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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



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# Challenge to 8(a) Business Development Statute Gets Rebuked

*By Steven W. Cave\**

*In a recent decision, the U.S. Court of Appeals for the D.C. Circuit held that the statute creating the Small Business Administration's "8(a) Program" is not unconstitutional. The author of this article discusses the decision and the likelihood of future challenges to the implementing regulations.*

The U.S. Court of Appeals for the D.C. Circuit recently held that the statute creating the Small Business Administration's ("SBA") "8(a) Program" is not unconstitutional. Nevertheless, in addition to being appealed, the ruling creates possibilities for future successful challenges to certain aspects of the 8(a) Program and its administration.

The case, *Rothe Dev., Inc. v. U.S. Dep't of Def.*,<sup>1</sup> involved a challenge to the constitutionality of Section 8(a) of the Small Business Act (the "Act"). Rothe claimed that Section 8(a) of the Small Business Act violated its constitutional right to equal protection under the Due Process Clause because Section 8(a) "contains a racial classification that presumes that certain racial minorities are eligible for the program" and there is no such presumption for individuals who are not members of those groups.

The issue before the D.C. Circuit was whether the U.S. District Court for the District of Columbia had properly granted summary judgment in favor of the defendant.

## **SECTION 8(a) BACKGROUND**

Section 8(a) establishes the government's right to offer various forms of assistance to companies that are majority owned and controlled by "socially economically disadvantaged individuals." Companies that participate in the 8(a) Program are eligible to receive "sole-source" contracts (up to a ceiling of \$4 million for goods and services and \$6.5 million for manufacturing), which permit participants to avoid competing against other contractors for the applicable work.

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<sup>1</sup> No. 1:12-cv-00744 (D.C. Cir. Sept. 9, 2016).

The plaintiff, Rothe, claimed that Section 8(a) of the Act violated its constitutional right to equal protection under the law by establishing a presumption that certain minorities are eligible for the Program, and therefore the benefit of, among other things, set-aside contracts.

### **THE COURT’S RULING CREATES THE POSSIBILITY FOR SUCCESSFUL APPEAL**

In order to assess whether a law violates a particular party’s right to equal protection, the reviewing court will apply one of a number of “standards of review.” The standard of review sets forth the burden that the defendant must meet in order to demonstrate that the challenged law is constitutional. To guide lower courts in their review of cases alleging a violation of the equal protection rights, the U.S. Supreme Court has established three standards of review: rational basis, intermediate scrutiny, and strict scrutiny.

In its Order<sup>2</sup> granting summary judgment to the defendant, the D.C. district court applied the strict scrutiny standard, which is the most rigorous standard to overcome. Despite applying the most rigorous standard and requiring the government to demonstrate that the 8(a) Program satisfied a “compelling interest” that was “narrowly tailored” to satisfy the goals and issues identified, the D.C. district court found in favor of the government. The D.C. district court found that Congress identified a compelling need and addressed it a meaningful and tailored manner.

On appeal, the D.C. Circuit upheld the grant of summary judgment but, importantly, overturned the D.C. district court’s application of the strict scrutiny standard and employed the rational basis standard instead. The D.C. Circuit justified its decision to employ the rational basis standard because “Congress chose [] to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias.” As a result, the D.C. Circuit concluded that “[b]ecause the statute lacks a racial classification . . . we apply rational-basis review, which the statute readily survives.”

The D.C. Circuit’s decision to apply the rational basis standard of review was somewhat surprising for a number of reasons. First, each party to the case agreed that strict scrutiny was the proper standard of review; the defendant simply argued that Section 8(a) of the Act withstood even the most rigorous review. Second, the D.C. district court had applied the strict scrutiny standard,

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<sup>2</sup> <http://cases.justia.com/federal/district-courts/district-of-columbia/dcdce/1:2012cv00744/154173/74/0.pdf?ts=1433582622>.

which required the D.C. Circuit to overturn that aspect of the decision while upholding the decision to grant summary judgment in favor of the defendant. Third, the D.C. Circuit's decision to apply the rational basis standard also conflicts with two cases (involving the same plaintiff) that directly addressed the constitutionality of the 8(a) Program and applied the strict scrutiny standard.<sup>3</sup>

In the first *DynaLantic* case, which was decided by the D.C. Circuit in 1997, the government argued “that the 8(a) statute is not itself race-conscious; only the implementing SBA regulations are.” The majority of the D.C. Circuit found “the government’s statutory analysis rather dubious” because “the Act includes as a congressional finding that certain racial groups—the same groups as are identified in [the SBA regulation]—are socially disadvantaged.”<sup>4</sup>

In the second *DynaLantic* case, the D.C. district court applied the strict scrutiny review standard, just as it did in *Rothe*, to determine whether Section 8(a) of the Act was unconstitutional.<sup>5</sup> The D.C. Circuit employed the heightened level of review because Section 8(a) limited certain contract awards to companies or individuals that are “socially and economically disadvantaged.”<sup>6</sup> The *DynaLantic* court found that the Act satisfied a compelling interest and that it was narrowly tailored to address the issues identified by Congress and summarized in the Act’s “findings.” The second *DynaLantic* case was appealed but ultimately settled before the *Rothe* decision was issued.

The D.C. Circuit’s decision to apply the rational basis standard of review may expose the decision to further appeal. Judge Henderson of the D.C. Circuit issued a dissent, in which she disagreed with the majority’s application of the rational basis standard. In her dissent, Judge Henderson cites a number of sections within the Act that classify individuals based on race, which conflicts with the majority’s ruling that Section 8(a) of the Act is race-neutral. For example, Judge Henderson cites Section 8(a)(5) of the Act, which defines “socially disadvantaged individuals” as “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”<sup>7</sup> Judge Henderson also cites Section 2(f) of the Act at length because it designates specific racial groups as being presumptively disadvantaged.

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<sup>3</sup> *DynaLantic Corp. v. Dep’t of Def.*, 115 F.3d 1012, 1013 (D.C. Cir. 1997); *DynaLantic Corp. v. United States Dep’t of Def.*, 885 F. Supp. 2d 237 (D.D.C. 2012).

<sup>4</sup> *DynaLantic Corp.*, 115 F. 3d at 1017.

<sup>5</sup> *DynaLantic Corp.*, 885 F. Supp. 2d at 250.

<sup>6</sup> *Id.* at 250–51.

<sup>7</sup> 15 U.S.C. § 637(a)(5).



According to Judge Henderson, all of the information taken together clearly indicates that Section 8(a) is not racially neutral and, as a result, the proper standard of review is strict scrutiny (Judge Henderson's dissent does not indicate disagreement with the outcome under the strict scrutiny standard).

### **THE COURT'S RULING CREATES A LIKELIHOOD OF FUTURE CHALLENGES TO SBA'S IMPLEMENTING REGULATIONS**

The scope of Rothe's challenge to the 8(a) Program was an important aspect of the D.C. Circuit's ruling. The D.C. district court and the D.C. Circuit emphasized Rothe's decision to limit the challenge to the constitutionality of Section 8(a) of the Act itself, not SBA's implementing regulations. As a result, both courts limited their respective reviews and rulings to the Act itself.

Nevertheless, the D.C. Circuit noted that, in contrast to Section 8(a) of the Act, "the SBA's regulation implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups (and within them, 37 subgroups) is socially disadvantaged." The D.C. Circuit's distinction between the "racially neutral" language in the Act and the "racial classifications" in the regulations is an important one because it creates a likelihood that any challenge to the implementing regulations will be significantly more difficult to overcome.