



### STANDARD OF REVIEW

As noted in the Initial Ruling, a party may move to dismiss because of lack of subject matter jurisdiction at any time during the course of an action. See Rules 12(b)(1) & 12(h)(3), Fed. R. Civ. P.; John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 588 F.2d 24, 27 (2d Cir. 1978). Once challenged, the burden of establishing a federal court's subject matter jurisdiction rests on the party asserting jurisdiction. See Thomson v. Gaskill, 315 U.S. 442, 446 (1942); Grafon Corp. v. Hausermann, 602 F.2d 781, 783 (7th Cir. 1979). Unlike a motion to dismiss pursuant to Rule 12(b)(6), however, dismissals for lack of subject matter jurisdiction are not predicated on the merits of the claim. See Exchange Nat'l Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976).

In a motion to dismiss for lack of subject matter jurisdiction, a court construes the complaint broadly and liberally in conformity with the principle set out in Rule 8(f), Fed. R. Civ. P., "but argumentative inferences favorable to the pleader will not be drawn." 5A C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d § 1350 at 218-19 (1990) ("Wright & Miller"). The mover and the pleader may use

affidavits and other materials beyond the pleadings themselves in support of or in opposition to a challenge to subject matter jurisdiction. See Land v. Dollar, 330 U.S. 731, 735 (1947); Exchange, 544 F.2d at 1130. However, litigants cannot waive subject matter jurisdiction by express consent, conduct, or estoppel. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); 13 Wright & Miller, § 3522 at 66-67.

#### PROCEDURAL BACKGROUND

In the action currently before this court, ECI challenges the constitutionality of (1) § 106(c) of the Surface Transportation Assistance and Uniform Relocation Act of 1987 ("STURAA"), as amended (Pub.L.No. 100-17, 101 Stat. 132 et seq.(1991)); (2) certain sections of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA")(Pub.L.No. 102-240, 105 Stat. 1914 et seq.), (3) administrative regulations accompanying the ISTEA, including 49 C.F.R. Parts 23 & 26, and (4) CDOT's Disadvantaged Business Enterprise ("DBE") Program.

Specifically, ECI alleges that by the actions of the defendants, CDOT, Richard Blumenthal, Connecticut Attorney General, and James F. Sullivan, Commissioner of CDOT: (1) it has been denied an equal opportunity to compete for federal highway contracts because of the race and gender of its

owners; (2) it was unduly burdened by the requirements to satisfy the DBE goals for past projects in which it bid successfully; and (3) CDOT is attempting to force ECI to remit 10% or more of the aggregate value of the contracts it performed due to their alleged failure to satisfy the DBE requirements.

CDOT previously moved to dismiss ECI's claim on the grounds that ECI lacked standing to challenge CDOT's minority/disadvantaged business enterprise program and that the Eleventh Amendment bars suits against a state in federal court unless the state explicitly consents to suit. In its ruling on that motion dated June 20, 2001, (the "Initial Ruling"), the court denied the motion finding that ECI had standing

based upon its challenge to the constitutionality of 49 C.F.R. Part 23 which serves as the structural framework of the disputed contracts between the parties in the State court action. ECI's injury is "particularized" as it alleges that 49 C.F.R. Part 23 is unconstitutional and CDOT's emphasis upon its requirements as the basis for its State court complaint are inappropriate. In addition, the injury is "actual" or "imminent" as CDOT's complaint alleges approximately \$1.7 million dollars in damages which it is attempting to withhold or recoup based upon violations of the requirements of 49 C.F.R. Part 23.<sup>2</sup>

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<sup>2</sup>The court also found no Eleventh Amendment bar under the exception to the Eleventh Amendment sovereign immunity doctrine announced in Ex Parte Young, 209 U.S. 123 (1908),

Subsequent to the Initial Ruling, CDOT amended its State court complaint. CDOT asserts that its amended State court complaint cannot be read as enforcing the DBE program; rather, the State now contends that "while CDOT continues to allege that ECI committed DBE fraud by submitting and using a sham DBE supplier, CDOT's allegations as to ECI's DBE fraud are grounded strictly upon ECI's fraudulent DBE submittals and false representations to CDOT." See State Defendants' Memorandum of Law In Support of Their Motion to Dismiss Plaintiff's Amended Complaint at 4 (hereinafter, State Def.'s Mem.).

#### DISCUSSION

CDOT now moves to dismiss ECI's constitutional claims on three grounds: (1) that ECI's claim is moot; (2) that ECI lacks standing to challenge the constitutionality of the DBE program; and (3) that ECI cannot challenge the constitutionality of the DBE program as a defense to CDOT's fraud action. None of these grounds have merit.

##### I. Mootness

CDOT argues that ECI's claim is moot because CDOT's

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which allows an action against a state seeking prospective injunctive relief to go forward.

amended State court complaint cannot be interpreted as "enforcing" the DBE program but sounds only in fraud. Specifically, it says that the complaint alleges that (1) ECI knowingly submitted fraudulent sworn documents to CDOT regarding its outstanding construction work in connection with the establishment of its bidding capacity and its eligibility to receive a contract award; (2) ECI knowingly submitted fraudulent documents to CDOT regarding ECI's intended and supposed fulfillment of CDOT contractual DBE requirements; and 3) ECI's multiple instances of bidding fraud and DBE fraud violated CUTPA. (State Def.'s Mem. at 8.) CDOT further states that it no longer seeks relief based on "ECI's thwarting of the DBE program." CDOT asserts that the relief ECI currently seeks in this action is thus not related to the State court fraud action and that the constitutionality of the DBE program has no relevance to that action. ECI responds that the amendment of CDOT's State court complaint does not render moot ECI's civil rights claims in this action.

Mootness is a threshold jurisdictional issue. See United States v. Alaska S.S. Co., 253 U.S. 113, 116 (1920). Federal courts lack the power to decide questions that cannot affect the rights of litigants in the case before them. See North Carolina v. Rice, 404 U.S. 244, 246 (1971). Under the

mootness doctrine, legal issues sought to be litigated must remain alive throughout the course of the litigation. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. at 189-90 (2000). The Supreme Court, however, has carved out an exception to the mootness doctrine that applies when the defendant voluntarily ceases the challenged activity. See id. at 189; City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289 (1982); Associated Gen. Contractors of Ct., Inc. v. City of New Haven, 41 F.3d 62, 65-66 (2d Cir. 1994). In such instances, unless the party claiming mootness can show that the challenged activity cannot reasonably be expected to resume, the claim is not moot. See Friends of the Earth, 528 U.S. at 189. The party asserting mootness, here CDOT, bears the "heavy burden" of persuading the court that the challenged conduct cannot reasonably be expected to start again. See id. CDOT has failed to meet this burden.

In the cases cited by CDOT, the challenged activity generally became moot as a result of forces beyond the control of either party. See, e.g., Park County Res. Council v. United States Dep't of Agric., 817 F.2d 609 (9th Cir. 1987). Unlike those cases, the challenged activity in the instant case, if it in fact has stopped, has done so as a result of CDOT's voluntary action. As a result, the burden of

persuading the court that the challenged activity will not resume falls to CDOT. See Friends of the Earth, 528 U.S. at 189. CDOT has, however, failed to make the necessary showing that it will not resume enforcement of the DBE program.

Assuming arguendo, that the current State court fraud action is not an enforcement of the DBE program, CDOT offers nothing other than its own assertion that it will not restore the claims the court previously found constituted an attempt to enforce the DBE program, see Initial Ruling, or take other actions to enforce the DBE program against ECI. This assertion does not satisfy CDOT's heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start again.

## II. Standing

CDOT next maintains that ECI's constitutional claims are barred for lack of standing by Article III of the United States Constitution which limits the jurisdiction of federal courts to actual cases and controversies. CDOT argues that because ECI's claim "exists only as a response to CDOT's Fraud Action" and because CDOT does not seek in that action to enforce the DBE program, ECI has no basis for standing. In other words, CDOT claims that because it no longer seeks to withhold or recoup money damages from ECI due to its failure

to satisfy the DBE program and does not rely upon 49 C.F.R. Part 23 as the structural framework for its fraud action, ECI cannot show any threat of concrete and imminent injury traceable to the fraud action. CDOT also argues that any injuries ECI might sustain in the State court action could not be redressed by a favorable decision from this court and thus any decision by this court would be merely advisory.

In opposition, ECI contends that there has been no substantive change in CDOT's State court claim since the court's Initial Ruling because CDOT is still attempting to enforce the DBE program through both the State court fraud action and by actions outside of that litigation.

As stated in the Initial Ruling, under the law of standing a plaintiff bringing a claim in federal court must have suffered a "concrete and particular" injury. In addition, there must be a causal connection between the injury and the challenged activity, and the injury must be susceptible of being addressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). The standing issue must be resolved without regard to the merits of the substantive claims. Bordell V. General Elec. Co., 922 F.2d 1057, 1060 (2d Cir. 1991).

In determining whether a party has standing to bring a

claim in federal court, the court "accept[s] as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501 (1975); accord Pennell v. City of San Jose, 485 U.S. 1, 7 (1988); Thompson v. County of Franklin, 15 F.3d 245, 249 (2d Cir. 1994). And, "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." Lujan, 504 U.S. at 561 (alterations in original). In addition, the Supreme Court has held that "[w]hen the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." Id. at 561-62.

To establish standing, ECI alleges in its complaint that it has suffered a particularized, imminent injury because (1)

since July, 1996, the mandatory DBE subcontractor set-aside requirements have not applied to prime contractors who were themselves DBE's; (2) by requiring non-DBE prime contractors to use DBE subcontractors and vendors based on racial and gender based preferences, the program invidiously discriminates against white-owned contractors such as ECI; (3) by requiring non-DBE prime contractors to use DBE subcontractors for at least 10% of any contract, ECI was precluded from using its own forces, or other non-DBE subcontractors and vendors, at a lesser cost; (4) ECI was denied equal opportunities in competing for such contracts, and was unduly burdened by satisfying the DBE requirements for its contracts; (5) CDOT is currently attempting to enforce forfeiture provisions in the DBE program based on alleged shortfalls by ECI; (6) the defendants have characterized ECI's alleged violations of the DBE program as fraudulent, thereby damaging ECI's reputation; (7) the State has pressured CDOT into withholding overdue contract payments and contract awards to ECI; and (8) ECI has lost work on other, non-public projects due to the defendants' actions.

The court finds that ECI has standing to challenge the constitutionality of the DBE program. For the purposes of this motion, however, the court need not determine whether the

state court action constitutes an enforcement of the DBE program because ECI has sufficiently established an imminent, particularized injury stemming from the State's enforcement of the DBE program irrespective of the state court action.

ECI has alleged numerous ways in which the State can enforce the DBE program. These include: (1) disqualifying ECI from performing public works contracts with the state for two years; (2) withholding contract funds due ECI; (3) attempting to void contracts completed by ECI; and (4) issuing investigative subpoenas. These are examples of concrete, imminent injuries that could have severe consequences for ECI.

The court concludes that the State's enforcement of the DBE program can cause ECI particularized injuries and that "a judicial decree directing [the State] to discontinue its program would 'redress' those injuries." See *Northeastern Florida Contractors v. City of Jacksonville*, 508 U.S. 656, 666, n. 5.

### III. Constitutional Challenge as a Defense

In its final argument challenging ECI's right to bring its claims, CDOT posits that the constitutionality of the DBE program has no bearing on CDOT's fraud action against ECI because that action is based on ECI's knowing submission of false documents to CDOT regarding ECI's intended and supposed

fulfillment of contractual DBE requirements. CDOT argues that ECI cannot defend this fraudulent conduct as a permissible response to an unconstitutional regulation because such self help is impermissible. See Bryson v. United States, 396 U.S. 64 (1969)(stating that a defendant does not have the right to defend against the government's enforcement of an allegedly unconstitutional statute by committing fraud); Dennis v. United States, 384 U.S. 778 (1966)(same).

ECI responds that CDOT's characterization of its conduct and claims is incorrect and that the cases that CDOT primarily relies on involve self-help responses that violated criminal laws. Specifically, in both Dennis and Bryson, the defendants were charged with either conspiring to submit false statements under 18 U.S.C. § 371 or submitting false statements under 18 U.S.C. §1001, based on their submissions of false "non-communist" affidavits to the National Labor Relations Board. In defense of these charges, the defendants challenged the underlying statute that required them to submit the affidavits. Significantly, in both these cases the elements of the charged crimes could be proved without reference to the constitutionally-challenged statute. See Bryson, 396 U.S. at 68-69; Dennis, 384 U.S. at 867. This is not the case here. Unlike the situations in Dennis and Bryson, CDOT's State court

complaint is significantly intertwined with the DBE program whose constitutionality is challenged in this action and reference to the challenged program is necessary to finding that ECI committed fraud as alleged in the State court action. See Goland v. United States, 903 F.2d 1247, 1254 (9<sup>th</sup> Cir. 1990).

At best the self-help argument is an issue that can be raised and resolved in the State court action. It does not bar ECI from bringing its civil rights claims in this court.

CONCLUSION

For the foregoing reasons, CDOT's motion to dismiss [doc. # 74] is DENIED.

SO ORDERED this        day of November, 2001, at Bridgeport, Connecticut.

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Alan H. Nevas  
United States District Judge