

ACCA Western Region Newsletter

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Happy New Year & Season's Greetings

Please be safe and have a great holiday. See you on the other side in 2009!

Congratulations to Jesse Johnson

Congratulations to **Jesse Johnson** on his retirement after 29 years of service with the City of Long Beach!

<http://www.youtube.com/watch?v=kdGg1POJeYM>

News from AMAC - Victory for Oakland ACDBE Program

From a November 17, 2008 AMAC email (<http://www.amac-org.com/>):

Rothe Development Corp. v. Dept. of Defense

2008 U.S. App. Lexis 23093

(U.S. Court of Appeals for the Federal Circuit 2008-1017)

On November 4, 2008, the U.S Court of Appeals for the Federal Circuit issued a decision declaring unconstitutional the Department of Defense's (DOD's) 1207 Program. This is the program that DOD uses to assist it in meeting its Small Business Administration goals. We want to make sure that our members and supporters are aware of this decision and its implication for them. The following summary should be considered informational only and does not constitute legal advice to any of our members. In this area, as in many others, it is important that institutions and individuals with interest in these legal matters consult their own independent counsel.

Before considering the specifics of the decision, it is important to understand a few general points about the Federal Circuit's opinion. First, while the Federal Circuit did strike down the 1207 Program, it also signaled that federal minority contracting programs continue to be constitutional when properly enacted and supported by Congress with proper evidence. Second, and importantly, while this decision dealt with issues relevant to any race-conscious minority contracting program, it did not directly consider the merits of any DOT program and thus does not undermine the existing court decisions that have upheld the constitutionality of the DBE program. Third, there are important questions about whether this opinion is binding on other federal courts and, if so, which ones. It is unclear how the unique and narrow jurisdiction of the U.S. Court of Appeals for the Federal Circuit impacts the way that other federal courts will treat this decision. And finally, it is important to realize that the primary tool available under the 1207 program for leveling the playing field (the so-called PEA or price evaluation adjustment mechanism) has actually not been used since 1999 (the contract at issue in the case was let in 1998). By law, the PEA is automatically suspended for a full year after any year in which the Department's 5% goal is met. DOD has met its 5% goal in every year since 1999.

With those caveats, AMAC members and supporters should be aware of a number of points made by the court:

The court, following the Supreme Court in *Croson* and *Adarand* and other decisions, held that before enacting (or reenacting) a race-conscious minority contracting program, Congress must have a "strong basis in evidence upon which to conclude that the remedial action [is] necessary." *Rothe Development Corp. v. Dept. of Defense*, 2008 U.S. App. Lexis 23093, at 31 (internal quotations and citations omitted). This holding reaffirms the importance of AMAC's legislative efforts, which will be all the more critical and time-sensitive as we move into the 111th

Congress.

The court did opine on issues related to statistical evidence of discrimination. Specifically, the court made a number of statements about the relative merits of different sources of empirical data in demonstrating the existence of discrimination. In brief, the court:

- Agreed with the district court that Congress should generally rely on the best available recent data and rejected the argument that any data more than five years old is per se stale. The court also declined to set an absolute limit on the age of data.
- Discussed (without deciding) the issue of how courts should determine whether evidence should be considered to be "before Congress." The court did seem to suggest that mere mention of a study in a floor statement might not be sufficient to show that the study was "before Congress" when the program was enacted, and suggested that Congressional findings and hearings are an important part of the deliberative process. The court clearly held that in order for Congress to enact a race-conscious program, it is not necessary that Congress have evidence demonstrating discrimination by the federal government itself.
- Discussed the quality and quantity of disparity study methodologies Congress would need to have before it in order to demonstrate a strong basis in evidence of the need for race-conscious remedial efforts. The court was especially interested in how best to determine "availability" and account for "capacity" of contracting firms and commented favorably on the use of regression analysis. While the court discussed these issues and found the evidence lacking in this particular case, it was careful not to make any absolute pronouncements about what methodologies might be deemed sufficient or how many studies would be necessary to sustain a similar program. Indeed, the court specifically stated "[w]e stress that our holding is grounded in the particular items of evidence offered by DOD and relied on by the district court in this case, and should not be construed as stating blanket rules, for example about the reliability of disparity studies." Rothe at 70-71. Furthermore the court stated that "we still think that Congress need not amass evidence of discrimination in all fifty states to meet its burden." Rothe at 60.

In summary, the Federal Circuit's holding in the Rothe case provides both AMAC and its members and supporters with good information about one court's views on the constitutional questions involved in evaluating federal affirmative action programs. Even so, it remains unclear exactly whether this case will be binding on any other court outside of this case.

Sincerely,

Don O'Bannon
AMAC Chair

Upcoming Events

January 9, 2009

Bay Area Contract Compliance Officers Association (BACCOA) Meeting
San Mateo County Transit District - 1250 San Carlos Avenue, San Carlos, CA
Kato Cooks (650-508-7940)

June 6 - 9, 2009

25th Annual Airport Business Diversity Conference
Baltimore, MD
<http://www.amac-org.com>

June 16 - 19, 2009

California Association of Equal Rights Professionals (CAERP) Training Conference
Lake Tahoe, CA
<http://www.caerp.org>

September 15 - 19, 2009

American Contract Compliance Association Training Institute
Fort Worth, TX - Omni Fort Worth Hotel

<http://www.acca298.org>

October 24 - 29, 2009

National Minority Supplier Development Council (NMSDC) Annual Conference

New Orleans, LA

<http://www.nmsdc.org>

Contact Information

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From January 1, 2009

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Web Sites

ACCA - <http://www.acca298.org/>

TriMet - <http://trimet.org/>

B2Gnow - <http://www.B2Gnow.com/>

Port of Tacoma - <http://www.portoftacoma.com/>

Port of Oakland - <http://www.portofoakland.com/>

Port of Portland - <http://www.portofportland.com/>

City of Portland - <http://www.portlandonline.com/>

Multnomah County - <http://www.multcopurch.org/>

Portland Community College - <http://www.pcc.edu/>

Housing Authority of Portland - <http://www.hapdx.org/>

Portland Development Commission - <http://www.pdc.us/>

City of Long Beach - <http://www.longbeach.gov/diversity/>

D. Moore Consulting - <http://www.dmooreconsulting.com/>

Metro Regional Government - <http://www.metro-region.org/>

Providence Health System - <http://www.providence.org/oregon/>

City and County of Denver - <http://www.milehigh.com/business/do-business>

San Francisco Bay Area Rapid Transit District (BART) - <http://www.bart.gov/>

City of San Francisco Human Rights Commission - www.sfgov.org/sfhumanrights

Business Diversity Institute dba: Minority Business Opportunity Committee -

<http://bdiweb.org/>

Email us your organization's link and we'll feature it on the list.