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Concrete Works of Colorado, Inc. v. City and County of Denver
("*Concrete Works IV*")
No. 00-1145, 10th Circuit, Feb. 10, 2003

In a stunning reversal, the Tenth Circuit Court of Appeals upheld Denver's Minority and Women Business Enterprise Program after more than a decade of litigation. The Court reversed the trial court's holding that Denver had failed to meet strict constitutional scrutiny and directed the entry of judgment for the government.

I. Facts

The City adopted an ordinance in 1990 that provided for annual goals of 16% for Minority Business Enterprises (MBEs) and 12% for Women Business Enterprises (WBEs) in construction contracts, and 10% for both MBEs and WBEs in professional design and construction services contracts. Bidders were to meet contract specific goals or make good faith efforts to do so. The City revised the program in 1996 and 1998, reducing the annual goals for both MBEs and WBEs in construction contracts to 10% and prohibiting M/WBEs from counting self- performed work towards the goals.

Plaintiff Concrete Works of Colorado, Inc. (CWC), a construction firm owned by a white male, sued the City in 1992, alleging that it had been denied three contracts for failure to meet the goals or to make good faith efforts and seeking injunctive relief and money damages. The district court granted the City's motion for summary judgment.[1] Plaintiff appealed and the Tenth Circuit reversed, holding that genuine issues of material fact precluded summary judgment.[2] The district court conducted a bench trial in 1999 on the constitutionality of the three ordinances and found in favor of CWC.[3] Denver appealed.

The Tenth Circuit held that CWC's claims for prospective injunctive relief against the operation of the 1990 and 1996 ordinances became moot as each was amended and replaced by the 1998 ordinance. Plaintiff's retrospective claim for money damages for the enforcement of the 1990 ordinance was not moot.

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[1] *Concrete Works of Colorado, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D. Colo. 1993) ("*Concrete Works I*").
[2] *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, (10th Cir. 1994) ("*Concrete Works II*").
[3] *Concrete Works of Colorado, Inc. v. City and County of Denver*, 86 F.Supp.2d 1042 (D. Colo. 2000) ("*Concrete Works III*").

II. Denver's Evidence

Denver introduced evidence of its contracting activities dating back to the early 1970s. This included reports of federal investigations into the utilization and experiences of local MBEs and of the City's early affirmative action efforts. M/WBE participation dramatically increased when the City adopted its first MBE ordinance in 1984. After conducting surveys and hearings, Denver extended the Program and increased the goals in 1988.

In the wake of *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), the City commissioned a study to assess the propriety of the Program. The 1990 Study[4] found large disparities between the availability and utilization of M/WBEs on City projects without goals. It likewise found large disparities on private sector projects without goals. Interviews and testimony revealed continuing efforts by white male contractors to circumvent the goals. After reviewing the statistical and anecdotal evidence, the City adopted the 1990 Ordinance. A 1991 study of goods, services and remodeling industries also found large disparities for City contracts not subject to goals.

When the Tenth Circuit reversed and remanded for trial in *Concrete Works II*, the City commissioned another study. The 1995 Study used Census Bureau data to determine M/WBE availability and utilization in the construction and design industries in the Denver Metropolitan Statistical Area (MSA). It calculated separate disparity indices for firms with and without paid employees. Census data were also used to examine average revenues per employee and rates of self-employment. Disparities in self-employment rates persisted even after holding education and length of work experience constant. A telephone survey to determine the availability and utilization of M/WBEs in the Denver MSA showed large disparities in the construction and professional design industries. The 1995 Study included discussion of a 1993 Study for the Denver Housing Authority (DHA) which found disparities for M/WBEs in some areas in some years, including those when DHA implemented an affirmative action program, and a 1992 Study for the Regional Transportation District that found large disparities for both prime and subcontracting in the Denver marketplace. Based upon this evidence, the City enacted the 1996 Ordinance.

In 1997, Denver commissioned a Study[5] to examine whether discrimination limited the opportunities of M/WBEs in construction projects of the type undertaken by the City. According to the court, this Study used a "more sophisticated" method to calculate availability by: (1) specifically determining the City's geographic and procurement marketplace; (2) using Dun & Bradstreet's *Marketplace* data to obtain the total number of available firms and numerous directories to determine the number of M/WBEs; (3) conducting surveys to adjust for possible misclassification of the race and gender of firms; and (4) presenting a final result of weighted averages of availability for each racial group and women for both prime and subcontracts.

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[4] The 1990, 1991 and 1995 studies were conducted by Brown, Bortz & Coddington, Inc. and Harding & Ogborn.

[5] The 1997 Study and the expert witness testimony at trial were provided by National Economic Research Associates, Inc. The author was counsel to NERA and the City on this phase.

The 1997 Study then compared M/WBE availability and utilization in the Colorado construction industry. It also examined 1987 Census Bureau data, the most current data then available. Again, all comparisons yielded large and statistically significant disparities. The 1997 Study also found that the potential availability of M/WBEs, as measured by the rates at which similarly situated white males form businesses, was significantly greater than their actual availability. The Study next examined whether minorities and women in the construction industry earned less than white males with similar characteristics. Large and statistically significant disparities were found for all groups except Asian-Americans. A mail survey was conducted to obtain anecdotal evidence of the experiences of M/WBEs and non-M/WBEs in the construction industry. Again, with the exception of Asian-Americans, minorities and women with similar characteristics experienced much greater difficulties than their white male counterparts. A follow up telephone survey indicated that the disparities were even greater than first indicated. Based upon the 1997 Study, the City enacted the 1998 Ordinance.

At trial, the City also introduced additional and extensive anecdotal evidence. M/WBEs testified that they experienced difficulties in prequalifying for private sector jobs; their low bids were rejected; they were paid more slowly than non-M/WBEs; they were charged more for materials than non- M/WBEs; they were often required to do additional work not required of white males; and there were barriers to joining trade unions and associations. There was extensive testimony detailing the difficulties M/WBEs suffered in obtaining lines of credit. The "most poignant" testimony involved harassment suffered at work sites, including physical assaults.

III. Legal Analysis

Whether the government has demonstrated the "strong basis in evidence" necessary to meet strict scrutiny[6] is a question of law. Once this burden is satisfied, a plaintiff must rebut this initial showing by: (1) providing a neutral explanation for the disparities; (2) demonstrating that the statistics are flawed; (3) proving that the disparities are not significant or actionable; or (4) presenting contrasting statistical data. "[T]he burden of proof remains at all times with CWC to demonstrate the unconstitutionality of the ordinance." *Concrete Works IV* at 15.

[6] The court applied "intermediate" scrutiny to the WBE portion of the program. The parties did not explicitly address this issue and neither did the court since Denver produced evidence of sex discrimination in the local construction marketplace.

The circuit court held that the district court's legal framework "misstate[d] controlling precedent and Denver's burden at trial." *Concrete Works IV* at 42.[7] The government need not prove that the statistical inferences of discrimination are "correct." "Strong evidence" supporting the government's determination that remedial action is necessary need not be "irrefutable or definitive" proof of discrimination. Statistical evidence creating inferences of discriminatory motivations is sufficient and therefore evidence of marketplace discrimination can be used to meet strict scrutiny. *Id*. at 55. It is the plaintiff who must prove by a preponderance of the evidence that such proof does not support those inferences.

Croson does not require that each group included in the Ordinance suffer equally from discrimination. In contrast to Richmond, Denver introduced evidence of bias against each group; that is sufficient.

Nor must Denver demonstrate that the "ordinances will *change* discriminatory practices and policies" in the local marketplace. *Id*. at 49 (emphasis in the original). Such a test would be "illogical" because firms could defeat the remedial efforts simply by refusing to cease discriminating.

Next, a municipality need not prove that "private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. . . . Denver's only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and link its spending to that discrimination. . . . Denver was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. To impose such a burden on a municipality would be tantamount to requiring proof of discrimination and would eviscerate any reliance the municipality could place on statistical studies and anecdotal evidence." *Id*. at 45-46. Similarly, the trial court was wrong to reject the statistical evidence because such evidence cannot identify the individuals responsible for the discrimination. *Id*. at 51.

Contrary to the district court's sixth question, the burden of compliance need not be placed only upon those firms accountable for the discrimination. The proper

[7] The district court rejected the City's evidence because it did not answer the following questions: "(1) Is there pervasive race, ethnic and gender discrimination throughout all aspects of the construction and professional design industry in the six county Denver MSA? (2) Does such discrimination equally affect all of the racial and ethnic groups designated for preference by Denver and all women? (3) Does such discrimination result from the policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity or gender? (4) Would Denver's use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentages on each project make Denver guilty of prohibited discrimination? (5) Is the compelled use of certified MBEs and WBEs in the prescribed percentages on particular projects likely to change the discriminatory policies and programs that taint the industry? (6) Is the burden of compliance with Denver's preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination?" *Concrete Works III*, 86 F.Supp. at 1066-67.

focus is whether the burden on third parties is "too intrusive" or "unacceptable." *Id*. at 50.

Croson'*s* admonition that "mere societal" discrimination is not enough to meet strict scrutiny, *see* 488 U.S. at 497, does not apply where the government presents evidence of discrimination in the industry targeted by the program. "If such evidence is presented, it is immaterial for constitutional purposes whether the industry discrimination springs from widespread discriminatory attitudes shared by society or is the product of policies, practices, and attitudes unique to the industry. . . . The genesis of the identified discrimination is irrelevant." *Id*. at 47. The trial court was wrong to require Denver to "show the existence of specific discriminatory policies and that those policies were more than a reflection of societal discrimination." *Id*. at 48.

The court further rejected the notion that a municipality must prove that it is itself guilty of discrimination to meet its burden. Denver can show its compelling interest by "evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination . . . [by] linking its spending practices to the private discrimination." *Id*. at 49, 57. Denver further linked its award of public dollars to discriminatory conduct through the testimony of M/WBEs that identified general contractors who used them on City projects with M/WBE goals but refused to use them on private projects without goals.

The lending discrimination studies and business formation studies conducted by NERA are relevant and probative because they show a "strong link" between the disbursement of public funds and the "channeling" of those funds due to private discrimination. "Evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that M/WBEs are precluded *at the outset* from competing for public construction contracts. Evidence of barriers to fair competition is also relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts." *Id*. at 59 (emphasis in the original). CWC failed to present evidence to rebut the lending discrimination data, instead resting on its belief that such evidence is irrelevant. Contrary to the trial court's ruling, the business formation studies were not flawed because they did not control for "quality of education," "culture" and "religion." Plaintiff failed not only to define such vague terms but also to conduct its own study controlling for these factors or to produce expert testimony that to do so would eliminate the disparities. *Id*. at 63-64.

The district court also erred in rejecting the disparity studies because they did not control firm size, area of specialization, and whether the firm had bid on City projects. The circuit court agreed with Denver's experts that, while it may be true that M/WBEs are smaller in general than white male firms, most construction firms are small and can expand and contract to meet their bidding opportunities. Importantly, Denver established that size and experience are not race- and gender-neutral variables: "M/WBE construction firms are generally smaller and less experienced *because* of discrimination." *Id*. at 69 (emphasis in the original). Further, CWC failed to conduct any study showing that the disparities disappear when such variables are held constant. Likewise, plaintiff presented no evidence

that controlling for firm specialization explained the disparities. Finally, the number of City bidders is not an accurate measure of availability because it may include unqualified firms; as long as the same assumptions are applied to M/WBEs and non-M/WBEs disparities must still be explained by the plaintiff. "Additionally, we do not read *Croson* to require disparity studies that measure whether construction firms are able to perform a *particular contract*." *Id*. at 74 (emphasis in the original).

That M/WBEs were overutilized on City projects with goals goes only to the weight of the evidence because it reflects the effects of a remedial program. Denver presented evidence that goals and non- goals projects were similar in purpose and scope and that the same pool of contractors worked on both types. "Particularly persuasive" was evidence that M/WBE participation declined significantly when the program was amended in 1989. The "utilization of M/WBEs on City projects has been affected by the affirmative action programs that have been in place in one form or another since 1977. Thus, the non-goals data is the better indicator of discrimination in public contracting" and supports the position that discrimination was present before the enactment of the ordinances. *Id*. at 83 -84.

There is no requirement that anecdotal testimony be verified. "Denver was not required to present corroborating evidence and CWC was free to present its own witnesses to either refute the incidents described by Denver's witnesses or to relate their own perceptions on discrimination in the Denver construction industry." *Id*. at 88.

The court held that because CWC had waived its claim that the ordinances were not narrowly tailored at an earlier stage in this litigation, the district court's holding in *Concrete Works I* that the Ordinances satisfy the other prong of strict scrutiny was affirmed.

In summary, the court stated that "t]o meet its initial burden, Denver was not required to unequivocally establish the existence of discrimination nor was it required to 'negate all evidence of non-discrimination.' [citation omitted] . . . Denver met its initial burden of producing strong evidence of racial discrimination in the Denver construction industry. Denver has also shown that the gender-based measures were based on reasoned analysis. Moreover, although CWC does not raise the issue, we conclude that Denver had a strong basis in evidence to conclude that action was necessary to remediate discrimination against M/WBEs *before* it adopted both the 1990 Ordinance and the 1998 Ordinance. [citation omitted] . . . CWC cannot meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. . . . Denver has shown that it has a compelling interest in remedying racial discrimination in the Denver construction industry and that it has an important governmental interest in remedying gender discrimination. CWC has failed to rebut Denver's showing." *Id*. at 92-94.