

Robinson+Cole

Construction



June 2016

Portuguese-Owned Construction Firms No Longer Certifiable as Minority-Owned Businesses in Massachusetts

In the wake of a recent Superior Court decision in Massachusetts, the Commonwealth no longer recognizes Portuguese-owned construction firms as minority-owned businesses (MBEs). Massachusetts General Laws ch. 7C sec. 6 requires that public agencies retain a certain percentage of minority- and women-owned businesses for each of its construction projects. The Commonwealth enacted the statute to combat a lack of diversity and a documented history of discrimination against minority- and women-owned businesses in Massachusetts.

Under the statute, a minority is defined as “a person with a permanent residence in the United States who is American Indian, Black, Cape Verdean, Western Hemisphere Hispanic, Aleut, Eskimo, or Asian.” In addition, the Massachusetts Regulation that governs the certification of minority- and women-owned businesses in Massachusetts, 425 CMR 2.02, states that “Portuguese persons shall only be included in the definition of minority if specifically set forth in programs funded by state transportation bond statutes which include such persons as eligible participants.”

According to a recent article in *Massachusetts Lawyer Weekly*, until 2013, in accordance with the language of 425 CMR 2.02, the Massachusetts Supplier Diversity Office (SDO), which administers the certification of MBEs, permitted a Portuguese-owned business to qualify as an MBE only on projects funded by the transportation bond statute; however, following a dispute involving the certification of two Portuguese-owned businesses, the SDO reversed its position and began to certify Portuguese-owned businesses as MBEs for any public project.

In a recent complaint and request for preliminary injunction filed by Federal Concrete, Inc., a minority-owned subcontractor, Federal claimed that since that time the SDO “has wrongfully certified 106 firms as minority business enterprises on the ground (sic) that they are owned by persons of Portuguese origin.” In addition, Federal stated that as a “direct result of [the SDO’s] wrongful certification...25 of those firms, owned by persons of Portuguese origin, have collectively received \$32,041,038 over the last three fiscal years, amounting to 46 percent of all payments” paid to MBEs. Federal argued that granting Portuguese-owned firms MBE status violated the terms of the Massachusetts regulation. Federal also argued that the classification violated the Equal Protection Clause of the 14th Amendment and the Massachusetts Declaration of Rights “because it is not designed as a remedy for past discrimination nor narrowly-tailored to address such a remedial purpose.” As a result, Federal claimed that the misclassification of Portuguese-owned businesses deprived properly certified minority-owned businesses the opportunity to perform work on public projects.

In response, the SDO acknowledged that the certification of Portuguese-owned businesses was “out of step” with the definition of minority in 425 CMR 2.02. The SDO requested, however, that the court not enter the injunction and allow the SDO time to align the language of the regulation with its practice through the administrative rule-making process. On the same date that Federal filed its complaint and request for preliminary injunction, the SDO solicited comments on “New and Improved Regulations for its Certification of Minority and Women Business Enterprises,” which would broaden the definition of “Hispanic” to include Portuguese. The public comment period ended on April 15. In addition, the Massachusetts Executive Office for Administration and Finance is in the process of collecting Portuguese-specific data as a part of a new disparity study, due for completion next spring. Prior disparity studies failed to draw conclusions regarding Portuguese-owned businesses.

The Superior Court agreed with Federal and without a written decision granted the preliminary injunction, placing the focus in this matter on whether the SDO can demonstrate that the certification of Portuguese-owned businesses is a remedy for past and ongoing discrimination. In its order, the Superior Court cited to a 7th Circuit case, *Builder Assoc. of Greater Chicago v. County of Cook*, which struck down an ordinance that established a minority-owned business program on the grounds that the program was unconstitutional because there was no evidence that prime contractors on the county's projects were discriminating against minorities and that, because such discrimination was known to the county, the county was entitled to take remedial action.

The SDO is currently in the process of reviewing and analyzing the public comments received in response to its proposed amendment to the regulation to include Portuguese-owned businesses as MBEs; however, in light of the Superior Court's decision, the SDO likely faces a constitutional challenge to such an amendment and will be required to show evidence of discrimination against Portuguese-owned businesses. This showing, and whether Portuguese-owned businesses will again have the opportunity to participate as MBEs on all public projects in Massachusetts, will depend on the results of the pending disparity study.

If you have any questions or would like to discuss this update further, please contact [Elizabeth K. Wright](#) in [Robinson+Cole's Construction Group](#), or [George P. Kostakos](#) in [Robinson+Cole's Labor + Employment Group](#).