copies of the Form ED-530, Parts A and B, are included with this package. Additional copies are available from EDA Regional Offices. The Grantee must send the initial report, the 40% completion report, and certifications from minority firms to the Regional Director, *Attention: Civil Rights Division*, at the appropriate EDA Regional Office.

Waivers

Although a provision for waiver is included under this section of the Act, EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBEs. The request must indicate the specific MBE's which were contacted and the reason each MBE was not used. EDA will consider the degree to which the Grantee and potential contractors have used available referral sources and related assistance in evaluating waiver requests.

Some State or local laws involving bidding procedures or other matters may make fulfillment of the 10% MBE requirement difficult for some Grantees. It is the responsibility of each Grantee to find ways of achieving 10% MBE participation regardless of such laws. If qualified, *bona fide* MBE's are available, EDA will not grant a waiver of the 10% MBE requirement because of difficulties caused by State or local law.

Plaintiffs' Exhibit 2

Only the Grantee can request a waiver. Ordinarily a waiver request will be considered only after the Grantee and its prime contractors have taken every feasible action to achieve at least 10% MBE participation. For example, if the Grantee or its prime contractors have taken all feasible steps to locate relevant MBE's and have requested all available qualified MBE's to participate as contractors, subcontractors or suppliers and not enough MBE's can or will participate to reach the 10% MBE participation goal, a waiver request detailing the efforts of the Grantee and its prime contractor may be necessary in order for the project to proceed. Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful.

Waiver requests will also be entertained during the construction period if one or more MBE's which were committed to participate fail to do so through no fault of the Grantee or any of its prime contractors.

Finally, a Grantee situated in an area where the minority population is very small may apply for a waiver before requesting bids on its project or projects if it can show that there are no relevant, available, qualified minority business enterprises which could reasonably be expected to furnish services or supply materials for the project. It should be noted, however, that there may be relevant, available, qualified minority business enterprises for some types of projects in some areas and no such enterprises for other types of projects in those same areas. Therefore, waivers shall be granted only on a project-by-project basis.

In evaluating any request for a waiver, EDA will check all available sources including CCAC's, other OMBE-funded organizations and relevant non-OMBE-funded minority business organizations to determine whether the requesting Grantee and

its prime contractors have made all feasible efforts to locate and enter into contracts or subcontracts with MBE's and to assist MBEs in performing contract services or in furnishing contract supplies. A waiver will be granted only when EDA is satisfied that fulfillment of the 10% MBE requirement is not feasible and that the Grantee and its prime contractors have in no way frustrated fulfillment of that requirement.

Technical Assistance

The staffs of all OMBE affiliates and all SBA offices and the Civil Rights and LPW staffs of EDA Regional Offices are available to assist Grantees, prime contractors and MBE's themselves in achieving maximum MBE participation in the LPW program. EDA has funded special supplemental staff in SBA offices to facilitate SBA assistance in surety bond guarantees and working capital loans. In addition, the staffs of the EDA-funded University Resource Centers are prepared to furnish technical assistance to MBE's in bidding and other business and technical areas. A list of those centers and their addresses is attached.

PLAINTIFFS' EXHIBIT 4 — CITY OF NEW YORK — LIST OF PUBLIC WORKS PROJECTS SUBMITTED TO THE ECONOMIC DEVELOPMENT ADMINISTRATION FOR FUNDING UNDER ROUND II OF THE LOCAL PUBLIC WORKS CAPITAL DEVELOPMENT AND INVESTMENT PROGRAM

CITY OF NEW YORK

LIST OF PUBLIC WORKS PROJECTS SUBMITTED TO THE ECONOMIC DEVELOPMENT ADMINISTRATION FOR FUNDING UNDER ROUND II OF THE LOCAL PUBLIC WORKS CAPITAL DEVELOPMENT AND INVESTMENT PROGRAM

JULY 13, 1977

Plaintiffs' Exhibit 4

BRONX

PS 44, 102, 106 Modernization (BE-101)	$ 3,249,881
PS 175 Playground Rehabilitation (BE-130)	284,540
Street Reconstruction Third Avenue from 161st St. to Cross Bronx Expressway (THW-102)	4,133,359
Bussing Ave., Sewers and Street Reconstruction (THW-119)	1,489,968
Albert Einstein Peripheral, Sewers and Street Reconstruction (THW-130)	1,593,413
Bronx Zoo Orientation/Primate Building, New Building (PW-116)	4,693,266
Miscellaneous upgrading work at the following schools: Walton H.S., A.E. Smith H.S., PS 73, PS 117, PS 75 (BE-135)[1]	1,730,000
[1]Part of a joint application with Staten Island (BE-134 $2,128,857 Total)[1]	
Miscellaneous upgrading work at the following schools: PS 60, PS 100, PS 133, Clinton H.S., J.F.K. Photo Lab., J. Monroe H.S., PS 63, PS 138, PS 33 (BE-136)[1]	1,878,541
[1]Part of a joint application with Brooklyn ($3,591,541 Total)	

Plaintiffs' Exhibit 4

Installation of Yankee Stadium Regulator (DWR-128)	364,000
Construction of parking deck at Jerome Ave. and Gunn Hill Road (PW-128)	2,035,022
Reconstruction of City Island Bridge (THW-135)[1]	3,886,000
[1]Part of a joint application with Manhattan ($4,129,994 Total)	
Continuation of New Gateway and Orientation Facility for New York Botanic Gardens (PW-129)	2,029,989
TOTAL	$27,367,979

Plaintiffs' Exhibit 4

BROOKLYN

IS 246 Modernization (BE-107)	$ 1,857,809
Murrow HS II Shops (BE-126)[1]	1,600,000
[1]Joint application with Susan Wagner HS Shops Staten Island ($2,449,231 Total)	
Street Reconstruction in Church Avenue from East 52nd Street to Kings Highway, New York Avenue, etc. (THW-108)	2,349,777
Street Reconstruction in Broadway from Roebling Street to Marcy Avenue, Broadway from Rodney Street to DeKalb Avenue (THW-111)	3,285,389
Street Reconstruction in McDonald Avenue from Cortelyou Road to Avenue X, Shell Road, etc. (THW-109)	6,334,242
Street Resurfacing Boro-Wide (THW-125)	1,949,153
50th St. from 17th to 18th Ave. etc. and Belmont Ave. from Cleveland St. to Jerome St. Sewers (DWR-108)	784,000
Rehabilitation of Irrigation System, Brooklyn Botanic Garden (DPR-102)	539,000
Modernization of the following schools: PS 195, JHS 240, PS 269, PS 286 (BE-138)	1,997,075

Plaintiffs' Exhibit 4

Miscellaneous upgrading work at the following schools; PS 149, PS 49, PS 138, JHS 201, PS 51, Automotive HS, PS 259, PS 156, JHS 166, JHS 232 (BE-134)	3,070,158
Miscellaneous upgrading work at the following schools: JHS 293, John Jay HS, PS 197, FDR HS, JHS 136, 65 Court St., PS 274, JHS 35, Prospect Hts. HS, Tilden HS, PS 316 (BE-136)[1]	1,713,000
[1]Part of a joint application with the Bronx (BE-136 $3,591,541 Total)	
Renovation of Coney Island Broadwalk between W. 12th St. and W. 22nd St. (DPR-112)[1]	1,081,000
[1]Part of a joint application with Queens (DPR-112 $2,163,000 Total)	
Renovation of Kaiser Park Seawall and Promenade (DRP-113)	1,250,000
Renovation of Brooklyn Communications Office (PW-124)	1,065,342
Miscellaneous Rehabilitation and Renovation work in the Brooklyn Academy of Music (PW-120)	2,385,680
Renovation of Shore Boulevard Bulkhead (THW-132)	1,473,000

Plaintiffs' Exhibit 4

Rehabilitation of Manhattan Bridge Plaza (THW-142)	469,619
Renovation of Abraham Lincoln HS Athletic Field (BE-141)	759,850
TOTAL	$33,964,394

Plaintiffs' Exhibit 4

MANHATTAN

Street Resurfacing Boro-Wide (THW-123)	$ 3,045,760
Renovation of Harlem Hospital "K" Building (HHS-104)	4,999,000
Replace 48" Water Main and Street Reconstruction - First Avenue, Houston Street to 22nd Street (THW-117)	3,350,000
125th Street Parking Garage (MOD 101)	4,076,102
Modernization of PS 42 (BE-137)	1,274,077
Miscellaneous upgrading work at the following schools: (BE-133)	557,604
Part of a joint application with Queens ($3,154,604 total)	
PS 99	
Washington Irving H.S.	
Renovation of South Street Seaport Museum - Block 96 West - Facades and in fill Building (PW-126)	2,868,395
Renovation of several piers at South Street Seaport Museum (EDA-116)	2,500,000
Construction of Central Book Stacks and Automatic Book Lift System, New York Public Library (PW-125)	1,453,060

Plaintiffs' Exhibit 4

Renovation of Broadway Bridge (THW 135)[1]	243,994
[1]Part of a joint application with the Bronx	
Nassau St. Mall, Pace Plaza, Beekman to Spruce, John to Maiden Lane and Legion Square Repaving (THW-139)	804,073
TOTAL	$25,172,065

Plaintiffs' Exhibit 4

QUEENS

PS 159 Modernization (BE-112)	$ 1,177,722
Street Resurfacing Boro-Wide (THW-126)	2,350,685
Bell Boulevard, Sewers and Street Reconstruction (DWR-114)	4,892,580
Maspeth Avenue, Sewers and Street Reconstruction (DWR-118)	1,025,775
80th Street, Sewers and Street Reconstruction (DWR-115)	887,233
Seagirt Boulevard, Sewers (DWR-107)	5,374,500
Baisley Boulevard, Sewers (DWR-110)	4,832,000
Painting and Rehabilitation of Queensboro Bridge (THW-129)	3,748,380
Beach Channel H.S. Seawall and Dock Dike (BE-131)	981,682
Miscellaneous upgrading work at the following schools (BE-133)[1]	2,597,000

PS 177	Hillcrest Ave.
PS 99	LIC H.S.
PS 36	PS 95
PS 132	PS 101
JHS 157	PS 156
PS 70	PS 151
PS 221	JHS 180

Plaintiffs' Exhibit 4

PS 145	Richmond Hill H.S.
PS 77	John Bowne H.S.

[1]Part of a joint application with Manhattan (BE-133 $3,154,604 total)

Renovation of Rockaway Broadwalk from Beach 100th St. to Beach 108th St. (DPR-112)	1,082,000
Part of a joint application with Brooklyn ($2,163,000 Total)	
Combined overflow sewers in 124th St. (DWR-120)	5,271,000
TOTAL	*$34,220,557

Plaintiffs' Exhibit 4

STATEN ISLAND

Susan Wagner High School Shop (BE-126)[1]	$ 849,231
[1]Joint application with Murrow H.S. Shops Brooklyn ($2,449,231 Total)	
Street Resurfacing Boro-Wide (THW-127)	2,065,921
Benton Avenue, Sewers and Street Reconstruction (DWR-116)	1,228,496
Mason Avenue, Sewers and Street Reconstruction (DWR-103)	4,419,350
North Railroad Avenue Sewers and Street Reconstruction (DWR-119)	3,292,350
Lynhurst Avenue, Tysens Lane (DWR-102)	1,861,970
Victory Boulevard, Sewers (DWR-105)	4,791,300
Miscellaneous upgrading at Curtis H.S. (BE-135)[1]	398,857
[1]Part of a joint application with the Bronx (BE-135 $2,128,857 Total)	
Raymond Place, Sewers and Street Reconstruction (DWR-122)	2,657,880
Renovation of St. George Transportation Terminal - Ramp "B" (THW-136)	1,761,429

Plaintiffs' Exhibit 4

Reconstruction of Ferry Racks St. George Transportation Terminal (TFA-104)	2,100,000
TOTAL	$25,426,784

Plaintiffs' Exhibit 4

CITY-WIDE

Rehabilitation of Sedimentation Tanks and Installation of Waste Heat Boilers at Newtown Creek (DWR-101)	$ 3,034,000
Miscellaneous Roofing Work and Rehabilitation of House of Detention for Men for Contact Visits (PW-102)	1,153,992
Construction and Reconstruction of Municipal parking facilities at the following locations: Astoria, Flushing #1, Jamaica #2, Jamaica #3, Rego Park #1, Rego Park #2, Gowanus 36th-53rd St., Ave. M, Queens Village (PW-111)	1,685,539
Painting of Various Waterway Bridges (THW-122)	1,966,127
Rehabilitation of Various Tennis Courts (DPR-101)	700,000
Removal of Dead and Dying Trees (DPR-106)	1,429,000
Surrogate's Court Rehabilitation, Exterior Work and Conversion of Municipal Reference and Research Center, Improved Access for the Handicapped in Three City-owned buildings (PW-115)	1,370,850
Renovation of Lehman, Queens, Bronx Community and Staten Island Community Colleges (BHE-102)	1,021,335

Plaintiffs' Exhibit 4

Development of Yankee Stadium parking lot No. 13 (PW-122)	2,175,011
College Point Industrial Park, Drainage and Street Work (EDA-109)	2,150,000
New York Terminal Market, Expand Buildings B4 and C4 (EDA-108)	3,604,000
Rehabilitation and adaptation for the handicapped of various comfort stations - City-wide (DPR-115)	1,883,000
Miscellaneous rehabilitation and upgrading in various correctional institutions (PW-121)	1,097,812
Miscellaneous energy conservation improvements in City-owned Buildings (PW-118)	1,076,250
Heating and Fuel Storage at 110 Firehouses (PW-123)	1,078,163
Rehabilitation - Fresh Kills Landfill Structural Systems (SAN-110)	2,650,140
Renovation and Repair of Tweed Courthouse Roof and Skylight (PW-130)	374,719
Improvements for access of the Handicapped in various Municipal Hospitals (HHC-105)	1,881,495
Expansion and Improvement of existing Krasdale Foods Warehouse at Hunts Point (EDA-114)	4,200,000

Plaintiffs' Exhibit 4

Improvement to Howland Hook Marine Terminal (EDA-112)	4,545,000
Northeast Marine Terminal Improvements (EDA-113)	3,420,000
Renovation of Marine Transfer Stations W. 135th Street and 52nd Street (SAN-109)	1,707,750
High Pressure Sodium Street Light Conversion (PW-113)	1,510,038
TOTAL	$45,714,221
GRAND TOTAL	$191,866,000

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 19, 1977 (WERKER, J.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5786 (HFW)

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Plaintiffs,

-against-

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK, THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION AND BOARD OF EDUCATION OF THE CITY OF NEW YORK and HEALTH AND HOSPITALS CORPORATION,

Defendants.

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

APPEARANCES:

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Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

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Gerald Hartman, Department of Justice

WERKER, District Judge.

The plaintiffs in this civil rights action, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work, by order to show cause seek declaratory and injunctive relief to prevent the Secretary of Commerce, as the program administrator, and the remaining defendants, as potential

project grantees, from enforcing section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) (the "Act"), which requires 10 percent minority business enterprise participation in any local public works project funded thereunder.[1] Plaintiffs allege in their complaint that section 103(f)(2) of the Act (the "MBE requirement") violates the equal protection clause of the fourteenth amendment and hence also the due process clause of the fifth amendment.[2] Plaintiffs further allege that the MBE requirement is violative of the clear Congressional policy underlying the Civil Rights Acts of 1866 and 1964.

Similar allegations have recently been considered in several other districts.[3] It appears, however, that none of those courts

1. Under section 103(f)(2) of the Act a minority business enterprise is defined as "a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members, are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

2. Although the fifth amendment contains no express equal protection clause, it has been held that the due process clause of that amendment incorporates fourteenth amendment equal protection elements. *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040 48 L. Ed.2d 597 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

3. *Wright Farms Construction, Inc. v. Kreps*, 444 F. Supp. 1023 (D. Vt. 1977); *Ohio Contractors Association v. Economic Development Administration*, No. 77-619 (S.D. Ohio Nov. 22, 1977); *Montana Contractors Association v. Higgins*, 439 F. Supp. 1331 (D. Mont. 1977); *Associated General Contractors of Wyoming, Inc. v. Secretary of Commerce*, No. 77-222 (D. Wyo. Nov. 4, 1977); *Florida East Coast Chapter of the Associated General Contractors of America v. Secretary of Commerce*, No. 77-8351 (S.D. Fla. Nov. 3, 1977); *Associated General Contractors of California v. Secretary of Commerce*, 441 F. Supp. 955 (C.D. Calif. 1977); *Constructors Association of Western Pennsylvania v. Kreps*, 441 F. Supp. 936 (W.D. Pa. Oct. 13, 1977).

have reached a final decision on the merits and, as a consequence, this may well be the first decision squarely holding that the MBE requirement is an entirely constitutional method of remedying prior acts of discrimination in the construction industry and one which is fully consistent with the civil rights laws that preceded it.[4]

BACKGROUND

The complaint in this action was filed on November 30, 1977 and an initial hearing on plaintiffs' order to show cause was held the same day. At the close of that hearing, the Court denied plaintiffs' request for a temporary restraining order and, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, set the matter down for a consolidated hearing on the application for a preliminary injunction and trial on the merits the following day. The court further directed that each defendant file a memorandum of law at the time of the preliminary injunction hearing and trial.[5] That proceeding took place on November 31 and December 2, 1977, and further memoranda have since been filed. Although the Secretary has expressed concern about the speed with which this matter proceeded to a trial, that issue, quite obviously, has been mooted by the determination reached herein.

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4. In *Wright Farms, supra,* Judge Coffrin set down a hearing on a preliminary injunction and trial on the merits for December 12, 1977. There is no indication, however, that he has yet issued any opinion following that proceeding.

5. At the time of the initial hearing, plaintiffs had not served the Health and Hospitals Corporation of the City of New York, the New York City Board of Education or the New York City Board of Higher Education, each of which is a separate governmental entity. Accordingly, the Court directed that by 5:00 p.m. the following day each of these defendants be personally served with plaintiffs' complaint and accompanying papers. At the consolidated hearing and trial, Theodore Gilbert, Esq., an Assistant Corporation Counsel for the City of New York, entered an additional appearance on behalf of the Board of Education, but no one has appeared for either the Board of Higher Education or the Health and Hospitals Corporation.

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

HISTORY OF THE MBE REQUIREMENT

The Act was passed to extend the provisions of Title I of the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94—369, 90 Stat. 999—1012 (1976), under which Congress appropriated $2 billion to stimulate the national economy and the sagging construction industry by providing direct grants to state and local governments for the construction of public facilities which would immediately create a substantial number of jobs.[6] See H.R.Rep.No.1077, 94th Cong., 2d Sess. (1976). To assure that the program would actually be of direct benefit to the construction industry, the Act added a requirement that private firms, and not governmental units, perform any work funded. Act §103(e)(1), 42 U.S.C. §6705(e)(1); H.R.Rep.No.20, 95th Cong., 1st Sess. 4 (1977). An additional expenditure of $4 billion for construction projects was authorized under section 109 of the Act, 42 U.S.C. §6708, and Congress subsequently appropriated $2 billion for that purpose under what is commonly known as "Round Two" of the Local Public Works Program. Economic Stimulus Appropriations Act, Pub.L. No. 95—29, 91 Stat. 122, 124 (1977).

When the Act was being considered on the floor of the

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6. In the City of New York alone, $193,838,646 has been awarded for 83 projects to be built under the Act. It has been estimated that the New York City projects will generate "approximately 6,348,842 hours of employment, the equivalent of a full year of employment for 5039 construction workers." It is further anticipated that these projects will generate the equivalent of a full year of employment for 1618 workers in construction-related industries. Spending generated by these individuals and their employers is expected to produce at least an additional 18,644 person years of employment. Affid. of Anthony J. Sulvetta, Chief of the Program Analysis Division of the Economic Development Administration, sworn to Dec. 1, 1977, at 2, 4. The impact of Act-funded projects on the national economy is equally dramatic. *Id.* at 4-5.

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

House, Representative Parren Mitchell of Maryland introduced an amendment subsequently incorporated into the Act as the MBE requirement. *See* 123 Cong.Rec. H 1437—41 (daily ed. Feb. 24, 1977). That provision, in its present form, reads as follows:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."

The Secretary of Commerce, pursuant to authority granted her under section 107 of the Act, 42 U.S.C. §6706, has also promulgated regulations to carry out the terms of the MBE requirement while still affording an escape mechanism to contractors doing business in areas where compliance with the 10 percent set-aside is impossible.[7] Under the regulations, a project *grantee,* not the contractor, can seek a waiver of the MBE requirement when it first applies for a grant or, if

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7. The regulations, which appear at 42 Fed. Reg. 27,434-35 (1977) (to be codified in 13 C.F.R. §317.19), provide in pertinent part as follows:

> (b) Minority business enterprise. (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

necessary, at any later time—provided that sufficient supporting information is furnished to the reviewing officer. *See* Affid. of M.L. Banner, Chief of the Atlantic Regional Office of the Economic Development Administration, sworn to December 5, 1977. Moreover, the Department of Commerce has issued two sets of interpretive guidelines and a technical bulletin to assist project grantees in their efforts to comply with the MBE requirements.[8]

DISCUSSION

A. *Constitutionality of the Act.*

The first issue presented to the Court is whether the MBE requirement incorporates a constitutionally impermissible racial or ethnic quota, as plaintiffs suggest, or merely, as defendants argue, a legislative preference intended to remedy the adverse effects of past or present discrimination. Although the Secretary of Commerce steadfastly maintains that the MBE requirement should be considered as a goal which can be waived "where facts show that enforcement would be impractical,"[9] Secretary's Memorandum in Opposition to Plaintiffs' Motion at 13, and presumably that it should therefore be subject to some lesser standard, the Court need not enmesh itself in the goal

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8. Economic Development Admin., U.S. Dep't of Commerce, Guidelines for Round II of the Local Public Works Program (June 1977); Guidelines for 0% Minority Business Participation in LPW Grants (Aug. 1977); Minority Business Enterprise Technical Bulletin (Oct. 1977).

9. The Secretary's argument is, in this regard, overstated, for waivers are only granted "under exceptional circumstances." Guidelines for 10% Minority Business Participation in LPW Grants, *supra*, at 13. One court has accurately described the waiver criterion as one of practical impossibility. *Ohio Contractors Association v. Economic Development Administration*, slip op. at 14.

versus quota controversy, for resolution of the constitutional question presented by the plaintiffs would not be advanced one iota by such an exercise. No matter how the MBE requirement is characterized, it cannot be denied that it distinguishes among various business enterprises, at least in part, based upon the racial background of their principals. Consequently, since its operation involves the use of an inherently "suspect" classification, rigid scrutiny of both Congressional purpose and the means selected to effectuate that purpose is clearly mandated. *See Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

Two standards must therefore be met under the traditional formulation. First, the governmental objective advanced by the Act must be shown to serve a "compelling state interest." *See Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); second, defendants must demonstrate that other available means of accomplishing the objective would not, in practice, prove to be less discriminatory.[10] *Dunn v. Blumstein*,

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10. The Secretary contends that the proper standard for evaluation of legislative classifications that are inherently suspect has been recently set forth in *In re Griffiths*, 413 U.S. 717, 721-22, 93 S. Ct. 2851, 2855, 37 L. Ed.2d 910 (1973), under which the United States need only show:

> that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary to the accomplishment" of its purpose or the safeguarding of its interest. (Footnotes omitted.)

The Supreme Court expressly noted, however, that characterizing the requisite state interest as "overriding" or "compelling" or "substantial" signifies no substantive distinction, *id.* at 722 n. 9, 93 S. Ct. 2851. Furthermore, the Court sees no real difference between the *Griffiths* requirement that the classification be necessary and the concept that the classification must be narrowly drawn. The Court therefore adheres to the more frequently cited rigid scrutiny formula.

405 U.S. 330, 337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Loving v. Virginia*, 388 U.S. at 11, 87 S.Ct. 1817; *Associated General Contractors of California v. Secretary of Commerce*, 441 F.2d at 964. It is the Court's view that both of these requirements have been met in this action.

1. *Compelling Interest Analysis.* Plaintiffs concede that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination," Plaintiffs' Memorandum in Support of Preliminary Injunction at 10, but argue that the formal legislative history of the Act is devoid of any indication that Congress wished to assist minorities, rather than economically disadvantaged groups in general. *Id.* at 965. The Congressional purpose underlying enactment of the MBE requirement cannot be discerned merely by examining the reports of the Senate and House committees that considered the Act, however, because the minority business set-aside was not proposed until a relatively late date in the draft bill's history and was therefore never considered by any Congressional committee. *See Associated General Contractors of California v. Secretary of Commerce*, 441 F.2d at 969. Thus, even though the House Public Works and Transportation Committee called for federally financed or assisted public works projects as a "dual purpose instrument to help revitalize the Nation's financially-pressed communities and reactivate the distressed construction industry," H.R.Rep.No.20, 95th Cong., 1st Sess. at 1, there may well be other, equally important reasons for passage of the Act by Congress. As Professor Dickerson has aptly noted, there is frequently "a congeries of purposes" behind a bill. R. Dickerson, The Interpretation and Application of Statutes 89 (1975). It is therefore necessary, in the Court's view, to consider both the "debate rhetoric" surrounding introduction of the MBE requirement and the societal and legislative context within which that provision was meant to operate. *See Katzenbach v.*

Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) in which the Court discussed what Congress *might have found* in enacting challenged legislation.

Turning first to the floor debate, the Court finds that the remarks made in support of the MBE requirement indicate an intent to remedy prior wrongs to minority assist economically pressed construction contractors, subcontractors and vendors. For example, Representative Mitchell noted in his remarks that the federal government's program of assistance to minority businesses permits them to become "viable entities in our system" only to be "cut off" when contracts are awarded, and he added that "the only way that we are going to get the minority enterprises into our system" is by setting aside funds. 123 Cong.Rec. H 1437 (daily ed. Feb. 24, 1977). Representative John Conyers of New York, who also spoke in favor of the Mitchell amendment, observed perhaps a bit more directly that "minority contractors and businessmen who are trying to enter the bidding process . . . *get the 'works' almost every time.*" *Id.* at H 1440 (emphasis added). *See also* remarks of Representative Biaggi at *id.* ("Nation's record with respect to providing opportunities for minority businesses is a sorry one"); and remarks of Senator Brooke, *id.* at S 3910 (daily ed. Mar. 10, 1977) (noninvolvement of minority business exists despite legislation, executive orders and regulations).

It is true that these statements do not expressly attribute the difficulties encountered by minority business enterprises to prior racial discrimination, but whatever ambiguity is present is easily resolved when the available empirical data is examined. Thus, although the United States has a minority population of approximately 17 percent, only about four percent of all businesses are controlled by members of minority groups, and they account for less than one percent of national gross business receipts. Office of Minority Business Enterprise, United States

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

Dep't of Commerce, Minority Business Opportunity Handbook at I—1 (August 1976) ("Minority Handbook").[11] Minority businesses also receive less than one percent of the $120 billion in government contracts awarded annually. United States Comm'n on Civil Rights, Minorities and Women as Government Contractors 2, 6 n. 10 and 86 (May 1975). Plaintiffs question the soundness of the data contained in the reports relied upon by the Secretary, and point to recent increases in the number of minority businesses and the amount of their dollar receipts,[12] Plaintiffs' Post-Trial Memorandum at 10, but even if the statistics for minority businesses were to be doubled, there would still be an ample basis for Congress to have concluded that "the severe shortage of potential minority entrepeneurs with general business skills is a result of their historic *exclusion* from the mainstream economy." *See* Minority Handbook at I—1 –2 (emphasis added).

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11. A House committee recently suggested slightly different statistics:

> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only 16.6 billion or about 0.65 percent was realized by minority business concerns.

Report of the House Committee on Small Business, H. R. Rep. No. 1791, 94th Cong., 2d Sess. 124 (1977).

12. Between 1969 and 1972, the number of minority owned construction firms increased by 34 percent while gross receipts for such firms rose 84 percent. Bureau of the Census, U.S. Dep't of Commerce, 1977 Survey of Minority-Owned Business Enterprises (May 1975).

In fact, it appears that a House subcommittee has made that very finding. In reviewing the record of certain federal programs for minority business enterprises, the House Subcommittee on Small Business Administration Oversight and Minority Enterprise observed that:

> The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.

Report of the House Committee on Small Business, H.R.Rep.No.1791, 94th Cong., 2d Sess. 124 (1977).

The subcommittee furthermore noted that

> over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular.

Id. at 182

Where there is, as here, a statistical disparity between the representation of minority groups in the general population and

the degree of their involvement in economic activity, the Court believes that Congress could reasonably believe that prior racial discrimination was the cause.[13] *See, e.g., Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768, 45 U.S.L.W. 4882 (U.S. June 28, 1977); *Constructors Association of Western Pennsylvania v. Kreps*, 441 F.Supp. 936. However, even if the members of Congress were not aware of the relevant statistical information at the time that they adopted the MBE requirement, certainly they must have acted with knowledge of the many federal antidiscrimination measures implemented over the past several years.[14] When the Mitchell amendment is considered against the background of those programs, it becomes rather obvious that the MBE requirement was incorporated into the Act after only brief debate because of a general awareness of the compelling need for legislative action capable of overcoming the effects of prior discrimination against minority businesses seeking to

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13. Plaintiffs contend that under *Equal Employment Opportunity Commission v. Local 14*, 553 F.2d 251, 255 (2d Cir. 1977), the Secretary should only be entitled to marshal post-1965 statistics since Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000d and 2000e *eq seq.*, were not effective prior to then. The question before the Court, however, is what Congress could rightfully infer as to the reason for the poor showing of minority enterprises in our national economy; passage of the Civil Rights Act of 1964 is entirely irrelevant in that regard.

14. Judge Snyder catalogued many of the federal programs in *Constructors Association of Western Pennsylvania v. Kreps*, op. at 951 n. 8, and the reader is referred to that source for a summary description of the federal effort. The Secretary maintains that there are some 35 federal assistance programs designed particularly for minority enterprises. *See* Office of Minority Enterprise, U.S. Dep't of Commerce, Federal Assistance Programs for Minority Business Enterprises (1977).

participate in government contracting.[15]

None of the evidence introduced at the hearing held in this matter even remotely suggests a contrary conclusion. At best, the testimony shows that construction contractors in the New York City area have not engaged in any concerted effort to discriminate against minority subcontractors and venders.[16]

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15. Plaintiffs contend that the federal amelioratory scheme consists of remedies, which "cannot be substituted for the necessary clear basis of legislative findings and reliance to validate this act." Plaintiffs' Post-Trial Memorandum at 13-14. However, the critical issue before the Court is not whether Congress, in enacting the MBE requirement into law, actually made an express finding that there was prior racial discrimination in the construction industry; the issue, more properly, is whether such a finding would have been justified. As the Supreme Court noted in *Katzenbach v. Morgan*, 384 U.S. 641, 653, 86 S. Ct. 1717, 1725, 16 L. Ed.2d 828 (1966), "any contrary conclusion would require us to be blind to the realities familiar to the legislators." *Cf. Ohio Contractors Association v. Economic Development Administration*, slip op. at 17 (Court need not explore whether particular legislative act in question actually serves compelling interest so long as it falls within confines of well-established state interest.

16. Plaintiffs proffered the testimony of two construction contractors whose firms had submitted bids for projects funded under the Act. Both witnesses stated that their firms had been the successful bidder on projects requiring minority business enterprise participation and intended to submit further bids for additional Act-funded projects; that the 10 percent MBE requirement made it necessary for them to deal with minority subcontractors and venders whom they would not otherwise employ in connection with specified projects; and that they had each used minority venders or subcontractors on previous projects even though that was not required by the bid specifications for those projects. The sole witness for the Secretary was an Assistant Commissioner of the New York State Commission on Human Rights who, in essence, conceded on cross examination that he knew of no concerted effort by construction contractors to discriminate against minority business enterprises in the City of New York.

(Cont'd)

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

Although a host of labor union discrimination cases make that proposition rather dubious,[17] even if it were to be accepted, *arguendo*, based upon the disgraceful record of minority enterprise involvement in our national economy, Congress could still find that racial discrimination against minority businesses remained a serious problem in many *other* areas of the country. And as even plaintiffs have admitted, that is a problem the

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(Cont'd)

One of the construction contractors testified that he was meeting the MBE requirement for construction of a tide gate regulator by purchasing the mechanical equipment at somewhat increased cost from a minority vender, rather than acquiring it directly from the manufacturer as he normally would. Transcript at 39-40. At the time of the hearing, the Court was rather critical of this practice, which it suggested really amounted to incorporation of a welfare program within a public works project. Transcript at 66. According to the Secretary's published guidelines, however, "only the commission or fee earned by the MBE may be counted toward the 10% requirement" when the MBE "acts merely as an agent or a relatively passive conduit in connection with the provision of services or materials." Indeed, "even this commission or fee will not be counted if the MBE performs no substantive services and is a totally passive conduit." Minority Business Enterprise Technical Bulletin, *supra*, at 3-4 This restriction may make it even more difficult for nonminority contractors to comply with the MBE requirement but it certainly resolves any concern the Court may have had over possible squandering of federal funds. Furthermore, the restriction increases the likelihood that minority firms will be involved in large-scale construction projects in a meaningful way.

17. *E.g., EEOC v. Local 638*, 401 F. Supp. 467 (S.D.N.Y. 1975), *modified*, 532 F.2d 821 (2d Cir. 1976), *aff'd after remand*, 565 F.2d 31 (2d Cir. 1977); *United States v. Local 638, Enterprise Association Steamfitters*, 360 F. Supp. 979 (S.D.N.Y. 1973), *modified sub nom. Rios v. Enterprise Association Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *United States v. Local 638, Enterprise Association Steamfitters*, 347 F. Supp. 169 (S.D.N.Y. 1976); *United States v. Wood Wire & Metal Lathers, Local 46*, 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S. Ct. 2773, 37 L. Ed.2d 398 (1973).

federal government certainly has a compelling interest in resolving.

2. *Effective yet narrowly drawn means.* The critical question therefore becomes whether Congress adopted the least discriminatory method of accomplishing its concededly legitimate objective. In this regard, plaintiffs urge that the defendants could achieve the apparent purpose of Congress, with less imposition on nonminority persons, through greater use of (1) cash advances to minority contractors pursuant to 41 C.F.R. §1—30.400 *et seq.* (1977), and (2) section 8(a) of the Small Business Act, 15 U.S.C. §637(a), under which government procurement contracts are let to the Small Business Administration and are then fulfilled through noncompetitive subcontracts to "small business concerns owned and controlled by socially or economically disadvantaged persons." *See* 13 C.F.R. §124.8—1(b) (1977). Plaintiffs further contend that a set-aside for all disadvantaged enterprises would be a less onerous method of remedying the problem of prior racial discrimination. The record presently before this Court establishes, however, that the section 8(a) program has not been an effective remedy. *See* Minorities and Women as Government Contractors, *supra,* at 35—62. And the record further demonstrates that programs designed to provide minority businesses with additional capital through loans or advances are incapable of making them full participants in our economy since construction contractors clearly perfer to deal with firms that have an established track record. *See* Transcript at 18, 51. Yet without mandated opportunities to participate in large scale construction contracts, minority businesses are not in a position to develop such credentials and, therefore, are not likely to garner a greater share of government contracts. As one of the witnesses at trial put it:

> It gets to be a vicious cycle because the insurance companies and the banks will not cooperate with them if

> they don't have an established track record. They can not [*sic*] establish a track record if they don't get a chance to perform.

Transcript at 82. Expanding the set-aside to include all economically disadvantaged groups is also no answer to the problem, for in our present economy all construction firms are economically disadvantaged and redefining the set-aside to include them all would consequently be tantamount to striking it from the legislation entirely.

Plaintiffs make the further argument that any MBE requirement should be limited to a percentage "commensurate with the present minority participation in the economy." Plaintiffs' Post-Trial Memorandum at 15. The basis for this contention is apparently that the United States Commission of Civil Rights has only set the following goal for the federal government:

> Within the next 5 years, the Federal Government should increase the annual dollar volume of its contracts and subcontracts with minority males, minority females and nonminority, female-owned firms to an amount at least equal to their representation in all American businesses. Minorities and Women as Government Contractors, *supra*, at 129.

It is not clear whether plaintiffs would want the MBE requirement reduced to a tenth of its present scope to reflect more accurately the degree to which minority businesses actually participate in the United States economy or would be content merely to have it halved to approximate the percentage of minority enterprises that presently exist; nevertheless, the suggestion is absurd in either case.

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

In the first place, since the Act accounts for less than four percent of annual government contracting, the Commission's goal would not be met even if the MBE requirement were readjusted to require that 90 percent of all Act funds be spent through subcontracts with minority enterprises. Secondly, as Judge Snyder noted in *Constructors Association of Western Pennsylvania v. Kreps:*

> [T]he 10% figure is a reasonable one. Although the minority population is about 17%, the 10% figure is justifiably below that percentage, given their 1% past participation in the construction industry, and is not a concealed limitation on them. Since the program is short-term, there is no danger that the 10% requirement would become in practice a limitation of 10% once minority businesses have become established and competitive. On the other hand, the 10% requirement applies only to the extent local projects are funded by grants under [the Act] and is not overly intrusive on non-minorities. It is not a requirement that projects receiving federal funds assure that 10% of the *project* funds be given to minority businesses. Nor does it attempt to create an overall 10% requirement for the construction industry as a whole. These public works funds are intended to boost the construction industry by channeling extra funds into one aspect of the industry. A set-aside of 10% of these remedial funds for an additional remedial purpose is not unreasonable, especially given the availability of a waiver to the extent the 10% objective is unobtainable.

441 F.Supp. at 953.

Moreover, since the MBE requirement is subject to a December 31, 1978 cut-off date, Congress will have to

demonstrate continued compelling need in order for it to be extended beyond that time. Whether such need exists can then be determined through examination of readily available statistics, *id.*, at 953, including presumably updated Census Bureau data. *See* Survey of Minority-Owned Business Enterprises, *supra*, at 1.

Any reduction in the percentage of minority business participation required under the Act would, of course, result in reduced channeling of funds to the detriment of nonminority businesses and therefore less discriminatory impact. *See Ohio Contractors Association v. Economic Development Administration*, slip op. at 20. Nevertheless, the Court believes that requiring that 10 percent of all grant funds awarded under the Act be set aside for minority contractors or venders cannot be considered unreasonable in view of the consistent failure of less intrusive attempts to nurture the growth of minority enterprises. The Court accordingly finds that the MBE requirement in its present form is necessary for the accomplishment of Congress' goal of promptly alleviating the handicap imposed upon minority businesses due to the lingering effects of discriminatory conduct in the construction industry, and plaintiffs' first two causes of action are dismissed.

B. *The Statutory Question.*

Plaintiffs raise a further claim that the MBE requirement violates various provisions of the Civil Rights Act of 1866 and 1964.[18] The Court does not believe, however, that there is any inconsistency between the requirements imposed by virtue of the Civil Rights Acts and the course of conduct mandated by the MBE requirement. *See Constructors Association of Western Pennsylvania v. Kreps*, at 954. Indeed, it

18. 42 U.S.C. §§1981, 1983 and 1985 (1970); 42 U.S.C. §§2000d and 2000e *et seq.* (1970).

defies credulity to argue that measures intended to correct the invidious effects of racial discrimination must be limited to remedies which are not race sensitive, for minority groups would forever be frozen into the status quo if that were the intent of the Civil Rights Acts. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 173--74 (3d Cir.), *cert. denied*, 404 U.S. 854, 92 S. Ct. 98, 30 L.Ed.2d 95 (1971). Even more importantly, the host of cases permitting racially sensitive remedies for prior discriminatory acts totally belies plaintiffs' argument. *See, e. g., United Jewish Organizations v. Carey*, 430 U.S. 144, 161, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977); *Associated General Contractors of Massachusetts v. Altshuler*, 490 F.2d 9, 16—17 (1st Cir. 1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974) (and cases cited therein). As the Court of Appeals for the Second Circuit has observed, racial classification is frequently impermissible not because it is a per se violation of the Constitution, but because it has been drawn for the purpose of maintaining racial inequality. Where, on the other hand, it is employed to effect equality, it is clearly proper. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931—32 (1968). It may well be that the Supreme Court's impending decision in the *Bakke* case[19] will necessitate some reevaluation of "reverse discrimination" actions such as this one, but it is not the role of this Court to follow the law as superior tribunals might delineate it at some time in the future. The Court therefore holds that the MBE requirement accords with the intent of the Civil Rights Acts and rejects plaintiffs' statutorily-based contentions.

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19. *Bakke v. Regents of the University of California*, 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 429 U.S. 1090, 97 S. Ct. 1098, 51 L. Ed.2d 535 (1977).

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

SUMMARY

In conclusion, the court holds that defendants have sustained their burden of establishing the constitutionality of the MBE requirement. Plaintiffs' request for a preliminary injunction and declaratory relief is denied, the Secretary of Commerce's motion for a directed verdict is granted and the complaint is dismissed in its entirety.

SO ORDERED.

Dated: New York, New York
December 19, 1977

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U.S.D.J.

JUDGMENT DATED DECEMBER 28, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

H. EARL FULLILOVE, et al.,

Plaintiffs

-against-

JUANITA KREPS, Secretary of Commerce of the United States of America, et al.,

Defendants.

77 Civ. 5786 (HFW)

Plaintiffs having moved by show cause order and the Court having denied plaintiffs' request for a temporary restraining order, and the Court, pursuant to Rule 65(a)(2), of the Federal Rules of Civil Procedure, set the matter down for a consolidated hearing on the application for a preliminary injunction and trial on the merits, and the proceeding took place on November 31 and December 2, 1977, before the Honorable Henry F. Werker, United States District Judge, and the Court thereafter on December 21, 1977, having handed down its memorandum opinion, denying plaintiffs' request for a preliminary injunction and declaratory relief and granting the Secretary's motion for a directed verdict and dismissing the complaint, it is,

ORDERED, ADJUDGED and DECREED: That defendants JUANITA KREPS, Secretary of Commerce of the United States of America, et al., have judgment against plaintiffs H. EARL FULLILOVE, et al., dismissing the complaint in its entirety.

Dated: New York, N.Y.
December 28, 1977

s/ Raymond F. Burghardt
Clerk

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 22, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 894—September Term, 1977.

(Argued May 24, 1978 Decided September 22, 1978.)

Docket No. 78-6011

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORR AIR-CONDITIONING CO., INC.,

Plaintiffs-Appellants,

—v.—

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITALS CORPORATION,

Defendants-Appellees.

Before:

OAKES, *Circuit Judge*, and
BLUMENFELD* and MEHRTENS,** *District Judges.*

* Senior United States District Judge for the District of Connecticut, sitting by designation.

** Senior United States District Judge for the Southern District of Florida, sitting by designation.

Opinion of the Court of Appeals for the Second Circuit Dated September 22, 1978

This is an appeal from an order of the United States District Court for the Southern District of New York, Werker, *J.*, denying plaintiffs' application for a preliminary injunction restraining the defendants from implementing a federal statute requiring that 10 percent of all federal funds appropriated for specified public works projects be expended on bids tendered by minority business enterprises, and dismissing the action.

Affirmed.

ROBERT G. BENISCH (Berman, Paley, Goldstein & Berman, New York, N.Y.); Robert J. Fink, of counsel (French, Fink, Markle & McCallion, New York, N.Y.); Richard L. O'Hara, Robert A. Kennedy, Robert J. Aurigema, William M. Savino, Stephen J. Smirti, Jr., of counsel (Doran, Colleran, O'Hara & Dunne, Garden City, N.Y.), on the brief, *for Plaintiffs-Appellants.*

ROBERT B. FISKE, JR., United States Attorney, New York, N.Y. (Gaines Gwathmey, III, Dennison Young, Jr., Mary C. Daly, Patrick H. Barth, Assistant United States Attorneys, of counsel); Drew S. Days, III, Assistant Attorney General, Civil Rights Div., U.S. Dept. of Justice (Vincent F. O'Rourke, Jr., Jessica Dunsay Silver, of counsel), *for Defendant-Appellee Kreps.*

DOMINICK J. TUMINARO, Assistant Attorney General of the State of New York, New York, N.Y. (Louis J. Lefkowitz, Attorney General, George D. Zuckerman, Assistant Attorney

General in charge of Civil Rights Bureau; Arnold D. Fleischer, Assistant Attorney General, of counsel), *for Defendant-Appellee State of New York.*

BLUMENFELD, *District Judge:*

This is an appeal from the decision of the District Court, Werker, *J.*, that upheld the constitutionality of section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. § 6705(f)(2). The statute mandates that "no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." "Minority business enterprise" (MBE) is defined as "a business at least 50 per centum of which is owned by minority group members . . . ." The statute defines minority group members in racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

Appellants are several associations of contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work. Their application for a preliminary injunction on their petition for declaratory and injunctive relief to prevent the Secretary of Commerce as program administrator from enforcing the MBE provision was consolidated with a hearing on the merits. The District Court found that the provision was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry. The District Court denied their petition and dismissed the complaint. We affirm.

Opinion of the Court of Appeals for the Second Circuit Dated September 22, 1978

I.

In 1976 Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369 (July 22, 1976), 90 Stat. 999-1012, 42 U.S.C. §§ 6701-6735, designed to help alleviate nationwide unemployment in the economically depressed construction industry by appropriating $2 billion for public works projects. The Secretary of Commerce was to administer the program through the Economic Development Administration (EDA), charged with distributing funds under the Act to state and local governments. Congress mandated that the program be administered expeditiously[1] and the Secretary approved grants for the entire appropriation by February 1977. In May 1977, Congress supplemented the initial appropriation through the Public Works Employment Act of 1977, Pub. L. No. 95-28 (May 13, 1977), 91 Stat. 116-121, 42 U.S.C. §§ 6701-6736, to the extent of an additional $4 billion.

During the consideration of the PWEA on the floor of the House, the MBE requirement was introduced as an amendment to the Act. As contained in the final enactment, the provision reads:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For

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1 The Act required that each eligible project be started within 90 days of EDA approval (42 U.S.C. § 6705(d)), any application that was not rejected within 60 days of its submission to EDA would be deemed approved (42 U.S.C. § 6706), and the EDA was ordered to promulgate regulations governing grant applications within 30 days of the Act's passage (42 U.S.C. § 6706). The Act became law on May 24, 1977 and funds allocated under the PWEA had to be committed to an approved state or local project by September 30, 1977.

> purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

The appellants' attack is aimed only at the amendment; they do not contend that the inclusion of the amendment rendered the entire statute unconstitutional.

The question presented in this appeal is a narrow one. We are called upon to decide whether Congress acted in a constitutionally permissible manner in conditioning the receipt of federal grants for local public works projects under the PWEA upon the requirement that 10 percent of the grants be allocated to minority business enterprises.

II.

At the outset we note that when Congress seeks to exercise its spending powers, it is required to distribute federal funds in a manner that neither violates the equal protection rights of any group nor continues the effects of violations that have occurred in the past, for

> "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

Lau v. *Nichols*, 414 U.S. 563, 569 (1974), *quoting* 110 Cong. Rec. 6543 (1964) (remarks of Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

Opinion of the Court of Appeals for the Second Circuit Dated September 22, 1978

The Secretary acknowledges that in enacting the MBE provision Congress created an explicitly race-based condition on the receipt of PWEA funds. Under modern equal protection standards,[2] racial classifications are "suspect." This denomination often triggers the highest level of scrutiny imposed by the courts. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). Usually when a classification turns upon an individual's racial or ethnic background, "he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Regents of the University of California* v. *Bakke*, 46 U.S.L.W. 4896, 4904 (U.S. June 28, 1978) (opinion of Powell, J.); *In re Griffiths*, 413 U.S. 717 (1973). Whether rigid scrutiny is mandated whenever an act of Congress conditions the allocation of federal funds in a manner which differentiates among persons according to their race is a question we need not reach, for we are of the opinion that even under the most exacting standard of review the MBE provision passes constitutional muster.[3]

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2 Although the Equal Protection Clause appears only in the fourteenth amendment, which applies only to the states, the Supreme Court has held that the equal protection principles of the fourteenth amendment are embodied in the Due Process Clause of the fifth amendment. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 99-100 (1976); Washington v. Davis, 426 U.S. 229, 239 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

3 Four Justices of the Supreme Court have indicated that an intermediate standard of scrutiny is sufficient when Government "acts not to demean or to insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area." *Bakke*, *supra*, 46 U.S.L.W. at 4911 (opinion of Brennan, White, Marshall and Blackmun, JJ.) and *see id.* at 4920-21. Mr. Justice Powell, however, rejected that view and the other four Justices did not reach the question.

III.

The principles which the court below applied in rejecting the appellants' contentions that the amendment was either unconstitutional or in violation of the Civil Rights Act of 1964 are not in dispute on this appeal. However, we restate them briefly in order to put the appellants' argument that they were misapplied by the trial judge into sharper focus.

The appellants agree that the district judge correctly decided that "strict scrutiny" was required, but they contend that the standard of review which such scrutiny requires was not correctly applied. Having conceded below and properly so, that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination," they advance two separate arguments that a compelling interest was not shown.

Their argument is that there was not an adequate basis for the court below to conclude that Congress' purpose was to remedy prior wrongs to minority groups who had been denied opportunities in the construction industry as a result of race discrimination. This proposition has two elements that are analytically distinct. That they are treated in combination is understandable for they are bound together and rest to some extent on the same history and policy considerations. The amendment is permissible only if it is a remedy for past discrimination. *See Regents of the University of California* v. *Bakke, supra,* 46 U.S.L.W. at 4905 (opinion of Powell, J.). Whether it was Congress' *purpose* to enact a remedy for past discrimination is one question. Whether such discrimination occurred in the past is another question. The second question depends upon an assessment of historical facts, the first upon what was in the mind of Congress.

A. *Congress' Purpose*

Congressional purpose is relevant to consideration of whether the classification is permissible. Under any equal protection test "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ." *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).[4] More recently in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973), the Court said that even if strict judicial scrutiny was not required, the statute "must still be examined to determine whether it rationally furthers some legitimate, articulated[5] state purpose and . . . does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." *See also* L. Tribe, *American Constitutional Law* § 16-30 at 1083-85 (1978); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 20-22 (1972). Since strict scrutiny should require no less, we turn our attention to whether Congress articulated its purpose in enacting the amendment.

The rule for ascertaining what the purpose of Congress was in enacting a statute that is subject to scrutiny under

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4 The notion that any conceivable purpose which would uphold a classification should be attributed to it, *e.g.*, McGowan v. Maryland, 366 U.S. 420, 425 26 (1961), allows for more judicial restraint than strict scrutiny permits. In *McGowan* the Court stated that the Equal Protection Clause is violated only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective—a statutory discrimination will not be set aside if any state of facts may reasonably be conceived to justify it.

5 Since no content was given to the word "articulated," we view it as a prophylactic against resort to the "any conceivable reason" justification of *McGowan*. See note 4 *supra*.

the Equal Protection Clause is more deferential than the rule which would be applied to test a state statute. In differentiating a law passed by Congress from a mandate by a state legislature, or an administrative agency, the Court has said, "Alternatively if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 103 (1976). That a large measure of judicial restraint must be accorded to Congress in its enactment of legislation to remedy past discrimination was affirmed recently in *Regents of the University of California* v. *Bakke, supra,* 46 U.S.L.W. at 4905 n.41 (opinion of Powell, J.):

> "[W]e are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Jones* v. *Alfred H. Mayer*, 392 U.S. 409 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures."

Judge Werker did not base his decision that it was the purpose of Congress to remedy past discrimination solely on a presumption. There is no need to rely solely on a bare presumption to determine the purpose of Congress. The classification established by the amendment is self-evident. The amendment makes no sense unless it is construed as a set-aside to benefit minority subcontractors.[6] It has been

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6 The appellants argue that the legislative history is silent with respect to any purpose to remedy the effect of past discrimination, and

suggested that "[i]f an objective can confidently be inferred from the provisions of the statute itself, recourse to internal legislative history and other ancillary materials is unnecessary." Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1077 (1969). It is also beyond dispute that the set-aside was intended to remedy past discrimination. To support that conclusion, it is "enough that [the court] perceive a basis upon which Congress might predicate a judgment that" the MBE amendment would remedy past discrimination against minority construction businesses. *See Katzenbach* v. *Morgan, supra*, 384 U.S. at 656. In view of the comprehensive legislation which Congress has enacted during the past decade and a half for the benefit of those minorities who have been victims of past discrimination,[7] any purpose Congress might have had

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shows only that $4 billion which Congress allocated under the PWEA was expected to generate 800,000 jobs in other industries. But, by that particular amendment (§ 103(f)(2)), injected in the Act from the floor during the course of the debate, Congress did not create more jobs. It is clear from the amendment that Congress intended to guarantee that part of the jobs already contemplated by the PWEA would go to minority businesses, and not, as the plaintiffs contend, to "disadvantaged as opposed to minority small businesses."

7 For example, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6); Pub. L. No. 92-261, §§ 2-8, 10, 11, 13, 86 Stat. 103-113 (codified at 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17); Pub. L. No. 92-318, title IX, § 906(a), 86 Stat. 375 (codified at 42 U.S.C. §§ 2000c, 2000c-6, 2000c-9); Pub. L. No. 93-608, § 3(1), 88 Stat. 1972 (codified at 42 U.S.C. § 2000e-4); Pub. L. No. 94-273, § 3(24), 90 Stat. 377 (codified at 42 U.S.C. § 2000e-14); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Pub. L. No. 90-284, title I, § 103(c), 82 Stat. 75; Pub. L. No. 91-285, §§ 3-6, 84 Stat. 315; Pub. L. No. 91-405, title II, § 204(e), 84 Stat. 853; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, title II, §§ 204, 206, title IX, § 405, 89 Stat. 402, 404 (codified at 42 U.S.C. § 1971 *et seq.*); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73-92 (codified at 18 U.S.C. §§ 231-233, 241, 242, 245, 1153, 2101, 2102; 25 U.S.C. §§ 1301-1303, 1311, 1312, 1321-

other than to remedy the effects of past discrimination is difficult to imagine.

B. *Past Discrimination*

Although Congress' purpose and the factual background from which it sprang are not so disjoined that they could not be considered together, Judge Werker considered the question of past discrimination separately. The comprehensive opinion of the District Judge to which we make reference considered remarks made on the floor of the House when the MBE provision was introduced during the debate on the PWEA. He noted that Representative Mitchell, the amendment's sponsor, criticized the federal program of assistance to minority businesses that permits them to become "viable entities in our system" only to be "cut off" when government contracts are awarded. See Joint App. 160a; 123 Cong. Rec. H. 1437 (daily ed. Feb. 24, 1977), *reprinted in Associated General Contractors* v. *Secretary of Commerce*, 441 F. Supp. 955, 997-1006 (C.D. Cal. 1977) (Appendix C). In concluding that Congress found past discrimination, he also properly relied upon remarks made by Representative John Conyers of New York. Speaking in favor of the amendment, the Representative observed that "minority contractors and businessmen who are trying to enter the bidding process . . . *get the 'works' almost every time.*" *Id.* (emphasis added). Those remarks clearly disclosed the connection between the past discrimination and the "set-aside" amendment, and powerfully reinforced the conclusion reached by the judge.[8]

1326, 1331, 1341; 28 U.S.C. § 1360 nts.; 42 U.S.C. §§ 1973j; 3532, 3535, 3601-3619, 3631); Pub. L. No. 93-265, 88 Stat. 84 (codified at 25 U.S.C. § 1341).

8 Statements made in debates may be regarded as authoritative indicia of congressional intent. Pan American World Airways, Inc. v. CAB,

That an explicit finding of past discrimination was not included in the committee reports may sometimes be "troublesome." *Constructors Association* v. *Kreps*, 441 F. Supp. 936, 952 (W.D. Pa. 1977), *aff'd*, 573 F.2d 811 (3d Cir. 1978).[9] In this case it is not surprising in view of the manner in which the amendment was introduced.[10] But the absence of such a finding in the reports is not determinative. The record that was considered provided sufficient justification for a finding of past discrimination. *Cf. Arizona* v. *Washington*, 46 U.S.L.W. 4127, 4132 (U.S. Feb. 26, 1978) (when record provides sufficient justification for trial judge's mistrial ruling, ruling not subject to collateral attack simply because judge failed to make explicit finding of "manifest necessity" for mistrial). The record may be sparse, but it is not entirely silent.

The judge quite properly took account of the data and observations contained in a report prepared by the Department of Commerce to evaluate existing opportunities for minority business. See U.S. Dept. of Commerce, Office of

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380 F.2d 770, 782 (2d Cir. 1967). The situation here was similar to that in United States v. Oates, 560 F.2d 45, 72 (2d Cir. 1977), where the court said: "It is, of course of critical importance that it was with the explanations of [the Representative who sponsored the amendment] freshly in mind that the full House of Representatives on the very day these remarks were uttered finally approved" the bill. The MBE amendment was considered and passed by the House on February 24, 1977, the date these statements were made on the floor. H.R. Rep. No. 95-20, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News 150. The remarks were much more extensive but were all to the same effect.

9 Judge Snyder in Constructors Ass'n v. Kreps, *supra*, found the same passage sufficient evidence that Congress enacted the MBE provision to remedy past discrimination in the construction industry.

10 This explains the absence of any mention of the amendment in the Committee reports. Furthermore, the lack of extended discussion clearly indicates the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry.

Minority Business Enterprise, *Minority Business Opportunity Handbook* (August 1976). Noting plaintiffs' objection to the soundness of the data contained in the report, the Judge found "even if the statistics for minority businesses were to be doubled, there would still be an ample basis for Congress to conclude that 'the severe shortage of potential minority entrepreneurs with general business skills is a result of their historical *exclusion* from the mainstream economy.'" Joint App. 161a quoting from the *Minority Handbook* at 1-1-2 (court's emphasis included).

Moreover the judge undertook consideration of evidence that Congress had recorded elsewhere to support its finding that the history of discrimination was specific to the construction industry. A report prepared by the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise contains the following statement:

> "The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, *or in the construction industry, in particular.* However, inroads are now being made and minority contractors are attempting to 'break-into' a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them."

Summary of Activities of the Committee on Small Business, House of Representatives, 94th Congress, at 182-83 (November 1976) (emphasis added). The judge's finding that Congress acted upon sufficient evidence of past discrimination is more than amply supported by the record and establishes a "perceived" basis for congressional action.

IV.

In employment discrimination cases it is well established that the government's interest in overcoming the disadvantages resulting from past discrimination in employment on account of race is sufficiently compelling to justify a remedy which requires the use of racial preferences.[11] The vitality of the rationale in those cases has not disturbed by the recent decision of the Court in *Regents of the University of California* v. *Bakke*, *supra*. The Justices did not disagree with the principle that race-conscious remedies can be imposed when there have been judicial, legislative or administrative findings of past discrimination and the remedies fashioned are appropriately drawn to rectify that

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11 Many of those cases are cited by Chief Judge Coffin in support of a decision upholding that principle in Associated Gen. Contractors v. Altshuler, 490 F.2d 9, 16-17 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), along with Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 954 (1971), which is cited with approval in *Bakke*, 46 U.S.L.W. at 4906.

Section 6705(f)(2) merely broadens the economic area in which that principle applies to include independent contractors in the construction industry. We do not attempt to draw any distinction between services and materials which might be furnished by independent subcontractors on construction jobs. We note, however, that a person conducting a minority business who is denied an opportunity to compete for a certain amount of business on account of his race would have a cause of action under 42 U.S.C. § 1981. Runyon v. McCrary, 427 U.S. 160 (1976); Hollander v. Sears, Roebuck & Co., 450 F. Supp. 496, 499-500 (D. Conn. 1978).

discrimination. *Id.*, 46 U.S.L.W. at 4905 & n.41 (opinion of Powell, J.).[18]

In affirmative action programs to remedy the effects of past discrimination the effect of preferring members of the injured groups at the expense of others must be considered. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), Mr. Justice Powell, at 784-86 (concurring & dissenting), warned that affirmative action ordered as equitable relief must not exceed the bounds of fundamental fairness. *See Acha* v. *Beame*, 531 F.2d 648 (2d Cir. 1976). It is established that in fashioning remedies for past discrimination courts must be sensitive to interests which may be adversely affected by the remedy. The courts, here, as in a number of other areas where legislation for which there is a compelling interest collides with constitutional principles, have adopted an ad hoc balancing test which examines each particular case, *e.g.*, *Branzburg* v. *Hayes*,

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18 As Mr. Justice Powell noted:

"We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations. See, *e.g.*, *Teamsters* v. *United States*, 431 U.S. 324, 367-376 (1977); *United Jewish Organizations* [v. *Carey*, 430 U.S. 144, 155-156 (1977)]; *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm."

Regents of the Univ. of Cal. v. Bakke, *supra*, 46 U.S.L.W. at 4906-07 (footnote omitted).

408 U.S. 665 (1972) (public interest in law enforcement outweighs reporters' first and fourteenth amendment interest in keeping news sources confidential). One of the significant limitations on a remedy of "reverse discrimination" for past discrimination is that its effects shall "not be 'identifiable,' that is to say, concentrated upon a small ascertainable group of non-minority persons." *EEOC* v. *Local 638 . . . Local 28, Sheet Metal Workers*, 532 F.2d 821, 828 (2d Cir. 1976). *See also Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). The amendment at issue falls well within such a boundary against inequitable results. The PWEA which added $4 billion to the $200 million not yet expended portion of the amount authorized by Round I (Local Public Works Act) amounted to about 2.5 percent of the total of nearly $170 billion spent on construction in the United States for 1977, according to Department of Commerce statistics.[13] The set-aside for minority contractors under the PWEA was for 10 percent of the total grant and thus extends to only .25 percent of funds expended yearly on construction work in the United States. The extent to which the reasonable expectations of these appellants, who are part of that industry, may have been frustrated is minimal. Furthermore, since according to 1972 census figures minority-owned businesses amount to only 4.3 percent of the total number of firms in the construction industry, the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry.[14]

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13 U.S. Dept. of Commerce, Industry and Trade Administration, *Construction Review*, May-June 1978, at 11.

14 U.S. Bureau of the Census, *1972 Census of Construction Industries: Industries Series, United States Summary—Statistics for Construction*

Considering that nonminority businesses have benefited in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business for the short time that the program has to run.

Ours is not the only circuit in which the MBE amendment's constitutionality has been challenged by associations of general contractors. Other cases that have denied preliminary injunctions against enforcement of the "set-aside" provision are *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, No. 77-0676 (D.R.I. Feb. 6, 1978); *Associated General Contractors* v. *Secretary of Commerce*, No. 77-4218 (D. Kan. Dec. 19, 1977); *Carolinas Branch, Associated General Contractors* v. *Kreps*, 442 F. Supp. 392 (D.S.C. 1977); *Ohio Contractors Association* v. *Economic Development Administration*, No. C-1-77-619 (S.D. Ohio Nov. 22, 1977); *Montana Contractors Association* v. *Kreps*, 439 F. Supp. 1331 (D. Mont. 1977); *Florida East Coast Chapter* v. *Secretary of Commerce*, No. 77-8351 (S.D. Fla. Nov. 3, 1977). *But see Associated General Contractors* v. *Secretary of Commerce*, 441 F. Supp. 955 (C.D. Cal. 1977), *vacated and remanded*, 46 U.S.L.W. 3802 (U.S. July 3, 1978), which held the provision invalid.[15] That case reached

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Establishments With and Without Payrolls, Table A 1 (Aug. 1975); U.S. Bureau of the Census, *1972 Survey of Minority-Owned Business Enterprises: Minority-Owned Businesses*, Table 1 (May 1975).

15 In Associated Gen. Contractors v. Secretary of Commerce, *supra*, the court held that § 103(f)(2) of the PWEA is inconsistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-1. The trouble with that conclusion is that it is based on the overbroad premise that *any* reverse discrimination in a remedy for past discrimination is prohibited *per se* by Title VI. A majority of the Supreme Court has held that "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself." Regents of the Univ. of Cal. v. Bakke, *supra*, 46 U.S.L.W. at 4911 (opinion of Brennan, White, Marshall and Black-

the Supreme Court where it was remanded to the District Court for consideration of mootness. *See also Wright Farms Construction, Inc.* v. *Kreps*, No. 77-260 (D. Vt. Dec. 23, 1977).[14]

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mun, JJ.); *id.* at 4901 (opinion of Powell, J.). As we have shown above, a remedy for the effects of past discrimination which results in a not unreasonable amount of reverse discrimination is not unconstitutional. *See, e.g.*, Franks v. Bowman Transportation Co., *supra*. *See also* Acha v. Beame, *supra*; United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969). The effect here is minimal when compared with Rios v. Enterprise Ass'n Steamfitters Local Union 638, 501 F.2d 622 (2d Cir. 1974), which upheld an order to a union to admit minority applicants to an apprenticeship program in sufficient numbers to achieve a goal of 30 percent nonwhite membership.

16 In Wright Farms Constr., Inc. v. Kreps, *supra*, the court made a specific finding that Vermont had a small minority population, and therefore held the MBE provision unconstitutional as applied to contractors in that state. However, Congress clearly manifested its intent that the set-aside provision should not apply in such a case. See 123 Cong. Rec. 1437 (daily ed. Feb. 24, 1977), *reprinted in* Associated Gen. Contractors v. Secretary of Commerce, *supra*, 441 F. Supp. at 998-99 (Appendix C), where Representative Mitchell, the sponsor of the amendment, engaged in the following colloquy with Representative Kazen:

> "Mr. Kazen: All right. What happens in the rural areas where there are no minority enterprises? Will the 10 percent be held up in order to bring minority enterprises from somewhere else where there is no unemployment into a place where there is unemployment and there is no minority enterprise?
>
> "Mr. Mitchell of Maryland: In response to the gentleman's question, the answer is 'No.'
>
> " . . .
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> " . . . Let me tell the gentleman why that would not occur. When Presidents Nixon and Ford put out their Executive orders to all the agencies to utilize minority contractors, the agencies then established certain guidelines which said, all right, we will utilize these minority contractors wherever possible, but where there are none, there can be no utilization, and therefore no project should be delayed.
>
> "For example, I would not expect to take my minority contractors from Maryland into Idaho to meet that State's requirement. That will not be an issue.
>
> "Mr. Kazen: If the gentleman would yield further, this is what I wanted the gentleman to clarify, that where there are no minority

Both the Third and the Sixth Circuits have upheld the constitutionality of the MBE amendment. *Constructors Association* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration*, —— F.2d ——, No. 78-3053 (6th Cir. July 7, 1978). We agree with their decisions that section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), is not unconstitutional.

The judgment is affirmed.

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enterprise contractors [then] this provision would not be in effect; am I correct?

"Mr. Mitchell of Maryland: That is absolutely correct, and that is done by administrative action already on the books with all of the agencies.

"Mr. Kazen: Does the gentleman's amendment leave room for that type of discretion in the Secretary?

"Mr. Mitchell of Maryland: I assume that it does. It would be my intent that it would because that is existing administrative law."

As Representative Mitchell amplified further, 123 Cong. Rec. 1438, *reprinted* in 441 F. Supp. at 1000:

" . . . I reiterate what I said earlier, that we already have in existence within the agency structure the SOP administrative law that says this kind of amendment would not apply where there are no minority contractors or where there are no minorities. It is already in the law."