

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

EQUITY DIVISION

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ALABAMA BRANCH, INC., et al., Plaintiffs,

v.

CIVIL ACTION NO.

CITY OF BIRMINGHAM, et al., CV77-506-014-WAT Defendants.

CONSENT DECREE

The present litigation is the 1989 sequel to the Alabama Supreme Court's 1981 decision in *Arrington v. Associated General Contractors*, 403 So. 2d 893 (Ala. 1981), which struck down the mandatory set-aside provisions of the City of Birmingham's Minority Business Enterprise Program (MBE) for its public works contracts. Because the current litigation is founded upon the 1981 court decision, some background facts are essential for a full understanding of this Consent Decree.

I. History of the Case.

In 1974, the Birmingham City Council adopted Ordinance 74-2, which required assurance of nondiscriminatory employment practices by those contracting with the City of Birmingham. Ordinance 74-2 was amended on May 3, 1977, by Ordinance 77-81 to include a requirement that, within thirty days of an award of a city contract, the contracting party provide an analysis of its work force by race, sex, and national origin. Additionally, the amended Ordinance authorized the Mayor to "promulgate such additional rules and regulations as he [might] determine to be reasonably necessary to insure compliance with or to promote the objectives of" the amended Ordinance.

In October 1977, former Birmingham Mayor David Vann, pursuant to the authority granted in Ordinance 77-81, instructed the City Engineer to include in the bid specifications for City contracts a requirement that the general or prime contractor agree to expend at least ten percent of the contract amount with certain minority subcontractors or suppliers. The specification had its genesis in the 1977 Public Works Employment Act, popularly known as the PWEA, 42 U.S.C. Section 6701, et seq. (Supp. III 1979). The PWEA required that a local government unit awarded PWEA funds assure that at least ten percent of the contract amount would be expended with minority business enterprises.

On November 30, 1977, Associated General Contractors of America, Alabama Branch, Inc. (AGC), along with several contractors doing business in the Birmingham area, brought suit in this court against Birmingham, its Mayor, and other city officials, seeking to have declared invalid Ordinance 77-81 and the Mayor's regulation requiring the ten percent minority commitment. Additionally, plaintiffs sought an order preliminary enjoining defendants' enforcement of the Ordinance and the Mayor's regulation. Plaintiffs' complaint alleged that the City's Ordinance and regulation violated due process and equal protection guarantees or the federal and state constitutions, federal statutes forbidding discrimination on account of race, and the state competitive bid law. After a hearing, this court entered an order denying plaintiff's motion to preliminarily enjoin enforcement of Ordinance 77-81, but granted plaintiffs' motion to preliminarily enjoin enforcement of the Mayor's regulation.

Nine days after this Court declared the Mayor's regulation void and enjoined its enforcement, the Birmingham City Council adopted Ordinance 77-257. Later, on August 28, 1979, the Council amended the ordinance to change certain bid requirements and to provide further for waiver of the ordinance provisions. Shortly thereafter, following the election of Richard Arrington, Jr., to succeed David Vann as Mayor of Birmingham, plaintiffs sought to permanently enjoin the enforcement of Ordinance 77-257, as amended, by amending their complaint of November 30, 1977, to put at issue the validity of the amended Ordinance and to substitute the then appropriate City officials as parties defendant.

The amendment complaint charged that the Ordinance violated the equal protection and due process guarantees of the state and federal constitutions, as well as 42 U.S.C. Sections 1981 and 1983; 42 U.S.C. Sections 2000 (d) (1)-(4); and the Alabama Competitive Bid Law, Code 1975, Section 41-16-50. Defendants put at issue each count of plaintiff's complaint, and after a hearing on the merits, this Court, with findings of fact and conclusions of law, found for plaintiffs and permanently enjoined enforcement of the challenged Ordinance. The defendants appealed this Court's order to the Alabama Supreme Court. A five member majority of the Supreme Court affirmed this Court's order. However, that majority limited its decision by emphasizing:

In conclusion, we note that our decision does not and cannot foreclose the City's enforcement of federal statutes or constitutionally imposed administrative regulations. Nor do we conclude that no municipality or state governmental entity may initiate a constitutionally sound affirmative action program. We only decide the case before us. 403 So. 2d at 903-04.

On January 21, 1988, plaintiffs filed their amended complaint, including a request for a preliminary injunction, and petition for an order to show cause. The parties were allowed to engage in limited discovery, and the hearing on the request for a preliminary injunction began on February 25, 1988. On January 28, 1988, the parties agreed that the hearing would relate only to the request for a preliminary injunction. It was further agreed that all other issues in the case could wait until the trial on the merits. No order to show cause or rule nisi was issued.

The hearing on the request for a preliminary injunction lasted from February 25, 1988, through May 10, 1989, with a subsequent briefing schedule through June of 1988.

Immediately after the United States Supreme Court decided *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), Mayor Arrington issued an executive order clarifying the MBE program, and he also issued a manual describing the MBE program as clarified. In light of these developments and since this Court had received no evidence on the request for a preliminary injunction for approximately nine months, the City moved for the trial court to conduct supplemental hearings. That motion was denied.

In compliance with its Resolution and in light of *Croson*, supra, the City also moved this Court to stay proceedings while the City Council reviewed what changes it would make in the MBE program. The City also informed this Court that the City was inclined to move on its own to a Disadvantaged Business Enterprise (DBE) Program, where white-owned disadvantaged businesses could participate. This Court also denied this request and instead issued its preliminary injunction in the form of an Order and Opinion, dated March 31, 1989.

The City filed a notice of appeal on April 3, 1989. The City requested that this Court stay its order, but that request was denied. The City then immediately requested that the Supreme Court of Alabama stay the preliminary injunction issued by this Court. The Supreme Court of Alabama stayed the preliminary injunction on April 7, 1989. The parties are presently briefing the issues on appeal in that Court. No hearing date has been set on this appeal.

During the pendency of the appeal in this case, the parties and certain interested non-parties have met frequently in an effort to resolve the issues raised by the plaintiffs and the defendants in a way that recognizes the respective legal rights of the parties and other concerned citizens of Birmingham and which promotes economic growth in Birmingham for all segments of the City. The parties are also concerned about the ever increasing expense of this litigation which could cost the City of Birmingham over \$1,000,000.00 for defending the case through the trial proceedings alone, and which said costs would probably not be recouped by the City even if its defense efforts are successful. By agreeing to this settlement, the defendants are not admitting liability or any wrongdoing. Likewise, the plaintiffs are not admitting that they would not obtain full relief on their claims if they proceeded with them to trial.

This Consent Decree, and the relief contained herein, is based upon the voluminous record developed both before this Court and in the administrative proceedings before the City Council of the City of Birmingham. The plaintiffs do not concede that the testimony given in the administrative proceedings is sufficient to support an affirmative action program. However, the parties agree, and the Court determines, that the total record developed before this Court adequately supports the relief contained in this Consent Decree. The relief contained in this Consent Decree does not infringe upon the federal or state constitutional or statutory rights of any person and does not constitute unlawful discrimination or racial or sexual grounds against any racial or gender group. The plaintiffs contend that the relief contained in this Consent Decree is nondiscriminatory and therefore the Supreme Court's decision in *Croson* is not applicable to the relief contained in this Consent Decree. The plaintiffs contend that the record developed before this Court and in the administrative proceedings before the City Council does not satisfy the guidelines set forth in *Croson* and is not adequate to support race-based preferences. The defendants contend that the record developed before this Court and in the administrative proceedings before the City Council satisfies the guidelines set forth in *Croson* and is adequate to support race-based preferences. Despite this disagreement, both parties agree, and the Court determines, that the relief contained in this Decree is not violative of the *Croson* decision. The plaintiffs do not admit that the existing record supports any future modification which the City may make in the affirmative action programs incorporated in this Consent Decree, nor does the existing record support any new or different affirmative action program. Notwithstanding this position of the plaintiffs, the parties recognize that the city retains the right to make future modifications in the affirmative action programs contained in this Consent Decree; if the City determines that the affirmative action programs contained in this Consent Decree are not adequate and effective in remedying past discrimination and the vestiges thereof, then the City may adopt stronger affirmative action programs, which may include but are not limited to mandatory set-asides and race-based preferences, provided the administrative record supports such modifications. In that event, the plaintiffs reserve the right to challenge that action and if they choose to pursue such a challenge, nothing in this Consent Decree shall serve to prejudice the plaintiffs.

## II. Class Certification

After consideration of all the evidence, and after proper notice, the Court has certified a class of all present, past and future non-minority owned construction contractors and subcontractors who have done or might have done business with the City or any of its Board or Agencies. The class was certified pursuant to Rule 23, Alabama Rules of Civil Procedure. The class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the claims of the class, and the representative plaintiffs will fairly and adequately protect the interest of the class. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole. This consent decree provides all appropriate relief to class members.

III. The Agreement The plaintiffs (and the class they represent) and the defendants, being desirous of implementing a solution to the subject-matter of this continuous litigation without further cost and expense, and the parties having waived further hearing and having agreed to the form of this decree, without admissions by the defendants of violations of the United States Constitution, federal statutes, the Constitution of the State of Alabama, or state laws, and the Court being of the opinion that the entry of this decree is in the interests of the parties and will effectuate the mandates of federal and state constitutions and federal and state laws, now therefore:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. This action, including plaintiffs' amended complaint, seeking a preliminary injunction and an order to show cause, is hereby dismissed with prejudice, with all parties to bear their own costs, except for the payment specified in paragraph four below.
2. The parties shall adopt, implement, comply with the affirmative action plan described as "Birmingham Plan-Construction Industry Program" (hereinafter referred to as "BP-CIP"), attached hereto as "Attachment 1" and incorporated herein in its entirety (including all Appendices).
3. The City Council shall within 60 days of the date this Consent Decree is approved by the Court adopt and pass Ordinance No. : \_\_\_\_\_, an ordinance establishing the Birmingham Construction Industry Authority, and which is Appendix "F" to Attachment 1. Once this ordinance is passed by the City Council, all previously adopted City minority business enterprise ordinances, resolutions, manuals, rules and regulations, including but not limited to Code of City of Birmingham sections 3-3-16, 4-1-51, 4-1-52, 4-1-53; Executive Order 31-81, as last amended; Resolution 87-88, as last amended; Executive Order 61-89; and, The City of Birmingham Manual for Minority Business Enterprise Program (issued March 1, 1989), shall be superseded by the affirmative action plan and ordinance provided for in this paragraph and in paragraph 2 above, as codified in Attachment 1.
4. (a) The city of Birmingham shall pay to James Starnes, lead counsel for the plaintiffs, the total sum of \$500,000.00, which said amount is hereby declared to be a fair and reasonable sum for the full payment of all monetary claims between the parties, attorneys' fees, costs, and expenses incurred in or related to this cause by plaintiffs and all counsel who have represented the named plaintiffs and the plaintiff class. The payment of this money shall satisfy any and all monetary obligations by and between any and all of the parties hereto. (b) In the event there is no appeal of this decree, the payment shall be made within seven days after the expiration of the time for appeal. If an appeal is filed, then the payment shall be made after affirmance of this decree and all time for subsequent challenge has elapsed. (c) In addition to the amounts specified in paragraph 4 (a) above, the defendants shall pay to James Starnes at the rate of \$150.00 per hour an additional amount for attorney's fees, but not to exceed 20 hours or \$3000.00, for services rendered on behalf of the plaintiff class in conjunction with the Rule 23 "fairness hearing". After approval of this Consent Decree, Mr. James Starnes shall submit to Mr. Donald V. Watkins, counsel for the defendants, and itemized list of his services rendered and payment shall not be remitted until 42 days after said submission.
5. (a) This Consent Decree resolves all issues presented in this area and vacates all prior orders, injunctions, and memorandum opinions entered by the Court in this case, including, but not limited to, any order, injunction, or memorandum opinion which prohibits the City of Birmingham from implementing its Decree. Moreover, this Consent Decree shall in no way constitute a finding or citation for contempt against the City of Birmingham or damage award for the Rives Construction Company, or any other plaintiff. (b) Contemporaneous with the execution of this Consent Decree, the parties have filed a joint motion for the Supreme Court of Alabama to vacate the preliminary injunction, vacate the stay, dismiss the appeal and remand the case for the purpose of allowing the trial court to consider this Consent Decree.
6. Prior to the commencement of any further legal action, whether a new lawsuit or an amendment to the complaint filed in this lawsuit, the parties shall engage in good faith efforts to resolve any disputes involving the MBE/DBE program. The parties hope that the programs established under this Consent Decree will achieve the goals and objectives of the BP-CIP's MBE/DBE Program, as outlined in Attachment 1. However, the parties recognize that changes or modifications may be

necessary in these programs. Those potential changes are of two types. First, there may be changes which are made by the BP-CIP's Authority. Any such change shall be made pursuant to the terms of the Plan, as described in Attachment 1, and does not require prior court approval. Second, the parties recognize that this Consent Decree does not compromise the constitutional or statutory authority of the Mayor and the City Council, in any respect. The Mayor, as chief executive, and the City Council, as a legislative body, shall maintain their authority to modify, repeal and replace, as they deem necessary and without prior approval of this Court, any of the programs provided for in this Consent Decree. If changes of this second type occur, the plaintiffs reserve their rights to challenge any such changes in the programs. While the parties hope that no changes of the second type are necessary, this Consent Decree neither limits the authority of the City to make such changes of the second type nor does it operate as prior consent by the plaintiffs to such changes. This Consent Decree does not affect the authority of the Mayor or the City with respect to appointments and other nonbid contract.

7. This Consent shall remain in effect until and unless both parties agree that it is no longer necessary.

Done this \_\_\_\_\_ day of \_\_\_\_\_, 1989

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Circuit Judge