



Case & Project Experience

Illinois Department of Transportation's DBE Program Upheld Based upon NERA's Expert Testimony

Background

In 2000, highway contractor Northern Contracting Inc. (NCI) filed suit against the Illinois Department of Transportation (IDOT) over IDOT's Disadvantaged Business Enterprise (DBE) program, which promotes a level playing field for socially and economically disadvantaged businesses in federally-assisted transportation projects. The lawsuit, *Northern Contracting, Inc. v. Illinois Department of Transportation*, challenged the constitutionality of the federal DBE program regulations as well as IDOT's application of those regulations.

The US District Court for the Northern District of Illinois ruled in favor of IDOT on 8 September 2005. District Court Judge Rebecca Pallmeyer extensively cited NERA Senior Vice President Dr. Jon Wainwright's testimony and NERA's research in her decision upholding the constitutionality of IDOT's DBE Program. NCI appealed the decision in April 2006. In January 2007, the Court of Appeals upheld Dr. Wainwright's initial analysis.

NERA's Role

IDOT commissioned NERA's Dr. Wainwright to conduct a study meeting the constitutional and regulatory requirements of the DBE Program and to testify at trial. To determine the baseline level of DBE availability, Dr. Wainwright developed a custom census to provide an accurate calculation of the relative availability of DBEs. Dr. Wainwright's analysis involved first identifying the relevant geographic market and the relevant product markets. Next, Dr. Wainwright surveyed Dun & Bradstreet's Marketplace, supplementing that database with a custom-compiled directory of minority-owned and women-owned businesses in IDOT's relevant market area. Dr. Wainwright then corrected for possible classification errors in the data by surveying a random sample

from the group; this survey led him to conclude that 22.8% of the firms listed as minority- or woman-owned were actually owned by white men and that 14.5% of firms listed as white male-owned were actually owned by minorities or women. In light of these survey results, Dr. Wainwright adjusted his calculation of DBE availability and arrived at an overall relative DBE availability for IDOT of 22.77%. Dr. Wainwright next analyzed the degree to which discrimination has depressed minority- and women-owned firms' formation rates and earnings, resulting in an estimate of DBE availability in a non-discriminatory market. Dr. Wainwright then presented his findings in federal court.

The Initial Result

In 2005, the US District Court for the Northern District of Illinois ruled in favor of IDOT, extensively relying upon Dr. Wainwright's testimony and NERA's research.

The Appeal

NCI appealed the decision in the United States Court of Appeals for the Seventh Circuit. NCI argued that IDOT 1) improperly calculated the relative availability of DBEs in Illinois, 2) failed to properly adjust its base figure based on local market conditions, and 3) failed to meet the maximum feasible portion of its overall goal through race-neutral means.

The Final Result

The Court of Appeals upheld Dr. Wainwright's initial analysis. On 8 January 2007, the Court ruled that NCI had failed to prove all three of its arguments, a failure that "reflects NCI's broader inability to demonstrate that IDOT's DBE program is in violation of the Constitution."

Contracting Affirmative Action

NERA is a leading provider of studies related to historically disadvantaged business enterprise. These studies evaluate goals established by federal, state, and local governments, and help public agencies to develop effective and lawful affirmative action programs for procuring goods and services from businesses owned by minorities and women. Learn more about our services and experience in the Labor and Employment section of our website at www.nera.com/labor.

Expert Involved

Dr. Jon Wainwright, NERA Senior Vice President

Dr. Jon Wainwright specializes in labor economics and industrial organization. He is an expert in analyzing the effects of discrimination and has testified as an expert witness in federal court and before Congress on these issues. A former Research Associate Professor at the Lyndon B. Johnson School of Public Affairs at the University of Texas at Austin, Dr. Wainwright has extensive experience assisting clients with public contracting and employment policies, including statistical analysis of strict scrutiny evidence, liability and damages, preparation of expert testimony, and preparation of deposition and cross-examination strategy for opposing expert witnesses. He is the author of *Racial Discrimination and Minority Business Enterprise: Evidence from the 1990 Census* (New York & London: Garland, 2000) and co-author of "An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry" (National Bureau of Economic Research, 2005).

About NERA

NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA's clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world's largest economic consultancies. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

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