

Caltrans Contracting Under Fire

By Dhyana Levey
Daily Journal Staff Writer

SAN FRANCISCO — While two groups filed a motion this week to intervene in a federal lawsuit they believe threatens the California Department of Transportation's Disadvantaged Business Enterprise Program, the plaintiff bringing the litigation says everyone appears to have missed its point.

The Associated General Contractors of America's San Diego Chapter filed a complaint against Caltrans in the US District Court in Sacramento in June claiming that its program is unconstitutional.

But the group isn't attempting to get rid of the program all together, rather it disputes the study the agency used to structure the program and questions the numbers it uses, said Jim Ryan, executive vice president of Associated General Contractors' San Diego Chapter.

The Federal Highway Administration in March approved the program to set goals for Caltrans construction projects encouraging the use of subcontracting companies run by "disadvantaged" groups. The move was important because of the evident disparities in the construction industry that leave women and minorities out of the loop to compete for jobs, said Ingrid Merriwether, chief executive officer of San Francisco-based insurance firm Merriwether & Williams and a member of the Coalition for Economic Equity.

Fearing that businesses run by women and minorities could lose contracting opportunities to the "good ol' boys" of the construc-

tion industry, the coalition and the NAACP's San Diego chapter asked to intervene Monday in the general contractor's suit. A hearing on their motion to intervene is set for Nov. 4 in Sacramento.

Caltrans' goal is to have 13.5 percent of its contracts statewide made available to disadvantaged groups, said Ralph Kasarda, a staff attorney for Pacific Legal Foundation, which is representing the general contractors.

To achieve this, 6.75 percent of the contracts must be offered to a wide range of diverse businesses, he said. For another 6.75 percent of contracts, primary contractors must make a concerted effort to offer the jobs to businesses run by women, Native Americans, African Americans, and Asian Pacific Americans.

The Ninth Circuit Court of Appeals held that a program like this is only constitutional if the state can prove ongoing discrimination. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005).

Caltrans in 2006 suspended the race and gender elements of a similar program in response to this ruling, but came back with a new program in March.

"California does not have enough evidence of past discrimination to justify this program," Kasarda said.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area, the American Civil Liberties Union, Equal Justice Society and Bingham McCutchen — all of which are representing the coalition and NAACP in the motion to

intervene — disagree.

After Caltrans suspended its program in 2006, the number of women and minority-owned businesses awarded Caltrans projects plummeted from nearly 11 percent in 2005 to 2.2 percent in 2009, according to LCCR.

Caltrans commissioned an extensive disparity study in 2007 that documented discrimination against small businesses owned by women and minorities in federally funded contracts, said Oren Sellstrom, associate director of litigation at LCCR.

He described the program as a modest step to remedy this problem and said it only requires recipients of federal funds to show that they have acted in good faith to reach out and meet the goals of participation. The program does not involve quotas or guarantee anyone a contract, Sellstrom said.

Ryan said all these arguments completely miss the point the general contractors group is trying to make. It claims that Caltrans' disparity study reached misleading conclusions and raises questions about how the agency came up with the 13.5 and 6.75 percentages to be used as goals.

Caltrans ignored specific criteria — such as a requirement that it break out the research according to region — that it was supposed to use in its study, and must go back and do it right, Ryan said.

"It just set the stage for good faith efforts to be in limbo," he said. "It's just a mess and it needs to be cleared up."

dhyana_levey@dailyjournal.com