ADMINISTRATIVE REVIEW APPEALS BOARD

Request for Proposal (RFP) 14749

Vendor Service Contract (VSC) for Disclosure Counsel Services

MEMORANDUM IN SUPPORT OF THE ADMINISTRATIVE REVIEW APPEALS BOARD'S EXERCISE OF JURISDICTION OVER APPELLANT'S APPEAL

On November 29, 2017, the Chairman of the Administrative Review Appeals Board ("A.R.A.B"), Vincent Bobot, directed both parties to this appeal to provide writing briefing on the issue of A.R.A.B jurisdiction. Appellants, Quarles & Brady LLP and MWH Law Group LLP ("MWH") submit this Memorandum in support of their position that A.R.A.B has clear jurisdiction to hear the appeal in this matter.

This is not a bid protest. Nor is this appeal about the failure of the City of Milwaukee to award Appellants the Disclosure Counsel Contract. For the Appellants acknowledge that they have no 14th Amendment property interest in the Disclosure Counsel Services contract itself. Rather, the Appellants are challenging the actions taken by the Evaluation Committee and/or Purchasing Department staff in connection with the Disclosure Counsel Services Request for Proposal process which deprived MWH of substantial benefits flowing from the property rights the firm has in its Small Business Enterprise ("SBE") and Local Business Enterprise ("LBE") certifications under the City of Milwaukee's Code of Ordinances. Indeed, the practical effect of the Evaluation Committee's and/or Purchasing Department's actions were to create new requirements for businesses to qualify as SBEs and LBEs and to revoke MWH's LBE and SBE certifications. But that went far beyond their authority. The requirements for LBE and SBE certification (and the benefits and preferences flowing therefrom) are set by the City of Milwaukee

and embodied in the Code of Ordinance. By imposing requirements upon MWH not contained in or contemplated by the Code of Ordinances -- including a requirement that the firm serve as a "subcontractor" and execute a form that would necessarily entail making a false certification that it would be serving as a "subcontractor" to the law firm of Quarles & Brady in connection with the Disclosure Counsel engagement -- the Evaluation Committee and/or Purchasing Department staff – exceeded their authority, acted in contravention of the SBE and LBE Ordinances and substantially interfered with MWH's property rights as a certified LBE and SBE firm. Entities like MWH whose 14th Amendment protected property rights have been adversely affected by decisions of the City of Milwaukee have a right to pursue an appeal before the A.R.A.B. The City of Milwaukee's actions represented a substantial and unwarranted infringement upon MWH's property rights under the 14th Amendment of the United States Constitution and, hence, the A.R.A.B has the requisite jurisdiction to entertain the instant appeal.

I. FACTUAL BACKGROUND

A. Issuance of RFP No. 14749 / Disclosure Counsel Services

On March 14, 2017, the City of Milwaukee issued Request for Proposal No. 14749 for Disclosure Counsel Services (the "RFP") (See **Exhibit A** hereto). To our knowledge, this was the first time that the City of Milwaukee issued a formal RFP for these services. The RFP stated that the anticipated contract period would be from July 1, 2017 through June 30, 2020 with the possibility of extensions. Further, the RFP provided that proposals were due by 2:00pm CST on Thursday, April 27, 2017. This deadline was subsequently extended to May 16, 2017.

B. SBE & LBE Participation

Pursuant to the City of Milwaukee's Code of Ordinances, the RFP also contained preferences for LBE and SBE participation. With respect to LBE participation, the RFP provided:

> If a LBE is a responsive and responsible Proposer, an additional number of points equal to 5% of the maximum number of points used in the evaluation of the RFPs shall be applied to the total score attained by the LBE. Effective January 1, 2017, if the LBE is certified as a SBE with the City of Milwaukee's Office of Small Business Development, an additional number of points equal to 10% of the maximum number of points used in the evaluation of the RFP shall be applied to the total score attained by the LBE. (See **Exhibit A**, page 5, hereto)

The RFP required that a proposer seeking points as a LBE complete a Local Business Enterprise Affidavit and Property Location Form, which MWH did and included in the response. The LBE Affidavit required a contractor to swear that it satisfied all of the following criteria:

> 1. Operates a business, or owns or leases property within the geographical boundaries of the City of Milwaukee. Post office boxes shall not suffice to establish status as a Local Business Enterprise.
>
> 2. A residential address may suffice to establish compliance as a Local Business Enterprise, but only if the business does not operate another business, or own or lease other real property, either within or outside the geographical boundaries of the City of Milwaukee.
>
> 3. **Leased property shall not suffice to establish compliance as a Local Business Enterprise unless at least half of the acreage of all the real property owned or leased by the business is located within the geographical boundaries of the City of Milwaukee.**
>
> 4. Has been doing business in the City of Milwaukee for at least one (1) year.
>
> 5. The business is not delinquent in the payment of any local taxes, charges or fees, or the business has entered into an agreement to pay any delinquency and is abiding by the terms of the agreement.
>
> 6. The business will perform at least 10% of the monetary value of the work required under the contract.

(emphasis added)

The Business Property Location Form merely asks the contractor to identify locations where it has property. It asks nothing about leases at any particular location nor the type of property at the listed location. The form does state that it must be submitted with "your bid" to be

considered for LBE status. As noted below, more than fifty percent (50%) of MWH's total leased space is based in the City of Milwaukee. This fact is beyond dispute.

With respect to the SBE preference, the RFP expressly provided that the use of SBE firms as "Co-Bond Counsel" [sic] would be a factor in whether a proposer received up to 20 points in the Experience and Capabilities category. Additionally, the RFP provided that proposer could be awarded up to ten (10) additional points for "Effective Utilization of a City Certified SBE Firm." Specifically, the RFP required proposers to provide details in their responses as to how the SBE firm would be used to perform services in connection with the Disclosure Counsel engagement. (See **Exhibit A**, Page 6 hereto). While the RFP contemplates that a proposer who plans to utilize a SBE firm as a "subcontractor" must complete and submit an Office of Small Business Development Contractor Compliance Plan form, nothing in the RFP required a subcontractor relationship between the Proposers. And, more importantly, nothing in the Code of Ordinances requires a SBE firm to be in a subservient "subcontractor" role to another entity in order to enjoy the preferences and benefits that flow from SBE status. The Appellants' submission was a joint proposal in which both Firms would work together to provide services and would share fees (50/50) accordingly. This arrangement was designed specifically to demonstrate "Effective Utilization of a City Certified SBE Firm" and to ensure that Appellants' proposal receive the corresponding 10 additional points. (See Affidavit of Emery K. Harlan attached hereto as **Exhibit B**).

C. Joint Proposal Submitted by the Firms

On May 16, 2017, the Firms submitted a Joint Proposal to RFP No. 14749.

The cover page of the proposal listed that it is submitted by:

Jeff Peelen	Jennifer Pflug Murphy
Quarles & Brady LLP	MWH Law Group

Further, the Firms provided the following relative to their division of responsibility as Co-Counsel:

> **Quarles & Brady LLP and MWH anticipate serving together as true Co-Disclosure Counsel, essentially acting as a single firm for purposes of providing Disclosure Counsel services to the City. In fact, all fees will be split between both firms.**
>
> **We envision MWH will be responsible for maintaining and distributing drafts of the offering document, while Quarles & Brady LLP leads the process of conducting due diligence reviews, including assembling and maintaining the due diligence files. However, both firms will be involved with every task in connection with Disclosure Counsel services rendered. In addition, both firms will be available to consult with the City and other transaction participants and participate in working group and other deal calls.**
>
> **We also expect both firms to deliver 10b-5 opinion letters.**

(*RFP Tab K – Proposed Co-Disclosure Counsel Information*) (emphasis added) (See **Exhibit A** attached hereto).

At the time of the Firms' proposal submission, MWH was certified as a SBE by the City of Milwaukee. A copy of MWH's SBE Certificate was included as Tab D in the Firms' proposal (A copy of MWH's SBE certification is attached hereto as **Exhibit C**). Additionally, MWH qualified as a LBE given that more than fifty percent (50%) of its total leased space was based in the City of Milwaukee. Emery K. Harlan, a Partner of MWH signed, in the presence of a notary public, the completed LBE Affidavit on April 11, 2017. This LBE Affidavit (along with the Property Location Form) was attached to the Firms' proposal as Tab D) (A copy of this Affidavit is attach hereto as **Exhibit D**).

D. Scoring of the Proposals/Award of Disclosure Counsel Contract to Katten Muchin Rosenman LLP

On September 15, 2017, Ms. Karen Jeffries of the City's Purchasing Department, notified Quarles & Brady LLP via email that "[a]fter considerable review, the City of Milwaukee has

awarded the contract to Katten Muchin Rosenman LLP the highest ranked proposer with a cumulative score of 105.4." This was the first notice the Firms received that they had not been selected. Further, Ms. Jeffries' email provided no indication that the Firms could appeal the RFP decision.

The scoring tabulation sheet in connection with the RFP provides that Quarles & Brady received the second highest score -- 88.2. Despite the Firms' submission of MWH's SBE Certificate and LBE Affidavit with their proposal, no points were awarded for LBE or SBE participation. By contrast, Katten Muchin Rosenman LLP, received 9.8 points for SBE participation. In subsequent communications with the Purchasing Department, the Firms were informed that no SBE points were awarded to them because their proposal did not contain Form A for SBE subcontractor utilization.

With respect to the decision not to award the Firms LBE points, the Purchasing Department expressly stated, in writing, that this was based upon the fact that MWH does not qualify as an LBE because it does not meet criteria #3 as set forth in the City of Milwaukee LBE Program Affidavit of Compliance. (See copy of R. Kelsey's 10/6/17 Email attached hereto as **Exhibit E**) In a subsequent communication with the Purchasing Department, MWH was informed that the determination that it did not satisfy criteria #3 was based solely upon counting the number of offices it listed as having. Yet, "criteria #3" in the LBE Affidavit says nothing about the number of offices a firm has or even how many of a firm's offices must be within the City of Milwaukee. Instead, "criteria #3" expressly provides as follows:

> **Leased property shall not suffice to establish compliance as a Local Business Enterprise unless at least half of the acreage of all the real property owned or leased by the business is located within the geographical boundaries of the City of Milwaukee.**

(emphasis added) (See **Exhibit D** hereto)

No other rationale has ever been articulated by the Purchasing Department or any City of Milwaukee official for the decision to withhold the award of points to MWH on account of its status as a LBE. As will be discussed in greater detail below, more than 50% of the square feet of office space leased by MWH was, at the time of the proposal submission (and now), within the City of Milwaukee.

In response to the Firms' questions regarding the decision to deny them points in the evaluation process for LBE and SBE participation given MWH's certifications in both categories, the Purchasing Department conducted a review of its initial determination that the Disclosure Counsel Services contract be awarded to the Chicago-based law firm of Katten Muchin Rosenman LLP. On Friday, October 6, 2017, the Purchasing Department notified the Firms that it had found no error in the scoring of the Firms' proposal and would not set aside the initial determination that Katten Muchin Rosenman LLP should be awarded the contract. At no point has the Purchasing Department, or anyone else at the City of Milwaukee explained the authority which exists for requiring that a business have the majority of its offices in the City of Milwaukee in order to enjoy LBE status. Indeed, nothing in the Code of Ordinances allows for LBE status to be determined based on aggregate number of office locations. As discussed below, the Code of Ordinances expressly provides that LBE status determinations are based upon number of square feet leased where, in the case of MWH, the business does not own the property where it does business.

It is also important to note that at no point prior to the contract award was MWH notified that it was being denied points relative to its LBE and/or SBE statuses. Nor was MWH afforded a hearing relative to the decision to deprive it of the scoring preferences and benefits arising out of the LBE and/or SBE certifications issued to the firm pursuant to the City of Milwaukee's Code of Ordinances.

E. The City of Milwaukee has Issued Just Two Request for Proposals for Legal Services Subsequent to the MWH's Certification as a SBE and No Additional Solicitations are Contemplated

MWH received its certification as a SBE law firm on March 31, 2017. Since that time, MWH has received only two Requests for Proposal from the City of Milwaukee which solicited legal services. (See Affidavit of Emery K. Harlan attached hereto as **Exhibit B**). Both RFPs were issued for services relating to public finance transactions. (Id). One was issued by the City of Milwaukee on or about March 14, 2017 for Bond Counsel Services. And, the other RFP was for Disclosure Counsel Services -- the procurement that this appeal concerns. Coincidentally, the same Chicago law firm was awarded both contracts. (Id) Based upon information and belief, no additional solicitations for legal services containing SBE and LBE preferences are contemplated by the City of Milwaukee until the current Bond and Disclosure Counsel contracts expire in 2020. (Id)

II. MWH HAS PROPERTY INTERESTS IN ITS LBE AND SBE CERTIFICATIONS PURSUANT TO THE CITY OF MILWAUKEE CODE OF ORDINANCES THAT ARE PROTECTED BY THE FOURTEENTH AMENDMENT

Section 3 of the Administrative Review Appeals Board's Rules of Procedure provide, in pertinent part, that:

> Who May Appeal. Appeals may be filed by any person have constitutionally protected rights which are entitled to due process protection under the 14th Amendment of the U.S. Constitution and having substantial interest which is adversely affected by an administration decision of a governing body, board commission, committee, agency, officer, or employee, of the City of Milwaukee or agent acting on behalf of the City of Milwaukee.

Further, Section 68.02(3) of the state statute which creates a right to appeal certain municipal determinations, expressly provides that the following action by a municipality shall be reviewable:

> **(3)** The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.

Here, there is no question that MWH has valuable constitutionally protected property rights arising out of its status as a SBE and LBE pursuant to the City of Milwaukee's Code of Ordinances. And, there is no question that those rights were infringed upon by the Evaluation Committee and/or Purchasing Department staff when, without authority, they imposed new criteria for the receipt of benefits and preferences (points) that businesses certified as LBEs and SBEs are entitled to under the City of Milwaukee's Code of Ordinances. Hence, the A.R.A.B has jurisdiction to hear the instant appeal.

At the time of its joint proposal submission with Quarles & Brady in connection with RFP No. 14749, MWH met all of the requirements for certification as a Local Business Enterprise pursuant to Chapter 365 of the City of Milwaukee's Code of Ordinances. For more than 50% of the total square feet of space it leases is located within the City of Milwaukee. Further, it is beyond dispute that MWH was certified as a Small Business Enterprise pursuant to Chapter 370 of the Code of Ordinances. (See Copy of MWH's SBE Certification attached hereto as **Exhibit C**)

It is well-settled that certifications like the LBE and SBE certifications held by MWH represent property interests which are entitled to due process protection under the 14th Amendment. See *Chi. United Indus. v. City of Chicago*, 669 F. 3d 847, 851 (7th Cir. 2012) (a copy of this case is set forth in **Exhibit F** hereto); *Baja Contractors, Inc. v. Chicago*, 830 F. 2d 667 (7th Cir. 1987) (a copy of this case is set forth in **Exhibit G** hereto); *Cornelius v. LaCroix*, 631 F. Supp. 610, 617 (E.D. of Wis. 1986) (a copy of this case is set forth in **Exhibit H** hereto); *aff'd in part, rev'd in part or other grounds*, 838 F. 2d 207 (7th Cir. 1986).

In *Chi. United Indus. v. City of Chicago*, the Seventh Circuit Court of Appeals directly addressed whether business preference certifications akin to those held by MWH confer 14th

Amendment property rights. There, owners of a minority-owned business sued the City of Chicago for alleging violating their constitutional rights by denying their business certification as a Minority Business Enterprise. On appeal, the City of Chicago argued that the business owners' constitutional claims should fail, in part, because they did not have a property right interest in certifications as a minority business. Further, the City sought to distinguish minority certifications from liquor licenses given that the Seventh Circuit had previously held that those licenses were property for constitutional purposes. In an opinion authored by former Judge Richard Posner, the Seventh Circuit rejected the City's contention that Minority Business Enterprise certifications did not confer property rights. *Chi. United Indus. v. City of Chicago*, 669 F. 3d at 851. Judge Posner observed as follows with respect to the City of Chicago's attempt to distinguish liquor licenses from minority business certifications:

> The City argues that certification as a minority business enterprise is not property within the meaning of the word in the due process clause because it is too contingent: it is merely an opportunity to sell to the City rather than a right to do so. On this ground it distinguishes the liquor license that we held to be property in *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983). But all a liquor license is a right to sell liquor; it is not a guarantee that anyone will buy. What makes it property is that it is a valuable asset to which the holder has a legal entitlement. An MBE certification is likewise a potentially valuable asset to which the holder has a legal entitlement because it can be revoked only for cause. For 'where state law gives people a benefit and creates a system of non-discretionary rules governing revocation or renewal of that benefit, the recipients have a secure and durable property right, a legitimate claim of entitlement.

(Id.)

The question of whether business certifications like SBEs and LBEs confer constitutionally protected property rights to its owners has also been addressed by a local court. In *Cornelius v. LaCroix*, Issac Cornelius, a full-blooded American Indian and a company owned by Mr. Cornelius, sued the Milwaukee Metropolitan Sewerage District ("MMSD") and various affiliated individuals, as a result of MMSD's decision to deny certification of Cornelius' company as a Minority Business

Enterprise ("MBE"). Mr. Cornelius and his company filed suit alleging, among other things, that MMSD violated its 14th Amendment due process rights by virtue of refusing to certify his business as a MBE. The late Judge Myron Gordon presided over this matter. A jury issued a decision in favor of Mr. Cornelius and his company after a trial. In denying MMSD's post-trial motions, Judge Gordon rejected MMSD's argument it had sole power to determine whether a firm qualifies for MBE certification. *Cornelius v. LaCroix*, 631 F. Supp. at 617. Judge Gordon expressly held that Mr. Cornelius' company had a property interest in its MBE certification and that interest could not be taken away without due process. (Id.) Judge Gordon analogized MBE certifications to situations where a person receives governmental benefits such as welfare or unemployment compensation. (Id.) While the Seventh Circuit set aside the jury's verdict, it did not disturb Judge Gordon's findings that MBE certifications confer property rights which may not be infringed upon without due process.

Moreover, a cursory review of A.R.A.B minutes reveals that it has exercised jurisdiction over numerous appeals relating to small business certification issues. (See **Exhibit I** hereto) In fact, a significant number of appeals heard by A.R.A.B involved businesses appealing the denial of their applications for SBE certification. Hence, those businesses had not been conferred any certification-based property rights at the time of their appeals. Rather, they were seeking to obtain constitutionally protected rights. By contrast, this appeal involves MWH's preexisting property rights as a LBE and SBE certified firm. Hence, A.R.A.B's jurisdiction is even clearer in the present context.

In short, there is absolutely no question, that MWH's status as a certified LBE and SBE under the City of Milwaukee's Code of Ordinances vested it with valuable property rights that are protected from abridgement by the 14th Amendment without due process. At issue in this appeal

are actions by the RFP Evaluation Committee and/or Purchasing Department staff, which improperly imposed requirements and conditions upon MWH for the receipt of valuable benefits and preferences it was entitled to as a matter of right, by virtue of its status as a certified LBE and SBE business -- requirements and conditions not found anywhere in the Code of Ordinances which animates MWH's property rights in the first instance. By imposing conditions upon MWH for the receipt of valuable preferences and benefits in accordance with its City of Milwaukee conferred statuses as a certified LBE and SBE, the Evaluation Committee and/or Purchasing Department staff effectively revoked MWHs certifications and materially impaired its constitutionally protected property interests.

III. MWH'S SUBSTANTIAL PROPERTY INTERESTS AS A LBE AND SBE FIRM WERE ADVERSELY AFFECTED BY THE PURCHASING DEPARTMENT STAFF'S AND/OR EVALUATION COMMITTEE'S ACTIONS IN WITHHOLDING LBE/SBE PREFERENCES AND BENEFITS TO WHICH IT WAS ENTITLED BY VIRTUE OF THE CODE OF ORDINANCES AND THE EXPRESS TERMS OF THE REQUEST FOR PROPOSAL

The criteria for certification as a SBE and LBE are set forth with great specificity in the City of Milwaukee's Code of Ordinances. The Purchasing Department staff and/or the Evaluation Committee exceeded their authority by imposing conditions upon MWH in order for the firm to exercise its rights as a certified LBE and SBE - - including the execution of a false certification as to "subcontractor status" -- which adversely affected MWH's substantial property rights. In essence, MWH's statuses as a LBE and SBE were revoked by virtue of the Evaluation Committee's and/or Purchasing Department's actions in the RFP process. Given the limited opportunities for law firms like MWH to pursue City of Milwaukee RFPs, the actions taken by the Evaluation Committee and/or Purchasing Department staff were particularly harmful and detrimental to MWH's constitutionally protected rights as a LBE and SBE.

Chapter 365 of the Ordinances defines a Local Business Enterprise as a business which satisfies all of the following criteria:

> a. Operates a business, or owns or leases real property within the geographical boundaries of the city of Milwaukee. Post office box numbers shall not suffice to establish compliance with this paragraph. A residential address may suffice to establish compliance with this paragraph, but only if the business does not operate another business, or own or lease other real property, either within or outside the geographical boundaries of the city of Milwaukee. Leased property shall not suffice to establish compliance with this paragraph unless at least half of the acreage of all of the real property owned, operated or leased by the business is located within the geographical boundaries of the city of Milwaukee.
>
> b. Has been doing business within the geographical boundaries of the city of Milwaukee for at least one year.
>
> c. Is not delinquent in the payment of any local taxes, charges, or fees, or has entered into an agreement to pay any delinquency and is abiding by the terms of the agreement.
>
> d. Will perform at least 10% of the monetary value of the work required under the contract.

Significantly, nothing in the Ordinance discusses consideration of the aggregate number of offices operated by a business in determining whether it qualifies as a Local Business Enterprise. Rather, the Ordinance specifically references the aggregate space occupied by the business in the City of Milwaukee.

As set forth in Appellant's underlying appeal papers, at the time of the proposal (and now), it satisfied each of the criteria for LBE certification. Further, MWH executed the form.

Further, Chapter 365, provides that Local Business Enterprises shall be entitled to certain preferences in connection with contract bids. Toward that end, the RFP at issue here provides the following relative to points that a LBE would be entitled:

> **Bonus:** If a **Local Business Enterprise (LBE)** is a responsive and responsible Proposer, an additional number of points equal to 5% of the

> maximum number of points used in the evaluation of the RFP **shall** be applied to the total score attained by the LBE. **Effective January 01, 2017**, if the LBE is certified as a Small Business Enterprise (SBE) with the City of Milwaukee's Office of Small Business Development, an additional number of points equal to 10% of the maximum number of points used in the evaluation of the RFP shall be applied to the total score attained by the LBE. Up to Ten (10) additional Points.

(emphasis added)

Similarly, Chapter 370 of the City of Milwaukee Code Ordinances sets forth the criteria for certification as a Small Business Enterprise. Nothing in the Ordinance conditions a business entitlement to the rights and benefits as a SBE upon making a false certification that it is serving as a "subcontractor" to another business. Further, as in the case of LBEs, businesses holding certification as a SBE, are entitled to certain preferences in connection with contract bids. In fact, the RFP at issue here provided the following benefits for proposal which included certified SBEs:

> **Bonus: SBE Participation**: Effective Utilization of a City Certified SBE Firm **(Optional)** Other Services Offered **(Optional)**. Proposers who utilize a City-certified SBE vendor for this contract will be eligible for up to 10 additional points for subcontracting a portion of the work with a city certified SBE vendor. In order to qualify for these additional SBE points, proposers must provide details in their proposal response as to the percentage of the contract that will be subcontracted to the SBE vendor and a description of the meaningful services that the SBE subcontractor will be performing. The Office of Small Business Development Contractor Compliance Plan (Form A) must be completed and submitted with your proposal if you intend to utilize an SBE subcontractor. Failure to return these properly completed forms will result in disqualification from receiving the additional points for SBE participation. Up to Ten (10) Additional Points.

(See **Exhibit A** hereto)

There is no dispute that MWH's property rights as a business that is certified as a SBE and one that met all criteria for designation as a LBE, were adversely affected by the decision of the Purchasing Department and/or the Evaluation Committee, to impose conditions and requirements not contained in the City Ordinances. Indeed, these actions resulted in MWH's proposal receiving

zero LBE or SBE points in the procurement process. Had MWH's proposal received the points to which it was entitled by virtue of its status as a certified LBE and SBE, its team would likely have received a higher overall score than the successful proposer. Moreover, unlike areas such as construction and maintenance, there are extremely limited procurement opportunities for law firms seeking work from the City of Milwaukee via the RFP process. It is undisputed that the City's current Bond and Disclosure Counsel agreements run to at least 2020. Further, since the date MWH received its certification as an SBE firm, there have only been two RFPs for any type of legal services by the City of Milwaukee – the Bond and Disclosure Counsel RFPs won by the Chicago law firm of Katten Muchin Rosenman LLP. Hence, there is no real dispute that MWH's property rights are substantial and were adversely affected by the decision of the Evaluation Committee and/or Purchasing Department staff to impose conditions and requirements not authorized by the City of Milwaukee's Code of Ordinances. That decision deprived MWH of benefits and preferences flowing from its SBE and LBE certifications and likely caused its proposal to be ranked lower than the successful proposer.

IV. CONCLUSION

For all of the reasons set forth above, Appellants respectfully request that the A.R.A.B accept jurisdiction over this appeal and grant the appropriate relief on account of the unauthorized actions of the Evaluation Committee and/or Purchasing Department staff, which infringed upon its substantial 14th amendment protected rights as a certified LBE and SBE firm.

Respectfully submitted,

Quarles & Brady LLP
MWH Law Group LLP

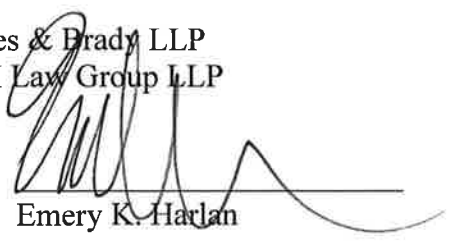
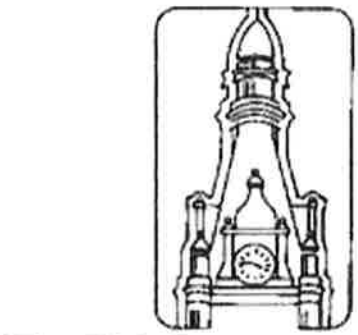
By: 
Emery K. Harlan

EXHIBIT A

Request for Proposal No. 14749 for Disclosure Counsel Services



Request for Proposal (RFP) 14749

Vendor Service Contract (VSC) for Disclosure Counsel Services

All Proposals shall be addressed and delivered to:

Karen Jeffries, CPPB, Procurement Specialist

City of Milwaukee
Department of Administration - Purchasing Division
200 E Wells Street, Room 601
Milwaukee, WI 53202

March 14, 2017

Proposals Must Be Received No Later Than:

2:00 p.m. CST on April 27, 2017

Table of Contents

***ANTICIPATED* CONTRACT TERM**

July 1, 2017 through June 30, 2020 or Three Years from Date of Contract Award with two one year extensions, or one two-year extension at the option of the City upon mutual consent of both parties.

COST PROPOSAL

The required Pricing Format has been provided separately. Please use RFP 14749 Attachment B – Cost Proposal Word document provided to supply your pricing quotation.

This separately submitted document shall include a description of the proposed costs and prices. All pricing information shall be limited *solely* to this Cost Proposal. This document should address all requirements set forth in Scope of Work and RFP 14749 Attachment A – Scope of Services as well as any other items pertinent to your proposal pricing. The requirements have been developed to allow the City to uniformly evaluate prices submitted for the work. Accordingly, you should follow these instructions carefully and provide all data requested in the formats specified herein and in any referenced attachments.

Any omissions in this proposal shall be identified by each Vendor and incorporated into their proposal.

The City will not increase the contract or any purchase order (either dollar amount or time) for items not included in the submitted proposal documents. The City reserves the right to purchase part or the entire proposal.

SCOPE OF SERVICES

As contained in this document and **RFP 0000014749 Attachment A - Scope of Services for Bond Counsel Services dated March 14, 2017.**

CHANGES

The City will not consider change orders or amendments unless it is deemed a change in the original scope of the project. All items not itemized in the pricing above which are instrumental to completing the project will be at the cost of the vendor to supply at no additional charge to the City. All prices quoted shall be firm and fixed for the specified contract period.

CONTACT INFORMATION

Proposers are specifically directed not to contact any other City of Milwaukee staff for discussions that are related to this RFP. **Unauthorized contact of any City personnel is a cause for rejection of the proposal.**

Any additional information or clarifications that are provided to one firm will be provided to all firms in the form of an addendum posted to the Bonfire Portal.

All communications regarding this RFP and the submittal process should be directed to:

Karen Jeffries, CPPB, Procurement Specialist
City of Milwaukee, Department of Administration
Purchasing Division
200 E. Wells Street, Room 601
Milwaukee, WI 53202-3560
Phone: 414-286-3501 Email: kdjeffr@milwaukee.gov (preferred method)

RFP ESTIMATED TIMELINE

The following is the proposed schedule for this project. DOA – Purchasing Division reserves the right to change the RFP schedule, issue amendments to the RFP, cancel the RFP, or reissue the RFP at any time.

RFP Release Date	Wednesday, March 29, 2017
Questions Due to Purchasing Division	Monday, April 10, 2017
Answers to Questions Posted Online via an Addendum	Wednesday, April 12, 2017*
Closing Date	Thursday, April 27, 2017
Evaluation of Proposals	May 1-5, 2017*
Selection of Highest-Ranked Proposers	May 8, 2017*
Oral Interviews	May 9-12, 2017*
Contract Negotiations Public Debt Commission/Purchasing Division endorsement of Award	May 15-19, 2017*
Award of Contract	May 23, 2017*
Commencement of Services *TENTATIVE DATES	July 1, 2017*

EVALUATION AND AWARD PROCESS

Award

An evaluation team will review accepted proposals utilizing the weights and criteria in the Proposal Evaluation section below.

The City will select the respondents whose proposals best meets the City's needs as defined in this RFP. Contractual commitments are contingent upon the availability of funds. All contracts are subject to the approval of the City's legal counsel and the Purchasing Director, prior to execution. Once awarded, the contracts will be the final expression of the agreement between the parties and may not be altered, changed or amended except by mutual agreement, in writing.

Proposal should address all the points outlined in the RFP. The proposal should be prepared simply and economically, providing a straightforward, concise description of the Respondent's capabilities to satisfy the requirements of the RFP. Proposals will be scored according to the following criteria.

PROPOSAL EVALUATION

EVALUATION - SCORING

Service delivery capabilities, emphasizing the capabilities of the assigned Legal Team members	**45 Points Maximum**
Fees	**25 Points Maximum**
Experience and Capabilities of the Firm, including its history and use of SBE firms as Co-Bond Counsel	**20 Points Maximum**
Overall quality of the proposal	**10 Points Maximum**
Bonus: If a **Local Business Enterprise (LBE)** is a responsive and responsible Proposer, an additional number of points equal to 5% of the maximum number of points used in the evaluation of	**Up to Ten (10) Additional**

the RFP shall be applied to the total score attained by the LBE. **Effective January 01, 2017**, if the LBE is certified as a Small Business Enterprise (SBE) with the City of Milwaukee's Office of Small Business Development, an additional number of points equal to 10% of the maximum number of points used in the evaluation of the RFP shall be applied to the total score attained by the LBE.	**Points**
Bonus: **SBE Participation**: Effective Utilization of a City Certified SBE Firm **(Optional)** Other Services Offered **(Optional)**. Proposers who utilize a City-certified SBE vendor for this contract will be eligible for up to 10 additional points for subcontracting a portion of the work with a city certified SBE vendor. In order to qualify for these additional SBE points, proposers must provide details in their proposal response as to the percentage of the contract that will be subcontracted to the SBE vendor and a description of the meaningful services that the SBE subcontractor will be performing. The Office of Small Business Development Contractor Compliance Plan (Form A) must be completed and submitted with your proposal if you intend to utilize an SBE subcontractor. Failure to return these properly completed forms will result in disqualification from receiving the additional points for SBE participation.	**Up to Ten (10) Additional Points**

RESPONSE REQUIREMENTS

For this RFP, the City of Milwaukee is using a Bonfire portal for accepting and evaluating proposals digitally.

Upload your submission at:

https://cityofmilwaukee.bonfirehub.com/opportunities/2986

Your submission must be uploaded, submitted, and finalized prior to the **Closing Time of April 27, 2017 at 2:00 PM CST**. We strongly recommend that you give yourself sufficient time and at least **ONE (1) hour before Closing Time** to begin the uploading process and to finalize your submission.

In addition to the above, **three (3) hard copies** of your proposal, which includes the entire proposal and any attachments must be provided prior to the closing date and time to:

City of Milwaukee
DOA-Purchasing Division

Attention: Karen Jeffries, CPPB
200 E. Wells Street, Room 601
Milwaukee, WI 53202

The proposal must be sealed and clearly marked with the following information:

RFP #
RFP description
Name of the Proposer
Closing Date
Closing Time

Structure of Responses
In order to simplify the review process and to obtain the maximum degree of comparability, proposals should be submitted in accordance with the RFP 0000014749 Proposer's Document Submission Checklist and Attachment A: Scope of Services Section VIII. Failure to comply with these requirements may be cause for the proposal to be considered non-responsive and not receive further consideration.

The City accepts no responsibility for any costs incurred by the proposer in either responding to this RFP, benchmark testing, oral interviews, etc., and that all costs are the sole responsibility of the proposer. Please see INCURRED COST on Page 9.

If the contractor requires additional equipment, and/or items to meet and/or implement the requirements of this proposal, this must be included in the contractor's proposal.

OTHER

Proposal Questions
The deadline for submitting questions regarding this RFP is no later than **April 10, 2017**. Questions are to be submitted to Karen Jeffries, CPPB via email (only) at kdjeffr@milwaukee.gov. Answers to the questions submitted will be posted in the form of an addendum to this RFP no later than April 12, 2017.

. **Questions submitted after the deadline will not be considered. (No exceptions)**

Contractor's Relationship to the City of Milwaukee

It is expressly understood that the successful vendor is in all respects an Independent Contractor as to the work, and the vendor is no respect an agent, servant or employee of the City of Milwaukee.

Insurance

The successful proposer will be required to provide the City with evidence of Insurance coverage that is in full compliance with the City's Insurance Requirements.

It is the successful proposer's responsibility to provide its insurance agent with a copy of the City's insurance requirements.

It is the successful proposer's responsibility to check the Insurance Certificate before it is sent to the City to verify that these documents are in full compliance with the City's insurance requirements.

An original copy of the fully compliant Insurance Certificate and shall be furnished to the City, in accordance with the request requirements.

Exceptions

Any exceptions taken to the Scope of Services should be provided in writing to the Purchasing Agent listed on the cover page of this RFP no later than seven (7) days prior to the closing date. The written request should include any and all changes or exceptions proposed by the consultant to the requirements detailed in this Request For Proposal. The request shall be under consideration for negotiation and proposed exceptions will not be considered a disqualification of any consulting firm, nor should inclusion of the exceptions be viewed as acceptance by the City, without negotiation. Exceptions not provided in this manner, will not be considered.

Addendums

It is the responsibility of the Proposer, prior to submitting a response to the RFP, to periodically check the Purchasing Division webpage to insure that all addenda for this Request for Proposal have been downloaded and that all of the information, documentation, etc. that has been requested has been included in the RFP response.

Jurisdiction, Venue, Choice of Law

This RFP and any resulting contract shall be governed by and construed according to the laws of the State of Wisconsin.

Follow-up Interviews

Should the department request follow-up interviews, proposers must be available for these follow-up interviews/presentations at City facilities or by teleconference on specific dates and times. **The contractor's and/or consultant's proposed primary point of contact person must be present at this meeting or during the teleconference call to lead the interview team.**

Negotiations

After interviews and final evaluations are completed, the City may at its sole option open negotiations with three or more of the highest ranked proposers prior to award. The City also reserves the right to open negotiations with one or more of the next highest ranked proposers if negotiations with one or more of the previously selected highest ranked proposers are not successful.

Incurred Costs

Those Proposers submitting proposals do so entirely at their expense. There is no expressed or implied obligation by the City to reimburse any individual or firm for any costs incurred in preparing or submitting proposals, for providing additional information when requested by the City or for attending and/or participating in any follow-up interviews and negotiation sessions.

Confidential Matters

- **City Data:** All data and information pertaining to this RFP, shall be treated by the Proposer and its agents as confidential. The Proposer and its agents shall not disclose or communicate the aforesaid matters to a third party or use them in advertising, publicity, propaganda, and/or in another job or jobs, unless written consent is obtained from the City Purchasing Director.

- **Vendor Data:** If any information submitted in the proposal is confidential or proprietary, the Proposer must identify this information by completing and including the Designation of Confidential and Proprietary Information with their proposal.

Assignment

The Proposer may not reassign any portion of the work that is awarded as a result of this RFP, without prior written consent from the City.

Rejection

The City reserves the right to reject any and all proposals, to waive any informality in the proposals that are received, to accept or reject any or all items in the proposal. Moreover, the City reserves the right to make no selection if the proposals are deemed to be outside the fiscal constraint or not in the best interests of the City.

EXHIBIT B

Affidavit of Emery K. Harlan

ADMINISTRATIVE REVIEW APPEALS BOARD

Request for Proposal (RFP) 14749

Vendor Service Contract (VSC) for Disclosure Counsel Services

AFFIDAVIT OF EMERY K. HARLAN IN SUPPORT OF MEMORANDUM IN SUPPORT OF THE ADMINISTRATIVE REVIEW APPEALS BOARD'S EXERCISE OF JURISDICTION OVER APPELLANT'S APPEAL

I, Emery K. Harlan of MWH Law Group LLP ("MWH'), being first duly sworn, state that I have personal knowledge of the facts and circumstances described in this Affidavit and attest to the following:

1. MWH negotiated an approach with respect to its joint proposal for the Disclosure Counsel RFP which was designed to demonstrate unusually high Small Participation so as to ensure that the proposal received the maximum amount of points available for Small Business Enterprise participation pursuant to the RFP guidelines.

2. Neither party to the joint proposal submitted by MWH and Quarles & Brady deemed their relationship as a contractor/subcontractor relationship. As set forth in their joint proposal, the firms agreed to equally share all fees and work in connection with the Disclosure Counsel engagement.

3. The RFP issued by the City of Milwaukee represented one of the rare instances where the city uses the request for proposal process to engage a law firm, with Local Business Enterprise and Small Business Enterprise preferences. Since the date MWH became a certified SBE firm, it has received a total of two RFP solicitations for legal services from the City. One was for Bond Counsel services on or about March 14, 2017. And the other was the RFP for

Disclosure Counsel services. I believe no other legal services solicitations containing SBE and LBE preferences have been issued by the City during this period.

4. The City's current Bond and Disclosure Counsel contracts will not expire prior to 2020.

FURTHER AFFIANT SAYETH NOT.

Emery K. Harlan, Esq.

Subscribed and sworn to before me
this 2nd day of April, 2018.

Notary Public in and for the State of Wisconsin

My Commission Expires/~~Is~~: 07.19.2019

EXHIBIT C

MWH's SBE Certification

City of Milwaukee

Office of Small Business Development (OSBD)

Small Business Enterprise Certification & Compliance Program

This certificate acknowledges

MWH Law Group, LLP

As a **Small Business Enterprise (SBE)** owned, operated and controlled company, which has met the criteria established by the City of Milwaukee.

CERTIFICATE EXPIRES: **3/31/2020** CERTIFICATE **OSBD**

NAICS Code	Description
541110	Offices of Lawyers

City of Milwaukee

Small Business Development Manager

This certificate supersedes any certificate previously issued. If there are any changes regarding the information (i.e. business structure, ownership, day-to-day management, operational control, addresses, phone and fax numbers or authorized signatures) provided in the submission of the business application for certification as a SBE, you must immediately (within 30 days of such changes) notify the Office of Small Business Development in writing. The Office of Small Business Development reserves the right to conduct a compliance review at any time to confirm certification eligibility. Furthermore, certification may be suspended or revoked upon findings of ineligibility.

EXHIBIT D

LBE Affidavit

City of Milwaukee

Revised December 28, 2016

DEPARTMENT OF ADMINISTRATION
PURCHASING DIVISION

LOCAL BUSINESS ENTERPRISE (LBE) PROGRAM
AFFIDAVIT OF COMPLIANCE

IMPORTANT: This form must be submitted with your bid to be considered for LBE status.

RFP #: 14749

Company Name: MWH Law Group LLP

Address: 735 N. Water Street, Suite 610

City, State, Zip Milwaukee, Wisconsin 53202

This signed and notarized affidavit of compliance will be the contractor's sworn statement that the business satisfies all of the following criteria:

1. Operates a business, or owns or leases property within the geographical boundaries of the City of Milwaukee. Post office boxes shall not suffice to establish status as a Local Business Enterprise.
2. A residential address may suffice to establish compliance as a Local Business Enterprise, but only if the business does not operate another business, or own or lease other real property, either within or outside the geographical boundaries of the City of Milwaukee.
3. Leased property shall not suffice to establish compliance as a Local Business Enterprise unless at least half of the acreage of all the real property owned or leased by the business is located within the geographical boundaries of the City of Milwaukee.
4. Has been doing business in the City of Milwaukee for at least one (1) year.
5. The business is not delinquent in the payment of any local taxes, charges or fees, or the business has entered into an agreement to pay any delinquency and is abiding by the terms of the agreement.
6. The business will perform at least 10% of the monetary value of the work required under the contract.

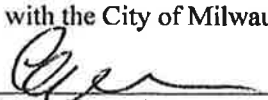
IMPORTANT: Is your business certified as a Small Business Enterprise (SBE) with the City of Milwaukee?
Please Select: _X_ Yes or ___ No

NOTE: A copy of MWH Law Group's SBE certification is included at the end of this affidavit

NOTE: If you are the primary owner of more than one business location and the other business location(s) is not located within the geographical boundaries of the City of Milwaukee, the business you are seeking to qualify as a Local Business Enterprise must serve as the primary functionally operational entity that is capable of providing the required services, commodities, or supplies for the purposes of this Bid/RFP. If you own more than one business, please list the name of the business(es) and their addresses on the "Business Property Location" form.

SITE VISITS: Please note the contractor agrees to allow the City to verify Local Business Enterprise status by allowing City Staff to visit the operation(s) of the business that is seeking Local Business Enterprise status at any time without notice, in an effort to maintain the integrity of the City's bidding process.

I hereby declare compliance with the City of Milwaukee Code of Ordinances Chapter 365.

Authorized Signature: 

Printed Name: Emery K. Harlan

Date: April 11, 2017

Revised December 28, 2016

NOTARIZATION

Subscribed to before me on this 11th day of April in the year 2017, at Milwaukee County, Wisconsin State.

NOTARY PUBLIC SIGNATURE: Tammy L Williams

TAMMY L WILLIAMS
Notary Public
State of Wisconsin

(SEAL)

PRINT NAME: Tammy L. Williams My commission expires: 4/5/18

PLEASE SUBMIT THIS FORM WITH YOUR BID OR PROPOSAL TO:
200 E. WELLS STREET, ROOM 601
MILWAUKEE, WISCONSIN 53202
OR FAX TO 414-286-5976

EXHIBIT E

Copy of R. Kelsey's 10/6/17 Email

Subject: RFP 14749 - Disclosure Counsel Services

From: Kelsey, Rhonda [mailto:Rhonda.Kelsey@milwaukee.gov]
Sent: Friday, October 6, 2017 5:19 PM
To: Bertieri, Pamela S. (MKE x1826) <Pamela.Bertieri@quarles.com>
Subject: RE: RFP 14749 - Disclosure Counsel Services

Hello Ms. Bertieri:

I am following up to the email below. While I certainly do understand the concern, please see the responses below to the remaining two questions that you posed:

In regard to your question regarding LBE participation, MWH Law Group, LLP does not qualify as an LBE because it does not meet criterion #3 as set forth in the City of Milwaukee's LBE Program Affidavit of Compliance.

As it relates to your question regarding SBE participation, the Request for Proposal (RFP) states: **SBE Participation**: Effective Utilization of a City Certified SBE Firm **(Optional)** Other Services Offered **(Optional)**. Proposers who utilize a City-certified SBE vendor for this contract will be eligible for up to 10 additional points for subcontracting a portion of the work with a city certified SBE vendor. In order to qualify for these additional SBE points, proposers must provide details in their proposal response as to the percentage of the contract that will be subcontracted to the SBE vendor and a description of the meaningful services that the SBE subcontractor will be performing. The Office of Small Business Development Contractor Compliance Plan (Form A) must be completed and submitted with your proposal if you intend to utilize an SBE subcontractor. Failure to return these properly completed forms will result in disqualification from receiving the additional points for SBE.

Should you have any additional questions or concerns, please do not hesitate to contact me at 414-286-3501.

Rhonda U. Kelsey

City Purchasing Director

City of Milwaukee

DOA-Purchasing Division

200 E. Wells, Room 601

Milwaukee, WI 53202

EXHIBIT F

Chi. United Indus. v. City of Chicago, **669 F. 3d 847, 851 (7th Cir. 2012)**

Chi. United Indus. v. City of Chicago

United States Court of Appeals for the Seventh Circuit

November 29, 2011, Argued; January 24, 2012, Decided

No. 10-3361

Reporter
669 F.3d 847 *; 2012 U.S. App. LEXIS 1261 **; 2012 WL 202783

CHICAGO UNITED INDUSTRIES, LTD., et al., Plaintiffs-Appellants, v. CITY OF CHICAGO, et al., Defendants-Appellees.

Prior History: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 05 C 5011—Robert M. Dow, Jr., Judge.

Chi. United Indus. v. City of Chicago, 685 F. Supp. 2d 791, 2010 U.S. Dist. LEXIS 3148 (N.D. Ill., 2010)

Disposition: AFFIRMED.

Core Terms

contracts, purchases, broker, certification, wholesalers, requirements, debarment, five-month, bid, occupational, supplier, curtail, due process clause, dog food, orders

Case Summary

Procedural Posture
Plaintiffs, a city requirements contractor and its principals, alleged defendant city violated constitutional rights and breached its contract in threatening to revoke its minority-owned business enterprise certification, suspending purchases for 5 months, and debarring the contractor for 8 days. The U.S. District Court for the Northern District of Illinois, Eastern Division, granted the city summary judgment. Plaintiffs appealed.

Overview
An 8-day bar that caused merely a temporary loss was not a deprivation of occupational liberty for purposes of due process. And, the principals's due process claim failed as their employment by the contractor was never interrupted. And, mere diminution as to the contractor's business was not destruction. Temporary losses were not destruction. And, to curtail liberty in conformity with law was not a denial of due process and there was no evidence the city violated the certification in curtailing purchases while pursuing efforts to debar or decertify it. The eventual abandonment of those efforts did not show the city's suspicions were groundless. The litigation pleadings were public, and were of public concern given the contractor's allegations of wasting taxpayer money, thus, they were within the scope of the free speech clause of the *First Amendment*. An unreasonable refusal to extend a contract was not a breach of contract. It was mere conjecture that the city was buying items from another supplier in violation of the requirements contract. There was no evidence city employees were ordered not to do business with the contractor.

Outcome
The district court's judgment was affirmed.

LexisNexis® Headnotes

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > General Overview

HN1 **Business Aids & Assistance, Disabled, Disadvantaged, Minority & Women-Owned Businesses**

"Broker" means a person or entity that fills orders by purchasing or receiving supplies from a third party supplier rather than out of its own existing inventory and provides no substantial service other than acting as a conduit between his or her supplier and his or her customer. Chicago, Ill., Municipal Code § 2-92-420(c).

Public Contracts Law > Business Aids &

Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > Minority-Owned Businesses

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > Women-Owned Businesses

HN2[] Disabled, Disadvantaged, Minority & Women-Owned Businesses, Minority-Owned Businesses

Minority-owned and women-owned business enterprises receive favored treatment by the City of Chicago. Chicago, Ill., Municipal Code § 2-92-460(a), (d).

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > General Overview

HN3[] Business Aids & Assistance, Disabled, Disadvantaged, Minority & Women-Owned Businesses

Brokers not only may not bid for wholesale contracts, but also may not, by serving as subcontractors to wholesalers, be certified as minority-owned business enterprises. Chicago, Ill., Municipal Code §§ 2-92-420(c), -480, -540(a).

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Public Contracts Law > Contract Terminations > Complete & Partial Terminations

HN4[] Procedural Due Process, Scope of Protection

Even if barring a government contractor from doing business with the government, with the effect of destroying the contractor's business because he neither has nor can obtain any other customer, would be a deprivation of occupational liberty (that is, even if a corporation can have a profession, vocation, or calling), a short bar that does not destroy the contractor's business or even permanently weaken it, but causes merely a temporary loss, is not a deprivation of occupational liberty for purposes of due process. A liberty interest is not implicated where the charges merely result in reduced economic returns and diminished prestige, but not permanent exclusion from or protracted interruption of employment.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN5[] Procedural Due Process, Scope of Protection

One simply cannot have been denied his liberty to pursue a particular occupation for purposes of due process when he admittedly continues to hold a job — the same job — in that very occupation.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > General Overview

HN6[] Procedural Due Process, Scope of Protection

A minority-owned business enterprise certification is a potentially valuable asset to which the holder has a legal entitlement because it can be revoked only for cause, and it can be property within the meaning of the due process clause. For where state law gives people a benefit and creates a system of nondiscretionary rules governing revocation or renewal of that benefit, the recipients have a secure and durable property right, a legitimate claim of entitlement. There can be de facto revocation, which is treated the same under the due process clause, if the government entity destroys the certification's value, but diminution is not destruction. And, temporary losses are common in business, and do not equate to destruction.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN7[] Procedural Due Process, Scope of

Protection

To curtail liberty in conformity with law is not a denial of due process.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Forums

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN8[] **Freedom of Speech, Forums**

Pleadings and other submissions in a lawsuit are (with very rare exceptions) public, and if they articulate issues of public concern, most obviously but not only in "cause" litigation, they are within the scope of the free speech clause (and sometimes the petition for redress of grievances clause) of the *First Amendment.*

Public Contracts Law > Contract Terminations > Complete & Partial Terminations

Public Contracts Law > Types of Contracts > Requirements Contracts

HN9[] **Contract Terminations, Complete & Partial Terminations**

A requirements contract would be empty if the purchaser could at will decide that he "required" less from the seller. To avoid constituting a breach, therefore, a change in requirements has to be in good faith — has to be based for example on a reduction in demand for the purchaser's end product and therefore in the purchaser's demand for the input purchased under the requirements contract, rather than on the purchaser's regretting having made the contract. *810 ILCS 5/2-306(1)*. But the seller has the burden of proving that the purchaser acted in bad faith in reducing his "requirements."

Counsel: For CHICAGO UNITED INDUSTRIES, LTD. an Illinois Corporation, GEORGE LOERA, NICK MASSARELLA, Plaintiffs - Appellants: Mark A. LaRose, Attorney, LAROSE & BOSCO, Chicago, IL.

For CITY OF CHICAGO, an Illinois municipal corporation, MARY DEMPSEY, LOUIS LANGONE, Defendants - Appellees: Christopher S. Norborg, Attorney, CITY OF CHICAGO LAW DEPARTMENT, Chicago, IL.

Judges: Before POSNER and KANNE, Circuit Judges, and PRATT, District Judge.*

Opinion by: POSNER

Opinion

[*849] POSNER, *Circuit Judge*. This suit, now in its seventh year, pits Chicago United Industries (which the parties call CUI) and its principals (George Loera and Nick Massarella) against the City of Chicago and two of its employees (Mary Dempsey and Louis Langone, whom we need not discuss separately from the City). CUI charges the City with a number of constitutional violations and also, by invoking the supplemental jurisdiction of the district court, with breaches of contract under Illinois law. After an interlocutory appeal to this **[**2]** court, decided in *Chicago United Industries, Ltd. v. City of Chicago, 445 F.3d 940 (7th Cir. 2006)*, and a number of amendments to the complaint, and other preliminaries, the case finally reached a point at which the defendants could move for summary judgment, which was granted, precipitating this appeal.

CUI sells a variety of products, and has annual sales that vary between about $10 million and $20 million. It purports to be a wholesaler, though there are (or at least were) suspicions that it's really a broker—an intermediary between the wholesalers and the City of Chicago or other purchasers from wholesalers. *HN1*[] "'Broker' means a person or entity that fills orders by purchasing or receiving supplies from a third party supplier rather than out of its own existing inventory and provides no substantial service other than acting as a conduit between his or her supplier and his or her customer." Chi. Municipal Code § 2-92-420(c).

The City had certified CUI as an MBE—a minority-owned business enterprise; Loera, the 51 percent owner, is Hispanic. *HN2*[] Minority-owned and women-owned business enterprises receive favored treatment by the City; for example, they alone can bid on certain contracts with **[**3]** the City called "target market" contracts. Chi. Municipal Code §§ 2-92-460(a), (d); City of Chicago Department of Procurement Services, "Your Business Is Certified—Now What?" p. 5,

* Hon. Tanya Walton Pratt of the Southern District of Indiana, sitting by designation.

www . cityofchicago.org/content/dam/city/depts/dps/Outreach/YourBusinessIsCertifiedNowWhat.pdf (visited Dec. 7, 2011). The City is virtually CUI's only customer. But early in 2005 the City began to suspect that CUI really was a broker rather than a wholesaler, which if true would make it ineligible to bid for contracts as an MBE because as a broker it would be helping wholesalers who are not MBEs circumvent the City's affirmative-action policy. Office of the Inspector General, City of Chicago, "Review of the Minority and Women-Owned Business Enterprise Program" 2-9, 31-32 (May 2010), www.chicagoinspectorgeneral.org/wp-content/uploads/2011/03/Report_MWBE-ProgramReview.pdf (visited Dec. 20, 2011). The policy goal is to promote minority-owned wholesalers rather than to enable minority brokers to scrape a broker's premium off contracts of non-MBE wholesalers. See RJB Properties v. Board of Education, 468 F.3d 1005, 1007 (7th Cir. 2006). CUI had at the time only six employees, and though it claims to **[**4]** have had a warehouse, which a broker would not have had, it is hard to see how it could operate a warehouse with so few employees, given the heterogeneous mixture of products—signs, stainless steel, helix light poles, air conditioners, steel cages, sewer bricks, catch basin frames, manhole covers, de-icing chemicals, dog **[*850]** food, laser speed detectors, and more—that it supplies to the City. Maybe it has a small warehouse, from which it distributes some of the products that it sells the City, while acting as a broker for most of its contracts.

HN3[↑] Brokers not only may not bid for wholesale contracts, but also may not, by serving as subcontractors to wholesalers, be certified as MBEs. Chicago Municipal Code §§ 2-92-420(c), -480, -540(a). And so the City notified CUI that it was considering revoking its certification, though it never completed its investigation and the company retains the certification to this day.

The City also believed that the company had shorted it on a shipment of aluminum sign blanks, and on that ground notified the company that it was considering debarring it from dealing with the City altogether, whether or not it remained an MBE.

Both notifications—of possible decertification **[**5]** and possible debarment—were issued in March 2005, and for the next five months the City drastically curtailed its purchases from CUI. From an average of $1 million a month they fell to about $190,000 a month, and during this period the company sustained a net loss of more than $600,000, which is the principal item of damages that it seeks.

At the end of the five-month period the City formally debarred the company from selling to the City for three years. The company sued immediately, and promptly sought and obtained a temporary restraining order and as a result the debarment was in effect for only eight days. The City soon abandoned its attempt to debar the company, and in the decision cited earlier we dismissed the defendants' appeal from the district court's order (which had ripened into a preliminary injunction, and thus was appealable) as moot. From that point the case proceeded as a suit for damages for losses sustained by CUI during the five months of curtailed purchases and the eight days of actual debarment.

We lead off with Loera's and Massarella's claims. We can be brief because they are frivolous. (Actually the entire case is pretty frivolous.) The two principals argue that **[**6]** the eight-day debarment deprived them of their occupational liberty—their right to pursue their chosen occupation—in violation of the *due process clause of the Fourteenth Amendment.* See, e.g., Board of Regents v. Roth, 408 U.S. 564, 573-74, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); Townsend v. Vallas, 256 F.3d 661, 669-72 (7th Cir. 2001); Colaizzi v. Walker, 812 F.2d 304, 307 (7th Cir. 1987); Donato v. Plainview-Old Bethpage Central School Dist., 96 F.3d 623, 630-33 (2d Cir. 1996). HN4[↑] Even if, as the D.C. Circuit believes, barring a government contractor from doing business with the government, with the effect of destroying the contractor's business because he neither has nor can obtain any other customer, would be a deprivation of occupational liberty (that is, even if a corporation can have a profession, vocation, or calling), Trifax Corp. v. District of Columbia, 314 F.3d 641, 643-45, 354 U.S. App. D.C. 200 (D.C. Cir. 2003); Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953, 961-62, 203 U.S. App. D.C. 371 (D.C. Cir. 1980), an eight-day bar that does not destroy the contractor's business or even permanently weaken it, but causes merely a temporary loss, is not a deprivation of occupational liberty. "A liberty interest is not implicated where **[**7]** the charges merely result in reduced economic returns and diminished prestige, but not permanent exclusion from or protracted interruption of employment." Munson v. Friske, 754 F.2d 683, 693 (7th Cir. 1985). If a lawyer's principal client is a public agency, which gets angry with him and as a result he loses money for five straight months before the agency makes up with **[*851]** him, that is not a de facto revocation of his license to practice law.

Anyway it isn't CUI that's bringing this claim, but Loera and Massarella, and their employment by the company was never interrupted. HN5[↑] "One simply cannot have been denied his liberty to pursue a particular occupation when he admittedly continues to hold a job—the same job—in that very occupation." Abcarian v. McDonald, 617 F.3d 931, 941-42 (7th Cir. 2010).

So much for Loera and Massarella. The company's principal argument is that the City deprived it of its property without due process of law, the property consisting of its certification as a minority business enterprise. The City didn't actually decertify the company, but the argument is that by drastically reducing its purchases from it for five months the City effectively decertified it for that period, **[**8]** since during that time it had a net loss.

The City argues that certification as a minority business enterprise is not property within the meaning of the word in the *due process clause* because it is too contingent: it is merely an opportunity to sell to the City rather than a right to do so. On this ground it distinguishes the liquor license that we held to be property in Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983). But all a liquor license is is a right to sell liquor; it is not a guarantee that anyone will buy. What makes it property is that it is a potentially valuable asset to which the holder has a legal entitlement. Board of Regents v. Roth, supra, 408 U.S. at 577. HN6[↑] An MBE certification is likewise a potentially valuable asset to which the holder has a legal entitlement because it can be revoked only for cause, and on that ground Baja Contractors, Inc. v. City of Chicago, 830 F.2d 667, 676-77 (7th Cir. 1987), holds that it can be property within the meaning of the *due process clause*. For "where state law gives people a benefit and creates a system of nondiscretionary rules governing revocation or renewal of that benefit, the recipients have a secure and durable property **[**9]** right, a legitimate claim of entitlement." Cornelius v. LaCroix, 838 F.2d 207, 210-11 (7th Cir. 1988); see also Reed v. Village of Shorewood, supra, 704 F.2d at 948 ("property is what is securely and durably yours under state . . . law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain").

Although CUI's certification as an MBE was never revoked, there would be de facto revocation, which is treated the same under the *due process clause*, if the City "destroyed the [certification's] value." Id. at 949; see also Med Corp., Inc. v. City of Lima, 296 F.3d 404, 411-13 (6th Cir. 2002); Westborough Mall, Inc. v. City of Cape Girardeau, 794 F.2d 330, 336-37 (8th Cir. 1986); cf. Parrett v. City of Connersville, 737 F.2d 690, 693-95 (7th Cir. 1984) (constructive discharge of a public employee in violation of the *due process clause*). But diminution is not destruction, and diminution is all the company has shown. It continued to bid on City contracts, and won some, while continuing to function as an MBE on its existing contracts with the City. Throughout the five-month period in question it sold $939,000 worth of goods to the City, **[**10]** some under new contracts, some under existing ones. True, it had nowhere near the same success that it had had before and would have again, and we can assume that the City's hostility was the reason it lost money during the five-month period. But temporary losses are common in business, and do not equate to destruction.

Furthermore, HN7[↑] to curtail liberty in conformity with law is not a denial of due process. Otherwise our jails and prisons would be empty. CUI presented no evidence **[*852]** that the City violated any terms of the company's MBE certification in curtailing purchases from the company while pursuing efforts to debar or decertify it. The eventual abandonment of those efforts doesn't show that the City's suspicions that the company was a broker and had cheated it on sign blanks and therefore was an unreliable contractual partner were groundless—that it lacked as it were probable cause to curtail its business with the company. Nor has the company made any showing that the City was forbidden by statute or ordinance or regulation or the terms of its contracts or the language of the company's MBE certification to curtail its dealings with a supplier that it had probable cause to believe was **[**11]** violating the law, while it investigated. So far as appears, the City's provisional self-help remedy was as proper as detaining an arrested person to await a preliminary hearing before a magistrate.

The company makes the further constitutional argument that the City retaliated against it for its filing this lawsuit by continuing to reject its bids and by ignoring complaints and inquiries by Loera and other employees of CUI concerning the City's treatment of the company. The HN8[↑] pleadings and other submissions in a lawsuit are (with very rare exceptions) public, and if they articulate issues of public concern, most obviously but not only in "cause" litigation, they are within the scope of the free speech clause (and sometimes the petition for redress of grievances clause) of the *First Amendment*. See, e.g., Connick v. Myers, 461 U.S. 138, 146-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2493-98, 180 L.

Ed. 2d 408 (2011); Salas v. Wisconsin Dep't of Corrections, 493 F.3d 913, 925 (7th Cir. 2007); Rendish v. City of Tacoma, 123 F.3d 1216, 1219-25 (9th Cir. 1997). CUI's suit includes allegations that the City is wasting the taxpayers' money, which we'll assume is enough to bring the case within **[**12]** the protection of the *First Amendment*. See Wainscott v. Henry, 315 F.3d 844, 849-50 (7th Cir. 2003); Glatt v. Chicago Park District, 87 F.3d 190, 193 (7th Cir. 1996). But the actions of which CUI complains were not retaliation but simply the continuation beyond the initial five-month period of the cold-shoulder treatment that the City had given the company during that period because of its suspicions.

Last, CUI claims under Illinois law that the City broke contracts that it had made with the company. The decline in purchases during the five-month period resulted not only from the City's turning down new bids by the company but also from its reducing its purchase orders under requirements contracts that the City had made with the company and from its refusing to renew some contracts that expired during that period. CUI contends that both the reduced orders and the refusals to renew expired contracts were breaches of contract.

HN9[↑] A requirements contract would be empty if the purchaser could at will decide that he "required" less from the seller. To avoid constituting a breach, therefore, a change in requirements has to be in good faith?has to be based for example on a reduction in demand **[**13]** for the purchaser's end product and therefore in the purchaser's demand for the input purchased under the requirements contract, rather than on the purchaser's regretting having made the contract. 810 ILCS 5/2-306(1); Schawk, Inc. v. Donruss Trading Cards, Inc., 319 Ill. App. 3d 640, 746 N.E.2d 18, 25, 253 Ill. Dec. 776 (Ill. App. 2001). But the seller has the burden of proving that the purchaser acted in bad faith in reducing his "requirements." Zeidler v. A & W Restaurants, Inc., 301 F.3d 572, 575 (7th Cir. 2002) (Illinois law); Empire Gas Corp. v. [*853] American Bakeries Co., 840 F.2d 1333, 1341 (7th Cir. 1988) (ditto).

CUI's most dramatic example of an alleged breach of one of the requirements contracts is the City's not buying any dog food from the company during the five-month period. Surely, the company argues, the dogs (police dogs) could not go without food for five months—they would have been driven to roam in packs, eating small children, or even each other; the pathetic starved bodies of the weaker or more fastidious dogs would have littered the Chicago sidewalks. None of this happened. Therefore the City must have been getting the dog food from some other supplier, in violation of the requirements contract.

This is conjecture, **[**14]** rather than actual evidence of breach, and contrary conjectures can easily be proposed: that the City had overbought dog food, and was working off a swollen inventory; that it had reduced the number of police dogs as an economy measure; that the dog food that CUI had obtained from its suppliers lately was unpalatable. Only imagination limits conjecture. In a case that had been dragging on for years, the company had ample opportunity in pretrial discovery to ascertain the actual reasons for the decline in orders, and it either failed to avail itself of the opportunity or found no evidence to support its conjecture.

CUI does cite testimony of a City employee named Wolfe that he was ordered not to do any business with the company, period, which is some evidence that the City was failing to obtain its requirements from the company. But the testimony is weak and vague, the key passage in it being that "from that time [the date of the order not to do business with CUI], Wolfe *does not recall* ordering anything from CUI, even on the valid contracts that CUI had with the City" (emphasis added). Should he have recalled it? Who knows? Wolfe's evidence was not enough to raise a triable issue.

In **[**15]** its reply brief CUI mentions for the first time an alleged breach by the City of a contract to deliver sewer bricks. The extended narrative in the district court to which the brief refers the reader describes complicated contractual maneuvering. The company refused to deliver the bricks unless the City extended the contract term and increased the contract price. A letter from the responsible City official rejected that demand. CUI describes the official as having by that rejection "reneged on her election to extend the contract," yet also states that in the interval between the "election" and the "reneging" "CUI did not have a legal contract . . . and was not required to deliver." After the "reneging," the City placed an emergency order with another supplier, and the company argues that the processing of the order took longer than if the City had ordered from it. Later, it adds, the sewer-brick contract was twice rebid—and CUI won the bid. The City says that it had placed the emergency order with another supplier because CUI was refusing to deliver, pending formal modification of its original contract—CUI acknowledges this. We can't begin to figure out what was going on—or

what the **[**16]** breach of contract was.

CUI makes the further argument (again relying mainly on testimony by Wolfe) that during the five-month period the City arbitrarily refused to extend its contracts with the company when the contracts expired. The company argues that an unreasonable refusal to extend a contract is a breach of contract. Not so. The purpose of including an expiration date in a contract is to allow a party to terminate its relationship with the other party without having to give a reason.

This case has dragged on for far too long. It has no possible merit. Let this **[*854]** be the last of it. The judgment in favor of the defendants is

AFFIRMED.

End of Document

EXHIBIT G

***Baja Contractors, Inc. v. Chicago*, 830 F. 2d 667 (7th Cir. 1987)**

Baja Contractors, Inc. v. Chicago

United States Court of Appeals for the Seventh Circuit

January 20, 1987, Argued ; September 16, 1987, Decided

No. 86-1990

Reporter
830 F.2d 667 *; 1987 U.S. App. LEXIS 14016 **

Baja Contractors, Inc., et al., Plaintiffs-Appellees, v. The City of Chicago, et al., Defendants-Appellants

Prior History: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 86 C 2655 -- Milton I. Shadur, Judge.

Core Terms

certification, concrete, supplier, regulations, district court, contractor, procedures, property interest, injunctive relief, contracts, leasing, preliminary injunction, due process, injunction, applications, deprivation, recipient's, contends, eligibility, front, site, minority business, non-minority, businesses, documents, ownership, irreparable harm, disadvantaged, notified, merits

Case Summary

Procedural Posture
Appellant city sought review of the order of the United States District Court for the Northern District of Illinois, Eastern Division which granted appellee contractor a preliminary injunction restraining appellant from determining that appellee was not a concrete supplier under the Minority Business Enterprise program.

Overview
Appellee contractor filed suit under *42 U.S.C.S. § 1983* against appellant city alleging that appellant's administration of the Minority Business Enterprise program violated *U.S. Const. amend XIV*'s due process clause by refusing to grant appellee certification as a concrete supplier after granting it certification as a concrete contractor. Appellee secured a preliminary injunction preventing appellant from denying certification and appellant sought review. The court reversed because appellee's application for certification as a concrete supplier provided many of the procedural protections usually required before the loss of a protected property interest and appellant's procedures afforded adequate protection against the risk of an erroneous deprivation of appellee's property interest. The court held that with respect to whether appellee was operating as a front, the procedures employed were adequate to satisfy the demands of due process.

Outcome
The order of the district court which enjoined appellant city from denying appellee contractor certification as a concrete supplier was reversed because appellant's procedures afforded adequate protection against the risk of erroneous deprivation of appellee's property interest in certification.

LexisNexis® Headnotes

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > General Overview

HN1[] **Business Aids & Assistance, Disabled, Disadvantaged, Minority & Women-Owned Businesses**

The USDOT regulations define a minority business enterprise as a small business concern which is owned and controlled by one or more minorities or women. Under the regulations, ownership and control means that a business must be at least 51 per centum owned by one or more minorities or women or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by one or more minorities or women; and its management and daily business operations are controlled by one or more such individuals. *49 C.F.R. § 23.5(f) (1986)*.

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > General Overview

HN2 **Business Aids & Assistance, Disabled, Disadvantaged, Minority & Women-Owned Businesses**

See 49 C.F.R. § 23.53(a)(1) and (a)(2).

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > General Overview

HN3 **Business Aids & Assistance, Disabled, Disadvantaged, Minority & Women-Owned Businesses**

See 49 C.F.R. 23.

Governments > Legislation > Statute of Limitations > Time Limitations

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > General Overview

HN4 **Statute of Limitations, Time Limitations**

See 49 C.F.R. § 23.55(a) (1986).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN5 **Standards of Review, Abuse of Discretion**

In reviewing the decision of a district court to grant or deny a preliminary injunction, the appellate court has continued to invoke the phrase abuse of discretion in articulating the applicable standard. In deciding whether to afford injunctive relief, the district court must first make findings of fact and conclusions of law, and then exercise its discretion to grant or deny the injunction. The appellate court reviews the findings of fact under the clearly erroneous standard; legal conclusions are given de novo review.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN6 **Injunctions, Preliminary & Temporary Injunctions**

The plaintiff bears the burden of establishing five requirements necessary for the issuance of a preliminary injunction: (1) that it has no adequate remedy at law; (2) that it will suffer irreparable harm if the preliminary injunction is not issued; (3) that the irreparable harm it will suffer if the preliminary injunction is not granted outweighs the irreparable harm the defendant will suffer if the injunction is granted; (4) that it has a reasonable likelihood of prevailing on the merits; and (5) that the injunction will not harm the public interest.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

HN7 **Reviewability, Exhaustion of Remedies**

No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. However, the exhaustion requirement is not inflexible, and must be applied with an understanding of its purposes and of the particular administrative scheme involved. When resort to the agency would in all likelihood be futile, the cause of overall efficiency will not be served by postponing judicial review, and the exhaustion requirement need not be applied.

Constitutional Law > Substantive Due Process > Scope

HN8[] **Constitutional Law, Substantive Due Process**

To establish a due process violation, a plaintiff must show: (1) a protected property or liberty interest, and (2) that it was deprived of that interest by government action and without due process of law.

Constitutional Law > Substantive Due Process > Scope

HN9[] **Constitutional Law, Substantive Due Process**

Whether an individual has a property interest in a government benefit depends upon whether the person is entitled to that benefit.

Constitutional Law > Substantive Due Process > Scope

HN10[] **Constitutional Law, Substantive Due Process**

The government may not deny a property interest without first giving the putative beneficiary an opportunity to present his claim of entitlement.

Counsel: Michael J. Daley, Niesen, Elliott & Meier, for Petitioner.

Frederick R. Klein, Schiff, Hardin & Waite, for Respondent.

Judges: Flaum and Ripple, Circuit Judges, and Eschbach, Senior Circuit Judge.

Opinion by: RIPPLE

Opinion

[*667] RIPPLE, Circuit Judge

Appellees, Baja Contractors, Inc. (Baja) and Humberto Jaimes, filed suit under *42 U.S.C. § 1983* against the City of Chicago and certain City employees, Mary Skipton, Leroy Bannister, Paul Spieles, McNair Grant and Sam Patch (referred to collectively as the City), alleging that the City's administration of the Minority Business Enterprise (MBE) program violated the *fourteenth amendment's due process clause*. After having granted Baja MBE certification, the City classified Baja as a "concrete contractor." It later refused to permit Baja to use its MBE certification to receive credit for work done as a "concrete supplier" without reapplication. When Baja reapplied, it was denied certification. After a hearing on Baja's motion for a preliminary injunction **[**2]** restraining the City from, *inter alia*, determining that **[*668]** Baja is not a concrete supplier under the MBE program until the City conducted a review of Baja's application "in accordance with due process requirements established to preserve and protect Baja's property rights pursuant to applicable laws." *Baja Contractors, Inc. v. City of Chicago*, No. 86 C 2655, Amended Preliminary Injunction at 6 (N.D. Ill. June 12, 1986); R.41 at 6. For the reasons set forth in this opinion, we reverse the judgment of the district court.

I

Facts

A. *Introduction*

Baja, an Illinois corporation, was formed in 1983 by Humberto Jaimes and Andres Hortatsos. In August, 1983, the Illinois Department of Transportation certified Baja to perform "miscellaneous concrete construction" work on state contracts as a disadvantaged/minority business enterprise. In December 1984, Baja applied to the City for MBE certification. On the application, it listed the nature of its business as "concrete contractor." The City granted this application for certification on February 28, 1985 and listed Baja as a "concrete contractor" in its directory of MBEs. However, when Baja started working on a **[**3]** City contract supplying concrete, city officials notified Baja that it needed a separate MBE certification as a concrete supplier. Baja then filed an application for certification as a concrete supplier. The City denied this application. After attempting to appeal the denial of certification within the City administration, [1] Baja sought injunctive relief.

Before analyzing Baja's procedural due process claim

[1] Baja also filed an appeal with the USDOT pursuant to *49 C.F.R. § 23.55 (1986)*. *See infra* notes 3 & 7.

against the City, we will first describe the structure of the City's MBE program and then discuss in greater detail Baja's efforts to obtain MBE certification as a concrete supplier.

B. *The City's MBE Program*

The purpose of the MBE program is to afford businesses owned and controlled by members of historically disadvantaged groups, including minority groups and women, an increased opportunity to compete for contracts. The City's MBE program initially was implemented because the City **[**4]** received funds from the United States Department of Transportation (USDOT) and was required by the USDOT to establish an MBE program approved by the USDOT that would apply to all federally-funded contracts. The City's program was established pursuant to USDOT regulations contained in *49 C.F.R. part 23*. [2] In **[*669]** August 1980, the City's first MBE program was submitted to the USDOT for approval. On June 16, 1981 a revised version of the program was submitted. *See* R. 48, Defendants' Ex. 24.

[5]** In April 1985, Mayor Harold Washington issued Executive Order 85-2 (Executive Order), designed to augment the City's existing MBE program. The Executive Order mandated that the specifications for construction contracts contain a requirement that the "bidder commit to the expenditure of 25% of the dollar value of the contract (including any modifications) with one or more MBEs and 5% of the dollar value with one or more WBEs [women business enterprises]." R. 1, Ex. A at 4-5. The Executive Order also required the City's Purchasing Agent to "issue rules and regulations to implement the procedures designed by the Contract Compliance Officer. . . ." *Id.* at 7. Under the Executive Order, the Contract Compliance Officer was directed to:

> Establish uniform procedures to apply for certification as MBE or WBE, and to appeal from denial of certification as MBE or WBE. Each application for certification shall be in writing, and executed under oath by an officer or owner of the applicant, and shall contain such information as may assist the Contract Compliance Officer in determining the status of the applicant.

Id. at 8. The City has drafted regulations to implement the **[**6]** Executive Order, but a final set of rules under the Executive Order had not been issued at the time of this appeal. The district court found that the Executive Order did not incorporate the USDOT regulations, but rather required the promulgation of rules to implement its mandate separately from the federal regulations. *See* Tr. of May 14, 1986 at 18. However, much of the language contained in the Executive Order parallels the text of the USDOT regulations. For example, the City's definition of an MBE is identical to the definition contained in the USDOT regulations. For example, the City's definition of an MBE is identical to the definition

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[2] *HN1*[↑] The USDOT regulations define a minority business enterprise (MBE) as "a small business concern . . . which is owned and controlled by one or more minorities or women." Under the regulations, ownership and control means that a business must be "at least 51 per centum owned by one or more minorities or women or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by one or more minorities or women; and [its] management and daily business operations are controlled by one or more such individuals." *49 C.F.R. § 23.5(f) (1986)*.

The regulations further provide that:

> *HN2*[↑] The following standards shall be used by recipients in determining whether a firm is owned and controlled by one or more minorities or women is [sic] and shall therefore be eligible to be certified as an MBE. Businesses aggrieved by the determination may appeal in accordance with procedures set forth in *§ 23.55*.
>
> Bona fide minority group membership shall be established on the basis of the individual's claim that he or she is a member of a minority group and is so regarded by that particular minority community. However, the recipient is not required to accept this claim if it determines the claim to be invalid.
>
> An eligible minority business enterprise under this part shall be an independent business. The ownership and control by minorities or women shall be real, substantial, and continuing and shall go beyond the *pro forma* ownership of the firm as reflected in its ownership documents. The minority or women owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by a [sic] examination of the substance rather than form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as an MBE. In determining whether a potential MBE is an independent business, DOT recipients shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial, equipment leasing, and other relationships with nonminority firms vary from industry practice.

Id. *§ 23.53(a)(1)* and *(a)(2)*.

contained in the USDOT regulations. *Compare* R.1, Ex. A at 3 *with* 49 C.F.R. § 23.5(f) (1986). In addition, for federally-funded projects, a contractor must comply with both the USDOT regulations and the Executive Order. *See* Minority Business Enterprise Commitment and Women Business Enterprise Commitment; Appellants' App. at 52.

The USDOT regulations express concern over maintaining the integrity of the MBE program by preventing nonminority owned enterprises from controlling MBEs. The regulations recognize that:

> HN3[↑] Substantial **[**7]** concern has been expressed about the infiltration of DOT-assisted programs by "fronts" -- businesses that claim to be owned and controlled by minorities, women, or other disadvantaged individuals, but which, in fact are ineligible for participation is [sic] DOT-assisted programs as MBEs, WBEs or disadvantaged businesses.
>
> The Department wants to take this opportunity to reemphasize the importance of scrutiny of all firms seeking to participate in DOT-assisted programs. We believe strongly that recipients should take prompt action to ensure that only firms meeting the eligibility criteria of 49 CFR Part 23 participate as MBEs, WBEs, or disadvantaged businesses in DOT-assisted programs. This means not only that recipients should carefully check the eligibility of firms applying for certification for the first time, but also that they should review the eligibility of firms with existing certifications in order to ensure that they are still eligible.

49 C.F.R. part 23, subpart D, app. A, at 150. In its Executive Order, the City responded to the concern expressed in the USDOT regulations about MBEs serving as "fronts" by directing the Contract Compliance Officer to:

> **[**8]**
>
> Investigate the status of certified MBEs and WBEs to determine whether they should retain certification. An investigation of the status of all currently certified MBEs and WBEs shall be undertaken **[*670]** immediately after the effective date of this Order, with priority given to investigation of previously certified firms to which contracts or subcontracts are awarded after the effective date hereof.

R.1, Ex. A at 8-9.

The Executive Order set time limitations for the City to consider an application for MBE certification. The Executive Order provides that "initial certification of any entity as MBE or WBE, or denial of such certification, shall be completed no later than 60 days after receipt of bid or proposal for a contract or subcontract contemplating the applicant's participation as MBE or WBE." *Id.* at 8. However, the Executive Order does not specify any process of appeal from the City's decision. The USDOT regulations, on the other hand, do provide for an appeal from denial of certification. [3] However, the denial of certification is not stayed during an appeal. *See* 49 C.F.R. part 23, subpart D, app. A, at 150 (1986).

[9]** C. *Baja's Application for MBE Certification*

On February 28, 1985, the City notified Baja by letter that it had received certification as a disadvantaged business enterprise. [4] Baja further was informed that it would be listed as a "concrete contractor" in the City's directory of MBEs and that the firm's eligibility would be reviewed on an annual basis. R.1, Ex. B.

In May 1985, Baja started working as a concrete supplier at the O'Hare Airport Development Project as a subcontractor for the Turner Construction Company (Turner). After Baja had started working at O'Hare, a city employee contacted Mr. Jaimes and notified him that Baja needed MBE certification as a concrete supplier in order to work on the contract at O'Hare. In response, Baja sent the City a letter on July 15, 1985 requesting

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[3] The regulations provide the following means of appealing a denial of MBE certification:

> HN4[↑] Any firm which believes that it has been wrongly denied certification as an MBE or joint venture under §§ 23.51 and 23.53 by the Department or a recipient of DOT financial assistance may file an appeal in writing, signed and dated, with the Department. The appeal shall be filed no later than 180 days after the date of denial of certification. The Secretary may extend the time for filing or waive the time limit in the interest of justice, specifying in writing the reasons for so doing. Third parties who have reason to believe that another firm has been wrongly denied or granted certification as an MBE or joint venture may advise the Secretary. This information is not considered an appeal pursuant to this section.

49 C.F.R. § 23.55(a) (1986).

[4] The term disadvantaged business enterprise (DBE) encompasses both minority and women business enterprises. For the purposes of this appeal, the terms MBE and DBE are synonymous.

certification as a concrete supplier. **[**10]** Appellants' App. at 53; R.1, Ex. D.

In September 1985, Mr. Triplett, a city employee, inspected Baja's concrete plant at O'Hare. Mr. Triplett indictated that he was inspecting the operation to determine whether Mr. Jaimes was running the operation himself. In the report to the City regarding his site inspection, Mr. Triplett indicated that Peter J. Poulos & Sons, Inc. (Poulos) leased the concrete mixer to Baja and supplied three workers. Further, a consultant from Material Service Corp. was in charge of quality control for the mixer. Baja also leased trucks from Material Service Corp. Appellants' App. at 99-100 (oral report later committed to writing).

On September 9, 1985, the MBE Certification Committee sent a letter to Baja notifying it that it was denied MBE certification as a concrete supplier. R.1, Ex. E. The letter indicated that the City had denied certification because a review of Baja's application and supporting documents did not indicate that Baja was an independently operated business. Specifically, the letter referred to "reliance upon Pavlos [sic] and Sons, Inc. and Material Service Corp. for personnel, technical assistance, leasing of concrete plant and equipment" **[**11]** as evidence that Baja was not independently operated. *Id.* In this letter, the City stated that its decision was final, but notified Baja that an appeal could be filed with the USDOT. Further, a city employee informed Baja's attorney that the City generally was amenable to considering **[*671]** additional information about an application after it had been denied.

On September 17, 1985, Baja's attorney met with city officials and requested that they reconsider Baja's application for MBE certification as a concrete supplier. On February 20, 1986, Baja's attorney wrote to the City formally requesting reconsideration of Baja's application. Appellants' App. at 28. In this letter, Baja indicated that, if the City had not provided it a final determination by March 4, 1986, it would conclude that reconsideration had been denied. On March 6, Baja exercised its right to file an appeal from denial of certification with the USDOT. Appellants' App. at 34. Four days later, on March 10, Baja submitted additional documents and filed a formal appeal with the City. Appellants' App. at 29-30. The City's Assistant Purchasing Agent met with Mr. James and Baja's attorney regarding Baja's appeal and **[**12]** the City again inspected Baja's work site at O'Hare. This report indicated that "Material Service Corporation provides invoicing, billing, computerize [sic] invoice receipts, and truck leasing services to Baja at no apparent cost for these services. An employee of Material Services [sic] Corporation was seen on the premises mixing the various raw materials." Appellants' App. at 102 (oral report later memorialized). The report concluded that "essentially, Baja Contractors Incorporated is an agent for Material Service Corporation." *Id.* On April 11, Baja's attorney was informed through a telephone conversation that it was doubtful that Baja's appeal would receive favorable treatment. Subsequently, Mr. Jaimes and Baja filed this suit seeking injunctive and declaratory relief as well as punitive damages on the ground that the City denied them due process of law in considering their application for MBE certification.

II

The District Court Opinion

On May 16, 1986, the district court issued a preliminary injunction restraining the City from, *inter alia*, informing contractors that Baja was not certified as a concrete supplier under the MBE program. The district court found **[**13]** that Baja was owned and controlled by a member of a minority group, Humberto Jaimes, and that this minority ownership was sufficient to qualify Baja for certification as an MBE under Executive Order 85-2. The district court further held that, in its application for MBE certification, Baja did not seek limited certification. The court found that, at the time of Baja's certification, there were no existing distinctions between concrete contractors and concrete suppliers. The district court therefore concluded that Baja's certification as a concrete contractor included certification as a concrete supplier.

Regarding the City's administration of its MBE program, the district court found that McNair Grant, then the Director of Contract Monitoring and Compliance for the City, retained the sole authority to grant MBE certification to applicants that he believed were clearly entitled to receive certification. If Mr. Grant found that MBE certification was questionable, the application was then reviewed by the MBE Certification Committee. The district court found that the committee reached decisions on applications without "appropriate notice of the nature and scope of the proceedings." Tr. **[**14]** of May 14, 1986 at 19. The district court noted that the decisions were reached without the guidance of written procedures, ascertainable standards or a formal record.

The district court then applied the standards for granting a preliminary injunction to its findings of fact. The court stated that, in order to receive injunctive relief, Baja had

the burden of showing that: 1) it had no adequate remedy at law, 2) it would suffer irreparable harm if the injunctive relief were denied, 3) the irreparable harm it would suffer if the injunction were denied would be greater than the irreparable harm the defendant would suffer if the injunction were granted, 4) it had a reasonable likelihood of prevailing on the merits, and 5) the injunction would not harm the public interest.

[*672] The district court held that Baja had sustained its burden of showing that it was entitled to injunctive relief. First, the court determined that equitable relief was necessary because it would be difficult to calculate Baja's damages from the denial of MBE status and an award of damages would not prevent the loss of contract opportunities while the litigation was pending. Second, the court concluded **[**15]** that Baja would suffer irreparable harm absent injunctive relief because Baja would lose contracts to competitors that had received MBE certification. Third, in balancing the harms, the court noted that the City has an interest in promoting the goals underlying the MBE program and in ensuring that the MBE program is properly administered.

In assessing the likelihood of success on the merits, the fourth requirement for injunctive relief, the court noted that it must analyze Baja's likelihood of establishing a deprivation of due process, not of establishing that it will ultimately be permitted to operate as an MBE concrete supplier. The court stated that for Baja to bring a successful due process claim, it must first be able to establish a property interest and then be able to show that the existing procedures were inadequate. The court found that Baja could establish the existence of a property interest in MBE certification as a concrete supplier in two ways: 1) the court found that Baja's initial certification as a concrete contractor included certification as a concrete supplier, and 2) the certification provided Baja with a heightened opportunity to compete for City contracts. **[**16]** [5] After reviewing the City's procedures for considering certification applications, the district court concluded that they were inadequate because the unwritten procedures were constantly changing and decisions were made without appropriate notice of the scope of the proceedings. The court determined that the certification decisions were made without "properly formulated and announced standards or other implementing rules and regulations." *Id.* at 19-20. Therefore, the court concluded that there was a reasonable likelihood that Baja would be able to establish a violation of procedural due process.

Fifth, the court found that issuing an injunction to prevent the City from denying Baja procedural due process would serve the public interest by promoting the evenhanded administration of the **[**17]** MBE program. Accordingly, the district court granted Baja's motion for a preliminary injunction.

III

Contentions of the Parties

A. *Appellants' Argument*

The focal point of the City's argument is that the district court erred in holding that Baja established a reasonable likelihood of success on the merits. The City contends that Baja did not possess a protected property interest in MBE certification as a concrete supplier. According to the City, the district court's finding that Baja's certification as a concrete contractor included certification as a concrete supplier is clearly erroneous because Baja's initial MBE application described the nature of its business as a concrete contractor and the equipment it listed as owning on the application is equipment used by a concrete contractor, not a concrete supplier. Appellants' Br. at 22.

The City also contends that the district court's alternative ground for finding that Baja had a protected property interest in MBE certification as a concrete supplier was clearly erroneous. In finding a property interest, the court relied upon two purchase orders from the Robert P. Anderson Co. (Anderson Construction) issued to Baja **[**18]** that provided: "Fulfillment of the terms of this purchase order is dependent upon Baja receiving certification from the City of Chicago as a 100% MBE supplier." Appellants' Br. at 24-25. The City argues that a property interest cannot be contingent upon a future grant of certification, **[*673]** but must be based upon a presently existing status or right. The City concludes that " this attenuated 'right,' under recent Seventh Circuit law, does not rise to the level of a property right protected by the *Fourteenth Amendment*." Appellants' Br. at 25.

Even if Baja did possess a protected property interest in MBE certification as a concrete supplier, the City further disputes that Baja was deprived of due process when its application was denied. The City maintains that,

[5] The district court found that Baja's heightened opportunity to receive contracts was illustrated by the fact that Anderson Construction issued two purchase orders to Baja conditioned upon Baja's receipt of MBE status.

because every specification for bids contained notification that the USDOT regulations published in 49 C.F.R. part 23 governed eligibility for the MBE program, Baja had notice of the standards that would be applied to evaluate its application. The City contends that Baja's application was denied because it could not demonstrate that it operated independently as a concrete supplier, rather than as a "front" for a non-minority **[**19]** owned business. In support of this conclusion, the City emphasizes that a non-minority owned company, Material Service Corp., supplied all of the aggregate material to produce the concrete and handled all of Baja's billing.

The City further maintains that the procedures it used to determine MBE eligibility satisfied the requirements of due process. The City claims that it has consistently applied the standards contained in the USDOT regulations since the inception of its MBE program. The City contends that, even though its procedures were unwritten, the City reviewed both of Baja's applications according to the standard internal operating procedures and the applications received careful and thorough review. The City cites Brown v. Retirement Comm., 797 F.2d 521 (7th Cir. 1986), *cert. denied, 479 U.S. 1094, 107 S. Ct. 1311, 94 L. Ed. 2d 165 (1987)*, for the proposition that "the proper inquiry is not whether the internal operating practices were committed to writing, but whether the plaintiff *actually received* due process." Appellants' Br. at 29 (emphasis in original). The City further contends that Baja was not denied due process merely because **[**20]** the rules and regulations under the Executive Order were not promulgated but were in draft form. The City argues that until the rules were issued under the Executive Order, the USDOT regulations provided the applicable standards. Moreover, the City maintains that there was an adequate record of the proceedings to provide the basis for Baja's appeal to the USDOT of its denial of MBE certification. Specifically, the City contends that the record on appeal includes Baja's application for certification, corporate documents, two leases with Material Service Corp., income tax returns, the lease for the concrete plant, the site reports and the denial letter.

Finally, the City contends that Baja has not satisfied its burden of showing that it could meet the other requirements for injunctive relief. The City claims that Baja has an adequate remedy at law because it could only identify an anticipated $17,000 loss of profit from three contracts denied because it lacked MBE certification as a concrete supplier. The City argues that Baja did not suffer irreparable harm because it did not show any lost contract opportunities and the most it would be entitled to recover for a deprivation of due **[**21]** process is nominal damages. The City further maintains that the grant of injunctive relief is more harmful to it and to the public than the denial of such relief would be to Baja because the integrity of the City's MBE program would be jeopardized if Baja were serving as a "front" for non-minority owned businesses.

B. *Appellees' Argument*

As did the appellants, the appellees first address whether the district court correctly determined that Baja has shown a likelihood of success on the merits. Baja contends that it has shown a reasonable likelihood of establishing a property interest. Baja maintains that, as a certified MBE, it would enjoy a significant advantage in competing for contracts because the MBE program creates a strong incentive for general contractors to utilize MBEs. Baja further contends that its loss of a contract with Anderson Construction after it had been denied MBE certification as a concrete **[*674]** supplier evidences that certification constitutes a beneficial property interest.

Baja also claims that the City's decision to categorize Baja as a concrete contractor but not as a concrete supplier was arbitrary. According to Baja, the City has no **[**22]** listing of MBE categories. Consequently, it argues that an MBE applicant must choose for itself an appropriate label when filing an application and the City is later free to interpret that label more narrowly than the applicant.

Baja also claims that the district court's decision that the City deprived Baja of procedural due process was correct. Baja contends that procedures comporting with due process require that an MBE applicant be provided meaningful notice and an opportunity to be heard before the City issues its final decision. Baja maintains that it was not notified of the City's Certification Committee meeting nor was it informed about the standards used by the committee to reach its decision. Baja contends that the City administrators were confused as to whether the appropriate standards were contained in the USDOT regulations or in the Executive Order. Further, Baja claims that the record of the City's proceedings was inadequate. Baja also maintains that improving the procedures for reviewing MBE applications would not impose an unmanageable administrative burden upon the City. Baja also notes that the City failed to follow the procedures proscribed in its submission of **[**23]** its MBE program to the USDOT.

Baja concludes its argument by stating that it satisfied its burden of showing that it was likely to prevail on the remaining requirements for injunctive relief. Baja contends that it has no adequate remedy at law because any monetary damages would be awarded after Baja had lost business opportunities and Baja's damages would be difficult to calculate. Because of lost contract opportunities, Baja maintains that it would suffer irreparable injury if injunctive relief were not granted. According to Baja, the district court properly balanced the potential harms to each party and correctly found that Baja would suffer a greater injury than the City if injunctive relief were denied.

IV

Analysis

A. *Standard of Review*

"HN5[↑] In reviewing the decision of a district court to grant or deny a preliminary injunction, this court has continued to invoke the phrase 'abuse of discretion' in articulating the applicable standard." Darryl H. v. Coler, 801 F.2d 893, 897 (7th Cir. 1986); *see also* Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 735 (7th Cir. 1987). In deciding whether to afford injunctive relief, **[**24]** the district court must first make findings of fact and conclusions of law, and then exercise its discretion to grant or deny the injunction. This court reviews the findings of fact under the clearly erroneous standard; legal conclusions are given *de novo* review. *See* Manbourne, Inc. v. Conrad, 796 F.2d 884, 887 (7th Cir. 1986); Lawson Prod., Inc. v. Avnet, Inc., 782 F.2d 1429, 1437 (7th Cir. 1986). "[A] factual or legal error may alone be sufficient to establish that the court 'abused its discretion' in making its final determination. . . . However, in the absence of such an error the district judge's weighing and balancing of the equities should be disturbed on appeal only in the rarest of cases." Lawson Prod., 782 F.2d at 1437. However, while exercising his judgment, "the district judge must keep in mind that, while preliminary injunctions are an interlocutory form of relief, they are also 'an exercise of a very far-reaching power,' Warner Bros. Pictures, Inc. v. Gittone, 110 F.2d 292, 293 (3d Cir. 1940) (per curiam), and, consequently, 'one in which the stakes are sufficiently high to make mistakes very **[**25]** costly.'" Darryl H., 801 F.2d at 898 (quoting Lawson Prod., 782 F.2d at 1433). [6] With these principles in mind, we review the district court's grant of a preliminary injunction.

[26] [*675]** B. *The Requirements for the Issuance of a Preliminary Injunction*

As correctly stated by the parties and the district court, HN6[↑] the plaintiff bears the burden of establishing five requirements necessary for the issuance of a preliminary injunction:

> (1) that it has no adequate remedy at law; (2) that it will suffer irreparable harm if the preliminary injunction is not issued; (3) that the irreparable harm it will suffer if the preliminary injunction is not granted outweighs the irreparable harm the defendant will suffer if the injunction is granted; (4) that it has a reasonable likelihood of prevailing on the merits; and (5) that the injunction will not harm the public interest.

Manbourne, Inc., 796 F.2d at 887; Brunswick Corp. v. Jones, 784 F.2d 271, 273-74 (7th Cir. 1986). In this appeal, the district court and the parties have focused primarily on the requirement that Baja demonstrate a reasonable likelihood of success on the merits. We also believe that this element is the pivotal factor and

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> The task for the district judge in deciding whether to grant or deny a motion for preliminary injunction is to minimize errors: the error of denying an injunction to one who will in fact (though no one can know this for sure) go on to win the case on the merits, and the error of granting an injunction to one who will go on to lose. The judge must try to avoid the error that is more costly in the circumstances. That cost is a function of the gravity of the error if it occurs and the probability that it will occur. The error of denying an injunction to someone whose legal rights have in fact been infringed is thus more costly the greater the magnitude of the harm that the plaintiff will incur from the denial and the greater the probability that his legal rights really have been infringed. And similarly the error of granting an injunction to someone whose legal rights will turn out not to have been infringed is more costly the greater the magnitude of the harm to the defendant from the injunction and the smaller the likelihood that the plaintiff's rights really have been infringed.
>
> Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 388 (7th Cir. 1984).

[6] Because the stakes involved in deciding whether to issue injunctive relief are high, this court has stated that the district court must attempt to minimize errors.

therefore shall discuss it first. [7]

[7] Although the parties did not raise this issue, we consider whether Baja failed to exhaust the available administrative remedies before filing for injunctive relief. Generally HN7[↑] "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 82 L. Ed. 638, 58 S. Ct. 459 (1938). However, the exhaustion requirement is "not inflexible, and must be applied with an understanding of its purposes and of the particular administrative scheme involved." Atlantic Richfield Co. v. United States Dep't of Energy, 248 U.S. App. D.C. 82, 769 F.2d 771, 781 (D.C. Cir. 1984). "When resort to the agency would in all likelihood be futile, the cause of overall efficiency will not be served by postponing judicial review, and the exhaustion requirement need not be applied." Id. at 782.

In this case, Baja filed an appeal from the City's decision to the USDOT, but as of the date Baja filed for injunctive relief, the agency had not issued its decision on the appeal. Exhaustion is not required in this case, however, because it would be futile. First, a favorable decision on appeal to the USDOT would afford relief only for federally-funded contracts. As the section-by-section analysis of the USDOT regulations states, "once a recipient has made a final decision on certification, that determination goes into effect immediately *with respect to the recipient's DOT-assisted contracts* (see § 23.53(g))." 49 C.F.R. part 23, subpart D, app. A, at 150 (1986) (emphasis supplied). A favorable decision from the USDOT would not provide relief for contracts funded only by the City. *See* Interstate Material Corp. v. City of Chicago, 150 Ill. App. 3d 944, 501 N.E.2d 910, 917, 103 Ill. Dec. 593 (Ill. App. Ct. 1986).

Further, an appeal to the USDOT would provide inadequate relief because the USDOT would not be able to stay the City's decision while the appeal was pending. The section-by-section analysis of the USDOT regulations provides that:

> If a firm that has been denied certification or has been decertified appeals the recipient's action to the Department under § 23.55, . . . the recipient's action remains in effect until and unless the Department makes a determination under § 23.55 reversing the recipient's action. The recipient's action is not stayed during the pendancy [sic] of a § 23.55 appeal.

49 C.F.R. part 23, subpart D, app. A, at 150 (1986). Further, the regulations provide no time limitations during which the USDOT must issue its decision on the appeal. The appeal to the USDOT therefore provides inadequate relief because Baja would be denied MBE status and lose the concomitant advantage in competing for contracts for an indefinite period of time. Accordingly, we conclude that exhaustion is not required in this situation.

[27]** 1. Likelihood of Success on the Merits

HN8[↑] To establish a due process violation, Baja must show: "(1) a protected property or **[*676]** liberty interest, and (2) that [it] was deprived of that interest by government action and without due process of law." Cunningham v. Adams, 808 F.2d 815, 820 (11th Cir. 1987).

a. *Property Interest*

To establish that the City has violated its *fourteenth amendment* due process rights, Baja must first demonstrate that the City has deprived it of a property interest. The question of HN9[↑] whether an individual has a property interest in a government benefit depends upon whether the person is entitled to that benefit. As the Supreme Court stated in Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing **[**28]** rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577; *see also* Reed v. Village of Shorewood, 704 F.2d 943, 948 (7th Cir. 1983) ("Property is what is securely and durably yours under state . . . law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain."). [8]

[8] According to this concept of a property interest:

> The applicable federal, state or local law which governs the dispensation of the benefit must define the interest in such a way that the individual should continue to receive it under the terms of the law. This concept also seems to include a requirement that the person already has received the benefit or at least had a previously recognized claim of entitlement.

2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law* § 17.5, at 235 (1986).

[29]** Applying this analytical framework to the facts of this case, we must now decide whether the district court correctly decided that Baja has shown a reasonable likelihood of establishing a property interest in MBE certification as a concrete supplier. The City's action in denying Baja MBE certification as a concrete supplier can be viewed in two ways: 1) as a more restrictive interpretation of its earlier grant of a general certification as an MBE, in effect, a partial decertification, or 2) as a denial of an application for certification under a different classification (concrete supplier as opposed to concrete contractor), in effect, a denial of a new benefit. The district court concluded that the first option was the correct one and that the City's actions were more appropriately characterized as a more restrictive interpretation of the earlier grant of certification. The district court found that, in initially applying for MBE certification, Baja "did not . . . seek limited certification." Tr. of May 14, 1986 at 8. Further, the court found that there were no "water-tight compartments existing between concrete contractor and concrete supplier" and that the City's efforts to "dredge **[**30]** such water-tight compartments out of *49 CFR, Part 23* and the Small Business Administration Regulations are a kind of distortion of those documents, as well as of the place that those documents played and currently play in the certification structure and procedures." *Id.* The court concluded that "the City's later effort to limit the scope of the certification would constitute a deprivation of [Baja's] property interest." *Id.* at 15.

We cannot say that the district court abused its discretion in reaching this conclusion. To the extent that its conclusion is based on a factual determination as to the nature and extent of Baja's original application, its finding is not clearly erroneous. While the regulations are far from models of clarity and specificity, we cannot say, on the basis of our own study of those provisions, that the district court has misread them. Neither the USDOT regulations nor the Executive Order contain a list of certification classifications. **[*677]** While the City's Directory of Minority Business Enterprises labels each business according to its field of work, the absence of any provision in the USDOT regulations or in the Executive Order stating that **[**31]** MBE certification is limited to a particular line of work supports the district court's conclusion that MBE certification is not restricted in such a manner. [9]

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[9] The district court's finding that there were no written descriptions of various job classifications is supported by the testimony of Mr. Spieles, the City's Director of Contract Compliance.

> Q. [Attorney] Do you know whether there's a difference between being a concrete contractor and a concrete supplier?
>
> A. [Mr. Spieles] Yes, I do.
>
> Q. How do you know the difference? What's the foundation for your knowledge that there is a difference?
>
> A. I know what a concrete contractor does and I know what a concrete supplier does.
>
> * * * *
>
> Q. How do you know the difference between a concrete contractor and a concrete supplier?
>
> A. I have reviewed a number of applications from a number of businesses in -- who are concrete contractors. I've also reviewed a number of applications from concrete suppliers.

Tr. of May 5, 1986 at 53-54. Further, Mr. Spieles testified on cross-examination that the label applied to an MBE in the City's Directory describing its field of work is not selected from a comprehensive list of job classifications, but is provided after the business has been certified.

> Q. And the categories that are included in that particular directory, those categories are not set up prior to the applicant's certification; isn't that correct?
>
> A. That's correct.
>
> Q. For example, when a minority business enterprise applicant comes to the certification committee or to the Director of Purchasing and asked to be classified under the category Diversified Industrial, Commercial and Public Works, that wasn't a category that was set up before certification; is that right?
>
> A. That's correct.

Tr. of May 5, 1986 at 92-93.

Further, the regulations and Executive Order do not vest the City with wide discretion in revoking MBE certification.

> The City's program rules indicate to MBEs that they are entitled to the continuation of MBE certification so long as the firm continues to satisfy the City's uniform, enumerated standards. The Executive Order which establishes the City's MBE program sets forth specific criteria for MBE certification. (See City of Chicago Executive Order 85-2, sec. 1(b) (April 3, 1985); see also *49 C.F.R. sec. 23.53 (1985)*.) Once MBE certification is conferred by the City, this certification remains in full force and effect for an indefinite period of time, provided the firm continues to satisfy the City's specified criteria of what constitutes a "minority business enterprise." (See City of Chicago Executive Order 85-2, sec. 5(e) (April 3, 1985); see also *49 C.F.R. secs. 23.51* 23.53 (1985).)

[32]** Baja therefore has established a likelihood of showing that it has a protected property interest in MBE certification because the City had already conferred that benefit upon it.

b. *What Process is Due*

HN10[↑] The government may not deny a property interest without first giving the putative beneficiary an opportunity to present his claim of entitlement. "It has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest." *Logan v. Zimmerman Brush Co., 455 U.S. 422, 433, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982)* (quoting *Board of Regents, 408 U.S. at 570-71 n.8*) (emphasis in original). "What is fundamentally fair in terms of the form and time of the notice and hearing must of necessity depend on circumstances that will vary from case to case." *Signet Constr. Corp. v. Borg, 775 F.2d 486, 490 (2d Cir. 1985)*. "In general, something less than a full evidentiary hearing is sufficient prior to adverse administrative action." *Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985)*.

We begin by noting the **[**33]** limited, indeed focused, inquiry before us. Our task is not to determine whether the *entire* MBE review process employed by the City affords *all* businesses due process in *all* aspects of the administration of the program. Rather, our task is to determine whether, in the particular posture of this case, Baja was afforded due process when the City proposed to limit its MBE certification so as to exclude its operation as a concrete supplier.

Our review of the record reveals that Baja's application for certification as a **[*678]** concrete supplier (which, as we have noted above, amounted to an application to prevent partial decertification as an MBE) provided many of the procedural protections usually required before the loss of a protected property interest. The application that Baja completed specifically notified it that the provisions of *49 C.F.R. part 23* governed. *See* R.1, Ex. D at 2. [10] Those regulations, as we have noted above, specifically alerted the contractor that it could not function as a front for a non-minority business and still receive MBE certification. The Executive Order, while not as precise, contained the same requirement. Moreover, as we have **[**34]** already noted, Mr. Triplett, the City's on-site inspector, indicated to Baja that he was inspecting the site at O'Hare to determine whether Mr. Jaimes was running the operation himself. *See* Tr. of May 1, 1986 at 30.

The MBE Certification Committee reviewed Baja's application in early September 1985. During this meeting, the committee reviewed documents submitted by Baja and heard an oral report of the site inspection. The lease **[**35]** agreements submitted by Baja as part of its application indicated that the mixing plant and delivery trucks were leased on terms that prohibited their removal from the job site. Baja did renegotiate its lease with Material Service Corp. for the leasing of "redi-mix" trucks while its application with the City was pending. Unlike the earlier leases, this lease did not require the trucks to be used only at the O'Hare job site. The job site report indicated that Poulos supplied Baja with three of its workers and that a consultant from Material Service Corp. was in charge of quality control. After discussion, the committee voted unanimously to deny certification to Baja as a concrete supplier.

Baja was then notified of the committee's decision and the reason for the decision:

> Your application and supporting documents does [sic] not indicate that your firm is an independently operated business. Relevant factors include the reliance upon Pavlos [sic] and Sons, Inc. and Material Service Corp. for personnel, technical assistance, leasing of concrete plant and equipment.

R.1, Ex. E.

Moreover, after this negative decision, Baja, through its attorney, had an opportunity **[**36]** to discuss the reasons for the denial and was afforded an opportunity to submit to City officials additional information. Indeed, on March 10, 1986, Baja's attorney filed a formal appeal

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Interstate Material Corp., 501 N.E.2d at 915.

[10] The instructions at the top of the certification application, schedule A, provided:

> Please fill out the form completely, the extensive information required is necessary to determine applicant's eligibility as a small business owned at least 51% by women or minorities (Black Americans [B] Hispanic Americans [H], Native Americans [N], Asian Americans [A]), or any other individuals found to be disadvantaged under the Small Business Act, and whose management and daily operation is controlled by such individuals (See *49 CFR Part 23*.)

R.1, Ex. D at 2.

with the City from the denial of certification. This request was granted by the City's Purchasing Agent. On March 24, 1986, Mr. Jaimes and Baja's attorney met with Mr. Grant, the City's Assistant Purchasing Agent, regarding Baja's appeal. At this meeting, Mr. Grant discussed the ownership of Baja's trucks, the source of the materials used to manufacture concrete and the number and ethnic background of Baja's employees. The reasons for the denial of the application as set forth in the September 9 letter also were discussed. Mr. Grant requested the submission of additional documents from Baja and stated that a second site visit would be scheduled. Tr. of May 2, 1986 at 65-66.

Mr. Wheaton, a compliance officer and an accountant, visited the work site during the week of April 7, 1986 and also reviewed Baja's purchase orders, invoices, tax returns, and billing practices. Mr. Wheaton also toured Baja's facilities and orally communicated his report to Mr. Bannister, the City's First Deputy Purchasing Agent **[**37]** (the report was later committed to writing). The report stated that Material Service Corp. served as the major source of materials purchased by Baja, that Material Service Corp. provided invoicing, billing, computerized **[*679]** invoice receipts and truck leasing services to Baja at no apparent cost, and that a Material Service Corp. employee mixed the raw materials. Mr. Wheaton concluded that Baja was an agent for Material Service Corp. Subsequently, Baja's attorney was informed in a telephone conversation that it was unlikely that Baja'a request for reconsideration would receive favorable treatment because no new material facts had been submitted since the application had been considered in September 1985.

In *Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)*, the Supreme Court established the basic analysis to be employed in determining, in terms of procedural due process, the adequacy of the administrative procedures employed by the government. Under *Mathews*, a court must assess the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of **[**38]** such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335; *see also Brown v. McGarr, 774 F.2d 777, 785 (7th Cir. 1985)*.

Here, Baja's interest in certification as an MBE is substantial because of the increased potential for contract awards that MBE certification allows. Certainly, once granted, MBE certification is a valuable business asset. It gives the holder of the certification a significant competitive advantage in the market of government contracts. As noted by the Illinois Appellate Court in *Interstate Material Corp., 501 N.E.2d at 916*, "MBE certification is an extremely important asset to a minority business, and it is questionable whether a minority enterprise would be able to remain a viable competitor in its industry, if MBE certification is revoked."

The City's interest lies in ensuring that the businesses certified actually qualify for MBE status **[**39]** and are not serving as fronts for other non-minority owned corporations. Rather than competing, the potential MBE's interest and the City's interest converge, provided that the business actually satisfies the criteria for certification as an MBE. If the company is owned and operated by a member of a minority group, then it is in both the firm's interest and the City's interest for it to receive certification as an MBE to promote the goals underlying the MBE program. In this sense, both the applicant and the City would benefit from adequate procedures to ensure that bona fide MBEs receive certification and that MBEs serving as fronts are denied certification.

We believe that the City's procedures, *as applied in this case*, afforded Baja adequate protection against the risk of an erroneous deprivation of its property interest. From the beginning, Baja was on notice that, to function as an MBE, it could not operate as a front for a non-minority business. It had an opportunity, during the application process, to present evidence to show independent ownership and control. Indeed, at one point in the process, the City's on-site inspector, Mr. Triplett, specifically focused Baja's attention **[**40]** on this requirement. Baja was also informed, in no uncertain terms, of the reason for the City's action and was then given an opportunity to supply additional information. Under these circumstances, we cannot say that the procedures employed by the City presented, with respect to the issue of whether Baja was a front for a non-minority business, a significant risk of error.

We understand that the City's MBE review process,

when viewed in its totality, was hardly the model of a well-constructed administrative process. The district court was of the view that some of the substantive criteria for evaluating applications were not well-established. The district court found that: "What's painfully clear from the testimony is that the rules, if they can be called that, are changing on a continuing basis. They are sort of being made up as the defendants go along." Tr. of **[*680]** May 14, 1986 at 16-17. While there is some indication in the record that, in the absence of rules promulgated under the Executive Order, the City applied the criteria contained in the federal regulations, *see, e.g.*, tr. of May 5, 1986 at 185, the district court determined "that the Executive Order did not **[**41]** incorporate, as is now claimed, *49 CFR Part 23*, as its rules and regulations. And . . . the Executive Order required rules and regulations under its paragraph 3(i)." *Id. at 18.*

We need not determine, in any definitive way, whether the record supports these conclusions even under the highly deferential standard which we employ in reviewing factual findings. *See Anderson v. City of Bessemer City, 470 U.S. 564, 573, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)*; *Gianukos v. Loeb Rhoades & Co., 822 F.2d 648, 652 (7th Cir. 1987)*. Rather, in our view, it is simply unnecessary, in this litigation, to address in such broad fashion the adequacy of *all* of the City's procedures. It is sufficient to determine that, with respect to whether Baja was operating as a front, the procedures employed were adequate to satisfy the demands of due process. Since the course followed by the City authorities in this case adequately reconciled the private and public interests involved and reduced to a minimum the possibility of an erroneous deprivation of Baja's property interest, the mandate of *Mathews* has been met.

Conclusion

Because Baja was not deprived of **[**42]** due process of law by the action of the government, it was not entitled to a preliminary injunction. Accordingly, the judgment of the district court is reversed.

REVERSED.

End of Document

EXHIBIT H

***Cornelius v. LaCroix*, 631 F. Supp. 610, 617 (E.D. of Wis. 1986)**

Cornelius v. La Croix

United States District Court for the Eastern District of Wisconsin

April 3, 1986

Case No. 83-C-470

Reporter
631 F. Supp. 610 *; 1986 U.S. Dist. LEXIS 27265 **

ISAAC J. CORNELIUS and CORNELIUS CONTRACTORS CORP., Plaintiffs, v. DAVID B. LA CROIX, JAMES F. ESTES, MILWAUKEE METROPOLITAN SEWERAGE DISTRICT, LETHA F. HARMON, E. MARTY PAYNE, DAVID MANNING, and WILLIAM P. BECKETT, Defendants

Subsequent History: [1]** Affirmed In Part and Reversed In Part January 14, 1988.

Core Terms

plaintiffs', certification, qualified immunity, new trial, deprived, damages, compensatory damages, punitive damages, notice, award of punitive damages, post-trial, cross-claim, due process of law, equitable relief, defendants', remittitur, affirmative defense, amend, property interest, defense motion, due process, enlargement, subcontract, asserts, revoke, successor in office, no evidence, requirements, projects, motions

Case Summary

Procedural Posture
Defendants, individuals and sewerage district, filed a motion for judgment not withstanding the verdict or new trial based on a jury's finding that defendants deprived plaintiffs, individual and corporation, of their minority business enterprise certification without due process of law. Defendants asserted that there was no deprivation of rights, that defendant individual was entitled to qualified immunity, and that damages were improper.

Overview

Plaintiffs filed an action pursuant to *42 U.S.C.S. § 1983* and *16* other federal statutory and constitutional provisions, alleging that defendants conspired to deprive plaintiffs of a certification as a minority business enterprise (MBE) eligible for preference in the awarding of federally funded construction contracts. Plaintiffs charged that defendants' actions constituted unlawful discrimination and deprived them of their property without due process of law. The court held for plaintiffs, and defendants moved for a new trial. The court held (1) that the evidence supported the jury's verdict, (2) that comments by plaintiffs' counsel did not warrant a new trial, (3) that defendant individual was not entitled to qualified immunity, because the individual waived this right, (4) that the compensatory damages awarded by the jury required a remittitur of which defendants would be jointly and severally liable, and (5) that a comment by plaintiffs' counsel regarding punitive damages against defendant individual did not deprive the individual of a fair trial. The court also granted equitable relief to plaintiffs relative to MBE rights and provisions.

Outcome
The court granted, in part, and denied, in part, defendants' motions.

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN1[] **Judgment as Matter of Law, Judgment Notwithstanding Verdict**

In deciding a judgment notwithstanding the verdict motion, the court must consider whether the evidence presented, combined with all reasonable inferences that

can be drawn from it, is sufficient to support the verdict when viewed in the light most favorable to the prevailing party. A court may not judge the credibility of the witnesses or reweigh the evidence to find a preponderance on one side or the other. The court, however, will consider whether the evidence to support the verdict is substantial; a mere scintilla of evidence will not suffice. The authority to grant a new trial, unlike a judgment notwithstanding the verdict, rests almost completely within the trial court's discretion. A new trial is warranted to prevent a miscarriage of justice if the district court determines that the jury verdict is contrary to the clear weight of the evidence, the damages are excessive, or, for any other reason, the trial was not fair to the moving party. A new trial is not justified merely because the jury could have reached a different result.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN2[] **Affirmative Defenses, Immunity**

Under *Fed. R. Civ. P. 8(c)*, a defendant must plead all of his affirmative defenses in his answer. Any defense not pleaded is waived. Qualified immunity is an affirmative defense that must be pleaded by the defendant.

Torts > ... > Types of Damages > Compensatory Damages > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN3[] **Types of Damages, Compensatory Damages**

The obligation to pay compensatory damages to rectify an inseparable injury for which several defendants are liable is joint and several.

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN4[] **Damages, Punitive Damages**

Punitive damages may be assessed in a *§ 1983* action when the defendant's conduct is shown to be motivated by evil force or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN5[] **Sanctions, Misconduct & Unethical Behavior**

The misconduct of counsel justifies a new trial where that misconduct prejudiced the adverse party. The key issue is whether the trial was fair to the moving party.

Civil Procedure > ... > Pleadings > Time Limitations > Extension of Time

Civil Procedure > Pleading & Practice > Motion Practice > Time Limitations

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

HN6[] **Time Limitations, Extension of Time**

Pursuant to *Fed. R. Civ. P. 6(b)(2)*, the court, in its discretion, may order an extension of time after the expiration of a specified time period, but only for cause shown, and if the failure to act was the result of excusable neglect. This standard requires the party seeking the enlargement to demonstrate good faith and a reasonable basis for noncompliance with the time limit specified in the rules. Mere inadvertence will not support a finding of excusable neglect. The court will also consider whether allowing the enlargement of time would prejudice an opposing party.

Civil Procedure > Remedies > General Overview

HN7[] **Civil Procedure, Remedies**

Once a constitutional violation is established, the court should tailor the scope of the equitable remedy to fit the nature and extent of the constitutional violation. First, the remedy must be related to the condition alleged to offend the constitution. Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Third, the federal courts, in devising a remedy, must take into account the interests of state and local authorities in managing their own affairs, consistent with the constitution. Within these parameters, the court should make every effort to achieve the greatest degree of relief possible.

Counsel: Frank A. Putz, Asst. Corporation Counsel, Milwaukee, Wisconsin, for Defendant Letha F. Harmon.

Mark M. Camp, Pfannerstill & Camp, Milwaukee, Wisconsin, for Plaintiffs.

James H. Peterson, Attorney at Law, Milwaukee, Wisconsin, for Defendants La Croix and Sewerage District.

Daniel S. Farwell, Assistant Attorney General, Madison, Wisconsin, for Defendants Payne, Manning & Beckett.

Judges: Myron L. Gordon, Senior Judge.

Opinion by: GORDON

Opinion

[*615] MYRON L. GORDON, SENIOR JUDGE

DECISION and ORDER

The plaintiffs, Isaac J. Cornelius, a full-blooded American Indian, and Cornelius Contractors Corporation (Cornelius), filed this action pursuant to *42 U.S.C. § 1983* and sixteen other federal statutory and constitutional provisions. They alleged that the defendants conspired to deprive the corporate plaintiff, Cornelius, of its certification as a minority business enterprise (MBE) eligible for preference in the awarding of federally funded construction contracts. The plaintiffs charged that the defendants' actions constituted unlawful discrimination and deprived them of their property without due process of law.

The liability **[**2]** and damage issues were tried to a jury; the question of equitable relief was reserved for the court. At the close of the plaintiffs' case, the court granted the defendants' motion for a directed verdict as to the conspiracy and discrimination claims. At the same time, the court dismissed with prejudice the plaintiffs' action against three defendants: the County of Milwaukee, the Wisconsin Department of Natural Resources (DNR), and the Wisconsin Department of Development (DOD).

The jury returned a special verdict finding that each of the remaining defendants had deprived Cornelius of its status as a certified MBE without due process of law. The jury awarded Cornelius damages for lost profits of $20,000 each against defendants David La Croix, James F. Estes, and the Milwaukee Metropolitan Sewerage District (District). In addition, the jury assessed punitive damages of $50,000 against Letha Harmon, $45,000 against Mr. Estes, and $5,000 against Mr. La Croix. Currently pending are several post-trial motions as well as the plaintiffs' claim for equitable relief.

I. POST-TRIAL MOTIONS OF THE DISTRICT AND DAVID LA CROIX

Defendants David La Croix and the District (collectively referred to **[**3]** as "the District defendants") have filed a motion for judgment notwithstanding the verdict (J.N.O.V.) or, alternatively, a new trial contending that (1) neither they nor defendant James Estes deprived Cornelius of its MBE certification without due process of law; (2) Mr. La Croix is entitled to qualified immunity from damages; and (3) challenging the jury award of both compensatory damages against Mr. La Croix, Mr. Estes and the District, and the punitive damage award against Mr. La Croix. As a prerequisite to their claim that Mr. La Croix is entitled to qualified immunity in this case, the District defendants have moved to amend their complaint to assert the affirmative defense of qualified immunity on behalf of Mr. La Croix. Finally, the District has moved for an enlargement of time to answer Mr. Estes' cross-claim against the District for indemnification.

Before addressing the merits of these motions, the court notes that counsel for Mr. La Croix and the District, James H. Petersen, challenges not only the verdict against his own clients but also contests the verdict against Mr. Estes. Mr. Petersen never has purported to appear on behalf of Mr. Estes in this action, nor has

he **[**4]** filed a notice of appearance on behalf of Mr. Estes. Neither has Mr. Estes, appearing pro se in this action, indicated to the court that he joins in the District defendants' post-trial motions. The court simply will not allow counsel to speak on behalf of a party to this lawsuit that he does not represent and who has not joined in the pending motions. Accordingly, the court will not entertain the District defendants' challenge to the verdict against Mr. Estes.

A. Due Process Violation

The District defendants, Mr. La Croix and the District itself, move for J.N.O.V. or a new trial as to the jury's finding that they deprived Cornelius of its MBE certification without due process of law. *HN1*[↑] In deciding a (J.N.O.V.) motion, the court must consider whether the evidence presented, combined with all reasonable inferences **[*616]** that can be drawn from it, is sufficient to support the verdict when viewed in the light most favorable to the prevailing party. *Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 153 (7th Cir. 1981)*. A court may not judge the credibility of the witnesses or reweigh the evidence to find a preponderance on one side or the other. *La Montagne v. American Convenience [**5] Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984)*. The court, however, will consider whether the evidence to support the verdict is substantial; "a mere scintilla of evidence will not suffice." *Id.*

The authority to grant a new trial, unlike J.N.O.V., rests almost completely within the trial court's discretion. *Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 66 L. Ed. 2d 193, 101 S. Ct. 188 (1980)*. A new trial is warranted to prevent a miscarriage of justice if the district court determines that the jury verdict is contrary to the clear weight of the evidence, the damages are excessive, or, for any other reason, the trial was not fair to the moving party. *Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 85 L. Ed. 147, 61 S. Ct. 189 (1940)*; *General Foam Fabricators, Inc. v. Tenneco Chemicals, Inc., 695 F.2d 281, 288 (7th Cir. 1982)*. A new trial is not justified merely because the jury could have reached a different result. *Continental Air Lines, Inc. v. Wagner-Morehouse, Inc., 401 F.2d 23, 30 (7th Cir. 1968)*.

The District defendants, in their post-trial motion, do not challenge the court's earlier finding that MBE status is a constitutionally protected **[**6]** property interest. Rather, they contend that Cornelius was not recognized by the District as having MBE status at the time the firm was denied MBE certification. The evidence proves otherwise.

In early 1981, Cornelius submitted a registration form to the District identifying itself as an MBE. Firms submitting such registration forms were accepted by the District as MBEs if no questions arose from an examination of the forms themselves. Pursuant to this "self-certification," Cornelius was treated by the District as having MBE status and was placed on a list of firm names supplied to potential prime contractors seeking MBE subcontractors to meet the participation goals for District work funded in whole or in part by federal or state grants. During the time Cornelius was recognized by the District as a certified MBE, the company bid on and received subcontract work as an MBE on District contracts.

There is no evidence to suggest that under the District's program MBE certification was effective for only a limited period of time or lapsed automatically at the end of one year. It was Mr. Cornelius' reasonable understanding that his firm's MBE certification did not automatically lapse **[**7]** but could be revoked only for good cause. It can be inferred that this was also the District's understanding based on the fact that the District felt it necessary in July 1982 to change the procedural rules governing its MBE program.

In July 1982, the District altered its rules to require that each firm seeking MBE status file a certified affidavit after October 15, 1982, to be effective for one year only. The notice requiring submission of the certified affidavit also purported to withdraw all prior MBE certification. It is true that a public entity may redefine property interests without causing a deprivation of due process. *See Logan v. Zimmerman Brush Co., 455 U.S. 422, 433, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982)* ("[A] welfare recipient is not deprived of due process when the legislature adjusts benefit levels."). That, however, is not the case here. The District changed only the procedure governing MBE certification and not the substantive standard for certification.

Pursuant to the District's new rules, Cornelius submitted its affidavit in November 1982. On March 17, 1983, with no prior notice or opportunity to be heard, Cornelius was informed that it would not be **[**8]** certified by the District as an MBE. The reasons for the deprivation of certification are not relevant to the plaintiffs' procedural due **[*617]** process claim and need not be addressed by the court.

The key issue, as the District itself asserts, is whether Cornelius had attained MBE status with the District prior

to March 1983. The District contends that because of its 1982 rule change, Cornelius as well as all other previously certified MBEs automatically lost their certification as of October 15, 1982, pending the submission of new affidavits subject to District approval and only effective for a one-year period. Therefore, according to the District, Cornelius did not lose anything in March 1983 when it was denied MBE certification because it had already lost its certification in October 1982.

Cornelius, however, had been treated as an MBE by the District prior to the time it was denied certification in March 1983. Mr. La Croix testified that even after the District changed its procedures for MBE certification in 1982, he continued to recognize Cornelius as an MBE. The District, of course, was entitled to change its procedure for MBE certification. It was not permissible to **[**9]** revoke such certification, however, without due process of law, whether that revocation occurred on October 15, 1982, on March 17, 1983, or at some point between these dates. "'While the Legislature may elect not to confer a property interest . . ., it may not constitutionally authorize the deprivation of such an interest once conferred without appropriate procedural safeguards.'" *Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494 (1985)* (quoting *Arnett v. Kennedy, 416 U.S. 134, 167, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974)* (Powell, J., concurring in part and concurring in result in part)). Nor may the District circumvent the requirements of due process simply by changing its rules for MBE certification.

The District asserts that it has sole power to determine whether a firm qualifies as an MBE for purposes of awarding District contracts; that authority is not questioned by the court. The district quite correctly observes that Cornelius' property interest in MBE certification by the District was not created by federal statute, *42 U.S.C. § 6705*, or by the policy of the U.S. Environmental Protection Agency defining an MBE. *43 Fed.Reg. [**10] 60220, 60221-22 (1978)*. Instead, the firm's property interest arose because the District recognized and treated Cornelius as an MBE. The District can revoke that status but only if it first gives Cornelius notice and an opportunity to be heard.

In short, the District cannot create a property interest and then take it away without due process. Once it is determined that a constitutionally protected property interest exists, the process due is a question of federal constitutional law and cannot be circumscribed by state legislation or regulation. *Cleveland Bd. of Educ. v. Loudermill, supra, 105 S. Ct. at 1493* (expressly rejecting the "bitter with the sweet" approach to due process of the plurality opinion in *Arnett v. Kennedy, supra, 416 U.S. at 152-54*).

The present case is analogous to the situation in which an individual receiving governmental benefits, such as welfare or unemployment compensation, or who is licensed by a governmental body is first told that he presumptively no longer qualifies for the license or benefits but must requalify under a new procedure, and subsequently is informed that he does not qualify for the entitlement. In such a case, the individual is entitled **[**11]** to adequate notice and an opportunity to be heard prior to being deprived of his benefits or license. *See, e.g., Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978)*; *Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)*; *Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970)*; *see also Freitag v. Carter, 489 F.2d 1377, 1382 (7th Cir. 1973)* ("A governmental licensing body which judges the fitness of an applicant must afford the applicant adequate notice and a hearing.")

Because the evidence supports the jury's verdict that the District and its employee, **[*618]** Mr. La Croix, deprived Cornelius of its MBE certification without due process of law, the District defendants' motion for J.N.O.V. or, in the alternative, a new trial as to the liability issue will be denied.

In the alternative, the District moves for a new trial alleging that it was unduly prejudiced by the erroneous assertions of plaintiffs' counsel on several occasions during the trial that Cornelius' status as an MBE already was established by federal law. Notwithstanding the comments of plaintiffs' counsel, the jury was clearly **[**12]** instructed that they could not find a due process violation unless they first determined that Cornelius "was registered with the respective agencies that employed the individual defendants and was recognized by the defendants as an MBE immediately prior to the time that they denied or cancelled the corporation's status as a Minority Business Enterprise." In view of this instruction, the court concludes that the challenged comments of plaintiffs' counsel do not warrant a new trial.

B. Qualified Immunity

David La Croix asserts that as a matter of law he is entitled to qualified immunity from the damages

awarded against him in this case. Mr. La Croix, however, did not plead the defense of qualified immunity in his answer to the plaintiffs' complaint or at any time prior to the jury verdict in this case. He first moves, therefore, to amend his answer, pursuant to Federal Rule of Civil Procedure 15(b), to state the affirmative defense of qualified immunity.

HN2[↑] Under Federal Rule of Civil Procedure 8(c), a defendant must plead all of his affirmative defenses in his answer. *See also* Fed. R. Civ. P. 12(b). Any defense not pleaded is waived. Pinto Trucking Service, Inc. v. Motor Dispatch, [**13] Inc., 649 F.2d 530, 534 (7th Cir. 1981). Qualified immunity is an affirmative defense which must be pleaded by the defendant. Gomez v. Toledo, 446 U.S. 635, 640, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980).

Mr. La Croix seeks to overcome his waiver of the qualified immunity defense by a Rule 15(b) motion to amend. Under Rule 15(b), issues not raised by the pleadings but tried with "the express or implied consent of the parties" are treated as if raised in the pleadings. A party may move to amend the pleadings to raise such issues at any time, even after judgment.

Mr. La Croix's reliance on Rule 15(b) is misplaced here. The question of qualified immunity was not tried with the plaintiffs' "express or implied consent." The issue, in fact, was not tried at all. Mr. La Croix himself acknowledges that the defense of qualified immunity in this case presents a question of law for the court and not one of fact for the jury. *See* Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984). Qualified immunity is an issue, therefore, which by its very nature is not resolved by the presentation of evidence at trial.

The cases relied on by Mr. La Croix in support of his motion for a Rule 15(b) [**14] amendment are inapposite. In both of the cases that he cites, the immunity issue was one of fact on which evidence was introduced at trial. Trapnell v. Riggsby, 622 F.2d 290, 294 (7th Cir. 1980); Bradford Audio Corp. v. Pious, 392 F.2d 67, 73-74 (2d Cir. 1968). Although the defendants in *Trapnell* and *Pious* were permitted pursuant to Rule 15(b) to assert an immunity defense after having failed to plead the defense, the cases were decided prior to the Supreme Court's decision in Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

Harlow redefined the qualified immunity defense by rejecting any inquiry into a defendant's state of mind in favor of a completely objective standard. Under the doctrine of qualified immunity as it now stands, the issue is whether the challenged conduct violated clearly established constitutional or statutory rights of which a reasonable person would have known. Id. at 818.

The plaintiffs, moreover, would be prejudiced if Mr. La Croix is permitted [*619] at this late date to raise the defense of qualified immunity. The complaint in this case was filed well over two years prior to trial. Only [**15] after the jury returned a verdict for both compensatory and punitive damages against Mr. La Croix did he move to amend his answer to assert the affirmative defense of qualified immunity. The court will not countenance a defendant's waiting to see whether the trial will result in a verdict unfavorable to him before raising for the first time a defense to that verdict. Resort to Rule 15(b) does not guarantee that the express affirmative pleading requirement of Rule 8(c) will not be enforced. *See* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1492 (1971).

Finally, the court's earlier ruling that the individual state defendants were entitled to qualified immunity from damages has no bearing on Mr. La Croix's motion to amend. The state defendants, unlike Mr. La Croix, raised the affirmative defense of qualified immunity in their answer. Accordingly, Mr. La Croix's motion to amend his answer to state the affirmative defense of qualified immunity will be denied. It follows, therefore, that his motion for J.N.O.V. or, alternatively, a new trial based on the defense of qualified immunity from damages will be denied.

C. Compensatory Damages

The District defendants move for [**16] a remittitur of the compensatory damage awards of $20,000 each against the District, Mr. La Croix,. and Mr. Estes to a single award of $9,300 for which these three defendants would be held jointly and severally liable. The court, as previously explained, will not consider the District defendants' challenge to the verdict against Mr. Estes. If the district court determines that a jury verdict is excessive, it may either grant the new trial motion or deny the motion conditioned upon the prevailing party's acceptance of a remittitur of the damage award. McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984).

In the present case, the plaintiffs sought compensatory damages for lost profits resulting from the decertification of Cornelius as an MBE. The plaintiffs did not seek damages for mental or emotional distress or for loss of

business reputation. The court, accordingly, instructed the jury:

> "The plaintiff has the burden of establishing by a preponderance of the evidence that the plaintiff corporation would have been successful in being selected as a subcontractor on any particular project but for its ineligibility to be considered as an MBE participant in fulfilling **[**17]** governmentally mandated MBE goals.
> "In deliberating on this question, you may only consider what amount of money, if any, would reasonably have been expected to have been accounted for as profit from any subcontract work.
> "Once again, it's the plaintiff's burden to prove, by a preponderance of the evidence, that the corporation not only lost business opportunities, but also the amount of lost profit resulting from such decertification without due process of law."

The jury also was cautioned that they could not presume damages or award speculative damages, that is, damages which although possible are not reasonably certain to occur. *See* 3 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 85.08 (1977).

The only evidence to support an award of compensatory damages against the District defendants came from Mr. Cornelius. He testified that his firm submitted subcontract bids on two District projects, the Oak Creek North Interceptor project and the Franklin Northeast Interceptor project, of $130,000 and $56,000 respectively, a cumulative total of $186,000. The District does not argue that Cornelius did not lose the subcontract work on these two projects as **[**18]** a proximate result of being denied MBE certification by the District.

Cornelius, however, is not entitled to recover the gross sum of these bids but only the profit he reasonably could have expected **[*620]** to make on the subcontract work for the two projects. Mr. Cornelius testified that he generally tried to calculate a 10% to 15% profit margin on his subcontract bids, although he indicated that as a general rule he realized an actual profit of only about 5%. Later in his testimony, however, in discussing his subcontract bid on the Wisconsin DNR's Brookfield Wastewater Treatment Plan project, Mr. Cornelius testified that he expected a profit of approximately 10%.

Based on Mr. Cornelius' testimony, the jury could have reasonably awarded the plaintiffs $18,600 in compensatory damages against the District defendants, representing 10% of the firm's bids on the Oak Creek and Franklin projects. Any amount beyond the profit Cornelius reasonably could have expected for work on these two projects would be purely speculative and cannot support a compensatory damage award. Thus, while the plaintiffs might have offered evidence of other business opportunities lost as a result of the District's **[**19]** decertification of Cornelius as an MBE, they failed to do so. The plaintiffs suggest that they could have proved substantially greater actual damages had their economic expert been permitted to testify. His testimony, however, was not allowed; the plaintiffs do not now challenge the court's ruling in this regard. The court, therefore, will set aside the compensatory damage awards against Mr. La Croix and the District and will order a new trial limited solely to the determination of compensatory damages against these defendants unless the plaintiffs accept a remittitur of the compensatory damages against such defendants to a total of $18,600.

The District defendants also assert that the compensatory damages awarded individually against the District, Mr. La Croix and Mr. Estes should be a single award for which these three defendants are held jointly and severally liable. Again, the court will not consider the District defendants' claim as to the compensatory damage award against Mr. Estes.

HN3[↑] "The obligation to pay compensatory damages to rectify an inseparable injury for which several defendants are liable is joint and several." *McKinnon, supra, 750 F.2d at 1387*. In the matter **[**20]** at bar, the jury found that the District and Mr. La Croix, as a District employee, deprived Cornelius of its status as a certified MBE without due process of law. As a result, Cornelius lost its MBE status with the District and, consequently, suffered lost business profits. It is not possible to determine which portion of the plaintiffs' injury would have been avoided if one of the two District defendants had not participated in the wrongful conduct. *See id.* The injury caused by these defendants, therefore, is indivisible. Accordingly, the court will order the District and Mr. La Croix jointly and severally liable for compensatory damages of $18,600, if the plaintiffs accept the remittitur, or as determined in a partial new trial, if the plaintiffs reject the remittitur.

Although it is appropriate for the court to order the District defendants jointly and severally liable for compensatory damages, the issue is academic in this case. The Wisconsin indemnity statute, *Wis. Stat. § 895.46*, provides that a defendant public employee

against whom a judgment for damages is entered for acts within the scope of employment shall be indemnified by the political subdivision employing him **[**21]** or her. *See Bell v. City of Milwaukee, 746 F.2d 1205, 1268 (7th Cir. 1984)*. As a matter of state law, therefore, the District is responsible for any damages awarded against Mr. La Croix who for purposes of this suit was clearly acting within the scope of his employment with the District.

D. Punitive Damages

The jury assessed punitive damages of $5,000 against Mr. La Croix. He contends that this award must be overturned because there is no evidence that his conduct toward the plaintiffs was wanton, malicious or oppressive.

HN4[↑] Punitive damages may be assessed in a *§ 1983* action "when the defendant's conduct **[*621]** is shown to be motivated by evil force or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade, 461 U.S. 30, 56, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983)*. There is absolutely no evidence in the record that Mr. La Croix was motivated by evil force or intent when he recommended that Cornelius not receive MBE certification. Nor is there evidence that he acted with reckless or callous indifference to the plaintiffs' due process rights.

In *Soderbeck v. Burnett County, Wis., 752 F.2d 285* (7th Cir.), **[**22]** *cert. denied, 471 U.S. 1117, 105 S. Ct. 2360, 86 L. Ed. 2d 261 (1985)*, the Court of Appeals for the Seventh Circuit considered the showing required to establish "reckless or callous indifference" under the *Smith v. Wade* standard for awarding punitive damages in a *§ 1983* action. The court in *Soderbeck* held:

> "We may therefore set it down as a condition of awarding punitive damages that the defendant almost certainly knew that what he was doing was wrongful and subject to punishment. Among the types of conduct that fit this description is conduct so contrary to our society's basic ethical principles that it can safely be assumed to have been undertaken with knowledge that it was legally as well as morally wrong, including conduct that has come to be regarded as contrary to the modern civil rights, as well as the older personal liberties, of Americans."

Id. at 291. The court reasoned that "unless the defendant knew that the conduct which resulted in the injury to the plaintiff was forbidden, an award of punitive damages will have no deterrent effect." *Id. at 290*.

The deprivation of a company's status as a certified MBE without prior notice and an opportunity **[**23]** to be heard cannot be characterized as an action contrary to "society's basic ethical principles." Nor was Mr. La Croix's challenged conduct widely regarded at the time it occurred as a federal constitutional tort. Further, the plaintiffs presented no evidence to support a finding that Mr. La Croix knew or ought to have known that depriving Cornelius of its MBE certification without prior notice and hearing violated the plaintiffs' constitutional right to due process of law. Accordingly, Mr. La Croix will be granted J.N.O.V. as to the punitive damage award of $5,000 against him.

Mr. La Croix, in the alternative, moves for a new trial of the issue of punitive damages. Pursuant to *Federal Rule of Civil Procedure 50(c)(1)*, the court must conditionally rule on this alternative motion. Mr. La Croix asserts that plaintiffs' counsel improperly argued to the jury that it could consider the value of the District's new construction projects in assessing damages and that any punitive damages awarded against Mr. La Croix would be paid by the District.

HN5[↑] "The misconduct of counsel . . . justifies a new trial where that misconduct prejudiced the adverse party." *Wiedemann v. Galiano, 722 F.2d [**24] 335, 337 (7th Cir. 1983)*. The key issue is whether the trial was fair to the moving party. *Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 85 L. Ed. 147, 61 S. Ct. 189 (1940)*.

It was not a misstatement of law for plaintiffs' counsel to point out that any punitive damages assessed against Mr. La Croix would be paid by the District. Such is the case under Wisconsin's indemnification statute. *Wis. Stat. § 895.46(1)(a)*; *see also Bell, supra, 746 F.2d at 1271*.

At the same time, the award of punitive damages against an individual public official in a *§ 1983* action is to be assessed in view of his personal financial resources and not the presumably far more substantial resources of the municipality for which he works. *See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269-71, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981)*. Thus, the comments of plaintiffs' counsel were improper insofar as they suggested that any award of punitive damages against Mr. La Croix should be based on **[*622]** the District's, rather than Mr. La Croix's, financial status.

The court cannot conclude, however, that the comments of plaintiffs' counsel deprived Mr. La Croix of a fair trial on **[**25]** the issue of punitive damages. The jury was clearly instructed that if they chose to award punitive damages against an individual defendant, they should consider the personal wealth, or lack of wealth, of that defendant in determining the amount of punitive damages. That the jury did just that in assessing punitive damages against Mr. La Croix is evidenced by the amount of punitive damages, $5,000, awarded against Mr. La Croix. If the jury had been influenced by the wealth of the District in rendering their punitive damage award against Mr. La Croix, one would have expected the award to have been substantially greater than $5,000. Accordingly, Mr. La Croix's alternative motion for a new trial of the punitive damage issue will be conditionally denied.

E. Motion To Enlarge Time To Answer Estes Cross-Claim

In his amended answer to the plaintiffs, filed May 27, 1983, defendant James Estes interposed a cross-claim against the District for payment of any damages awarded against him. The District never answered Mr. Estes' cross-claim. The jury returned a verdict against Mr. Estes for compensatory damages of $20,000 and punitive damages of $50,000. The District now moves for an enlargement **[**26]** of time pursuant to *Federal Rule of Civil Procedure 6(b)* to answer Mr. Estes' cross-claim. The motion will be denied.

HN6[↑] Under *Rule 6(b)(2)*, the court, in its discretion, may order an extension of time after the expiration of a specified time period but only for "cause shown" and if "the failure to act was the result of excusable neglect." This standard requires the party seeking the enlargement to demonstrate good faith and a reasonable basis for noncompliance with the time limit specified in the rules. 4 C. Wright & A. Miller, Federal Practice and Procedure § 1165 (1969) (cases cited therein). Mere inadvertence will not support a finding of excusable neglect. *See Sherrod v. Piedmont Aviation, Inc., 516 F. Supp. 39, 41 n.1 (E.D. Tenn. 1978)*. The court will also consider whether allowing the enlargement of time would prejudice an opposing party. *Coady v. Aquadilla Terminal, Inc., 456 F.2d 677, 678 (1st Cir. 1972)*.

Counsel for the District states by way of affidavit that he failed to answer the cross-claim because he simply "missed" the filing of the stipulation allowing Mr. Estes to file his amended answer containing the cross-claim. Counsel for the District himself signed **[**27]** the stipulation. To claim now, well over two years after Mr. Estes filed his cross-claim, that the District's failure to answer was due to excusable neglect strains credulity. The District's failure to answer the cross-claim was the result of inadvertence and not excusable neglect.

The District also asserts that granting the motion for enlargement would not prejudice Mr. Estes. The court finds that just the opposite is suggested in this case. Mr. Estes was unrepresented at trial and only appeared as an adverse witness for the plaintiffs. If he had been put on notice by an answer to his cross-claim that the District opposed his indemnification claim, he may well have chosen to appear at trial, pro se or by counsel, to present his case. Accordingly, the District's motion for an enlargement of time to answer Mr. Estes' cross-claim will be denied.

II. LETHA HARMON'S MOTION TO SET ASIDE PUNITIVE DAMAGE AWARD

Letha Harmon, the MBE coordinator for the County, moves pursuant to *Federal Rule of Civil Procedure 59(e)* to set aside the jury verdict awarding Cornelius $50,000 in punitive damages against her. In the alternative, she seeks a new trial pursuant to *Rule 59(a)* of the punitive damage **[**28]** issue. Her motion to set aside the verdict pursuant to *Rule 59(e)* is properly **[*623]** characterized as a motion for J.N.O.V. pursuant to *Rule 50(b)*. Thus characterized, the motion will be granted.

Ms. Harmon first asserts that Cornelius may not recover punitive damages from her because the jury did not award compensatory damages against her. She also contends that there is no evidence to support the award of punitive damages against her. Because I agree with this latter contention for essentially the same reasons that I overturned the punitive damage award against Mr. La Croix, I need not address Ms. Harmon's initial argument.

There is no evidence in the record that Ms. Harmon's wrongful conduct was motivated by evil force or intent or that it involved reckless or callous indifference to the plaintiffs' due process rights. *Smith v. Wade, supra, 461 U.S. at 56*. Ms. Harmon could not have acted with reckless or callous indifference to a right that she could not reasonably have been expected to know that the plaintiffs possessed. *See Soderbeck, supra, 752 F.2d at 290-91*. Accordingly, Ms. Harmon will be granted J.N.O.V. as to the punitive damage award of $50,000 against her.

[29]** III. PLAINTIFFS' POST-TRIAL CLAIMS

The plaintiffs seek equitable relief in this action. They also have moved for a new trial on the question of damages against E. Marty Payne, minority business coordinator for the Wisconsin DNR.

As a preliminary matter, the state defendants, Mr. Payne, David Manning and William P. Beckett, have moved to strike the plaintiffs' post-trial brief in support of their claim for equitable relief because it was filed four days late, according to the briefing schedule set by the court at the close of trial. In their post-trial brief, the plaintiffs not only addressed the issue of equitable relief, to which the court's briefing schedule applied, but also responded to the numerous post-trial motions brought by the defendants and pressed their own motion for a partial new trial.

Under Local Rule 6.01 of this district, the court, on a showing of good cause, may extend the time for the filing of a brief. The plaintiffs did not request an extension of time to file their post-trial brief.

The state defendants contend that they were prejudiced by the plaintiffs' late filing because it reduced by several days their time to respond to the plaintiffs' claim for equitable **[**30]** relief. If these defendants were so concerned about their ability to effectively respond to the plaintiffs' post-trial brief within the schedule established by the court, they reasonably could have asked the court for an extension of time to file their brief. They requested no extension.

The plaintiffs certainly should have sought an extension of time from the court to file their post-trial brief in support of their claim for equitable relief. However, in light of the plaintiffs' minimal delay in filing their brief and because I do not believe the state defendants have been prejudiced by the plaintiffs' late filing, I will deny the motion to strike the plaintiffs' post-trial brief. The rigid enforcement of the briefing schedule under these circumstances would disserve the interests of justice.

A. Damages Against E. Marty Payne

The court previously ruled that Mr. Payne was entitled to qualified immunity from damages and, therefore, dismissed the plaintiffs' damage claims against him. The plaintiffs now move for a new trial of the issue of damages against Mr. Payne. The plaintiffs have advanced no authority to contradict the court's ruling that Mr. Payne is entitled to qualified **[**31]** immunity in this case. I will not repeat my rationale for this decision as it is part of the record. I merely point out that the constitutional right to notice and an opportunity to be heard prior to the deprivation of a firm's MBE certification was not clearly established at the time of Mr. Payne's wrongful conduct in this case. *See Harlow supra, 457 U.S. at 818-19*. Mr. Payne's right to qualified immunity in no **[*624]** way affects the availability of equitable relief against him.

The court also notes that the parties stipulated that this action was brought against the individual defendants, including Mr. Payne, in their individual, or personal, capacities and in their official capacities. A public official may be sued in both capacities. *See Kolar v. County of Sangamon, 756 F.2d 564, 568-569 (7th Cir. 1985)*. To the extent Mr. Payne is sued in his official capacity as a state employee, he is not protected by the doctrine of qualified immunity. *Owen v. City of Independence, 445 U.S. 622, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980)*. Instead, he is entitled to immunity from damages under the *eleventh amendment*. *Kentucky v. Graham, 473 U.S. 159, 105 S. Ct. 3099, 3107, [**32] 87 L. Ed. 2d 114 (1985)*. Accordingly, the plaintiffs' motion for a new trial of the issue of damages against Mr. Payne will be denied.

B. Equitable Relief

In their prayer for relief, the plaintiffs seek not only damages but also declaratory and injunctive relief. ***HN7***[↑] Once a constitutional violation is established, the court should "tailor 'the scope of the [equitable] remedy' to fit 'the nature and extent of the constitutional violation.'" *Hills v. Gautreaux, 425 U.S. 284, 293-94, 47 L. Ed. 2d 792, 96 S. Ct. 1538 (1976)* (citation omitted).

> "[First,] the remedy must . . . be related to 'the *condition* alleged to offend the Constitution. . . .' . . . Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' . . . Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."

Milliken v. Bradley, 433 U.S. 267, 280-81, 53 L. Ed. 2d 745, 97 S. Ct. 2749 (1977) (citations **[**33]** omitted) (emphasis in original). Within these parameters, the court should make every effort to achieve the greatest degree of relief possible. *Hills, supra, 425 U.S. at 297*.

First, insofar as the plaintiffs seek declaratory and injunctive relief affirming the qualifications of Cornelius as an MBE, their claim will be denied. The central issue in this case was whether Cornelius was deprived of its status as an MBE without due process of law. The wisdom of the defendants' decisions to deprive the firm of its MBE status was not at issue in this case. The jury was instructed accordingly.

Cornelius has no constitutional right to MBE certification. What it does have is a right to due process before being deprived of that status. An equitable remedy in which the court finds Cornelius to be qualified as an MBE, therefore, is beyond the scope of the constitutional violation established by the plaintiffs in this case.

Similarly, the court will not enjoin the defendants from denying Cornelius MBE certification "unless warranted by a change in circumstances." Apart from being ambiguous, such an order implicitly requires the court to rule that Cornelius meets the requirements for MBE certification. **[**34]** That is a determination to be made by the respective state and local defendants, not by the court. The equitable relief ordered in this case must be geared to restoring the MBE status of Cornelius and assuring that the firm is not deprived of this status without due process of law.

The state defendants, E. Marty Payne or his successor in office at the Wisconsin DNR (*see* Fed. R. Civ. P. 25(d)(1)), and David Manning and William P. Beckett or their successors in office at the Wisconsin DOD will be ordered to reinstate Cornelius to MBE status with the DNR and DOD, respectively. Defendant Letha Harmon or her successor in office with the County of Milwaukee similarly will be ordered to reinstate Cornelius to its MBE status with the County.

It will not be necessary for the court to order the District, Mr. La Croix, and Mr. Estes to restore Cornelius to its status as an MBE with the District. According **[*625]** to the uncontested affidavit of Matthew E. Gordon, Manager of the District's Small, Minority, and Women's Business Affairs Department, Cornelius was accepted as a certified MBE by the District on June 24, 1985.

The court further will order that the defendants may not suspend **[**35]** or revoke Cornelius' MBE status without first providing the firm with adequate predeprivation notice and hearing. A full adversarial, evidentiary hearing is not required. *See* Cleveland Bd. of Educ. v. Loudermill, supra, 105 S. Ct. at 1495-96. If the defendants choose to provide Cornelius with such a hearing, however, the requirements of due process certainly will be met.

The court's order will in no way limit the defendants' authority to suspend or revoke the status of Cornelius as a certified MBE provided such action is taken in conformity with the requirements of the due process clause.

To ensure that Cornelius is restored to the position it held before being deprived of its MBE status, the defendants will also be ordered to include the firm in all future directories and documents published by the defendants or their respective agencies which list certified MBEs. The court finds it unnecessary to order the defendants also to notify general contractors individually by special written notice that Cornelius' MBE status has been restored.

C. Costs and Attorney Fees

The plaintiffs also seek their costs and attorney fees in this action pursuant to Federal Rule of Civil Procedure [**36] 54(d) and *42 U.S.C. § 1988.* Because final judgment has not yet been entered in this case, they have not yet submitted their bill of costs or their application for attorney fees. The plaintiffs should submit these items in conformity with Federal Rules of Civil Procedure and the local rules of this district following the entry of final judgment; these matters will then be resolved by the court.

Therefore, IT IS ORDERED that the motion of defendants David B. La Croix and the Milwaukee Metropolitan Sewerage District (District) for judgment notwithstanding the verdict as to the punitive damage award against Mr. La Croix be and hereby is granted.

IT IS ALSO ORDERED that the motion of defendants La Croix and the District for a new trial of the issue of compensatory damages against them be and hereby is denied on the condition that the plaintiffs accept a remittitur of compensatory damages against Mr. La Croix and the District in excess of $18,600, Mr. La Croix and the District to be held jointly and severally liable for this sum. If the plaintiffs do not accept, serve and file the remittitur within 20 days from the date of this decision and order, a new trial will be scheduled by the **[**37]** court to be confined to the issue of compensatory damages against Mr. La Croix and the District.

IT IS FURTHER ORDERED that the motion of defendants La Croix and the District for judgment

notwithstanding the verdict or, in the alternative, a new trial be and hereby is denied in all other respects.

IT IS FURTHER ORDERED that the motion of defendants La Croix and the District to amend their answer to assert the affirmative defense of qualified immunity on behalf of Mr. La Croix be and hereby is denied.

IT IS FURTHER ORDERED that the motion of the defendant District for an extension of time to answer the cross-claim of defendant James F. Estes be and hereby is denied.

IT IS FURTHER ORDERED that the motion of defendant Letha F. Harmon for judgment notwithstanding the verdict as to the award of punitive damages against her be and hereby is granted.

IT IS FURTHER ORDERED that the motion of defendants E. Marty Payne, David Manning, and William P. Beckett to strike the plaintiffs' post-trial brief be and hereby is denied.

[*626] IT IS FURTHER ORDERED that plaintiff Cornelius Contractors Corporation (Cornelius) be and hereby is entitled to judgment against defendant James F. Estes **[**38]** for compensatory damages of $20,000 and punitive damages of $45,000.

IT IS FURTHER ORDERED that defendants Harmon, Payne, Manning, and Beckett or their successors in office be and hereby are enjoined to reinstate Cornelius to Minority Business Enterprise (MBE) status within fourteen (14) days of the date of this decision and order, with the same rights and privileges which attached to the firm's status as an MBE prior to the deprivation of that status.

IT IS FURTHER ORDERED that defendants La Croix, Estes, Harmon, Payne, Manning, and Beckett or their successors in office, and the defendant District be and hereby are enjoined from suspending or revoking the MBE status of Cornelius without first, at a minimum, providing Cornelius with:

(1) oral or written notice that such defendants are considering suspension or revocation of the firm's MBE status. Such notice shall state the reasons for the contemplated action and shall inform Cornelius of its right to a hearing to contest the contemplated action. The notice shall be provided at least fourteen (14) days in advance of any such hearing; and

(2) a hearing in which Cornelius is given an opportunity to present its position orally or **[**39]** in writing prior to any suspension or revocation of the firm's MBE status. A written record shall be made of any such hearing and the official(s) presiding at such hearing shall state orally or in writing the reasons for any suspension or revocation of Cornelius' MBE status. The presiding official(s) shall not have been actively involved in the initial consideration of the suspension or revocation of the firm's MBE status.

IT IS FURTHER ORDERED that defendants La Croix, Estes, Harmon, Payne, Manning, and Beckett and their successors in office, and the defendant District be and hereby are affirmatively enjoined to include Cornelius in all future directories and documents published by the defendants or their respective agencies which list certified MBEs, unless Cornelius' MBE status is suspended or revoked as a result of a hearing outlined above.

IT IS FURTHER ORDERED that this action be and hereby is dismissed with prejudice as to defendants County of Milwaukee, Wisconsin Department of Natural Resources, and Wisconsin Department of Development.

IT IS FURTHER ORDERED that the plaintiffs be and hereby are entitled to their costs and attorney fees in this action. The taxing of costs **[**40]** and attorney fees shall be stayed pending either the plaintiffs' acceptance of the remittitur or the resolution of the partial new trial.

IT IS FURTHER ORDERED that final judgment shall be entered in accordance with the court's mandate upon either the plaintiffs' acceptance of the remittitur or the resolution of the partial new trial.

End of Document

EXHIBIT I

A.R.A.B Minutes

City of Milwaukee

200 E. Wells Street
Milwaukee, Wisconsin 53202

Search Results

File ID	Type	Status	Title	Agenda Date	Agenda Nr.	Controlling Body	Department	Name	EN Nr.
12055	APPEAL	Denied	Appeal of Deborah Teglia, agent for Black Diamond Group, Inc., for denial of Minority, Woman or Small Business Enterprise Certification.		24.	ADMINISTRATIVE REVIEW APPEALS BOARD			
12093	APPEAL	Settled	Appeal of Ralph Davis, agent for RL Davis Contracting Services, LLC, for denial of Minority, Woman or Small Business Enterprise Certification.		29.	ADMINISTRATIVE REVIEW APPEALS BOARD			
12150	APPEAL	Settled	Appeal of Atty. Andrew Niebler on behalf of Rashawn Spivey, President of Hero Plumbing, Inc., for denial of Small Business Enterprise Certification.		21.	ADMINISTRATIVE REVIEW APPEALS BOARD			
13010	APPEAL	Denied	Appeal of Jack Ambrogio, agent for Northwest Metro Security, Inc., for denial of Small Business Development Certification.		27.	ADMINISTRATIVE REVIEW APPEALS BOARD			
14035	APPEAL	Denied	Appeal of Janice LeTourneau, agent for KBI C ustom Case, Inc. for denial of Small Business Enterprise Certification.		18.	ADMINISTRATIVE REVIEW APPEALS BOARD			

File ID	Type	Status	Title	Agenda Date	Agenda Nr.	Controlling Body	Department	Name	EN Nr.
14052	APPEAL	Denied	Appeal of Timothy Poehnelt and Charles Johnson III, owners for NuGen Johnson, LLC, for denial of Small Business Enterprise Certification.		19.	ADMINISTRATIVE REVIEW APPEALS BOARD			
14054	APPEAL	Settled	Appeal of Brian Ganos, agent for Sonag Ready Mix, LLC, for denial of Small Business Enterprise Certification.		22.	ADMINISTRATIVE REVIEW APPEALS BOARD			
14080	APPEAL	Denied	Appeal of Richard Platt, agent for Platt Construction, Inc., for denial of Small Business Enterprise Certification.		22.	ADMINISTRATIVE REVIEW APPEALS BOARD			
14175	APPEAL	Denied	Appeal of Edward Grober, E.K.G. Trucking LLC, for denial of Small Business Enterprise Certification. (1st Aldermanic District)		8.	ADMINISTRATIVE REVIEW APPEALS BOARD			
14198	APPEAL	Denied	Appeal of Cynthia Pickart, Keystone Exterior Finishes LLC, for denial of Small Business Enterprise Certification. (2nd Aldermanic District)		16.	ADMINISTRATIVE REVIEW APPEALS BOARD			
15004	APPEAL	Granted	Appeal of Jorge Lopez, Nuvo Construction Company, Inc., for denial of Small Business Enterprise Certification. (9th Aldermanic District)		9.	ADMINISTRATIVE REVIEW APPEALS BOARD			
15020	APPEAL	Denied	Appeal of Gloria Henderson, D&G Insulation, Inc. for denial of Small Business Enterprise Certification.		7.	ADMINISTRATIVE REVIEW APPEALS BOARD			

File ID	Type	Status	Title	Agenda Date	Agenda Nr.	Controlling Body	Department	Name	EN Nr.
15089	APPEAL	Denied	Appeal of Atty. Michael Ganzer on behalf of Valente Transport, Inc. for denial of Small Business Enterprise Certification.		16.	ADMINISTRATIVE REVIEW APPEALS BOARD			
15095	APPEAL	Granted	Appeal of Shawn Woldt, agent for Thunderbird Engineering for denial of Small Business Enterprise Certification.		17.	ADMINISTRATIVE REVIEW APPEALS BOARD			
15198	APPEAL	Denied	Appeal of Amy Hagerty for RB General Trucking, Inc., for denial of Small Business Enterprise Certification.		19.	ADMINISTRATIVE REVIEW APPEALS BOARD			
16006	APPEAL	Granted	Appeal of Sandra Hollmann for denial of Small Business Enterprise Certification.		8.	ADMINISTRATIVE REVIEW APPEALS BOARD			
16029	APPEAL	Denied	Appeal of Atty. Michael Ganzer, on behalf of Vandalae Services, Inc., for denial of Small Business Enterprise Certification. (10th Aldermanic District)		16.	ADMINISTRATIVE REVIEW APPEALS BOARD			
16035	APPEAL	Denied	Appeal of Michelle Magin, agent for Quad Construction LLC, for denial of Small Business Enterprise Certification.		17.	ADMINISTRATIVE REVIEW APPEALS BOARD			
16148	APPEAL	Granted	Appeal of Christine Miklaszewski, agent for Straightline Grading & Excavating, LLC, for denial of Small Business Enterprise Certification.		15.	ADMINISTRATIVE REVIEW APPEALS BOARD			
17009	APPEAL	Denied	Appeal of Jeanne Menzel, agent for Prairie Land Towing, LLC, for denial of Small		14.	ADMINISTRATIVE REVIEW APPEALS BOARD			

File ID	Type	Status	Title	Agenda Date	Agenda Nr.	Controlling Body	Department	Name	EN Nr.
			Business Enterprise Certification.						
17014	APPEAL	Settled	Appeal of Brian L. Ganos, agent for Sonag Company, Inc., for denial of Small Business Enterprise Certification.		1.	ADMINISTRATIVE REVIEW APPEALS BOARD			
17015	APPEAL	Denied	Appeal of Jorge Lopez, agent for Nuvo Construction Company, Inc. for denial of Small Business Enterprise Certification.		12.	ADMINISTRATIVE REVIEW APPEALS BOARD			