



## Column: DynaLantic Decision

### Court ruling good and bad for 8(a) program

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As reported in the last issue of *Set-Aside Alert*, a federal court in the District of Columbia recently decided a case that has made waves in the 8(a) community. The decision, *DynaLantic Corp. v. U.S. Dept. of Defense*, involved questions about the constitutionality and implementation of the SBA's 8(a) program. The court's ruling is a mixed bag for 8(a) firms, with both positive and negative elements and several unanswered questions.

First, the good news. The judges found that 8(a) is constitutional "on its face."

This is an important ruling in light of the Federal Circuit's 2008 decision in *Rothe Development Corp. v. Dept. of Defense*, which found a statute authorizing DOD to operate a race-based contracting program was unconstitutional because there was insufficient statistical evidence of discrimination. It was theorized that *Rothe* could be used to challenge the constitutionality of 8(a), but such a challenge was directly rebuffed in *DynaLantic*.

Indeed, the *DynaLantic* court found that the government had identified a compelling interest for 8(a) and had backed up that interest with a strong basis in evidence showing the program was needed to remedy discrimination. The court noted strong evidence of discrimination in construction, as well as in architecture and engineering, security guards, computer technology, janitorial/maintenance services, goods contracts and professional services.

The bad news is that the *DynaLantic* court also found 8(a) to be unconstitutional "as applied" by DOD in the military simulation and training industry. The program did not withstand strict scrutiny because the government could not produce any specific evidence of discrimination in that industry.

It was not enough that the government had produced significant evidence of discrimination to justify 8(a) as a whole; the lack of specific evidence of discrimination in

military simulation and training led the court to conclude that 8(a) was unconstitutional as applied to that industry.

As a result, effective Aug. 15, DOD suspended all 8(a) set-asides, including options under existing 8(a) contracts, in the military simulation and training industry.

Because the court found 8(a) to be unconstitutional only in the narrow circumstance of military simulation and training industry procurements at the DOD, there should be no immediate impact on 8(a) set-asides in other industries or at other agencies.

In fact, the court's decision can be read as support not only for 8(a) in general, but also for 8(a) set-asides in several industries, particularly construction, for which the court indicated that a sufficient basis in evidence already exists.

At the same time, *DynaLantic* raises a number of questions that are already vexing the 8(a) community.

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For example, the decision does not indicate how the government must satisfy the evidentiary basis needed to support an 8(a) set-aside in a particular industry: Is such a burden met only through fact-finding hearings presented before Congress, as the ruling may be read to imply, or can individual agencies satisfy the burden through other means?

Moreover, because *DynaLantic* dealt with the race-based nature of 8(a), how should the decision impact Native American-owned 8(a) firms? Arguably, the decision should not apply to Native American-owned 8(a) firms because they participate in 8(a) for reasons other than the racial factors addressed

in *DynaLantic*.

*DynaLantic* also could be a roadmap for future challenges against the use of 8(a) set-asides involving other agencies and different industries.

However, it should be noted that the *DynaLantic* case began in 1995 and took nearly 20 years to work its way through the legal system. As such, it is unlikely that "copycat" challenges to 8(a) set-asides in other industries, if filed in response to *DynaLantic*, would be resolved anytime soon.

A more immediate concern for the 8(a) community is that the unanswered questions from *DynaLantic* may cause confusion among agency officials responsible for set-aside decisions, especially about whether the agencies must have specific evidence of discrimination in a particular industry before using the 8(a) program. Such confusion, in turn, may foster reluctance to use 8(a) in other industries.

Although the Justice Department could appeal and the court may clarify its intent, the 8(a) community should not be passive.

Industry groups such as the Native American Contractors Association already are addressing the impact of the ruling at the SBA, DoD and elsewhere.

The 8(a) community members must be proactive to educate their counterparts in government about the narrow applicability of *DynaLantic* and about helpful takeaways in the decision that support the continued use of 8(a) in all industries other than military simulation and training.

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