

***Rothe Development Corp. v. Dept. of Defense***  
**545 F.3d 1023 (Fed. Cir. 2008)**  
**(U.S. Court of Appeals for Federal Circuit )**

On November 4, 2008, the U.S Court of Appeals for the Federal Circuit issued a decision declaring the Department of Defense's (DOD's) 1207 Program unconstitutional. The 1207 Program, codified at 10 USC 2323, is one of the programs that DOD uses to assist it in meeting its Small Business Administration goals.

Before considering the specifics of the decision, it is important to understand a few general points about the Federal Circuit's opinion. First, while the Federal Circuit did strike down the 1207 Program, it also signaled that federal minority contracting programs continue to be constitutional when properly enacted and supported by Congress with proper evidence. Second, the court strictly limited its decision to the 10 USC 2323 and the specific evidence available in this case.

Against that background, the specific issues raised in the case include:

- The court, following the Supreme Court in *Croson* and *Adrand* and other decisions, held that before enacting (or reenacting) a race-conscious minority contracting program, Congress must have a “strong basis in evidence upon which to conclude that the remedial action [is] necessary.” *Rothe Development Corporation v. Dept. of Defense*, 545 F.3d 1023, at 1036 (*internal quotations and citations omitted*).
- The court did opine on issues related to statistical evidence of discrimination. Specifically, the court made a number of statements about the relative merits of empirical data in demonstrating the existence of discrimination. In brief, the court:
  - Agreed with the district court that Congress should rely on the most recent available data and declined to set an absolute limit on the age of data.
  - Discussed (without deciding) the issue of how courts should determine whether evidence should be considered to be “before Congress.” The court did seem to suggest that mere mention of a study in a floor statement might not be sufficient to show that the study was “before Congress when the program was enacted, and suggested that Congressional findings and hearings are an important part of the deliberative process.
  - The court clearly held that in order for Congress to enact a race-conscious program, it is not necessary that Congress have evidence demonstrating discrimination by the federal government itself.
  - Discussed the quality and quantity of disparity study methodologies Congress would need to have before it in order to demonstrate a strong basis in evidence of the need for remedial efforts. While the court discussed these issues and found the evidence lacking in this particular case, it was careful not to make any absolute pronouncements about what methodologies might be deemed sufficient or how many studies would be necessary to sustain a similar program. Indeed,

the court specifically stated “[w]e stress that our holding is grounded in the particular items of evidence offered by DOD and relied on by the district court in this case, and should not be construed as stating blanket rules, for example about the reliability of disparity studies.” *Rothe* at 1049. Furthermore the court stated that “we still think that Congress need not amass evidence of discrimination in all fifty states to meet its burden.” *Rothe* at 1046.

- The injunction in this case was handed down on February 26, 2009 and is quite broad. It enjoins not just the prime contracting tools at issue in *Rothe* but all other provisions of the version of 10 USC 2323 enacted 2006 including those providing assistance to Historically Black Colleges and Universities (HBCUs) and other minority-serving institutions of higher education for science, engineering, research and development.

In summary, the Federal Circuit’s holding in the *Rothe* case provides good information about one court’s views on the constitutional questions involved in evaluating federal affirmative action programs. Even so, it remains unclear exactly how other courts beyond the Federal Circuit will treat this case.