

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, JUDGE**

TRAYLOR, Justice*

The Louisiana Associated General Contractors filed a Petition for Declaratory and Injunctive relief against the New Orleans Aviation Board’s Disadvantaged Business Enterprise Plan, alleging that it created unconstitutional race- and gender-based classifications. The trial court granted relief, and the Aviation Board filed a direct appeal with this court. This court determined that the trial court prematurely addressed the constitutional issue and remanded the case to the trial court. Upon remand, the trial court again held the Program unconstitutional. Both the Aviation Board and the Louisiana Associated General Contractors appealed. Finding this case warranted direct appeal due to the constitutional issue involved, the appellate court transferred the case to this court. We granted the appeal in accordance with our supervisory jurisdiction. Because we find that the Program directly violates the New Orleans’ Interim Disadvantaged Small Business Development Ordinance, we reverse the ruling of the trial court, but maintain the permanent injunction imposed.

FACTS AND PROCEDURAL HISTORY

The New Orleans Aviation Board (NOAB) adopted the “Disadvantaged Business Enterprise Plan for the New Orleans International Airport” (Program). The Program provides participation goals, preferences, and set-asides on airport and heliport related contracts for businesses that qualify as disadvantaged business enterprises (DBE). Before the NOAB will qualify a business as a DBE, at least fifty-one percent of a business must be owned and controlled by individuals who are socially and economically disadvantaged. Under the Program particular

*KNOLL, J., not on panel. See Rule IV, Part 2, § 3.

gender and racial groups are presumed to be socially and economically disadvantaged. This presumption may be rebutted if challenged by a third party.

On April 12, 1996, the Louisiana Associated General Contractors (LAGC) filed a Petition for Declaratory and Injunctive Relief against the NOAB alleging that the Program creates unlawful race- and gender-based classifications in violation of Article I § 3 of the Louisiana Constitution, which forbids the creation and application of laws that discriminate on the basis of race or “arbitrarily, capriciously, or unreasonably discriminate” on the basis of sex. LAGC further contended that Section 38:2233.2 of the Revised Statutes, which provides for set-asides in public works contracts for minority contractors, was also unconstitutional. Alternatively, LAGC alleged that the Program lacked authority because it violated the low bid requirements of the Louisiana Public Bid Law and the New Orleans Home Rule Charter by awarding contracts on the bases of race and gender. Upon LAGC’s motion, the trial court issued a temporary restraining order which enjoined NOAB from receiving bids on the Project.

On September 30, 1996, LAGC moved for summary judgment based on this court’s opinion in *Louisiana Associated General Contractors, Inc. v. State*, 98-2105 (La. 3/8/96); 669 So. 2d 1185, which found that the Louisiana Constitution absolutely bans race-based classifications. After a hearing, the trial court granted LAGC’s motion for summary judgement declaring Rev. Stat. 38:2233.2 and the Program unconstitutional as to city projects, and permanently enjoined NOAB from utilizing the Statute or the Program in non-federal public works projects.

NOAB appealed the trial court’s ruling directly to this court pursuant to La. Const. Art. V, § 5(D), which allows a petitioner to appeal the case directly to the supreme court if a law or ordinance has been declared unconstitutional. Noting that courts should avoid constitutional rulings when the case can be disposed of on the basis of non-constitutional issues, this court held that the trial court had prematurely addressed the constitutional issue. *Louisiana Associated General Contractors, Inc. v. New Orleans Aviation Board*, 97-0752 (La. 10/31/97); 701 So. 2d 130. Consequently, this court vacated the trial court’s judgment and remanded the case to the trial court for consideration of whether the NOAB had authority under local law to adopt the Program.

Following remand, the trial court ruled that the City of New Orleans Home Rule Charter

gave NOAB authority to adopt the Program. However, the trial court again declared the Program an unconstitutional violation of Article I, § 3. The trial court issued a permanent injunction restraining NOAB from enforcing the Program on any non-federal works projects.

NOAB appealed the trial court's ruling of unconstitutionality to the court of appeal, and LAGC cross appealed the trial court's ruling that NOAB had authority under local law to authorize the Program. On motion by LAGC, the court of appeal transferred the matter to this court pursuant to La. Const. Art. V, § 5 (D), because the matter involved a constitutional issue.

Upon review, we find that because the trial court declared a "program" unconstitutional, as opposed to a "law or ordinance" under La. Const. Art. V, § 5 (D), the LAGC did not have a right of direct appeal to this court. However, we decide to grant this case according to our supervisory jurisdiction under La. Const. Art. V, § 5(A) in order to avoid further delay in the disposition of this matter which we previously remanded to the trial court. *See also Progressive Sec. Ins. Co. v. Foster*, 97-2985 (La. 1/23/98); 711 So. 2d 675,694. *State Bond Com'n v. All Taxpayers, Property Owners, and Citizens of State*, 510 So.2d 662, 663 (La. 1987); *See also State v. Peacock*, 461 So. 2d 1040 (La. 1984); *Hainkel v. Henry*, 313 So. 2d 577 (La. 1975); *McClelland v. Gasquet*, 122 La. 241, 47 So. 540 (1908).

LAW AND DISCUSSION

The City of New Orleans' "Interim Disadvantaged Small Business Development Ordinance" (Interim Ordinance), authorizes establishment of "a program for participation goals, preferences, and set-asides in city contracts and procurement for firms owned by socially and economically disadvantaged persons," and "[provides] for the interim suspension of all race-based set-asides, goals, and preferences." Under the Interim Ordinance, if a public works or construction project exceeds \$50,000, the general contractor is required to make a reasonable effort to subcontract at least twenty-five percent of the total dollar in subcontracts to New Orleans' DBE's.

To qualify as a DBE under the ordinance, at least fifty-one percent of the business must be owned and controlled by socially and economically disadvantaged individuals. According to the Interim Ordinance, socially disadvantaged individuals are "individuals . . . who have been subjected to discrimination, prejudice, or cultural bias because of their identity as a member of a group without regard to their individual qualities." The social disadvantage must stem from

circumstances beyond their control. Also, the Interim Ordinance defines economically disadvantaged individuals as “those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged.” Before a person can qualify as a socially disadvantaged individual, the person must prove by clear and convincing evidence he has actually suffered a disadvantage. Merely claiming membership in a group which may be considered socially disadvantaged is not enough to qualify for disadvantaged status under the Interim Ordinance.

When determining which businesses qualify as economically or socially disadvantaged, the Interim Ordinance strictly forbids race- and gender-based discrimination or preferential treatment.

Section 2-604 (A)(1) of the Interim Ordinance states:

A) 1) 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 contract shall be set aside for award, nor shall any person or firm be awarded any city contract or subcontract or preference in contracting, subcontracting or vending to or with the city, on the basis of race, color, creed, national origin, or gender.

The Interim Ordinance also prevents the City of New Orleans from issuing or carrying out any policy dealing with city contracts that provide preferential treatment on the basis of race or gender. Section 2-603 provides that all ordinances, executive or administrative policy memoranda, directives, or orders which require or authorize race- or gender-based preferences in city contracts are, on an interim basis, superseded and suspended by the Interim Ordinance.**

According to the NOAB Program at issue individuals who belong to the following groups are presumed socially and economically disadvantaged:

(a) Women;

(b) African Americans, which includes persons having origins in any of the Black racial groups of Africa;

**The section reads in pertinent parts:
Articles XVIII and XIX and Section 2-50.5 of Article V of this Chapter, Executive Orders 84-01 and 83-02 (as originally issued and as supplemented and/or revised) and those provisions of all other ordinances, executive or administrative policy memoranda, directives, or orders which require or authorize the use of race-based or gender-based goals, set-asides, or other preferences in City contracts or procurement are, on an interim basis, (unless and to the extent that federal law requires otherwise), suspended and superseded by this Article, as of the effective date hereof and for so long as this Article is in effect. The provisions of Sub-Section II(A) of Section 2-602 of this Article shall become effective on the tenth day following the effective date of this Article.

(c) Hispanic Americans, which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(d) Native Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(e) Asian-Pacific Americans, which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and

(f) Asian-Indian Americans, which includes persons whose origins are from India, Pakistan, and Bangladesh.

Generally, the NOAB does not investigate the actual disadvantaged status of those individuals presumed to be disadvantaged unless their status is challenged by a third party. If challenged, the business may lose its status as a DBE if, for example, it is proved that the day-to-day activities of the business are not controlled by disadvantaged owners.

Individuals who do not belong to one of the aforementioned groups may also apply for DBE qualification to be reviewed on a case by case basis. No presumption is afforded to individuals whose race or gender is not listed in the Program. Before the NOAB will certify these individuals, they must prove that their disadvantaged status arises from individual circumstances, rather than by membership in a particular group.

Pursuant to the Program, the NOAB established a fifty percent participation goal for its Project No. 45-93-01W, entitled the “West Taxi Lot Lounge and Staging Facility at the New Orleans Airport” (Project). According to the Program’s requirements, the general contractor selected for the Project is obliged to make a good faith effort to award a least fifty-percent of the total subcontract dollars to DBE’s. To demonstrate good faith effort, the general contractor is required to document the steps taken in seeking out and considering DBE’s as potential subcontractors. The documented steps must include certain enumerated actions, such as contacting two or more DBE’s and affirmatively soliciting their interest, capability, and price quotations. If a general contractor fails to comply with the Program’s requirements, it is deemed a non-responsive bidder, even if it submitted the lowest bid.

We find that the Program facially violates the Interim Ordinance on two points. First, the Program’s standard for determining if an individual is socially and economically disadvantaged falls far below the standard commanded by the Interim Ordinance. Under the Program, if an

individual is female or belongs to a specific race-based group included in the Program's list, he is presumed to be socially and economically disadvantaged. The Interim Ordinance, however, refuses to consider an individual as disadvantaged simply because the individual belongs to a particular race or gender group. The individual must provide clear and convincing evidence that proves he actually suffered a disadvantage by belonging to a particular group. The Interim Ordinance's burden of proof falls upon the individual seeking disadvantaged status. However, no burden of proof exists under the Program unless the presumption is rebutted by a third party. Thus, we hold that the Program's presumption on its face violates the clear and convincing standard required by the Interim Ordinance.

Second, the Program violates § 2-604 of the Interim Ordinance which forbids showing preference toward or discriminating against individuals on the basis of gender or race when qualifying them for socially or economically disadvantaged set-aside contracts. The Program specifically states that individuals who are female or belong to a specific race-based group automatically qualify as socially and economically disadvantaged. Thus, if they own and control at least fifty-one percent of the business they are automatically allowed to bid on and receive up to one hundred percent of the full dollar amount of the contracts offered to subcontractors under the Program. However, the individuals who are not included within the Program's list of people presumed to be disadvantaged, may only bid on and receive up to fifty percent of the full dollar amount of the contracts offered to subcontractors under the Program unless they can prove that they have actually suffered a disadvantage because of their individual circumstances. During oral arguments before the trial court, NOAB's council conceded that the Program's requirements provided preferential treatment on the basis of race and gender by stating, "This is just a preference. . . . It is not a set aside." We agree with the argument that the Program's presumption is preferential but we further hold that it also allows unlawful discriminatory practices by providing set-asides on the bases of race and gender.

CONCLUSION

Because the Program's burden of proof for qualifying individuals as socially disadvantaged falls short of the burden required under the Interim Ordinance and because the Program provides preference toward individuals on the basis of race and gender when awarding public works contracts, we hold that the Program is prohibited by the City of New Orleans' Interim Ordinance.

Therefore, we reverse that part of the ruling of the trial court which held that the NOAB had authority under local law to adopt the Program, and maintain the permanent injunction imposed by the trial court.

DECREE

REVERSED.