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### ***Rothe v. Department of Defense: Potential Impact on Preference Laws and Set-Asides***

#### **Background**

On November 4, 2008, the U.S. Court of Appeals for the Federal Circuit voided a federal provision that required federal defense contracts to set a goal of awarding five percent of contracts each fiscal year to small disadvantaged companies. The unanimous Court decision found that Section 1207 of the National Defense Authorization Act of 1987 incorporates a racial preference; therefore it is unconstitutional as it violates the right to equal protection as covered under the due process clause of the Fifth Amendment.

Because the provision incorporated a racial preference, strict scrutiny was applied to its review, which means that a statute must be found to serve a compelling government interest. The Court ruled that Congress did not possess sufficient evidence that minority groups were the victims of nationwide discrimination in Department of Defense contracting; therefore the remedial measures contained in Section 1207 were unnecessary.

#### **Potential Effect on State Preference Laws**

The Court's decision in *Rothe v. Department of Defense* currently applies only to Defense contracting pursuant to the National Defense Authorization Act of 1987. However, the Court's application of strict scrutiny in evaluating the preference practices of this federal program may have implications for state preference laws. It is possible that future challenges to state preference laws may result in this application, and therefore states must be prepared to demonstrate that these laws are designed to remedy proven past racial, gender, or veteran discrimination.

NASPO encourages all state members to consult with their Attorneys General offices to determine the potential impact of this Court decision on their states' preference or set-aside programs.

## **Resources**

- ***Rothe Development Corporation v. Department of Defense***, U.S. Court of Appeals for the Federal Circuit: [www.cafc.uscourts.gov/opinions/08-1017.pdf](http://www.cafc.uscourts.gov/opinions/08-1017.pdf)
- “**Court decision voids major small business contracting law**”, [GovExec.com](http://www.govexec.com/story_page.cfm?articleid=41367&dcn=todaysnews). [http://www.govexec.com/story\\_page.cfm?articleid=41367&dcn=todaysnews](http://www.govexec.com/story_page.cfm?articleid=41367&dcn=todaysnews)
- “**Defense Department Contract Law Unconstitutional, Court Says**”, [FindLaw](http://news.findlaw.com/andrews/bf/gov/20081120/20081120_rothe.html). [http://news.findlaw.com/andrews/bf/gov/20081120/20081120\\_rothe.html](http://news.findlaw.com/andrews/bf/gov/20081120/20081120_rothe.html)
- “**Court: DoD minority contracting program unconstitutional**”, [Federal Times.com](http://www.federaltimes.com/index.php?S=3810166). <http://www.federaltimes.com/index.php?S=3810166>

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