

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

MARK ONE ELECTRIC CO. INC.,)	
and SK DESIGN GROUP, INC.,)	
)	
Plaintiffs)	Case No.:
v.)	
)	JURY TRIAL DEMANDED
CITY OF KANSAS CITY, MISSOURI)	
and)	
PHILLIP YELDER,)	
)	
Defendants)	

COMPLAINT

COMES NOW, Plaintiffs Mark One Electric Co., Inc. and SK Design Group, Inc. (collectively, “Plaintiffs”) and for their Complaint against the City of Kansas City, Missouri and Phillip Yelder, in his capacity as Acting Human Relations Director for the City of Kansas City, Missouri, state and allege as follows:

THE PARTIES

1. Plaintiff Mark One Electric Co. Inc. (“Mark One”) is a corporation organized under the laws of the State of Missouri, with its principal place of business located at 1414 Genessee Street, Kansas City, Missouri.

2. Plaintiff SK Design Group Inc. (“SK Design”) is a corporation organized under the laws of the State of Kansas, with its principal place of business located at 4600 College Boulevard, Suite 100, Overland Park, Kansas.

3. Defendant City of Kansas City, Missouri (the “City”) is a municipal corporation organized and existing under the laws of the State of Missouri. It can be served by leaving a copy of the Summons and Complaint with its counsel, Galen Beaufort, Senior Associate City Attorney, at Kansas City, Missouri, City Hall, 414 E. 12th Street, Kansas City, Missouri.

4. Defendant Phillip Yelder is the Acting Director of the Human Relations Department of the City of Kansas City and can be served at Kansas City, Missouri City Hall, 414 E. 12th Street, Kansas City, Missouri.

JURISDICTION AND VENUE

5. Plaintiffs bring this claim pursuant to 42 U.S.C. § 1983.

6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331, which provides federal district courts with “original jurisdiction of all civil acting arising under the Constitution,” and under 28 U.S.C. §1343, which provides federal district courts with original jurisdiction over civil actions brought “to redress the deprivation . . . of any right, privilege, or immunity secured by the Constitution of the United States.”

7. Jurisdiction is further proper pursuant to 28 U.S.C. § 1367, which provides district courts with supplemental jurisdiction “over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”

8. Defendants are Missouri residents and are therefore subject to general personal jurisdiction of the Missouri courts.

9. Venue is proper in this court pursuant to 28 U.S.C. § 1391 and Local Rule 3.2(a) because substantial part of the events or omissions giving rise to the claim occurred in this District in Kansas City, Jackson County, Missouri and because defendants reside in this District.

FACTS

10. In 1996, the City adopted an affirmative action program “to encourage utilization of small business enterprises owned and controlled by minority, women, and disadvantaged individuals on City contracts” (the “Affirmative Action Program”). *See, City of Kansas City, Missouri Disparity Study, 2016*, at pp. 1, 35 (2016).

11. In 2016, the City commissioned a Disparity Study, which analyzed data from 2008-2013 regarding the availability of minority-owned business enterprises (“MBEs”) and women-owned business enterprises (“WBEs”) (collectively, “M/WBEs”) in the relevant geographic and industry market area as well as anecdotal evidence related to the experiences M/WBEs had with the City’s small business inclusion programs.

12. In addition to a quantitative analysis of the race and gender-based disparities in City contracting, the 2016 Disparity Study also identified “qualitative evidence of race and gender discrimination” in the City’s market areas,” including the following:

- a. Discriminatory attitudes
- b. Negative perceptions of competence
- c. Inability to obtain work on an equal basis to non M/WBE firms

13. Ultimately, the 2016 Disparity Study identified the pool of qualified M/WBEs within the City’s geographic and industrial market able and willing to bid on City contracts.

14. The City used this information to establish goals for the engagement of M/WBEs in City contracts.

15. With respect to the Affirmative Action Program and the City’s efforts to address race and gender-based discrimination in City contracting, the 2016 Disparity Study provides “a strong basis in evidence for [the City’s] conclusion that remedial action was necessary.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 512 (1989) (internal citations omitted).

16. A recommendation was included in the 2016 Disparity Study that the City consider adding a personal net worth test. However, this recommendation was neither supported by quantitative nor qualitative analysis.

17. Notwithstanding the lack of any supporting data, the City amended the Affirmative Action program in 2018 to include, among other things, a personal net worth (“PNW”) test defined as follows:

- a. Personal Net Worth: The net value of the assets of an individual after total liabilities is deducted. An individual’s personal net worth does not include the individual’s ownership interest in a certified M/WBE or applicant for such certification or the individual’s equity, if any, in his or her primary place of residence. An individual’s personal net worth includes only his or her share of assets held individually or jointly with the individual’s spouse. Chapter 3, Article IV Code of Ordinances, Division 2, Sections 3-421 (36).

18. This language was taken, essentially verbatim, from the eligibility guidelines for the Disadvantaged Business Enterprise program (“DBE”) run by the U.S. Department of Transportation.

19. However, the program at issue in this Complaint provides rights and affords opportunities to enterprises owned by minorities and women. The City runs a separate, independent program for businesses owned by disadvantaged owners.¹

20. Moreover, despite the plain language above that the only assets considered are those held individually by the company owner and the percentage held jointly with a spouse, the City has notified current M/WBEs that it intends to also include assets held in trust when calculating an owner’s PNW.

¹ The term “disadvantaged” is defined at 49 CFR 26, Appendix E.

21. The PNW test was to take effect on October 1, 2019. However, the City delayed implementation until October 1, 2020.

22. Ms. Rosana Privitera Biondo is President of Mark One.

23. Mark One has been WBE-certified under the City's Affirmative Action Program since approximately 1996.

24. Ms. Biondo has properly and rightfully held certain of her assets in trust. Based on the new PNW threshold, Mark One stands to lose its WBE certification, despite otherwise meeting the gender-based elements of the M/WBE program.

25. Sassan and Katereh Mahobian are the owners of SK Design Group.

26. SK Design Group has been MBE-certified under the City's Affirmative Action Program since approximately 1990.

27. Sassan and Katereh Mahobian have properly and rightfully held certain of their assets in trust. Based on the new PNW threshold, SK Design Group stands to lose its MBE certification, despite otherwise meeting the race-based elements of the M/WBE program.

28. As a result of their M/WBE certifications, Plaintiffs have a vested interest in City construction projects and a vested right to bid on them. Indeed, Plaintiffs regularly submit construction bids on projects for the City and expects to continue to bid on such work.

29. Plaintiffs are ready, willing, and continue to bid on appropriate and available opportunities that arise within the scope of the work types listed above.

30. If their M/WBE certifications are invalidated, Plaintiffs will suffer significant financial losses, as well as irreparable losses to their reputation and goodwill. These losses not only threaten Plaintiffs' very existence and ability to continue business operations, they also threaten the employment and livelihoods of Plaintiffs' employees.

COUNT I

The Personal Net Worth Test is Not Narrowly Tailored to Remedy Prior Discrimination

31. Plaintiffs adopt and incorporate by reference the allegations in the foregoing paragraphs of this complaint as though fully set forth herein.

32. By its own terms, the 2016 Disparity Study addresses only race- and gender-based discrimination in City contracting and procurement.

33. The 2016 Disparity Study provides neither data nor analysis regarding any connection between efforts to remediate race and gender-based discrimination and personal net worth.

34. In fact, there is no evidence, even anecdotal, that the City has historically discriminated against M/WBEs based on the personal net worth of their owners.

35. Untethered to any underlying evidence, the arbitrary application of the PNW provision clearly demonstrates that this provision is not narrowly tailored to remedy prior discrimination as required by *Croson, supra*.

36. By amending the City's Affirmative Action Program to include a PNW test, Defendants acted under color of state law, and such conduct will imminently subject Plaintiffs to deprivation of rights, privileges and immunities secured by the Fourteenth Amendment of the United States Constitution.

37. Plaintiffs face an actual, imminent injury in that the implementation of the PNW test will unfairly and without due process disqualify Plaintiffs from participation in the Affirmative Action Program, which will result in significant financial and reputational losses.

38. Plaintiffs requests a declaratory judgment under 28 U.S.C. § 2201, declaring the PNW test now contained in the City’s Affirmative Action program is void, unconstitutional, and ineffective, and without force of law.

COUNT II

The City’s M/WBE Program is Not Narrowly Tailored to Address Prior Discrimination as a Result of the Personal Net Worth Test

39. Plaintiffs adopt and incorporate by reference the allegations in the foregoing paragraphs of this complaint as though fully set forth herein.

40. The City’s current Affirmative Action Program is premised on an initial disparity study completed in 2006. That study focused only on race and gender-based discrimination impacting access to City contracts.

41. The most recent study, completed in 2016, is also premised only on race and gender-based discrimination impacting access to City Contracts.

42. In fact, the City itself highlights the focus of its Affirmative Action Program on its own website:

- a. “The findings of the Study strongly suggested that minorities and women continue to suffer discriminatory barriers to full and fair access to City contracts. The Study results fully supported the City’s continuing interest in implementing its race- and gender-conscious Minority- and Women-Owned Business Enterprise Programs.” *See*, <https://www.kcmo.gov/city-hall/departments/human-relations/performance-measurement-reports>

43. Neither the 2006 disparity study, which provides the Constitutional basis for the current Affirmative Action Program, nor the 2016 Disparity Study which confirms the need to continue to implement “race- and gender- conscious Minority- and Women- Owned Business Enterprise Programs” analyzes the issue of personal net worth.

44. The current Affirmative Action program, which now includes the PNW test, is wholly unrelated to efforts to remedy prior discrimination against minorities and women or to efforts to remove barriers to “full and fair access” to City contracts.

45. There is not one scintilla of data or evidence supporting the PNW test as a constitutionally reliable measure of anti-discrimination efforts in City contracting.

46. By including the PNW test in the current Affirmative Action Program, the City has adopted an arbitrary and capricious definition of who qualifies as a women or minority.

47. Moreover, by including the PNW test in the current Affirmative Action Program, the City has arbitrarily and significantly diminished the pool of qualified M/WBEs by disqualifying them for reasons unrelated to race or gender discrimination, the essential purpose of the program.

48. Put simply, by amending the City’s Affirmative Action Program to include the PNW test, the City has impermissibly enacted a remedial action that has “no basis in evidence.” *See, Croson*, 488 U.S. at 511.

49. The City’s Affirmative Action Program is, therefore, unconstitutional.

50. Moreover, by amending the City’s Affirmative Action Program to include a PNW test, Defendants acted under color of state law, and such conduct will imminently subject Plaintiffs to deprivation of rights, privileges and immunities secured by the Fourteenth Amendment of the United States Constitution.

51. Plaintiffs face actual, imminent injuries in that the implementation of the current Affirmative Action Program will unfairly and without due process disqualify Plaintiffs from participation in the program, which will result in significant financial and reputational losses.

52. Plaintiffs request a declaratory judgment under 28 U.S.C. § 2201, declaring the City's Affirmative Action Program void, unconstitutional, and ineffective, and without force of law.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment as follows:

- a. Declaring that the Personal Net Worth test incorporated into the City's Affirmative Action Program void, unconstitutional, ineffective, and without force of law because there is no evidence that it aids the City's efforts to removing barriers to "full and fair access" to City contracts.
- b. Alternatively, declaring that the City's Affirmative Action Program is void, unconstitutional, ineffective, and without force of law because the Personal Net Worth limitation is wholly unrelated to efforts to remediate race and/or gender-based discrimination in the awarding of City contracts and the program is therefore not narrowly tailored.
- c. And awarding attorney's fees and such other relief as the Court deems appropriate under the circumstances.

Demand for Jury Trial

Plaintiffs respectfully demand a trial by jury on all claims and issues of fact.

Respectfully submitted,

POLSINELLI PC

By: /s/ Dan E. Cranshaw

DAN E. CRANSHAW #55081

JENNIFER J. ENG #63805

900 West 48th Place, Suite 900

Kansas City, Missouri 64112

(816) 753-1000

Fax: (816) 753-1536

dcranshaw@polsinelli.com

jeng@polsinelli.com

ATTORNEYS FOR PLAINTIFFS

VERIFICATION

STATE OF MISSOURI)
)
COUNTY OF JACKSON)

COMES NOW Plaintiff Rosana Privitera Biondo, being of lawful age and first duly sworn upon her oath, and states that she has read the Complaint and that the facts stated therein are true and correct to the best of her knowledge and belief.

Rosana Privitera Biondo

ROSANA PRIVITERA BIONDO
President, Mark One Electric Co. Inc.

Subscribed and sworn to before me, this 2nd day of October, 2020.

Kelli Renee Kline

Notary Public

My Commission Expires:

08-22-2021

