



Case & Project Experience

NERA Economists' Role in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation* and *Gross Seed Co. v. Nebraska Department of Roads* 345 F.3d 964 (8th Cir. 2003)

Overview

These consolidated cases resulted from a series of challenges to the constitutionality of the US Department of Transportation's (USDOT) Disadvantaged Business Enterprise (DBE) program, as implemented by the Minnesota Department of Transportation (MnDOT) and the Nebraska Department of Roads (NDOR). The purpose of the DBE program is to promote the inclusion of disadvantaged small businesses in transportation contracts and subcontracts funded with federal monies.

Background

In the wake of the US Supreme Court's landmark opinion in *Richmond v. J. A. Croson Co.* (488 U.S. 469 1989) applying strict constitutional scrutiny to race-conscious government classifications, numerous lawsuits were filed against such public sector affirmative action programs at all levels of government—local, state, and federal. In 1996, the constitutionality of MnDOT's prior DBE program was challenged by Sherbrooke Turf, Inc., a large, majority-owned landscaping subcontractor. In 1998, the US District Court granted Sherbrooke's motion for summary judgment and permanently enjoined MnDOT from implementing the federal DBE program on highway contracts in Minnesota. See *In Re Sherbrooke Sodding Co.*, 17 F.Supp.2d 1026 (D. Minn. 1998).

In early 1999, in response to this and other post-*Croson* rulings, USDOT issued substantive and significant revisions to its DBE program regulations (49 CFR 26). The revised DBE program provides contracting advantages to small businesses owned and controlled by "socially and economically disadvantaged individuals." The revised regulations stipulate that these are individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a

group, regardless of their individual qualities, or those socially disadvantaged individuals whose ability to compete in the free market system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

NERA's Role

Shortly after the revised DBE regulations were issued, MnDOT commissioned NERA to perform a statistical study of DBE availability in the market for MnDOT transportation contracts, to comply with the new federal regulations.

Led by NERA Senior Vice President Dr. Jon Wainwright, the NERA team measured the geographic and industry scope of MnDOT's transportation contract market using representative data on past contracting and subcontracting activity at MnDOT. NERA's next step was to conduct a quasi-census of DBE firms in that market. NERA combined and consolidated a large number of data sources on business enterprise in Minnesota, and then refined the race and sex classifications in the resulting database using scientific survey sampling techniques. As a result, NERA determined that DBEs made up approximately 11.4 percent of the prime contractors and subcontractors in the state's highway construction market. Furthermore, using Census data on business formation and business owner earnings in Minnesota, NERA provided statistical evidence that DBE availability levels would likely be higher than 11.4 percent if the relevant market operated in a race-neutral and/or gender-neutral manner. Based partly on NERA's research, MnDOT re-implemented its DBE program in 2000 with new goals for DBE participation drawn from the NERA study. The USDOT subsequently approved MnDOT's program submission.

Two non-minority-owned firms that provide landscaping services to prime contractors on federally assisted highway projects challenged the constitutionality of the DBE program as adopted in Minnesota and Nebraska. Minnesota retained Dr. Wainwright as its expert, and the US Justice Department brought in Professor David Blanchflower of Dartmouth College and Professor Ray Marshall of the University of Texas at Austin to provide additional expert testimony in both cases.

In its motion for summary judgment, Sherbrooke presented evidence attacking the reliability of the data NERA used in determining its recommended overall goal. However, the court found that Sherbrooke failed to establish that better data was possible or that MnDOT was otherwise unreasonable in undertaking the “thorough analysis” of the NERA study and relying on its results (*Sherbrooke*, 345 F.3d 964, at 973). Sherbrooke also presented an expert report by Dr. George La Noue attacking the DBE program on a variety of fronts. Drs. Blanchflower, Wainwright, and Marshall provided testimony in rebuttal that ultimately proved persuasive to the court.

In the Nebraska case, the plaintiff again submitted an expert report by Dr. La Noue. In this case, the judge excluded the majority of that report on the grounds that he was not a qualified expert. The portion of Dr. La Noue’s report that was not excluded was then successfully rebutted in writing and at trial by the work of Professors Blanchflower and Marshall. The court held that the “federal government’s evidence is sufficient to demonstrate past discrimination does exist in the construction industry . . . [and] in individual areas, such as highway construction” (*Gross Seed Co. v. Nebraska Dept. of Roads*, 4:00CV3073, 6 May 2002).

In reviewing these decisions, the court of appeals agreed not only that Congress met its constitutional burdens by developing strong evidence of discrimination and narrowly tailoring the overall remedy, but that the MnDOT and NDOR programs are constitutional as applied. On 17 May 2004, the US Supreme Court refused to grant cert, thus allowing the favorable circuit court rulings to stand.

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. 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 in contracting and employment proceedings, 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.

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.

Contact

Dr. Jon Wainwright

Senior Vice President
+512 383 4802
jon.wainwright@nera.com