



U.S. Department of Justice

Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

December 19, 2008

The Honorable Nancy Pelosi  
Speaker  
United States House of Representatives  
Washington, D.C. 20515

Re: Rothe Dev. Corp. v. U.S. Dep't of Defense, 545 F.3d 1023 (Fed. Cir. 2008)

Dear Madam Speaker:

In accordance with 28 U.S.C. 530D, we write to advise you that the Solicitor General has decided not to seek en banc or Supreme Court review of the decision of the United States Court of Appeals for the Federal Circuit in the above-referenced case. The Federal Circuit unanimously held that Section 1207 of the National Defense Authorization Act, 10 U.S.C. 2323 -- which by its terms will expire in September 2009 -- is facially unconstitutional under the equal protection component of the Fifth Amendment. A copy of the opinion is enclosed. The decision not to seek discretionary review at this stage before the court of appeals or Supreme Court does not reflect a determination that the statute -- which the Department has defended in this litigation -- is unconstitutional, but rather is based on practical litigation and timing considerations discussed below.

Section 1207 provides that, in the absence of compelling national security considerations, the Department of Defense (DOD) should direct at least five percent of federal defense contracting funds to small businesses owned and controlled by socially and economically disadvantaged individuals (SDBs). See 10 U.S.C. 2323(a)(1)(A). Section 1207 defines SDBs by reference to Section 8(d) of the Small Business Act, 15 U.S.C. 637(d), which presumes that certain racial or ethnic minorities are socially and economically disadvantaged. Section 1207 also allows the Department to apply a price evaluation adjustment (PEA) to bids submitted by non-SDBs, increasing those bids by up to ten percent before comparing them to the bids submitted by SDBs. 10 U.S.C. 2323(e)(3).

In a suit brought by a losing bidder, the Federal Circuit issued declaratory and injunctive relief barring DOD from operating the Section 1207 program. Applying strict scrutiny, the court determined that "Congress did not have before it, at the time of the 2006 reenactment of Section 1207, a 'strong basis in evidence' for the proposition that DOD was a passive participant in racial discrimination in relevant markets across the country and that therefore race-conscious remedial measures were necessary." Rothe Dev. Corp. v. United States Dep't of Defense, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989)). In particular, the court determined that the six state and local disparity studies before Congress at the time of the statute's enactment suffered from various methodological flaws that rendered them unreliable indicators of racial discrimination in defense contracting. Id. at 1042-1045. The

court "stress[ed] that our holding is grounded in the particular items offered by DOD \* \* \* and should not be construed as stating blanket rules." Id. at 1049. "Thus," the court continued, "if Congress reenacts Section 1207 again before it is set to expire in 2009 -- as Congress is free to do -- we cannot now predict, nor do we intend to prejudge, whether any such new enactment will be supported by a 'strong basis in evidence.'" Ibid.

The Department of Justice defended the constitutionality of Section 1207 in the trial court and the court of appeals. The Solicitor General has decided, however, not to seek discretionary review of the Federal Circuit's decision at this stage. The court of appeals' decision is unanimous and fact-bound, and emphasizes that it is limited to the facts of this case concerning a statute that is set to expire in September 2009. It does not conflict with any other court of appeals' decision, which is a key consideration for en banc review. Even if the en banc court of appeals agreed to reconsider the panel's decision, it appears unlikely that the case could be argued and decided by the en banc court before the statute is set to expire.

Furthermore, even if the en banc court of appeals reinstated Section 1207 shortly before the statute expires in September 2009, that action would have little if any practical effect even during that limited time frame. This case seeks only prospective declaratory and injunctive relief against the statute, because the contractual dispute that initially gave rise to this action is now moot. Moreover, the plaintiff's grievance arose from the PEA provision discussed above. By statute, however, DOD must suspend the application of the PEA provision if DOD met the five percent goal during the preceding year. 10 U.S.C. 2323(e)(3)(B)(ii). Under the statute, the PEA provision is currently suspended, and it has been suspended since February 1999. It also appears that DOD met the five percent goal for fiscal year 2008, and will therefore continue to suspend PEA adjustments through September 2009, when Section 1207 expires. Thus, even if the en banc court of appeals granted review, agreed with the government on the merits, and overturned the decision shortly before Section 1207 expires in September 2009, it is unlikely that the court of appeals' actions would have any practical effect even during that very limited time frame.

As noted, the court of appeals stressed that its decision does not prejudice any future reenactment of the statute based on a different evidentiary record. See 545 F.3d at 1049 ("[I]f Congress reenacts Section 1207 again before it is set to expire in 2009 -- as Congress is free to do -- we cannot now predict, nor do we intend to prejudge, whether any such new enactment will be supported by a 'strong basis in evidence.'"). And certainly developing a stronger record in connection with any reenactment of Section 1207 would bolster the Department's efforts in defending against any challenge to the statute.

A petition for rehearing of the court of appeals' decision would be due December 19, 2008, and a petition for certiorari would be due February 2, 2009. Please do not hesitate to contact this office if you would like additional information regarding this or any other matter.

Sincerely,



Keith B. Nelson

Principal Deputy Assistant Attorney General