

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1922

IN THE MATTER OF:

Served November 21, 1978

Application of SUGGS TRANSPORTATION )  
SERVICE, INC., for Temporary )  
Authority to Perform Charter Opera- )  
tions Pursuant to Contract -- )  
Department of Agriculture, Science )  
and Education Administration )

Case No. AP-78-37

By Order No. 1895, served September 29, 1978, the application of Suggs Transportation Service, Inc. (Suggs), for temporary authority to provide charter operations pursuant to contract with the United States Department of Agriculture, Science and Education Administration (USDA) was denied. On October 23, 1978, Suggs filed an application for reconsideration of said order. 1/

The involved contract was negotiated through the Small Business Administration (SBA) "8A" program which is responsible, inter alia, for promoting the participation of minority business enterprises in government procurement. Beltway Limousine Service, Inc. (Beltway), a certificated carrier which opposed Suggs' application, holds authority to provide the requested service, thus precluding the Commission from granting Suggs' application because of Title II, Article XII, Section 4(d)(3) of the Compact, specifying as a condition to a grant of temporary operating authority that there be ". . . no carrier service capable of meeting such need . . . ."

In support of its petition for reconsideration, Suggs asserts that, once the transportation contract was determined by USDA to be suitable for treatment under the "8A" program, Beltway, which is not "8A" certified, was no longer capable of serving USDA within the meaning of Title II, Article XII, Section 4(d)(3) of the Compact, thus removing the statutory impediment to the grant of temporary authority to Suggs. Suggs contends that, contrary to the language of Order No. 1895, the procurement regulations are discretionary as far as the SBA is concerned, but are binding

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1/ Included with the application for reconsideration were supporting statements from the Minority Trucking-Transportation Development Corp. (MTTDC), USDA Science and Education Administration, and letters from Members of Congress Marjorie S. Holt and Walter E. Fauntroy.

on the Commission. 2/ Suggs also argues that the SBA program is federal law and, under the doctrine of "Federal Supremacy", the SBA program cannot be hampered or burdened by "state or local policies" which are void as being in conflict with federal law pursuant to the supremacy clause of the Constitution. In addition, Suggs, MITDC and USDA argue that the SBA program is not necessarily limited to minority business enterprises and that the Commission's discussion of this issue raises questions of preferential treatment based on minority ownership that are not really in existence.

There is no doubt that the SBA has the general ability to enter contracts or to withdraw contracts from the competitive bidding process, Fortec Constructors v. Kleppe, 350 F.Supp. 171, 173 (D.C.D.C. 1972), and federal courts have heretofore upheld the constitutionality of the "8A" program, Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 703-704 (1973), cert. denied 415 U.S. 914, 94 S.Ct. 1410 (1974). We do not find, however, any statutory authority that disables Beltway from providing service to USDA. Operating within the constraints of the Compact, as we must, the validity of the "8A" program, standing alone, cannot overcome the finding that Suggs has not met the Compact criteria for temporary authority.

Applicant states that ". . . the Federal Government has the power to fix the terms of its contracts. It may contract with whom it pleases and upon such terms as it desires." This general principle has long been accepted in situations where conflicting statutory criteria were absent. 3/

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2/ Traditionally, this has not been true. For example, procurement regulations awarding contracts to a low bidder cannot bind the Commission to issue authority solely on the basis that a party is the lowest bidder because such action would replace the statutory standard that we are mandated to apply. The Commission has refused to accept this argument in the past. Cf. Order No. 1671, served April 13, 1977. The Interstate Commerce Commission has consistently held the same way, see Wellspeak Common Carrier Application, 1 M.C.C. 712 (1937), even where a carrier is the lowest bidder on a government contract, Gray Common Carrier Application, 69 M.C.C. 695 (1957), and in other cases where the government is the user of the service, C&D Transp. Co., Inc., Extension - New Orleans to Orange, 76 M.C.C. 265 (1958). We can see no logical difference to distinguish procurement under the "8A" program.

3/ A potential contractor, however, must be qualified, and in cases where the potential contractor is subject to economic regulation, one element of such qualification is to hold an appropriate regulatory license.

Ray Baillie, supra, at 709, citing Perkins v. Lukens Steel Co., 310 U.S. 113, 127, 60 S.Ct. 869, 876, 84 L.Ed. 1108 (1939). In the instant proceeding, however, the contract entered into between SBA and USDA cannot be used to circumvent the Commission's regulatory jurisdiction as established by the Congress acting as the local legislature for the District of Columbia, U. S. Constitution art. I, Section 8, Clause 17, and as the national legislature, U. S. Constitution art. I, Section 10, Clause 3.

The Commission has been authorized to regulate certain interstate commerce by Congressional authorization evolving, in part from art. I, Section 8, Clause 3 of the Constitution, and, while the Commission is not a federal agency, it does administer an interstate compact which is federal law, and it has succeeded to the jurisdiction of the Interstate Commerce Commission to regulate for-hire passenger transportation in interstate commerce in the Metropolitan District.

Applicant's assertion of federal supremacy, demanding implementation of the "8A" program notwithstanding the existence of the Compact, is misplaced because of the federal nature of the Compact. Suggs' reliance on Perez v. Campbell, 402 U.S. 637 (1971), illustrates this misperception of a federal versus state conflict inasmuch as the case concerns the validity of an Arizona law as opposed to the effectiveness of the federal Bankruptcy Act. The Supreme Court holding ". . . that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause", Perez, supra, at 652, has no applicability here.

Congress, acting in conjunction with the signatory states, has given the Commission jurisdiction coextensive with the Metropolitan District for the regulation and improvement of transit and the alleviation of traffic congestion within the Metropolitan District on a coordinated basis. Compact, Title I, Article II. Changing the Compact's entry requirements in order to consider such factors as promotion of minority businesses presented by the SBA's contract with Suggs is not a permissible area for Commission inquiry in considering temporary authority applications pursuant to this jurisdiction. In McLean Trucking Co. v. United States, 321 U.S. 67, 79-80 (1944), the Supreme Court stated that:

Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. . . . The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference

within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot without more ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicated a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned.  
[Emphasis added.]

Recently the Supreme Court found that the "public interest" criterion in the Federal Power Act and the Natural Gas Act is not a broad license to promote the general public welfare, specifically with regard to the elimination of employment discrimination. N.A.A.C.P. v. F.P.C., 425 U.S. 662, 96 S.Ct. 1806 (1976). In O-J Transport Co. v. United States, 536 F.2d 126 (1976) cert. denied 429 U.S. 960, a decision reviewing the ICC disposition of an application for a certificate of public convenience and necessity, the United States Court of Appeals for the Sixth Circuit found that "[t]he Interstate Commerce Commission is primarily concerned with insuring that the public has available for its use systems of transportation which are safe, adequate, economical and efficient . . . . When considerations other than those strictly concerned with transportation are found nevertheless to affect the transportation-related convenience and needs of the public they may be considered by the Commission." O-J, supra, at 131. The Court went on to say that:

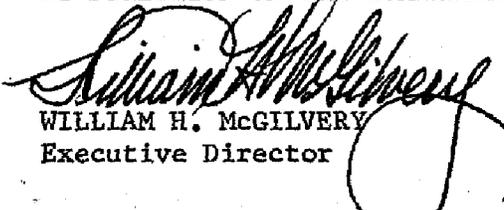
The skills of the Commission's staff are not those required to implement an affirmative action program designed to enlarge the opportunities of minority-owned and operated businesses. The public interest which Congress intended the Interstate Commerce Commission to promote and protect is one related to transportation; not the more general public interest in the sense of the general welfare . . . . This court is aware of the problems which minority-owned businesses encounter in getting established. This is particularly true in the field of motor transportation . . . . Nevertheless, Congress has not chosen to require the Commission to consider minority ownership as a separate factor in determining public convenience and necessity and it is beyond our authority to impose such a requirement. O-J, supra, at 132-133.

Were we concerned with an application for a certificate of public convenience and necessity in this proceeding, it is questionable as to what weight, if any, we could give to the fact that the involved contract was negotiated through the SBA in furtherance of a program promoting small business enterprises. In dealing with an application for temporary authority, however, we may not even reach the question of whether the enhancement of a small business promotes the public convenience and necessity. The language of Title II, Article XII, Section 4(d)(3) of the Compact speaks of only two precise criteria, both of which must be met before temporary authority may be granted. There is no purpose served by inquiry into other considerations after a determination that an existing carrier is capable of meeting the immediate and urgent need for service.

Upon consideration of the record in this proceeding and the application for reconsideration, the Commission finds no issues of fact or arguments of law which are contrary to the findings in Order No. 1895. Accordingly, the application must be denied.

THEREFORE, IT IS ORDERED that the application of Suggs Transportation Service, Inc., for reconsideration of Order No. 1895 be, and it is hereby, denied.

BY DIRECTION OF THE COMMISSION:

  
WILLIAM H. MCGILVERY  
Executive Director