UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

THOMPSON BUILDING WRECKING COMPANY, INC., PAULETTE TUCKER ENTERPRISES, INC., d/b/a TUCKER GRADING AND HAULING, RICHARD CALDWELL, d/b/a CLASSIC ROCK HAULING, SIDNEY CULLARS, d/b/a SIDNEY CULLARS TRUCKING,

Plaintiffs,

v. **107CV019**

AUGUSTA, GEORGIA,

Defendant.

ORDER

I. INTRODUCTION

In this civil rights action, various plaintiffs challenge the City of Augusta, Georgia's Disadvantaged Business Enterprises ("DBE") Program as unconstitutionally discriminatory. Doc. # 1. They claim that the Program violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as various provisions of the Georgia Constitution. *Id.* Because the Georgia Constitution claims raise novel issues of Georgia law -- whether the Augusta ordinance violates the Georgia Constitution -- this Court declines to exercise any jurisdiction it may have over them. 28 U.S.C. § 1367(c)(1); *see Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 643 (11th Cir. 2006) ("Any one of the section 1367(c) factors is sufficient to give the district court discretion to dismiss a case's supplemental state law claims"). The only issue now before the Court, then, is whether Augusta's DBE Program should be enjoined because it violates the United States Constitution.[1]

The plaintiffs allege that prime contract bids containing DBE participation at the subcontract level are treated more favorably than bids without DBE participation at the subcontract level; in other words, the DBE Program encourages prime contractors to discriminate against subcontractors on the basis of race, gender, and relative economic advantage. Doc. # 1 at 14-15; *see* doc. # 5, exh. C at 1-66 (AUGUSTA CODE § 1-10-62(b)(9)); *see also* doc. # 13 at 1 (the parties have stipulated that the City currently adds up to "20 points" to a proposal or bid that utilizes DBEs). According

[1] Much of plaintiff's complaint could also be read as a challenge to the DBE Program as applied during bidding for a project to demolish the Candy Factory Buildings in Augusta. *See* doc. # 1 at 5-8 (describing facts surrounding the bidding for the Candy Factory Buildings demolition contract). At a 2/13/07 hearing, however, the parties represented that the Candy Factory Buildings contract was being litigated in state court, so the issue is not before this Court. Doc. # 14. Thus, the plaintiffs here attack the DBE Program facially, rather than based on an individual past application.

Additionally, the plaintiffs' complaint discusses alleged violations of the DBE Program by the City. *E.g.* doc. # 1 at 15-16 (discussing businesses that were given DBE advantages despite not meeting DBE criteria and not being registered with the City). This seems relevant only to what could be read as an invocation of the due process "void for vagueness" doctrine. *Id.* at 19.

The challenge is that because the ordinance lacks adequate objective criteria for awarding contracts, city officials are acting arbitrarily and capriciously in violation of due process. *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003). The plaintiffs ignore this argument in their TRO briefing.

to the plaintiffs, this places them at a competitive disadvantage in bidding on Augusta projects. Doc. # 1 at 15.

On 2/13/07, this Court heard arguments on whether a temporary restraining order (TRO) should issue. The next day, it entered a 30-day restraining order requiring that any contracts entered by the City of Augusta be made without reference to the challenged DBE Program. Doc. # 6. With bids before it, the City of Augusta has stopped awarding contracts rather than award contracts without reference to the DBE Program. Doc. # 12 at 3 ("nine contract awards have been delayed since the entry of the Court's Order"). Of course, nothing in the Court's 2/14/07 Order requires the City to stop entering contracts; it simply requires that the City treat all companies the same, regardless of DBE status or DBE participation in a bid.

In any event, the parties have now briefed the Court on whether that Order should be extended or dissolved. Doc. ## 8-9. Meanwhile, the plaintiffs move for a contempt order, claiming that the City has violated the TRO, doc. # 16, but the Court will not pass on that until the City responds.

II. BACKGROUND

In 1994, concerned about the present effects of past discrimination in Augusta, the City commissioned the "Richmond County Disparity Study" (Study) -- Augusta being the county seat of Richmond County. Doc. # 5, exh. A. The Study makes numerous factual findings, including "compelling evidence of a large disparity between the utilization of minority and women vendors and their availability in the Richmond County market area ... much of [which] is attributable to the past and present effects of discrimination." *Id.* at vi.

The Study examines the disparity in socioeconomic status among the various races.[2] Among the findings:

- The Richmond County population was 55.1% white, 42% black, .3% Native American, 1.7% Asian, and 2% Hispanic, *id.* at vii;
- "Black families in Richmond County [in 1994 were] nearly four times more likely to have incomes below the poverty level, [sic] than white families," *id.* at vi, 23;
- Black unemployment was more than twice that of whites, *id.* at vi, 22;
- The white high school graduation rate was 76.8%, whereas the black high school graduation rate was 61.2%, *id.*;
- The white college graduation rate was 21.7%, whereas the black college graduation rate was 9.8%, *id.*;
- White median family income was $35,181, while black median family income was $21,543; and whites are more likely to be employed in management positions, *id.* at vi, 23.

These socioeconomic differences, the Study concludes, "have a significant impact on the ability of blacks to start and grow businesses because they reduce the financial resources and market size and strength." *Id.* at vi.

[2] The study compared the socioeconomic status of whites, blacks, Hispanics, Asians, and Native Americans. Doc. # 5, exh. A at 22-23, 24-35. The conclusions drawn all refer only to the disparity between whites and blacks. *Id.* at vi-viii.

The Study next compares black-owned businesses in Augusta to those owned in other regions and those owned by other racial groups. *Id.* at vii, 43-45. According to the Study, the 925 black-owned businesses had a mean annual revenue of $29,787. *Id.* at 44. This figure was statistically disparate from annual revenue of black businesses in the rest of the state ($55,443) and country ($46,593). *Id.* The 197 non-black minority firms had a mean annual revenue of $86,603, and the 1,900 female-owned firms had a mean annual revenue of $70,280. *Id.* The mean annual revenue of all Georgia firms was $159,859, and the mean annual revenue of all U.S. firms was $145,654. *Id.* at 44-45. A key datum, the mean annual revenue of *all* businesses in Richmond County, is missing.

The Study then discusses Georgia's racist history as it relates to contracting, including antebellum legislation making it illegal to contract with blacks "for the erection of buildings, or for the repair of buildings." *Id.* at vii-viii, 49-61.

Next, the Study describes the County's contracting outlays between 1992 and 1994. *Id.* at viii-x; *id.* at xvi-xxviii (charts of data). In 1992, the County awarded over $27 million in contracts, of which 1.25% (around $350,000) went to minority and women vendors. The percentages in 1993 and 1994 were 1.72% and 4.33% respectively. *Id.* at ix. The Study also noted a disparity in the "skew in awards," 28 for white firms, 5 for minority. *Id.* Though "skewness" is not explicitly defined, the Study notes that the disparity means that "disbursements to majority firms were five times more concentrated among a few firms than were disbursements to minority firms." *Id.*; *see id.* at xxi-xxii (charts 3.5 and 3.11).

The Study next discusses the City's record of "purchase orders under $1,500.00" in 1993. *Id.* at ix. The City fielded three telephone quotes for each such order. *Id.* Only 8% of the quotes were fielded from minority vendors in 1993, and only 1% of the dollar value went to minority vendors. *Id.*; *see* xxii-xxiii (Charts 4.2 & 4.3). Minorities and women received 1.7% of contracts over $5,000 in 1992 and 3.7% of such contracts in 1993. *Id.*

The City had 1,608 vendors available. *Id.* Minority and women firms constituted 12% (187) of them. *Id.* at ix-x. Of those 187, there were 88% black (85% male; 3% female); 8% white women; 3% Asian; and 1% Hispanic. Of the minority firms, 81% of those that responded to a survey never received a contract from the County, 47% believed white-male vendors were favored, 23% agreed or strongly agreed that their business had been discriminated against, 48% agreed that they had faced discrimination in seeking financing, and 36% agreed that they had encountered discrimination in pursuing contracts with majority firms. *Id.* at xi.

Finally, the Study includes anecdotal evidence of discrimination from 22 interviews conducted with minority and women vendors. *Id.*; *see also id.*, app. VIII (separately paginated section containing interview evidence). The Study characterizes the three types of discrimination encountered by the vendors as "Discrimination denying market access to competitive [vendors]," "Discrimination adversely affecting the ability of [vendors] to compete," and "Discrimination adversely affecting the availability of [vendors]." *Id.* at 1.

The Study draws the conclusion that "[t]he evidence documented herein points to the existence of significant racial and gender disparity in Richmond County Contracting [sic] and procurement." *Id.* at xiii-xiv. The Study

makes seven recommendations to cure the disparity:

> (1) create a program to "mandate race and gender conscious ... goals in contracting and procurement," including: bid preferences, requiring white-male firms subcontract with minority firms, prime contracts with minority firms, joint ventures between white-male and minority firms;
>
> (2) 21% utilization of minority- and female-owned businesses -- 16% black, 3% white women, 2% asian and hispanic;
>
> (3) waiver of goals in product areas with few available minority and women vendors;
>
> (4) only use of local minority- and female-owned businesses should count toward the established goals;
>
> (5) the program should be fully staffed to deal with certification of businesses, contract monitoring, and supervising contract compliance in purchasing and procurement;
>
> (6) solicit more quotes from minority- and female-owned vendors on contracts under $1,500;
>
> (7) create periodic reviews, graduation of businesses from the program, and a sunset on the program.

Id. at xiii-xiv.

Based on the Study, the City of Augusta enacted its DBE Program. *See* doc. # 5, exh. C (AUGUSTA CODE §§ 1-10-58 to 1-10-62). The challenged part of the Program requires the City to

> [i]nclude language in all formal bid documents requiring contractors to utilize [minority-owned, female-owned, and small businesses] to the maximum extent possible and economically feasible, as partners or subcontractors for service delivery or as suppliers of various goods required in the performance of the contract.

AUGUSTA CODE § 1-10-62(b)(9). Pursuant to this section, the City includes the following language in its bid documents:

> Augusta-Richmond County encourages minority participation through subcontracting, joint ventures, or other methods in contracting for services, in order to expedite the evaluation process, we have attached the Checklist for Good Faith Efforts, Proposed Disadvantaged Business Enterprise Participation, and Letter of Intent to Perform forms. The bidder should complete the Proposed DBE Participation Form, indicating the percentage of participation for this proposal . The completed form must accompany the proposal.

See doc. # 9 at 4 (Augusta's brief, quoting bid materials provided to contractors). The parties have stipulated that bids containing DBE participation in their "Proposed DBE Participation Form" are treated more favorably than bids without DBE participation. Doc. # 13 at 1.

III. ANALYSIS

This Court's discretion to grant a TRO is limited:

> The district court abuses its discretion when it grants a [TRO] in spite of the movant's failure to establish (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) that the movant will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest.

Warren Publ'g, Inc. v. Microdos Data Corp., 115 F.3d 1509, 1516 (11th Cir. 1997) (quotes and alterations omitted). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four prerequisites." *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003).

Initially, the Court points out that the plaintiffs fail to establish a likelihood of success on the merits insofar as they attack the DBE Program's discrimination based on gender and economic status. *See* AUGUSTA CODE §§ 1-10-58(a)–(b) (minority person includes "female"; DBEs include businesses "not dominant in [their] field" and "regarded as small in size"). That is because the plaintiffs' arguments focus solely on the scheme's failure to meet strict scrutiny. Doc. ## 2, 8. But under the Equal Protection Clause, legislation discriminating based on gender and economic status is subject to lesser judicial scrutiny. *See U.S. v. Virginia*, 518 U.S. 515, 532-33 (1996) (intermediate scrutiny for gender-based legislative discrimination; "Sex classifications may be used to compensate women for particular economic disabilities they have suffered [and] to promote equal employment opportunity" (quotes, cite, and original alterations omitted)); *Hodel v. Indiana*, 452 U.S. 314, 331 (1981) (rational-basis scrutiny for economic legislation; "Social and economic legislation ... that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose"); *see also Eng'g Assocs. S. Fla., Inc. v. Metropolitan Dade County*, 122 F.3d 895, 907-08 (11th Cir. 1997) (applying intermediate scrutiny to county program favoring female contractors). Therefore, the plaintiffs' TRO-extension request can succeed only insofar as it attacks the DBE Program's discrimination based on race.

1. Standing

The City primarily argues that plaintiffs are unlikely to succeed on the merits because they lack standing to challenge the DBE Program. Doc. # 9 at 9-12; doc. # 15 at 1-3.

> Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability.

Lance v. Coffman, 127 S.Ct. 1194, 1196 (2007).

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court discussed standing

under similar circumstances. There the federal government entered prime contracts with vendors that provided for extra compensation if subcontractors were run by "socially and economically disadvantaged individuals." *Id.* at 205. Most minority groups received a presumption of "socially and economically disadvantaged" status. *Id.* Adarand, a subcontractor not entitled to the presumption, sued. The Court held that Adarand had standing to challenge prospective application of the race-based presumption and to seek injunctive relief. *Id.* at 210-12.

The Court limited its analysis to the "injury in fact"standing requirement, which it held was met. *Id.* at 211. A plaintiff suffers injury in fact by "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Preventing a contractor from competing on an equal footing is a particularized injury, so Adarand met the first portion of the "injury in fact" requirement. *Id.* (citing *Ne. Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667 (1993)). It met the second portion of "injury in fact" because it showed "that sometime in the relatively near future it will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." *Id.* at 211-12. Thus, Adarand had standing to seek a prospective injunction.

In this case, the plaintiffs are a prime demolition contractor (Thompson) and three hauling subcontractors (Tucker, Caldwell, and Cullars). *See* doc. # 1 at 8-9. Among the subcontractors, Tucker is a DBE on non-race grounds and challenges the City's granting DBE status based on race; Caldwell and Cullars are non-DBE subcontractors. All the plaintiffs regularly bid and work on Augusta projects. *Id.* at 10.

Caldwell and Cullars have standing, under *Adarand*, to prospectively challenge the City's favoritism toward prime contract bids containing DBE participation. Because the Program, like the program in *Adarand*, encourages prime contractors to discriminate between subcontractors, Caldwell and Cullars suffer the particularized injury of not being able to compete on equal footing with other subcontractors. *Adarand*, 515 U.S. at 200.

In addition, the subcontractors allege that they bid and work on City of Augusta projects, and will continue to do so. Doc. # 1 at 9-10 (Caldwell and Cullars are hauling subcontractors regularly working on Augusta projects; "Plaintiffs have and continue to bid on [Augusta's] projects, as contractors, subcontractors and/or vendors"). Because Augusta regularly enters contracts ("nine contract awards [were] delayed [in the 10 day period following] the entry of the Court's [2/14/07] Order," doc. # 12 at 3), the future injury to Caldwell and Cullars, like the future injury in *Adarand*, is imminent. Therefore, the Court rejects the City's standing argument.[3]

2. Substantial Likelihood of Success

The Court must next determine whether the plaintiffs are substantially likely to succeed in showing that the racial preference in the DBE Program violates the Equal Protection Clause. "[A]ll racial classifications, imposed by

[3] Because Cullars and Caldwell have standing, it is not necessary, for purposes of this Order, to discuss whether Thompson and Tucker also have standing. Any argument on that score should be raised in a motion to dismiss.

whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227.

The City first argues that "all that is required for vendors to comply with Augusta's DBE Program is to make an appropriate good faith effort [to ensure DBE participation]." Doc. # 15 at 3. The implication is that requiring a good faith effort to employ DBEs is not a racial classification, even if some DBEs qualify simply on the basis of race. Yet Augusta's bidding materials require contractors to submit a "Proposed DBE Participation" form, *see* doc. # 9 at 4 (Augusta's brief, quoting bid materials provided to contractors), and the parties stipulate that bids containing DBE participation are treated more favorably than bids without such participation. Doc. # 13 at 1. Because a person's business can qualify for the favorable treatment based on that person's race, while a similarly situated person of another race would not qualify, the Program contains a racial classification.

This classification actually harms the subcontractors in two ways. First, when bids are requested from prime contractors, the prime contractors will discriminate based on DBE status because their bid will be treated more favorably with DBE participation. Second, when the City decides between competing bids, with bid "one" containing minority DBE participation and bid "two" (equal in all other respects or even superior to bid one in other respects) containing a plaintiff's participation, the City will favor bid one. Because bid one would not be favored but for the plaintiff's owners failure to be of an Augusta-blessed racial makeup, the City must show that the discriminatory program is narrowly tailored to meet a compelling interest.

That brings the Court to *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Croson*, a plurality of the Court noted that a city "has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Id.* at 492 (plurality).

"Thus, if the city could show it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry ... the city could take affirmative steps to dismantle such a system." *Id.* Though these statements were made in a three-justice plurality opinion, they were endorsed in majority portions of the opinion, *see, e.g., id.* at 504 (Opinion of the Court) ("States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, [but] they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief"), and by the Eleventh Circuit, *Eng'g Assocs.*, 122 F.3d at 907 (quoting the above, plurality portion of *Croson*).

The Eleventh Circuit has described a method for government to prove the existence of this compelling interest:

> Public employers may ... justify affirmative action by demonstrating "gross statistical disparities" between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to do the work. Anecdotal evidence may also be used to document discrimination,

> especially if buttressed by relevant statistical evidence.

Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994). The above-mentioned Study was Augusta's attempt to make this showing in 1994.

The Study found that of the 1,608 vendors available for contracting, minority and women firms constitute 12% (187). Doc. # 5, exh. A at ix-x. For the years 1992, 1993, and 1994, these firms received 1.25%, 1.72%, and 4.33% respectively of overall City contracting dollars. *Id.* at viii-ix. In other words, while white males ran only 88% of the City's contracting concerns, they averaged around 98% of the annual contracting dollars. These statistics buttressed the Study's anecdotal evidence of discrimination, received from minority and women contractors. Doc. # 5, exh. A, app. VIII at 1-8.

The Study, however, is not without flaws. The discrimination the City is attempting to justify operates between subcontractors. Only evidence showing that subcontractors of race "A" are discriminated against to the advantage of subcontractors of race "B" justifies governmental action attempting to cure the burden by favoring subcontractors of race A. *See Croson*, 488 U.S. at 504; *cf. id.* at 499 ("It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination.... Defining these sorts of injuries as 'identified discrimination' would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor"). For this reason, much of the Study is irrelevant to whether the City has a compelling interest in discriminating between subcontractors on the basis of race. *E.g.*, Doc. # 5, exh. A at vi-vii (socioeconomic status of racial groups in Augusta area).

Furthermore, the City must rely on narrowly tailored data to achieve what precedent requires: a narrowly tailored program. The Study's data lumps all minority and women vendors into a single group and compares that group to all "majority" vendors (*i.e.*, white male vendors). *Id.* at viii-x. But to establish a compelling interest that justifies narrowly tailored, race-based discrimination, better evidence would differentiate among the minority races. *Cf. Croson*, 488 U.S. at 506 ("If a 30% set-aside was 'narrowly tailored' to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation").

Too, it seems impossible to enact a narrowly tailored program by relying on evidence lumping gender- and race-based discrimination together, as the Study does. *See Eng'g Assocs.*, 122 F.3d at 919 n.4 (describing "the statistical phenomenon known as 'Simpson's Paradox,' which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated"). For purposes of this motion, however, the Court will assume that the City will be able to show the existence of a compelling interest to enact an affirmative action plan in 1994.

The question then becomes whether the Program crafted in 1994 is narrowly tailored. Though it is possible that the substance of the attacked portion of the Program is narrowly

tailored,[4] the Court need go no further than point out that the Program is still in place 13 years after the Study was compiled without any further investigation into the underlying reasons for creating a program, and without any sunset or expiration provision. Doc. # 13 at 1-2 (stipulations that the Program "does not have an expiration or sunset provision" and that the 1994 Study is "[t]he only disparity study on behalf of the Defendant"). Whether this defect is framed as a failure to show that the City has a compelling interest in 2007, as opposed to 1994, or a failure to prove that the Program adopted in 1994 was narrowly tailored temporally, the end result is that the plaintiffs are substantially likely to succeed on the merits.

This case demonstrates the need for unvarying vigilance against the arrogance of error too long unexamined. Government favoritism for one race over another, long borne of and too often perpetuated by evil motives, is rightly prohibited by the Equal Protection Clause. Equal protection simply *prohibits* government from favoring one race over another in contracting. Affirmative action is permitted very sparingly, and only where the government is convinced that not to take action would be passively engaging in the very racial discrimination that equal protection condemns. It would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit.

3. Irreparable Harm

The plaintiffs are substantially likely to succeed in proving that, when the City requests bids with minority DBE participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause. Minority DBEs qualify for the Program based *solely* on the race of their owners. At the same time, a losing bidder's ability to prove the injury in each instance would be next to impossible (whether rejected by a prime contractor, or part of a bid rejected by the City, was the rejection because of the subcontractor's status as a non-DBE?). On top of that, the measure of damages would be speculative. Plaintiffs therefore face the prospect of irreparable injury every time bids are solicited and considered under the current scheme.

4. Damage to the Movant versus Damage to the Defendant

Augusta argues that it will be harmed by the delay to public works projects if the Court extends its injunction. Doc. # 9 at 13. As discussed above, nothing in the Court's 2/14/07 Order prevents the City from entering into public works contracts, it simply enjoins the City from using the DBE Program to enter contracts. Doc. # 6. Specific behavior (discrimination based on race), rather than the letting of municipal contracts, is the only thing being halted here.

5. Adverse to the Public Interest

The City argues that an injunction would be adverse to the public's interest in remedying

[4] Again, Augusta requires bidders to submit "Proposed DBE Participation" with their bid. *See* doc. # 9 at 4 (Augusta's brief, quoting bid materials provided to contractors). Bids with DBE participation are treated more favorably. Doc. # 13 at 1.

past discrimination.[5] Doc. # 9 at 13. The plaintiffs argue that *not* issuing an injunction would be adverse to the public's interest in equal protection under the law. Doc. # 12 at 11 (citing *Cone Corp. v. Hillsborough County*, 723 F. Supp. 669, 678 (M.D.Fla.. 1989)).

Both arguments seem to beg ultimate questions at issue in the case. For present purposes it is sufficient to note that the City's reasoning would prevent TROs from ever issuing on legislation. For any piece of legislation with a rational basis, no matter how constitutionally odious, the argument can be made that "the public has an interest in [insert the rational basis for the legislation], so enjoining the legislation promoting that interest is adverse to the public interest." In short, the Court draws a distinction between an injunction that is adverse to the public interest and an injunction that merely limits the ability of government to promote a perceived public interest.

IV. CONCLUSION

The City of Augusta is hereby ***ENJOINED***, for the pendency of this action, from favoring contract bids that contain "minority DBE" or "minority business enterprise" (or any other entity that qualifies as a DBE based on the racial composition of its ownership) participation over other bids.

Furthermore, the City is ***ENJOINED***, for the pendency of this action, from distributing bid solicitation material, or otherwise publishing information in any manner, that would lead a bidder to believe that his bid would benefit from including "minority DBE" or "minority business enterprise" (or any other entity that qualifies as a DBE based on the racial composition of its ownership) participation. The City shall, within 3 days of the date of this Order, post a copy of the Order in portable document format (pdf) on the City's procurement department homepage (http://www.augustaga.gov/departments/purchasing/home.asp) via a reasonably visible hyperlink entitled "Court Order Enjoining Race-Based Portion of DBE Program."

Finally, this injunction is binding upon the City, its officers, agents, servants, employees and attorneys, and upon those person in active concert or participation with it who receive actual notice of this injunction by personal service or otherwise. *See* F.R.Civ.P. 65(d).

This 14 day of March, 2007.

B. AVANT EDENFIELD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

[5] The City also reiterates the position that an injunction would harm the public's interest in timely awarding construction contracts. As discussed in part III(4), nothing in a well-defined injunction will delay any public project.