SUPREME COURT OF LOUISIANA

No. 99-CA-0025

LOUISIANA ASSOCIATED GENERAL CONTRACTORS, INC.

VERSUS

NEW ORLEANS AVIATION BOARD

****
ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON,
HONORABLE PATRICK J. MCCABE, DISTRICT JUDGE
****

Calogero, C. J. concurring

I concur in the majority opinion which holds that the Aviation Board's Disadvantaged Business Enterprise Program violates the City of New Orleans' Interim Ordinance, and I write separately to express my views on this issue.

Since the New Orleans City Council had in effect, at least prior to its passage of the Interim Ordinance, ordinances and policies which authorized the use of race-based set asides or other preferences in City contracts, I viewed with suspicion plaintiff's argument, and now the majority's resolution, that the Aviation's Board's program ran afoul of the City's Interim Ordinance No. 13139 of 1989. However, with a better understanding of the historical context out of which the Interim Ordinance arose, I now understand its genesis and the majority's conclusion.

The United States Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) stated that while the states and their local subdivisions have the legislative authority to eradicate the effects of private discrimination, they must exercise that authority within the constraints of the Fourteenth Amendment. *Croson* held violative of the Fourteenth Amendment a city plan which denied certain citizens the right to compete for a certain percentage of public contracts based solely on their race. It was in response to that decision out of the United States Supreme Court, that the New Orleans City Council, which apparently already had in force an affirmative action program, acting on the advice of the city attorney, suspended the earlier program. It simultaneously passed the Interim Disadvantaged Small Business Development Ordinance, which at the direction of the City Council was designed to avoid constitutional infirmity by comporting with *Croson, supra*.

This is the frame work of the Interim Ordinance under the terms of which socially and economically disadvantaged individuals could be afforded some degree of preference. The Interim Ordinance specifically states that "[i]ndividuals must establish their social disadvantage on the basis of clear and convincing evidence." (Interim Ordinance II E 4 (b)), and additionally, that "[t]he individual's social disadvantage must stem from *his or her* cultural or educational background; developmental deprivation; dialectical variation from prevailing speech patterns; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause not common to small business persons who are not socially disadvantaged." *Id.* at 4(b)(2) (emphasis added). The ordinance goes on the require that the "*individual* must demonstrate that *he or she* has personally suffered social disadvantage, not merely claim membership in a group which could be considered socially disadvantaged." *Id*. at 4 (b)(2) (emphasis added). What the Interim Ordinance affirmatively stated, obviously to conform with Croson, was that there shall not be discrimination on the basis of race, color, or creed. Consistent with that, the ordinance, at Section 2-604 provides:

> No person or business firm shall be certified for inclusion or included in the registry of firms owned and controlled by socially and economically disadvantaged persons and no contracts shall be set aside for award, nor shall any person or firm be awarded any City contract or sub-contract or preference in contracting, sub-contracting or vending to or with the City, on the basis of race, color, creed, national origin, or gender.

The Aviation Board's Program, including as it does race and gender based presumptions of social and economic disadvantage and showing a preference to individuals on the basis of race or gender when qualifying them for set-aside contracts, does discriminate on the basis of race and gender and is therefore impermissible under the terms of the Interim Ordinance.

The Interim Ordinance, passed in 1989, has apparently not been subsequently amended. It appears applicable to all city agencies, of which the Aviation Board is one. LSA-RS 2:351A (West Supp. 1999). It was in 1992 that the Aviation Board instituted the affirmative action program which is under attack in this case.

The majority concludes that the constitutionality of the Aviation Board's Program need not be addressed if we find that it is not authorized by local law. The Aviation Board argues that the authority for implementing the program stems from the City of New Orleans Home Rule Charter. As I perceive it, the Home Rule Charter gives the City of New Orleans a great deal of

power, and the City Council expressed that power in the Interim Ordinance, which states that affirmative action programs are permissible as long as there is no discrimination on the basis of race. The Aviation Board is bound by the Interim Ordinance, and to the extent that its DBE program violates the Interim Ordinance, it is not legal.

I believe that the Aviation Board's affirmative action program is not authorized by the Home Rule Charter nor by the Charter as implemented by the legal ordinances thereunder. [1] That being the case, the majority is correct in pretermitting consideration of whether the Program, were it otherwise legal, violates Article I, Section 3 of the Louisiana Constitution.

This Court could send this case back to the court of appeal because the Program that the trial court declared unconstitutional is not a "law or ordinance" and therefore La. Const. art. V, sec. 5 (D) does not provide for a direct appeal to this Court. We are, however, at liberty to decide the case since writs were granted and the whole case is before us. Sending it back to the court of appeal would be contrary to the concept of judicial economy and the interest of the parties in having this lawsuit concluded. These considerations prompt me to favor resolution of the issue now. Furthermore, this disposition will facilitate any contemplated effort by the Aviation Board and the City Council, should they respectively so decide, to amend the Program to comply with the Interim Ordinance or to amend the Interim Ordinance in a constitutionally acceptable way under *Croson, supra*.

[1] There is no specific reference in the Charter to affirmative action programs or powers in that respect. The argument made by the Aviation Board is that the nature of the power authorized by the Home Rule Charter is so comprehensive that it necessarily authorizes the program at issue.