



## Case & Project Experience

### **NERA Economists' Role in *Concrete Works of Colorado, Inc. v. City and County of Denver* (10th Cir. 2003)**

#### **Overview**

The City of Denver created an affirmative action ordinance establishing participation goals for minority- and women-owned contractors on certain City construction and design projects. A non-minority-owned firm challenged the constitutionality of this ordinance in 1992. In 1993, the district court's grant of summary judgment in favor of Denver was reversed on appeal and the case was remanded for trial. A bench trial was held in 1999, where Denver presented historical, anecdotal, and statistical evidence at trial to support its program. In 2000, the district court enjoined Denver from enforcing the ordinance, thus halting the affirmative action program. Denver appealed, and on 10 February 2003 the 10th Circuit Court of Appeals overturned the 2000 ruling and upheld Denver's program. On 17 November 2003 the US Supreme Court rejected a constitutional challenge to the same Denver program, letting the 10th Circuit's ruling stand. The victory was significant for affirmative action programs and was watched closely by the United States government and other major metropolitan areas.

#### **Background**

In 1990, the City of Denver established an affirmative action ordinance that outlined annual goals for the utilization of minority business enterprises (MBEs) and women business enterprises (WBEs), and established a Mayor's Office of Contract Compliance (MOCC) to enforce the ordinance and set participation goals for individual projects. The ordinance required prime contractors and subcontractors interested in bidding on City contracts to meet project participation goals or demonstrate sufficient good faith efforts to meet those goals. Two subsequent ordinances modified participation goals and other details of the original ordinance. In 1992, Concrete Works of Colorado, Inc. (CWC), a construction firm owned and operated by a non-minority male, filed a complaint in federal court, alleging that the ordinance violated

the Fourteenth Amendment, after losing three contracts with the City because it did not comply with the 1990 Ordinance. CWC sought damages and injunctive relief. CWC appealed the summary judgment in favor of the City. In 1999, a bench trial to determine the constitutionality of the ordinances was conducted in which the court ruled in favor of CWC. The City appealed.

#### **The Expert Evidence**

In addition to historical and anecdotal evidence of discrimination, the trial hinged largely on statistical evidence determining the degree of participation of MBEs and WBEs in City projects. Denver had commissioned several disparity studies that assessed the propriety of the DPW goals. The first, conducted in 1990, analyzed the availability and utilization of MBE and WBE construction and design firms and showed large disparities in their utilization on projects undertaken in the Denver Metropolitan Statistical Area (Denver MSA) and on City bond projects from the 1970s and 1980s. The 1991 Study analyzed MBE and WBE utilization in the goods, services, and remodeling industries. A third disparity study, conducted in 1995, used Census Bureau data to examine M/WBE utilization in the Denver construction industry and also found disparities. The 1995 study also showed that Blacks and Hispanics had lower rates of self-employment than whites and that women had lower rates of self-employment than men.

#### **The NERA Study**

In 1997, Denver retained NERA to study the availability of MBEs and WBEs and whether race and gender discrimination limited their participation in typical City construction projects. The 10th Circuit Court stated that the NERA Study used a more sophisticated method to calculate availability than the 1990 and 1995 studies. NERA identified the construction specialties and geographic areas in which the City spent most

of its construction funds and used Standard Industrial Classification code data to summarize the City's construction expenditures by project type and geographic area and calculate M/WBE availability. The NERA study found disparities in the utilization of M/WBEs in Colorado construction.

NERA also concluded that African-Americans, Hispanics, and Native Americans working in construction were less likely to be self-employed than similarly situated whites. The NERA study established that the potential availability exceeded the actual availability of MBEs in Denver. The NERA study also showed disparities in the earnings of self-employed women, African-Americans, Hispanics, and Native Americans. NERA also conducted a survey of disparate treatment in business activities, such as applying for commercial loans and bidding on public or private sector contracts. The district court dismissed all of the City's evidence on grounds that none of it addressed six questions that the district court had posited as the legal framework for analyzing the City's evidence. The 10th Circuit disagreed, however, and ruled that the district court's questions misstated the law by placing the ultimate burden on Denver to prove that discrimination exists. Denver's statistical and anecdotal evidence was not only relevant but also essential to the City's claim that it had been an indirect participant in private sector discrimination.

Although CWC claimed that the disparities in Denver's studies could be attributable to firm size and experience rather than discrimination, The NERA team produced evidence that MBEs and WBEs, like most construction firms, have the ability to expand by hiring additional employees or subcontractors, but even so, that size and experience are not race- and gender-neutral variables, as demonstrated by NERA's lending discrimination and business formation studies. NERA's experts testified for Denver that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. CWC also argued that industry specialization by M/WBE firms could explain the observed disparities, but did not produce any evidence that M/WBEs that this was indeed the case. In contrast, NERA's experts testified that M/WBEs were represented across virtually all industry specializations. The NERA study, which controlled for SIC-code specialty yet still showed significant disparities, supported Denver's argument that firm specialization cannot explain the disparities.

The appellate court held that CWC did not meet its burden of proof because it relied on conjecture and unsupported criticisms of Denver's evidence rather than "credible, particularized evidence." Due largely to NERA's expert testimony, Denver demonstrated a "compelling interest in remedying racial discrimination in the

Denver construction industry and an important governmental interest in remedying gender discrimination in that industry." The 10th Circuit reversed and remanded the case with instructions to enter judgment for Denver. In November 2003, the Supreme Court refused to hear CWC's appeal of the 10th Circuit's decision, letting the ruling stand.

## Contracting Affirmative Action

NERA is a leading provider of studies related to historically disadvantaged business enterprises. 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 global website at [www.nera.com/labor](http://www.nera.com/labor).

## Experts Involved

### Dr. Jon Wainwright, NERA Senior Vice President

Dr. 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 LBJ School of Public Affairs at the University of Texas at Austin, Dr. Wainwright has extensive experience assisting clients in contracting and employment proceedings, including statistical analysis of liability, statistical analysis of damages, preparation of expert testimony, and preparation of deposition and cross-examination strategy for opposing expert witnesses.

## About NERA

NERA Economic Consulting ([www.nera.com](http://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. 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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