From Today's "Diversity News"

Affirmative Action: Chicago Wins Public-Contracting Fight

By Linda Bean

Although U.S. District Court Judge James B. Moran struck down an ordinance that required that a percentage of all subcontracts be reserved for diverse contractors, he supported the city's position that some sort of program is necessary to counter the historic impact of discrimination.

He also gave the city six months to rewrite its ordinance to conform with a standard of "narrow tailoring" defined by previous federal litigation.

"The city has a compelling interest in not having its construction projects slip back to near monopoly domination by white male firms," the judge wrote. "I recognize the executive and legislative bodies of this city cannot permit this to occur."

In the past 15 years, at least 25 race-based procurement programs have fallen to legal challenges across the country and dozens of others have folded when cities decided against defending their programs.

"I think it is a tremendous opportunity for the city of Chicago," said Ralph Moore, a Chicago consultant who works with minority-owned firms. "What we have is a watershed moment. We can finally take the issue of affirmative action and transform it from a historical set of activities to address past discrimination … to implement strategies that will look to the future."

"The other exciting part is we can finally get beyond the lawyers and get to the strategic planners and the supply chain professionals, and talk about how do we build businesses in our community as opposed to how do we defend an affirmative-action plan," Moore added.

Since 1990, more than 35 cases that challenge affirmative action in municipal contracting have been filed nationwide, according to George La Noue, a political-science professor at the University Maryland Graduate School. La Noue leads the school's project on civil rights and public contracting and often is retained as an expert witness by those challenging affirmative action.

Of those, 25 have gone to a verdict, La Noue said. Following a string of five or six losses, affirmative-action foes have been almost uniformly successful.

In 1996, the Builder's Association of Greater Chicago sued both the city and Cook County, the county in which Chicago is located, over set-aside ordinances. In 2000, a federal judge struck down the county ordinance and a federal appeals court affirmed that decision.

The nearly seven-year delay in litigation allowed those defending the city's ordinance to fine-tune their strategy, said Colette Holt, an attorney who specializes in procurement and contracting issues.

As a lawyer for the city in the early 1990s, Holt helped author Chicago's original ordinance. Now, she serves as a consultant and expert witness for government bodies, including Chicago, that are seeking to defend their procurement programs.

Rather than defending the program as a remedy for past discrimination, Holt said, the city "decided to take a look at the overall marketplace."

"We hired internationally known economists as experts," she said, and put on a case that identified discrimination as a marketplace barrier.

"Discrimination interferes with the ability of people to fairly and fully compete," Holt said, and patterns of discrimination were evident throughout the construction industry, dating to Chicago's early history.

In his decision, Moran provided a capsule history of discrimination in Chicago.

"Although Chicago did not suffer the legally mandated discrimination of the Southern states, it was a segregated city -- the most segregated city in the United States … and the breaking down of the barrier has been a long, slow, painful and continuing process," he wrote.

Moran detailed race riots, redlining, and employment discrimination and addressed at length the traditional steps young people in Chicago once took toward careers in the skilled building trades.

The city's most prominent trade school graduated few people of color and the city's trade unions were "virtually all white and … resistant to change," Moran wrote.

In response, the city commissioned reports, proposed broad plans and implemented new strategies -- none of which had any real impact on the second-class status of women and people of color in the construction industry.

In 1990, though, under the leadership of Mayor Richard Daley, the city -- following 18 days of public hearings -- hammered home an ordinance that set procurement goals and forced white contractors to meet those goals.

By 1994, 25 percent of the dollar value of city contracts were reserved for minority firms; 5 percent were reserved for companies owned by women.

That meant that 70 percent of all contracts were open to any bidder and generally won by large, majority-owned firms.

"People frankly were a little embarrassed to be a part of the case," Holt said. "I think they recognized that what they were saying is that '70 percent is not enough. We want 100 percent.' "

"In essence," said the Builders Association, "we questioned the legality of legislation, however well-intentioned, that essentially dictated hiring practices."

The association said in a prepared statement that "we support affirmative action and the embrace the benefits of a diverse workforce not only because it makes good business sense, but because it is the right thing to do."

"There is only one corner of the universe you can be certain of improving, and that's your own self."

- Aldous Huxley, English novelist (1864-1963)