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Affirmative Action Requirements in Illinois Public Contracts - S.N. Nielsen Company v. Public Building Commission

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AFFIRMATIVE ACTION REQUIREMENTS IN ILLINOIS PUBLIC CONTRACTS— *S.N. NIELSEN COMPANY V. PUBLIC BUILDING COMMISSION*

The Public Building Commission of Chicago (PBC)[1] is a municipal corporation[2] which oversees and finances the construction of public buildings and improvements.[3] To implement its purpose, the PBC is granted the power to

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1. Created pursuant to the Public Building Commission Act, ILL. REV. STAT. ch. 85, §§ 1031-1054 (1979), the PBC functions as a fiduciary. The Act is designed to encourage the construction, acquisition, and enlargement of public facilities for use by local government agencies, thereby centralizing the activities of those government units which furnish essential governmental, health, safety, and welfare service to citizens of counties and municipalities. *Id.* § 1032. The governing body of any municipality with a population exceeding 3,000 or the county board of any county may, by majority vote, organize a public building commission. *Id.* § 1034. The commission is a municipal corporation with express powers to select, locate, and designate sites for the erection, alteration, or improvement of such buildings, subject to final approval by the governing board of the local government entity. *Id.* § 1044. The Board of Commissioners has authority under the Act to issue bonds for the acquisition of the fee simple title to real property which the Commission has designated for purchase, for rental payments due on space leased by the Commission for governmental use, or to pay relocation costs to any person displaced by a public building commission. *Id.* §§ 1044(b), (h), 1044.2.

2. *Id.* § 1044. The term "municipal corporation" applies primarily to the traditional forms of local government having power over a certain bounded locality, such as cities. The term more broadly encompasses various incorporated entities, such as the PBC, which are organized for special purposes. "The term . . . applies to any public local corporation exercising some governmental functions . . . including both counties and sewer districts." Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 18, 153 N.W.2d 209, 221 (1967). *See generally* R. COOLEY, HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS (1914); W. VALENTE, LOCAL GOVERNMENTAL LAW (1975). *See also*, C. ANTIEAU, LOCAL GOVERNMENTAL LAW §§ 1.00-.32 (1981); C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS 1-9 (1980). For a historical view of municipal corporations, see 1 J. DILLION, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, 1-56 (5th ed. 1911).

In Illinois, municipal corporations derive their existence and powers from the General Assembly. Potson v. City of Chicago, 304 Ill. 222, 225, 136 N.E. 594, 596 (1922); City of Chicago v. M.&M. Hotel Co., 248 Ill. 264, 268, 93 N.E. 753, 755 (1911). Municipal corporations may legislate on subjects over which they have express statutory authority. Because statutes granting powers to municipal corporations are strictly construed, any fair and reasonable doubt as to the existence of a power is resolved against the local authority attempting to assert it. The overwhelming majority of courts favor the rule that municipal corporations may exercise only those powers expressly granted, those necessarily implied or incident to the express powers, and those essential to the declared purpose and objectives of the corporation. C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 4.7, at 64 (1980).

3. ILL. REV. STAT. ch. 85, § 1031 (1979). Public improvements are improvements upon public property which serve to further the interests and welfare of the public and the operation of the government. They may be local or general in nature and must be the proper subject of the municipal corporations' express powers, which include the power to provide suitable public buildings for the convenient transaction of municipal business and public education, welfare, safety, and health. 13 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 37.02 (3d ed. rev. 1971) [hereinafter cited as MCQUILLIN].

enact any rules and regulations it deems necessary.[4] This legislative power[5] is delegated by the General Assembly and is limited by several provisions in the PBC's enabling statute.[6] One restrictive provision requires that all contracts be awarded upon open, competitive bidding to the lowest responsible bidder.[7]

Although the lowest bid is self-evident,[8] the determination whether the lowest bidder is also responsible requires investigation by the PBC.[9] Inquiry in this regard has been restricted by Illinois courts to consideration of the bidder's financial and technical ability to fulfill the terms and obligations of the contract.[10] Further, the terms and obligations of the contract may pertain only to the technical aspects of the project. Attempts to effectuate social goals through clauses in public contracts uniformly have been found to be inconsistent with the lowest responsible bidder requirement because such clauses tend either to increase the project's cost to the public or to reduce competition.[11]

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4. ILL. REV. STAT. ch. 85, §§ 1038, 1044 (1979).

5. The power to provide necessary and desirable public improvements is generally regarded as legislative. *See* 13 McQUILLIN, *supra* note 3, § 37.03, at 19.

6. ILL. REV. STAT. ch. 85, §§ 1038, 1044 (1979).

7. *Id.* § 1050. The section provides in pertinent part that "all contracts to be let for the construction . . . of any buildings or other facilities . . . , where the amount thereof is in excess of $2,500, shall be let to the lowest responsible bidder, or bidders, on open competitive bidding . . . ." *Id. See generally* 2 F. COOPER, STATE ADMINISTRATIVE LAW 663-770 (1965).

8. *See, e.g.*, Holden v. City of Alton, 179 Ill. 318, 324-25, 53 N.E. 556, 557 (1899) (the determination of the lowest bid is settled by comparison of the amounts and requires no discretion).

9. Municipal officers having authority to let contracts sit in a judicial capacity when deciding which bid to accept since their duties require the exercise of discretion. 10 McQUILLIN, *supra* note 3, § 29.72, 392-93.

10. Hallett v. City of Elgin, 254 Ill. 343, 347, 98 N.E. 530, 532 (1912) (term "responsible" includes ability to respond to the contractor's discharge of obligations in accordance with what may be expected or demanded under contract terms and conditions). *See* People *ex rel.* Peterson v. Omen, 290 Ill. 59, 67, 124 N.E. 860, 864 (1919) (following *Hallett*); Johnson v. Sanitary Dist., 163 Ill. 285, 287, 45 N.E. 213, 214 (1896) (evidence must be furnished of ability to do the work and of necessary pecuniary resources to fulfill the conditions of the contract); Panozzo v. City of Rockford, 306 Ill. App. 443, 449, 28 N.E.2d 748, 751 (2d Dist. 1940) (lowest bidder who is by experience or otherwise capable of doing the work in a satisfactory manner must be awarded the contract); Stubbs v. City of Aurora, 160 Ill. App. 351, 360 (1911) ("responsible" includes ability to discharge contractual obligations in accordance with what might be expected thereunder).

Factors that enter into an evaluation of a contractor's "responsibility" include the contractor's ability, skill, and integrity to do faithful, conscientious work in promptly performing the contract according to its letter and spirit, in addition to its financial resources and ability. 10 McQUILLIN, *supra* note 3, § 29.73, at 397-99. A low bidder who has never made improvements in the municipality, who provides inferior materials, who has not been in business long enough to enable a municipality to determine the quality, durability, and general fitness of its work, and whose prior work in other municipalities has been poor and unsatisfactory, need not be awarded the contract, and a municipal corporation's good faith decision based upon these considerations will not be overturned by the courts. People *ex rel.* Assyrian Asphalt Co. v. Kent, 160 Ill. 655, 661-62, 43 N.E. 760, 761-62 (1896) (legislative intent was to limit competition to parties able to perform the conditions of contract).

11. Master Printer's Ass'n v. Board of Trustees, 356 F. Supp. 1355 (N.D. Ill. 1973); Holden v. City of Alton, 179 Ill. 318, 53 N.E. 556 (1899). *See* note 68 *infra*.

Recently, the Illinois Supreme Court reviewed the scope of a municipal corporation's power to implement social goals through the medium of public contracts. In *S.N. Nielsen Co. v. Public Building Commission of Chicago*,[12] the court held that municipal corporations are no longer bound to consider only the technical and financial ability of contractors to perform the contract, but may consider their social responsibility as well.[13] The court proceeded to find that only a reasonable basis for the award of the contract need be demonstrated by the public body administering the project.[14] Analysis of this decision demonstrates that the court greatly expanded the discretion granted to the PBC under its enabling statute.

FACTS AND PROCEDURES

On April 11, 1980, the PBC began publishing advertisements soliciting bids[15] for the construction of the New Loop and City Wide College.[16] When the sealed bids of the seven responding contractors were opened, it appeared that the S.N. Nielsen Company, the lowest bidder, would be awarded the contract.[17] The PBC, however, awarded the contract to the Del E. Webb Corporation, the third lowest bidder. There was no finding that Nielsen lacked the financial resources or the technical ability to construct the project.[18] In fact, the company was highly regarded by the PBC for previous

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12. 81 Ill. 2d 290, 410 N.E.2d 40 (1980).

13. *Id.* at 299, 410 N.E.2d at 44.

14. *Id.* at 300, 410 N.E.2d at 45.

15. *Id.* at 293, 410 N.E.2d at 42. In order to foster competitive bidding, advertisements for bids must be published at least once a week for three successive weeks. ILL. REV. STAT. ch. 85, § 1050 (1979). The advertisements must describe the nature of the proposed contract in sufficient detail to enable interested parties to know what their obligations will be should they become the successful bidder. *Id.* The purpose of advertising is to give publicity to the offered contract and thereby secure the utmost competition among bidders in order to obtain the lowest practicable price. 10 MCQUILLIN, *supra* note 3, §§ 29.52, at 348-49. The request for bids must not unduly restrict competition, and all parties able to perform the contract must be given the opportunity to compete freely without unreasonable restriction. *Id.* § 29.44, at 335-36.

16. Located at 30 East Lake Street, Chicago, Illinois, the project was proposed by the Junior College Board and funded through revenue bonds. *See* note 1 *supra*.

17. On May 15, 1980, the sealed bids on the project were opened publicly by the PBC, revealing the following bids:

S.N. Nielsen Company	$19,130,000.00
Paschen Construction Co.	$19,258,000.00
Del E. Webb Corporation	$19,320,000.00
A.J. Maggio Company	$19,374,000.00
The Lombard Company	$19,959,000.00
Leo Michuda & Son Co.	$20,100,000.00
W.E. O'Neil Construction Co.	$20,485,000.00

Brief of Del E. Webb Corporation, Defendant-Appellee at 12, S.N. Nielsen Co. v. Public Bldg. Comm'n, 81 Ill. 2d 290, 410 N.E.2d 40 (1980) [hereinafter cited as Brief for Defendant-Appellee].

18. It was stipulated in the trial court that Nielsen had the technical ability and experience, as well as the financial resources, necessary to complete the project satisfactorily. S.N. Nielsen v. Public Bldg. Comm'n, No. 80 L 11627, at 2 (Cook County Cir. Ct. June 2, 1980).

work under public contracts.[19] Rather, the PBC's award was based upon its "minority canvassing formula."[20]

Under the formula,[21] contractors receive credits for the number of hours worked by minorities for up to fifty percent of the total hours worked on the project.[22] Credits are applied to the contractors' bids to arrive at an "award criteria figure"; the bidder with the lowest such figure is awarded the contract for the amount of the original bid. Webb guaranteed that at least fifty percent of the total hours worked on the project would be logged by minorities.[23] Nielsen, in comparison, could only guarantee that thirty-five percent of the tradesmen hours and fifty percent of the laborer hours would

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19. Deposition of Brian M. Kilgallon, Executive Director of the PBC, at 38. Both Webb and Nielsen had done work for the PBC and were considered "responsible." *Id.*

20. 81 Ill. 2d at 293, 410 N.E.2d at 42 (1980). The sole basis for the award was the formula.

21. The formula was adopted by the PBC in 1974 from a form used by the City of Chicago and was contained in the bidding documents distributed to potential bidders. *Id.* at 292, 410 N.E.2d at 42. The form includes the following criteria:

CANVASSING FORMULA

Line 1. Base Bid, in figures. _____
Line 2. Percentage of the journeyman hours that the contractor proposes to be worked by minority journeymen during construction of the project. _____
Line 3. Multiply line 2 by line 1 by .04. _____
Line 4. Percentage of the total apprentice manhours that the contractor proposes to be worked by minority apprentices during construction of the project. _____
Line 5. Multiply line 4 by 1 by 0.03. _____
Line 6. Percentage of the total laborer manhours the contractor proposes to be worked by minority laborers during construction of the project. _____
Line 7. Multiply line 6 by line 1 by .01. _____
Line 8. Summation of lines 3, 5, and 7. _____
Line 9. Subtract line 8 from line 1 - AWARD CRITERIA FIGURE _____

Id. The form is filled out by the individual contractors according to rules provided by the commission. Lines 2, 4, and 6 may not exceed 50%, although that ceiling is not intended to prevent bidders from exceeding that percentage in their hiring practices. The limit is used merely to establish an upper limit for determining the "award criteria figure." Failure by the bidder to complete the form is grounds for rejection of the bid. Brief of Del E. Webb Corporation, Defendant-Appellee, Exhibit A.

Additionally, the successful bidder is bound by the figure submitted in lines 1, 2, 4, and 6 as a term of the contract. Liquidated damages for the contractor's failure to use the number of minorities promised are withheld from the money due the contractor after completion of the project. The damages are determined by use of formulas similar to those used in determining the "award criteria figure." Thus, for each full one percent deficiency of minority journeymen not utilized, four cents per each hundred dollars due the contractor is withheld. Similar formulas are used for deficiencies in utilization of minority laborers and apprentices, the cents per hundred dollars being one and three, respectively. Finally, fulfillment of the canvassing formula in no way abrogates the responsibilities of the contractors to comply with state and federal requirements under the applicable guidelines for equal employment opportunity, and a pre-bid conference to discuss these requirements is mandated. *Id.*

22. *Id.* In one project utilizing the formula all subcontract work was committed to minority firms. J. Butler, *Canvassing for Equality*, CHICAGO PUBLIC WORKS, Feb. 1975 [hereinafter cited as Butler]. Mr. Butler is now the Commissioner of the Department of Public Works.

23. Brief for Defendant-Appellee, *supra* note 17, at 11-12.

be worked by minorities.[24] Webb's and Nielsen's bids were so close that when the credits were applied, Webb had the lowest "award criteria figure" and was thus awarded the contract.[25]

Nielsen subsequently sued Webb and the PBC alleging that the PBC's award of the contract to Webb violated the statutory requirement that all PBC contracts be awarded to the lowest responsible bidder.[26] The defendants replied that the PBC possessed broad discretion in accepting bids and further contended that a bidder's equal opportunity employment practices were a necessary and proper factor to be considered in determining the lowest responsible bidder.[27] Nielsen responded that without statutory authorization, the PBC could not inject its own notions of public policy into the bidding process,[28] and that a contractor's commitment to affirmative action was irrelevant to whether it was "responsible."[29]

The trial court held that, absent a provision in its enabling statute authorizing such a procedure, the PBC's use of the canvassing formula violated the lowest responsible bidder requirement and was therefore an abuse of the PBC's powers.[30] Nielsen was denied its requested declaratory and injunctive relief, however, because the company had a remedy at law for lost profits[31] and the rights of the public, not party to the action, would

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24. *Id.*

25. Application of the formula to the bids resulted in the following figures:

BIDDER	*AWARD CRITERIA FIGURE*
Del E. Webb Corporation	$18,547,200.00
S.N. Nielsen Company	18,565,665.00
A.J. Maggio Company	18,599,040.00
Paschen Contractors, Inc.	18,822,761.20
The Lombard Company	19,320,342.00
Leo Michuda & Son Co.	19,497,000.00
W.E. O'Neil Construction	20,131,000.00

Id. at 12.

26. Brief of Plaintiff-Appellant at 1, S.N. Nielsen Co. v. Public Bldg. Comm'n, 81 Ill. 2d 290, 410 N.E.2d 40 (1980).

27. Trial Brief of Defendants at 10, 13, S.N. Nielsen v. Public Bldg. Comm'n, No. 80 L 11267 (Cook County Cir. Ct. June 2, 1980).

28. Transcript of Proceedings, May 30, 1980, at 6, S.N. Nielsen v. Public Bldg. Comm'n, No. 80 L 11267 (Cook County Cir. Ct. 1980).

29. *Id.* at 11.

30. *Id.*

31. *Id.* at 7-11. The trial court was clearly wrong on this point. Since the PBC acts in the public interest, it is generally held that disappointed bidders have no claim for monetary damages for wrongdoing on the part of the PBC. This is because the courts have found it unreasonable to make the public pay both a contractor for construction of a project and damages to a party who was not awarded the construction contract. Premier Elec. Constr. Co. v. Board of Educ., 70 Ill. App. 3d 866, 388 N.E.2d 1088 (1st Dist. 1979) (frustrated bidder has no cause of action for damages); Beaver Glass & Mirror Co. v. Board of Educ., 59 Ill. App. 3d 880, 376 N.E.2d 377 (2d Dist. 1978) (no damages for frustrated bidder). *See* 10 McQUILLIN, *supra* note 3, § 29.86, at 431.

be adversely affected if equitable relief were granted.[32] Direct, expedited appeal to the Illinois Supreme Court was granted.[33]

THE *NIELSEN* DECISION

The Illinois Supreme Court found that use of the minority canvassing formula was within the PBC's powers and ruled that the trial court correctly refused to order that the contract be awarded to Nielsen.[34] To sustain the PBC's use of the canvassing formula, the court relied upon a provision of the Illinois Fair Employment Practices Act (FEPA)[35] that requires all public contracts to be conditioned on the contractor's utilization of affirmative action hiring practices.[36] It interpreted the Act as a legislative mandate that *municipal corporations* take affirmative action to insure that contractors refrain from unfair employment practices during the construction of public works projects.[37] Because the court viewed affirmative action as something that could be expected or demanded in a contract, it concluded that the legislature's intention was that the *social* responsibility of a contractor should be considered as well as its financial responsibility and capacity to perform a contract.[38] The court ruled that the PBC, when acting in the public interest

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32. Transcript of Proceedings, May 30, 1980, at 7-11, S.N. Nielsen v. Public Bldg. Comm'n, No. 80 L 11267 (Cook County Cir. Ct. 1980). The College Board and minority groups who might be employed on the project comprised the groups whose interests might be adversely affected. *Id.*

33. The parties appealed under Illinois Supreme Court Rule 302(b) which provides:

> After filing of the notice of appeal to the Appellate Court in a case in which the public interest requires prompt adjudication by the Supreme Court, the Supreme Court or a justice thereof may order that the appeal be taken directly to it. Upon the entry of such an order, any documents already filed in the Appellate Court shall be transmitted by the clerk of that court to the clerk of the Supreme Court. From that point the case shall proceed in all respects as though the appeal had been taken directly to the Supreme Court.

ILL. REV. STAT. ch. 110A, § 302(b) (1979).

34. 81 Ill. 2d at 301, 410 N.E.2d at 45. Justice Kluczynski delivered the opinion of the court, from which Justice Clark was joined in dissent by Justices Ryan and Underwood.

35. ILL. REV. STAT. ch. 48, §§ 851-867 (1979). The FEPA was repealed by the Illinois Human Rights Act, ILL. REV. STAT. ch. 68, §§ 1-102 to 2-105 (Cum. Supp. 1979), which took effect July 1, 1980, and was not in effect when this case arose.

36. ILL. REV. STAT. ch. 48, § 854 (1979). The Act provides in part:

> Every contract to which the State . . . or any municipal corporation is a party shall be conditioned upon the requirement that . . . the contractor and his subcontractor . . . shall not commit an unfair employment practice in this State as defined in this Act, and shall take affirmative action to insure that no unfair employment practice is committed. To the full extent to which the State may have authority with respect to such contracts, this section shall be applicable.

Id. The new Human Rights Act provides that "[e]*very* party to a public contract shall: (1) Refrain from unlawful discrimination in employment and undertake action to assure equality of employment and eliminate the effects of past discrimination. . . ." ILL. REV. STAT. ch. 68, § 2-105(A)(1) (Cum. Supp. 1979) (emphasis added).

37. 81 Ill. 2d at 296-98, 410 N.E.2d at 43-44.

38. *Id.* at 299, 410 N.E.2d at 44.

and within statutorily granted discretion, may award contracts to one other than the lowest bidder.[39] Thus, *Nielsen* established that municipal corporations may use the public policy espoused in statutes other than their enabling acts as a basis for awarding contracts.

The Court's Interpretation of the FEPA

The FEPA expresses the Illinois legislature's policy decision that employment opportunities, free of racial discrimination, should receive state protection.[40] The FEPA not only prohibits the commission of unfair employment practices in the course of public works projects, but also requires affirmative action to avoid such practices as a precondition to obtaining a public contract.[41] Observing that the PBC was clearly governed by the FEPA and thereby authorized to include affirmative action provisions in its contracts, the court stated that the PBC was authorized to implement *its own* affirmative action program through its contracts.[42] This interpretation of the Act is unnecessarily broad and attributes to the legislature an intention that never clearly existed.

Affirmative action requirements were first inserted in Illinois public contracts after the federal government withdrew certain highway funds unless specific steps were taken to integrate the construction industry.[43] Subse-

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39. *Id.*

40. ILL. REV. STAT. ch. 48, § 851 (1979). The legislature determined that discrimination based on race, color, religion, sex, natural origin, ancestry, physical or mental handicap unrelated to ability, or unfavorable discharge from the military was contrary to the public interest because such discrimination results in under-utilization of productive resources and further deprives a portion of the population of earnings necessary to maintain a reasonable standard of living, thus causing resort to public charities and danger to the public safety, health, and welfare. *Id.*

41. *Id.* § 854. Unfair employment practices are defined as, inter alia, an employer's refusal to hire, or otherwise discriminating against, any individual with respect to hiring practices, advancement, apprenticeship, or conditions of employment solely because of, inter alia, the individual's sex or ethnic background.

42. 81 Ill. 2d at 297, 410 N.E.2d at 43. The court stated: "The Public Building Commission . . . is clearly governed by [the FEPA] and is thereby authorized to implement affirmative action requirements in the letting of its contracts *'to insure'* that no discrimination is practiced against minorities in employment decisions." *Id.* (emphasis in original). It was the opinion of the dissent that the FEPA and the Public Building Commission Act, ILL. REV. STAT. ch. 85, §§ 1031-1054 (1979), were two separate and distinct acts that addressed "different but equally important and valuable goals." 81 Ill. 2d at 305, 410 N.E.2d at 47 (Clark, J., dissenting). The dissent continued: "It is beyond the purview of this court to decide that one statute is more valuable than the other. Yet that is precisely what has occurred here." *Id.*

43. Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972). In that case, the court evaluated the "Ogilvie Plan," a program for the recruitment, placement, and training of minority group members in the southern Illinois construction industry. The Federal Aid Highway Act of 1968, § 22(a), 23 U.S.C. § 140 (1976), required Illinois to adopt a plan similar to the "Ogilvie Plan" in order to participate in Federal Aid Highway Act construction programs. Exec. Order No. 11,246, *as amended by* Exec. Order No. 11,375, 32 Fed. Reg. 14303 (1967), requires contractors desiring to participate in federal aid programs to take affirmative action in regard to equal opportunity employment, upgrading, recruitment, and selection for training and appren-

quently, the Chicago Board of Education made contractor compliance with state and federal equal employment opportunity laws a precondition to obtaining contracts.[44] The Board's procedure for awarding contracts comprised two steps. First, the lowest responsible bidder was determined, and then its compliance with equal employment laws was evaluated.[45] To determine compliance, a bidder was required to analyze areas in which it was deficient in utilizing minority groups in relation to a minimum percentage set by the Board.[46] When deficiencies were found, the contractor was required to develop an affirmative action program in the form of specific goals and timetables designed to increase the contractor's utilization of minorities in all segments of its work force.[47] In this way, the Board's contracts were made conditional upon a contractor undertaking affirmative action to avoid unfair employment practices.

By comparison, the PBC's canvassing formula fails to condition public contracts on a contractor undertaking affirmative action in two regards. First, the PBC does not make a separate determination of affirmative action

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ticeship. Federal funds were withheld from Illinois highway projects when it was discovered that of 2,300 laborers in a two county area, only 41 were blacks, even though the two counties were comprised of 69% and 22% blacks. *Compare* United States v. United Bhd. of Carpenters & Joiners Local 169, 457 F.2d 210, 214 (7th Cir. 1972), *with* Southern Ill. Builder's Ass'n v. Ogilvie, 471 F.2d 680, 684 n.8 (7th Cir. 1972).

44. This practice was first challenged in Illinois courts in Brunsfeld & Sons, Inc. v. Board of Educ., 54 Ill. App. 3d 119, 369 N.E.2d 283 (1st Dist. 1977). Reasoning that the constitution, statutes, and public policy of the state were in accord with affirmative action requirements in public contracts, *id.* at 120, 369 N.E.2d at 287, the court concluded that government agencies were to be responsible for eliminating discriminatory practices in the best interests of the community. *Id.* at 124, 369 N.E.2d at 286. Therefore, when an agency developed a plan to achieve this end, the contractor performing the work pursuant to a publicly funded contract was to be bound by the terms and conditions of the affirmative action program. *Id. Accord*, Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154, 1159 (S.D. Ill. 1971) (fact that plan was at variance with contractors' other contractual undertakings was legally irrelevant because those obligations included no minorities), *aff'd*, 471 F.2d 680 (7th Cir. 1972); Alfred Eng'r, Inc. v. Fair Empl. Prac. Comm'n, 19 Ill. App. 3d 592, 312 N.E.2d 61 (4th Dist. 1974) (Commission's rules found to be within its statutorily granted powers and contractors are bound by them).

45. Brunsfeld & Sons, Inc. v. Board of Educ., 54 Ill. App. 3d 119, 120, 369 N.E.2d 283, 285. A different procedure is followed for contracts awarded pursuant to the Illinois Purchasing Act, ILL. REV. STAT. ch. 127, §§ 132.1-.13 (1979). A contractor is required to petition the Fair Employment Practices Commission (Commission) for prequalification as "responsible" only with respect to his or her compliance with the rules and regulations of the Commission. If a contractor fails to get this classification, it is not permitted to bid for contracts awarded pursuant to the Act. *See* Eastman Kodak v. Fair Empl. Prac. Comm'n, 83 Ill. App. 3d 215, 403 N.E.2d 1224 (2d Dist. 1980) (failure to comply with Commission's rules and regulations makes one ineligible for government contracts).

46. Brunsfeld & Sons, Inc. v. Board of Educ., 54 Ill. App. 3d 119, 122, 369 N.E.2d 283, 285 (1st Dist. 1977). At the time, a contractor's work force had to be composed of at least 18% minority workers to avoid a finding of underutilization. *Id.*

47. *Id.* at 122-23, 369 N.E.2d at 285. The contractor was required to indicate the number of nonwhites he would hire, in what job categories they would work, and a specific target date. As work progressed, his good faith efforts to comply with these goals would be evaluated by the Board. *Id.*

compliance. The practical effect of the formula is to award contracts to the contractor hiring the most minorities without consideration of the actual composition of the lowest bidder's work force. The formula is automatically applied to a contractor's bid and admits of no evaluation of whether the contractor is in compliance with applicable fair employment laws. As demonstrated by the facts before the *Nielsen* court, in certain circumstances the formula serves to award contracts to one other than the lowest bidder, even though the lowest bidder is in full compliance with all laws.[48]

Second, although the canvassing formula utilizes the number of minorities hired, it does not require contractors to hire any minorities at all. The formula only establishes a maximum number of minorities that will be considered; unlike the Board of Education's standard it does not require a minimum figure.[49] The formula is admittedly intended to measure contractors' voluntary hiring of minorities,[50] but it is possible under the formula for contracts to be awarded to contractors who do not employ the percentage of minorities that reasonably could be expected based on the availability of minorities in the contractors' recruiting area.[51] Therefore, the *Nielsen* court's interpretation of the FEPA, and consequently its approval of the canvassing formula, does not require that public contracts be conditioned on a contractor's showing of affirmative action. Rather, these contracts are to be awarded to the contractor who is "most" responsible. A contractor which, like the Nielsen Company, is the lowest bidder and which also has an adequate affirmative action program, can be denied a contract if a competitor has pledged to hire more minorities. This system violates the plain meaning of the FEPA.

The plain meaning of the FEPA is that public contracts be *conditioned upon* a showing of affirmative action on the part of the contractor, not that municipal corporations such as the PBC are empowered to create their own affirmative action programs.[52] Enforcement of the FEPA was provided for in the Act itself, as shown by the creation of the Fair Employment Practices

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48. *See* notes 23-24 and accompanying text *supra*. There was no allegation that Nielsen failed to comply with applicable equal opportunity laws.

49. *See* notes 21-22 and accompanying text *supra*.

50. *See* Butler, *supra* note 22. Mr. Butler viewed the standards applied by the formula as "voluntary, yet objective and enforceable." *Id.* at 9. *Accord*, Deposition of Joseph Evans, Assistant Commissioner, Department of Planning, City of Chicago, at 34. Mr. Evans viewed a contractor's commitment as voluntary in comparison with required technical specifications of bids. *Id.*

51. The rules enacted by the Fair Employment Practices Commission require employers to employ a percentage of minorities based upon what can reasonably be expected of an employer in its area of recruitment. ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION RULES AND REGULATIONS Art. VII, §§ 7.1(b), 7.2 (1977). Because the rules passed by municipal corporations pursuant to the authority statutorily vested in them have the force and effect of law, this is the current law in Illinois, and all that is legally required of employers as a whole and contractors in particular.

52. *See* note 36 *supra*.

Commission (Commission).[53] The Commission was empowered to promulgate rules and regulations that bound all employers, including contractors performing public contracts.[54] The rules promulgated by the Commission are similar to those established by the Chicago Board of Education.[55] That the legislature intended a procedure such as the one used by the Chicago Board of Education is shown by the plain wording of the FEPA.[56] This is the procedure used by both the federal government[57] and other states[58] that permit affirmative action requirements in public contracts.[59] This proce-

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53. ILL. REV. STAT. ch. 48, § 855 (1979). Like the PBC, the Commission is empowered to enact rules and regulations not inconsistent with the other provisions of its enabling statute. *Id.* § 856.05. The Act goes further, however, and specifically grants the power to investigate employers' compliance with the rules it enacts, and if an employer is not obeying them the Commission may formally charge it, hold hearings on the matter, and issue appropriate orders. *Id.* §§ 858, 858.01. Subpoena power is vested in the Commission, and in the case of refusal to obey a subpoena the Commission is empowered to issue an order compelling such a person to appear before it and testify and produce evidence. *Id.* § 859. Finally, any party to the Commission's proceedings is entitled to apply for judicial review of the Commission's orders under the Administrative Review Act, ILL. REV. STAT. ch. 110, § 264 (1979), and the Commission may obtain an order of court for the enforcement of its order. ILL. REV. STAT. ch. 48, §§ 860, 861 (1979).

54. ILL. REV. STAT. ch. 48, § 854A (1979). This section provides in pertinent part:

> The Commission shall have the authority to issue rules and regulations, conduct investigations, hold hearings and issue orders based thereon for the purposes of enforcement and administration of [§ 854]. . . .
>
> No contract shall be awarded by the State to any employer found by the Commission to have violated its rules and regulations until the Commission shall certify that the violation has ceased. . . . Further, . . . any municipal corporation may avoid any such contract at its option and it may sue and shall recover the profits earned on such contract [when it is found that an employer had committed unfair employment practices during the construction of public projects].

Id.

55. *Compare* note 51 and accompanying text *supra with* notes 44-47 and accompanying text *supra.*

56. *See* note 36 *supra.*

57. See, e.g., Rossetti Contracting Co. v. Brennan, 508 F.2d 1039 (7th Cir. 1974) (bidders on federally assisted construction contracts must submit appropriate commitment required by "Chicago Plan" for minority hiring along with bid); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971) ("Philadelphia Plan" relating to minority hiring in federally assisted construction projects includes as precondition to federal assistance the bidder's submission of an affirmative action program containing goals within a set range for minority hiring), *cert. denied,* 404 U.S. 854 (1971).

58. Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973) (contract provision requiring contractors to employ a stated percentage of minority workers), *cert. denied,* 416 U.S. 975 (1974); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969) (lowest responsible bidder awarded contract only if in compliance with affirmative action laws), *cert. denied,* 396 U.S. 1004 (1970).

59. The *Nielsen* court, however, held that the express mention of affirmative action programs in the bidding statute of another municipal corporation, the Metropolitan Sanitary District, ILL. REV. STAT. ch. 42, § 331.3 (1979), did not indicate legislative intent that the PBC not implement such a program. 81 Ill. 2d at 298, 410 N.E.2d at 44. "[T]his sort of 'negative inference' is not one that we should draw, especially in light of a contrary expression of legislative intent such as that found in . . . the Fair Employment Practices Act." *Id.* (citing Concrete

dure protects both the goals of the FEPA and the economic goals of frugality in public contracts.[60] Therefore, the better interpretation of the FEPA is that public contracts are to be conditioned upon a contractor's compliance with established laws and regulations requiring equal employment opportunity.[61]

The Validity of the Formula's Use

The court's broad interpretation of the FEPA both established that the PBC had the power to promote affirmative action and enabled the court to redefine the means by which public contracts are awarded. Citing the FEPA as an indication of the legislature's intent that the social responsibility of contractors should be considered when determining the lowest responsible bidder,[62] the court found that a contractor's commitment to affirmative action could be expected or demanded under the terms of public contracts.[63] Thus, financial responsibility and the ability to perform the contract are no longer the only relevant factors to be considered by municipal corporations in awarding public contracts. The court stated that public bodies need only demonstrate a "reasonable basis" for determining which bid to accept.[64] Yet, this conclusion is inconsistent with well established case law and creates uncertainty in the law of public contracts because the public body authorizing the project is given undefined, broad discretionary powers.

The term "responsible," in the context of "lowest responsible bidder," has been interpreted by Illinois courts to mean financially responsible and able to fulfill one's obligations under the terms of public contracts.[65] Because the

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Contractors' Ass'n v. Village of LaGrange Park, 14 Ill. 2d 65, 72, 150 N.E.2d 783, 787 (1958)). Therefore, it appears that the court refused to look at the means used by other municipal corporations to integrate public works projects.

60. Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969) (increased cost of public contracts caused by affirmative action requirements is offset by reduction of expensive, post hoc, and punitive administrative proceedings and public prosecutions), *cert. denied*, 396 U.S. 1004 (1970).

61. *See* 81 Ill. 2d at 306-07, 410 N.E.2d at 48 (Clark, J., dissenting).

62. 81 Ill. 2d at 299, 410 N.E.2d at 44. The Court stated: "Antidiscrimination statutes such as . . . the Fair Employment Practices Act indicate the legislature's intention that, in public contracting, the *social* responsibility of the contractor should also be a concern." *Id.* (emphasis in original).

63. *Id.*

64. *Id.* The court quoted an authority on municipal corporations:

> In proper circumstances a contract may be awarded to one who is not the lowest bidder, where this is done in the public interest, in the exercise of discretionary power granted under the laws, without fraud, unfair dealing, or favoritism, and where there is a sound and reasonable basis for the award as made.

Id. (quoting 10 McQUILLIN, *supra* note 3, § 29.73a, at 407). The court read this statement out of context, however, and applied a broader meaning than the author intended. The public interest mentioned by the author was the protection against extravagant and unnecessary use of funds, and the statutory discretion was than granted under statutes similar to the PBC's enabling statute. *See* 10 McQUILLIN, *supra* note 3, § 2973, at 407-08.

65. *See* note 10 and accompanying text *supra*.

discretion vested in municipal corporations is limited to that provided in their enabling statutes,[66] municipal corporations are charged with, and restricted to, preventing extravagant use of public funds and obtaining reasonable assurances that a contractor will not breach his or her duties under the contract.[67] The policy of Illinois courts has been that a contract term tending to increase the cost of the project to the public or restrict competition was illegal and void.[68] In this way, the public was guaranteed that the best work would be performed at the lowest cost, the cost having been determined by competition among bidders and an evaluation of their bids based upon the terms and specifications spelled out in the contract.[69] The *Nielsen* decision, however, altered the traditional process. It allows contracts to be awarded to one other than the lowest bidder able to fulfill the terms of the contract. The use of the canvassing formula both increases the cost of public works projects and restricts competition.

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66. ILL. CONST. art. VII, § 8. Section 8 provides: "Townships, school districts, special districts and units, designated by law as units of local government, which exercise limited governmental powers, or powers in respect to limited governmental subjects shall have only powers granted by law." *Id.*

The section preserves the concept of "Dillon's Rule" with respect to special districts and units designated by law as units of local government which exercise limited governmental powers with respect to limited governmental subjects. ILL. ANN. STAT. art. 7, § 8, Constitutional Commentary at 85 (Smith-Hurd 1971). *See also* 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448 (5th ed. 1911). *Nielsen* does not raise any issue as to the power of a home rule unit of local government to adopt an ordinance in contravention of a State statute which would authorize use of the canvassing formula. For a discussion of home rule in Illinois, see Note, *A New Approach to Home Rule in Illinois—County of Cook v. John Sexton Contractors Co.*, 29 DEPAUL L. REV. 603 (1980).

67. 81 Ill. 2d at 305, 410 N.E.2d at 47 (Clark, J., dissenting).

68. The Illinois Supreme Court uniformly found that social requirements included in public contracts were against the public policy of acquiring public works at the lowest cost through competitive bidding. Reid v. Smith, 375 Ill. 147, 30 N.E.2d 908 (1940) (requirement that laborers be paid the prevailing minimum wage); Doyle v. People *ex rel.* John J. Handberg, 207 Ill. 75, 69 N.E. 639 (1903) (prohibition against hiring alien laborers); Glover v. People *ex rel.* S.B. Raymond, 201 Ill. 545, 66 N.E. 820 (1903) (eight-hour daily work limit); Sweet v. People *ex rel.* S.B. Raymond, 200 Ill. 536, 65 N.E. 1094 (1902) (eight-hour daily work limit); McChesney v. People *ex rel.* S.B. Raymond, 200 Ill. 146, 65 N.E. 626 (1902) (eight-hour day limitation and requirement that all laborers be union members); Treat v. People *ex rel.* S.B. Raymond, 195 Ill. 196, 62 N.E. 891 (1902) (union requirement); Grey v. People *ex rel.* S.B. Raymond, 194 Ill. 486, 62 N.E. 894 (1902) (union requirement); Givins v. People *ex rel.* S.B. Raymond, 194 Ill. 150, 62 N.E. 534 (1901) (prohibition against alien laborers); Hamilton v. People *ex rel.* S.B. Raymond, 194 Ill. 133, 62 N.E. 533 (1901) (prohibition against hiring alien laborers); Fiske v. People *ex rel.* S.B. Raymond, 188 Ill. 206, 58 N.E. 985 (1900) (eight-hour day limitation); Holden v. City of Alton, 179 Ill. 318, 53 N.E. 556 (1899) (union requirement); Adams v. Brennan, 177 Ill. 194, 52 N.E. 314 (1898) (union requirement); Ritchie v. People, 155 Ill. 98, 40 N.E. 454 (1895) (eight-hour day limitation). *See also* Master Printer's Ass'n v. Board of Trustees, 356 F. Supp. 1355 (N.D. Ill. 1973) (union requirement); Beaver Glass & Mirror, Inc. v. Board of Educ., 59 Ill. App. 3d 880, 376 N.E.2d 377 (2d Dist. 1978) (board's refusal to award contract to lowest bidder able to fulfill obligations of the contract because of failure to pay minimum wage overturned when board member admitted that contractor was "responsible").

69. *See* 10 MCQUILLIN, *supra* note 3, § 29.73, at 397-99.

The cost of the project is increased in two ways. First, the court accorded the PBC wide discretion to award the contract to one other than the lowest bidder when the PBC decides that doing so is in the public interest.[70] Thus, the lowest bidder may not get the contract, even if it has an effective affirmative action program. Second, all bids may be higher to account for the cost a contractor incurs when it goes outside of the usual recruiting area in search of available and qualified minorities.[71] In addition competition is restricted because those contractors who cannot afford the cost of recruiting the requisite number of minority workers may not risk the cost of preparing bids, feeling that their chances of obtaining the contract are slim. Thus, those contractors drawing their work force out of high-minority areas will have a distinct competitive advantage.

A second flaw in the court's approval of the PBC's use of the formula is its failure to define the authority of municipal corporations. It is clear that the court intended municipal corporations to continue to be bound by the lowest responsible bidder requirements to the extent that financial and technical ability to perform the contract is still a relevant factor in awarding contracts,[72] but the extent to which the court intended *social* responsibility to be considered may be wider. The court simply stated that municipal corporations must act in the "public interest."[73] After *Nielsen*, lower courts will have to decide to what extent the requirement of social responsibility is within the public interest. To interpret the FEPA as vesting in municipal corporations the power to decide when it is in the public interest to award contracts to a high bidder, without statutory definition of the interest involved, poses serious constitutional problems.[74] As it is, the court did not make clear when a statute would apply to public contracts and thus it is left

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70. 81 Ill. 2d at 299, 410 N.E.2d at 44.

71. Interview with Philip C. Clark, Director of Equal Employment Opportunity, City of Chicago Department of Public Works, in Chicago (Oct. 24, 1980).

72. 81 Ill. 2d at 300, 410 N.E.2d at 45. This is so because the court's decision requires the determination to be made within the discretion granted by law.

73. *Id.*

74. When the PBC was first created, the Public Building Commission Act, ILL. REV. STAT. ch. 85, §§ 1031-1054 (1979), was challenged on the grounds that it delegated legislative authority in terms so broad and indefinite as to deny due process of law. People *ex rel.* Adamowski v. Public Bldg. Comm'n, 11 Ill. 2d 125, 142 N.E.2d 67 (1957). In that case the Illinois Supreme Court held that the PBC is confined to the terms of its organic statute and for that reason was constitutionally established. The court stated:

> the ordinances, rules and regulations authorized in [the Act] are limited to those necessary for carrying into effect the object for which the commission is created . . . . The limitations contained in the sections show clearly that a commission is given no discretion as to what the law shall be but only some discretion as to its execution . . . .

Id. at 146-47, 142 N.E.2d at 79 (citing Sheldon v. Hoyne, 261 Ill. 222, 103 N.E. 1021 (1914)). *See also* People *ex rel.* Stamos v. Public Bldg. Comm'n, 40 Ill. 2d 164, 238 N.E.2d 390 (1968) (following *Adamowski*).

to the discretion of municipal corporations to determine which statutes apply to public contracts.[75]

The extent of municipal corporations' authority is further obfuscated by the court's conclusion that only a reasonable basis for an award must be demonstrated in order for the award to be upheld by the court.[76] The court failed to establish the bounds within which public bodies are constrained, and these can only be inferred by what was not decided by the *Nielsen* court. Specifically, it was not contended nor decided whether the formula was arbitrary.[77] It appears that the court intended that, to avoid being arbitrary, the basis upon which public contracts are to be awarded must be established at the same time as the terms and specifications of the contracts.[78] This would allow parties interested in bidding to evaluate their chances of success under the established procedures.[79] If this was the intention of the court, however, it was not articulated in the majority opinion.

Because setting terms of public contracts is an exercise of the legislative power vested in municipal corporations,[80] mention should be made of *Fullilove v. Klutznick*,[81] a recent United States Supreme Court decision concerning the propriety of legislative use of racial and ethnic criteria to accomplish

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75. While the *Nielsen* court stressed the fact that specific mention of municipal corporations was made in the FEPA, 81 Ill. 2d at 297, 410 N.E.2d at 43, its holding that *social* responsibility also be considered and that only a reasonable basis for the award as made must be shown, left unclear whether specific statutes are required authorizing the PBC to consider *social* responsibility in a certain area.

76. 81 Ill.2d at 299, 410 N.E.2d at 44.

77. *Id.* at 295, 410 N.E.2d at 42. Also, it was not decided whether the formula illegally discriminated against non-minorities, *id.*, or whether it was improperly adopted . *Id.* at 294, 410 N.E.2d at 42. The dissent argued that the formula was imposed upon contractors in an ad hoc manner, *id.* at 302, 410 N.E.2d at 45 (Clark, J., dissenting), and that since no formal resolution was adopted, the PBC lacked the authority to implement its canvassing formula. *Id.* at 302, 410 N.E.2d at 46.

78. The court stated that the PBC must act within the discretion granted by law, *id.* at 299, 410 N.E.2d at 44, and the statutory grant to the PBC requires that the terms and specifications of contracts be advertised in advance of the bidding. ILL. REV. STAT. ch. 85, § 1050 (1979). If the basis for making the awards was not determined until the bids were opened, it would surely be arbitrary. Approval of such a procedure would permit ex post facto acts by governmental agencies, which have been prohibited by the Illinois Supreme Court. Craddock v. Board of Educ., 81 Ill. 2d 28, 405 N.E.2d 794 (1980) (Board's failure to adopt a rule establishing specific grounds for suspending teachers prevented it from being allowed to suspend a teacher for cursing at a student).

The dissent argued that the canvassing formula, because it was not formally adopted, was adopted ex post facto. 81 Ill. 2d at 302, 410 N.E.2d at 45 (Clark, J., dissenting). However, the formula was first implemented in 1974, *id.* at 294, 410 N.E.2d at 42, and subsequently an article was published explaining the formula, see Butler, note 22 *supra*, and lectures were given to the Builders Association of Chicago explaining the formula. Brief of Del E. Webb, Defendant-Appellee, *supra* note 17, at 7. Because Nielsen bid on contracts containing the formula, *id.* at 9, there was no ex post facto application of the formula in the case at bar.

79. *See* note 15 and accompanying text *supra*.

80. *See* note 5 and accompanying text *supra*.

81. 448 U.S. 448 (1980).

remedial objectives.[82] The *Fullilove* Court held that such programs must be tailored narrowly to achieve their objectives and also to require vigilant and flexible administration.[83] The canvassing formula in *Nielsen*, however, was imposed without formal resolution,[84] and without any administrative guidelines, standards, or restrictions.[85] Although a contractor's minority utilization is vigilantly monitored during the construction of a public works project,[86] the administration of it is far from flexible. The formula is nothing more than a mathematical means of determining the lowest responsible bidder. It reduces the duties of the PBC to mere ministerial selection of the bidder with the lowest "award criteria figure." No consideration is given to the reasons a contractor has promised to utilize a particular percentage of minorities, or to the ability of the bidder to fulfill its minority hiring obligation. Further, no consideration is given to the factors that may cause a contractor to fail to hire the promised percentage of minorities; however, the PBC intends to strictly enforce the liquidated damages provision attached to the formula when a contractor fails to utilize the promised number of minorities.[87] The formula is neither tailored narrowly to achieve its purpose nor administered flexibly. Thus, the formula may be challenged as violative of the United States Supreme Court guidelines.

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82. The program evaluated by the court was the minority business enterprise provision of the Public Works Employment Act of 1977, § 102, 42 U.S.C. § 6701 (Supp. II 1976), *amending* the Local Public Works Capital Development and Investment Act of 1976, § 102, 42 U.S.C. § 6701 (1976). Section 102(f)(2) of the 1977 Act required that at least 10% of the amount of each grant made to a local government must be allocated to minority business enterprises, which were therein defined as businesses at least 50% of which is owned by minority group members. 91 Stat. 116, 42 U.S.C. § 6705(f)(2) (Supp. II 1976). This requirement was enacted as a short-term measure to alleviate national unemployment and to stimulate the economy by assisting local governments in building needed public facilities. The objective of the provision was to send public funds into a segment of the economy especially hard hit by unemployment, H.R. REP. No. 94-1077, 94th Cong., 2d Sess. (1976).

83. 448 U.S. at 480.

84. 81 Ill. 2d at 294, 410 N.E.2d at 42. The parties stipulated that the PBC's failure to formally adopt the formula had no effect upon the case before the *Nielsen* court. *Cf.* Givins v. People *ex rel.* S.B. Raymond, 194 Ill. 150, 62 N.E. 534 (1901) (municipal corporation's requirement that no aliens be employed during the construction of public works projects was never enforced by the corporation and potential contractors were aware of the corporation's policy of nonenforcement; therefore the illegal requirement did not invalidate the contracts).

85. The formula is not intended to restrict the number of minorities hired by contractors; it is only used for the purpose of determining the lowest "award criteria figure." *See* note 21 *supra*. No standards are set for determining whether a contractor is underutilizing minorities in his work force; the only standard is the number of minorities that the contractor promises to utilize on the particular project. *Id.* Finally, the only guideline established is that contractors should attempt to employ at least 50% minorities; however, no minimum level is required. *Id.*

86. The contractor is required to submit a payroll form and a "Total Manhours Worksheet" on a bi-weekly basis. These forms are required to list all subcontractors employed by the contractor and whether or not they were active during the period. Butler, *supra* note 22.

87. Deposition of Brian M. Kilgallon, Executive Director of the PBC, at 35. "When a successful bidder writes a figure down [for minority utilization, that bidder is] going to be held to it." *Id.* Mr. Kilgallon described the assessment of liquidated damages for failure to comply with the promises elicited by the formula as a "no-fault assessment." *Id.*

THE IMPACT OF *NIELSEN*

Undoubtedly, the *Nielsen* decision will have a significant impact on the method of awarding public contracts in Illinois, although the degree of that impact will depend upon how broadly the decision is interpreted. A broad interpretation would substantially increase the discretion delegated to state agencies in awarding contracts, while reducing the ability of the public to police the actions of those state agencies. Although courts have refused to interfere in the discretionary determination of a bidder's responsibility,[88] the basis for that determination was always limited to the terms of the contract.[89] A broad interpretation of *Nielsen*, however, would allow an agency to award its contracts in the name of the public interest, regardless of the amounts of the bids. Because the basis for making an award would be left to the discretion of the awarding agency, the courts would interfere only when that basis was arbitrary or predicated on fraud.[90] Therefore, the court's ambiguous opinion could have the undesirable effect of requiring expensive judicial proceedings to clarify the parameters of the power vested in municipal corporations.

A narrower interpretation of *Nielsen* would require state agencies to establish the basis for their discretion in advance of the bidding. For example, the canvassing formula serves to inform potential bidders of the PBC's reasons for awarding the contract to the successful bidder. The general language of the court's holding could easily support the narrower interpretation.[91] If so interpreted, it is likely that the integrity of the competitive bidding process would be protected, while at the same time societal obligations of the contractors and the state would be enforced. Whether a broad or narrow interpretation of the court's opinion is adopted, the *Nielsen* case did overturn eighty-five years of precedent, and leaves the law pertaining to public contracts in an uncertain state.

In addition to the direct impact upon the discretion vested in state agencies in awarding their contracts, *Nielsen* will have a dramatic effect on the integration of minorities into public works projects. A 1975 survey demonstrated that the canvassing formula has been effective in securing minority employment on public contracts. This survey showed that minorities com-

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88. *See, e.g.*, Hallett v. City of Elgin, 254 Ill. 343, 346, 98 N.E. 530, (1912) (absent fraud, courts will not interfere with the exercise of official discretion in awarding contracts); Kelly v. City of Chicago, 62 Ill. 279 (1871) (when the statute vests discretion in a municipal body to determine a question, it is not in the province of the courts to determine and control that discretion).

89. *See* notes 65-69 and accompanying text *supra*.

90. 81 Ill. 2d at 290, 410 N.E.2d at 44. *See* notes 77-79 and accompanying text *supra*.

91. Limiting language can be found in the court's statement that the discretion must be exercised within the laws granting that discretion. The court did not find that the FEPA overruled the entire Public Building Commission Act, only that it changed the definition of one of the terms therein. Therefore, it can be asserted that the court did not intend to relieve the PBC of the obligation to publish all applicable terms and specifications of the contract for which bids are solicited. Further, the fact that the court did not consider whether the formula was arbitrary leads to the inference that publication of the basis upon which the contract is to be awarded still must be made beforehand.

prised fifty-two percent of the work force on projects using the formula.[92] The *Nielsen* court approved the use of a mathematical formula to determine that it is more valuable to society to spend more money on public projects when this is done to ensure minority participation in those projects. This indicates that the court would approve the development by municipal corporations of set-off funds directed to minority businesses exclusively.[93] Such a program would provide encouragement to minorities to enter the construction industry and also maintain the integrity of the bidding process. In addition, because other contractors would still be bound by applicable equal employment opportunity laws, the state would be prevented from becoming an indirect party to discriminatory practices. Thus, a set-off would serve the economic and moral interests of the state and public, and preserve the integrity of the bidding process. A procedure such as this would therefore be in the best interests of the public. It is unfortunate that it arose only as a possibility at the expense of casting entrenched case law into a state of confusion.

CONCLUSION

The Illinois Supreme Court has provided an effective means for integrating public works projects. In the process, however, the court substantially altered the method of awarding public contracts by requiring that only a reasonable basis for the award be shown. Because the "reasonable basis" requirement was inadequately and ambiguously defined, unparalleled discretion has been vested in municipal corporations at the expense of the integrity of the bidding process. Through a strained interpretation of the FEPA the court has substituted its own idea of social betterment for that of the Illinois legislature's. The court erroneously interpreted the Act as repealing part of the Public Building Commission Act to the extent that the public must now bear the cost of defining the "reasonable basis" requirement through expensive litigation. A better interpretation would have been that municipal corporations are required to determine the lowest responsible bidder, as defined by precedent and then determine whether the successful bidder is in compliance with existing laws regarding equal employment opportunity. Because the court disdained this finding, the law pertaining to the discretion vested in municipal corporations in awarding public contracts has been left in a state of chaos.

Nicholas T. Buschmann

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92. Brief of Del. E. Webb, Defendant-Appellee, *supra* note 17, at 7-8. The survey was prepared by Philip C. Clark, Director of Equal Employment Opportunity for the Chicago Department of Public Works, and included only inner-city projects. Those projects where the formula was not used only comprised 20% minorities. *Id.* Another survey showed minority utilization as 33% on projects where the formula was used and only 19% where the formula was not used. *Id.*

93. *See* notes 81-83 and accompanying text *supra*.