UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 51

September Term, 2009

DAVID A. BRAMBLE, INC., ET AL.

v.

DEPARTMENT OF GENERAL SERVICES, ET AL.

Eyler, James R.,
Kehoe,
Moylan, Jr., Charles E.
(Retired, specially assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: March 22, 2010

This case arises out of application of the State Minority Business Enterprise (MBE) program to the competitive bid procedure for awarding State contracts. David A. Bramble, Inc., contractor, and John W. Tieder, Inc., subcontractor (hereinafter collectively "Bramble"), appellants, submitted a bid which did not meet the MBE goals for the project in question and requested a partial waiver of those goals. The Department of General Services, appellee, denied the waiver. Bramble filed suit in the Circuit Court for Kent County against DGS and Secretary Alvin C. Collins (hereinafter collectively "DGS"). After a non-jury trial, the circuit court dismissed the suit on the ground that Bramble failed to exhaust administrative remedies.

Much of the argument in this case focuses on constitutional issues and the standard of review applicable to the State agency's action. Both parties agree that a race and/or gender conscious program, including the State MBE program, is subject to constitutional review under a heightened standard. Both parties agree that racial classifications imposed by federal or state governments comply with the United States Constitution "only if they are narrowly tailored measures that further compelling governmental interests," (strict scrutiny). Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Both parties agree that gender classifications, to pass muster under the United States Constitution, must have "an exceedingly persuasive justification," serve important governmental objectives, and be substantially related to the achievement of those objectives (intermediate scrutiny) . Miss. Univ. for Women v. Hogan, 458 U.S. 718,724 (1982); United States v. Virginia, 518 U.S. 515,524 (1996). Lastly, DGS does

not dispute Bramble's assertion that gender based classifications, to pass muster under the State Constitution, must meet the strict scrutiny test. State v. Burning Tree, Inc., 315 Md. 254, 295 (1989). Bramble asserts that the constitutional standards set forth above apply to DGS's action in this case, and DGS asserts that they do not.

We conclude that the court erred in dismissing the case on the ground of failure to exhaust administrative remedies. We also conclude, however, that the constitutional standards do not apply to DGS's action. Thus, we affirm but for a reason other than that given by the circuit court.

Background

In August, 2007, DGS solicited competitive sealed bids for a project at Sandy Point State Park which consisted of resurfacing roads and parking lots and installing lighting ("the project"). The procurement was pursuant to Maryland Code (2006 Repl. Vol.), § 13-103 of the State Finance & Procurement Article ("State Fin. & Proc.") and COMAR 21.05.02. The procurement was subject to Maryland's MBE program. State Fin. & Proc. §§ 14-301 to 14-305. An MBE is an entity organized to engage in commercial transactions that is at least 51% owned and controlled by one or more individuals who are "socially and economically disadvantaged," presumptively including African Americans, American Indians/Native Americans, Asians, Hispanics, physically and mentally disabled persons, and women. State Fin. & Proc., § 14-301(f) and (i)(1)(i).

The solicitation for bids for the project contained goals for participation by MBEs. The goals were set at a pre-bid meeting held on September 11, 2007, attended by representatives from DGS, representatives from other agencies, representatives from Sandy Point State Park, and representatives from contractors, including Bramble. The MBE goal set at the meeting was an overall goal of 25%, with a "split goal"of 7% for African American owned businesses, 10% for women owned businesses, and 8% for "other." The percentage goals for the project matched the percentage goals set forth in State Fin. & Proc., § 14-302 ("a minimum of 7% of the unit's total dollar value of procurement contracts is to be made directly or indirectly from . . . African American-owned businesses"; "a minimum of 10% of a the unit's total dollar value of procurement contracts is to be made directly or indirectly from . . . women-owned businesses"; and "an overall minimum of 25% of the unit's total dollar value of procurement contracts is to be made directly or indirectly from all certified minority business enterprises."). Section 14-302 requires State agencies to structure procurement procedures "to try to achieve" the stated goals, State Fin. & Proc. § 14-302 (a)(1), by "using race-neutral measures to facilitate minority business enterprise participation in the procurement process." State Fin. & Proc. § 14-302(a)(4).

The solicitation for bids for the project also provided that, if a bidder made a good faith effort to achieve the goal but was unable to do so, the bidder could request a waiver.

In September, 2007, DGS received 7 bids. According to DGS, 5 of the 7 met the MBE goal. Bramble, paving contractor, was the low bidder at $807,485 but committed to 15.88% MBE participation rather than 25% and requested a waiver of the remainder of the goal and the 10% women subgoal. As part of its request for a waiver, Bramble revised its committed MBE participation to 13.89%, consisting of 12% African American owned participation and 1.89% women participation. DGS requested Bramble to submit information to support its waiver request, and Bramble complied.

According to Bramble, in an effort to meet the MBE goal, it focused on electrical subcontractors because 70% of the project was paving, and Bramble was a paving contractor. Bramble sent 77 letters to potential subcontractors, and Paul Bramble and Sarah Creighton, Bramble's employees, testified that they also made phone calls to solicit quotes from MBEs. KAP Contracting Co., a woman owned business in Fruitland, Maryland, submitted a quote for the parking lot lighting. According to Paul Bramble, his practice was to evaluate subcontractors on the basis of price but he would use an MBE if the price differential between an MBE and non-MBE were not too great. In its bid on the project, Bramble included a low quote in the amount of $163,500 from a non-MBE subcontractor for the lighting portion of the project, *i.e.*, John W. Tieder, Inc., rather than use a quote from KAP Contracting Co., in the amount of $252,400.[1] Bramble concluded that the difference in price was too great. If Bramble had used the higher quote, Bramble

[1]These numbers were taken from the circuit court's opinion.

would not have been the low bidder. Paul Bramble testified that, historically, Bramble was granted a waiver when there was a "big discrepancy" between an MBE and a non-MBE quote.

By letter dated November 2, 2007, Rashurn Harrison, a procurement representative for DGS, advised Bramble that, after reviewing the information provided to show efforts made to achieve the MBE goal, the waiver request was denied. The letter quoted a portion of COMAR 21.11.03.11(B) which states:

> A waiver of a certified MBE contract goal may be granted only upon a reasonable demonstration by the bidder or offeror that certified MBE subcontract participation was unable to be obtained, or was unable to be obtained at a reasonable price in the appropriate MBE classifications, and if the agency head or the agency head's designee determines that the public interest is served by a waiver. In making a determination under this section, the agency head or the agency head's designee may consider engineering estimates, catalogue prices, general market availability, and availability of certified MBEs in the area the work is to be performed, other bids or offers and subcontract bids or offers substantiating significant variances between certified MBE and non-MBE cost of participation, and their impact on the overall cost of the contract to the State and any other relevant factor.

The letter concluded that Bramble had not "reasonably demonstrated that [it was] unable to obtain the MBE contract goal for this solicitation," explaining that there were "various work categories (i.e., hauling, electrical) where more MBE companies could have been solicited,...there [were] a great number of available certified MBEs in the areas in which the work is to be performed as evidenced by the fact that other bidders achieved the entire MBE contract goal, . . . [and] the public interest will not be served by granting this waiver."

Bramble objected to the denial of the waiver and requested a meeting. On December 11, 2007, Bramble representatives met with DGS representatives. By letter dated February 6, 2008, Mark A. Pemberton, Assistant Secretary of the Office of Procurement & Logistics, advised Bramble that its waiver request was denied. The letter, in pertinent part, advised:

> I have reviewed the information submitted by David A. Bramble, Inc. ("Bramble") in support of your request for an 11.11% waiver of minority participation for the above referenced procurement. This waiver request included an 8.11% waiver of the woman owned business sub-goal. The basis for the waiver request is that Bramble sent out 77 letters; that one bid from a single subcontractor performing electrical work was too high; and, that Bramble did not subcontract more of its hauling work because it wanted to do that work itself.
>
> I have determined that for this procurement, Bramble has not made a reasonable demonstration that it was unable to obtain the stated MBE contract goal. Therefore, this determination affirms the rejection of Bramble's bid, dated November 2, 2007, from Rashurn Harrison, Procurement Representative.
>
> There are several factors that led me to this conclusion.
>
> First, the construction activities involved in this solicitation contain activities for which there are sufficient certified MBEs. Five of the seven bidders for this project stated that they were able to find sufficient MBE subs to achieve the contract goal. These included MBE subcontractors in the areas of trucking and hauling, electrical work, excavation, equipment supply and pavement marking. This indicates that there is general market availability.
>
> You have stated that Bramble sent 77 letters of solicitation to potential subcontractors.[2] Upon review of those letters, I have observed that many were sent to subcontractors that are not certified by MDOT; none were sent to an electrical subcontractor; and that many of the letters were sent to hauling or trucking firms located extremely far from the project location.

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[2]We received only 71 letters.

> Despite the cost factors and business decisions provided in your letter dated October 5, 2007, it is my determination that further meaningful efforts could have been made in attempt to meet the stated procurement goal. Accepting your waiver would be prejudicial to other bidders who made appropriate efforts and successfully obtained MBE participation in contract.
>
> Other than the proposal from KAP Contracting Co., Bramble provided no documentation or evidence of any additional solicitation of MBE electrical companies. I was also told that the electrical sub-contractor you proposed to do only 5.56% of the work (R.K. Construction Service) was brought to your attention by John W. Tieder, Inc. and through no effort of your own. The scope of work related to electrical/lighting was substantial enough to warrant further outreach to certified MBE contractors, of which there is an ample amount.
>
> Thus, for all the above reasons, I am not persuaded that there has been a reasonable demonstration by Bramble that certified MBE subcontract participation was unable to be obtained, or was unable to be obtained at a reasonable price or in the appropriate MBE classifications. Nor am I persuaded that the public interest would be served by a waiver. Accordingly, the waiver request is denied.
>
> In accordance with COMAR 21.11.03.14, a protest may not be filed concerning this decision.

On December 20, 2007, Bramble filed a complaint in circuit court against DGS, seeking declaratory and injunctive relief, including a temporary restraining order, to prevent the contract being awarded to another bidder. The circuit court granted the temporary restraining order. DGS moved to dismiss the complaint, and Bramble filed a motion for preliminary injunction. The court granted the preliminary injunction. DGS appealed to this Court, but that appeal was dismissed after the circuit court dismissed the complaint, and the record combined with the record in this appeal.

The complaint was amended twice, and the operative complaint was the verified second amended complaint, in which Bramble sought declaratory and injunctive relief.

Bramble sought a declaration that DGS was required to grant a waiver because (1) Bramble demonstrated reasonable efforts to achieve the MBE goals under COMAR 21.11.03.11; (2) the rejection of the waiver request was a violation of Articles 24 (due process) and 26 (equal protection) of the Maryland Declaration of Rights; (3) the rejection of the waiver request was a violation of Bramble's due process and equal protection rights under the Fourteenth Amendment of the United States Constitution; (4) the rejection of the waiver request was a violation of 42 U.S.C. §§ 1981, 1983, and 2000d, and; (5) the rejection of the waiver request was arbitrary, capricious, and an abuse of discretion. Bramble requested an order awarding it the contract, awarding it attorney's fees pursuant to 42 U.S.C. § 1988, and costs, expenses, and damages pursuant to 42 U.S.C. § 2000d. Bramble also requested the court to enjoin DGS from awarding the contract to another bidder and ultimately to award the contract to it. In its brief in this Court, Bramble summarizes the basis for its claims by stating that

> DGS' MBE preference program, as applied to Bramble and Tieder in denial of its waiver request, was not narrowly tailored ; that is: (a) DGS insufficiently implemented race-neutral methods to obtain its MBE goal; (b) DGS was insufficiently flexible in granting waivers; (c) DGS failed to establish its MBE goals for the project by considering the relationship between MBE goal setting to the relevant business market; and (d) DGS did not consider the rights of third parties.

Prior to trial, both parties filed various motions. They included Bramble's motion for partial summary judgment, Bramble's motion for separation of questions, and DGS's motion for summary judgment, all of which the court denied. The court's reasons for the

denial are not clear. The primary issue raised by the motions was whether Bramble's federal civil rights claims were subject to review under a strict scrutiny standard.

Another of the pre-trial motions was a motion in limine by DGS asking the court to exclude evidence, if offered by Bramble, in three categories. The first category was evidence that DGS did not properly set the MBE goal for the project in question on the ground that Bramble had waived any such claim by not raising it prior to bid. The second was evidence relating to past discrimination against minorities or evidence of discriminatory conduct by non-minorities on the ground that DGS's actions were not racial classifications, and thus, the evidence was irrelevant. The third was evidence relating to DGS' review of Bramble's waiver request, other than the materials provided by Bramble, on the ground that only the materials that were before the agency were relevant.

Bramble deposed several witnesses, including DGS representatives who were involved in the project. Bramble argued that the evidence was relevant to determining how the goals were set for the project in question. Bramble asserted that DGS made racial and gender classifications when it established the goals and that the allegations in the second amended complaint corresponded to the factors to determine whether a race conscious program met the strict scrutiny test. According to Bramble, the program was not administered in a manner that satisfied the test. The evidence proffered was that DGS, in setting the goals for the project; (1) did not consider race-neutral methods to

increase MBE participation; (2) did not make an individualized assessment whether it was necessary to not grant Bramble's waiver request to serve a compelling governmental interest; (3) did not take into account MBEs that were available, willing and able to perform work at the time the goals were established, and; (4) did not consider the rights of third party non-MBEs or how they might be harmed. Bramble noted that the above evidence corresponded to the four factors relevant in determining whether a race conscious program met the strict scrutiny test, as set forth in United States v. Paradise, 480 U.S. 149, 171 (1987).

The court granted DGS' motion and held that the evidence was inadmissible on the ground, at least in part, that the strict scrutiny standard did not apply.

In November, 2008, the case was tried. The court denied DGS' motion for judgment. By memorandum opinion and order dated February 23, 2009, the court dismissed the second amended complaint and dissolved the preliminary injunction which had been entered on February 11, 2008. The court, *sua sponte*, raised the question of exhaustion of administrative remedies and held that Bramble had to pursue its claim with the State Board of Contract Appeals ("MSBCA" or "Board") before it could seek judicial review. In pertinent part, the court explained:

> Counsel submits that the Maryland State Board of Contract Appeals 'does not hear these types of cases' and have submitted opinions from the Board in other cases to back up their assertion. [3] The apparent attempt by

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[3] *Snake River Land Company, Inc. v. Maryland Transit Authority*, MSBCA No. 2539 (Sept. 2006); *James F. Knott Construction Co., Inc. v. Maryland Aviation*

MSBCA to limit the jurisdiction vested in them by the Legislature may not stand appropriate judicial scrutiny. That scrutiny cannot occur here because the MSBCA has never been presented with this case, as they obviously were with the ones referenced by Plaintiff. It is significant that in each of those cases the protestor did pursue their rights before the MSBCA. Even though the MSBCA did not address the issues presented to them, as the protestors requested, each protestor was advised in writing of their rights to judicial review under COMAR 21.10.01.02. Because Bramble did not give MSBCA the opportunity to not decide the case (and advance its reasons therefore), Bramble has deprived itself of any right of judicial review, and deprived this Court of its only basis for jurisdiction.

See *Attorney Grievance Commission v. Hyatt*, 302 Md. 683 (1985) at page 690; *Highfield Water Co. v. Washington County Sanitary District*, 295 Md. 410 (1983) at page 414; *Herbert Brown, et. al. v. Fire and Police Employees' Retirement System, et. al.*, 375 Md. 661 (2003).

Bramble noted an appeal to this Court, and DGS noted a cross appeal.[4]

Questions Presented

As phrased by Bramble, they are:

> I. Did the circuit court err when it dismissed appellants' declaratory judgment and permanent injunction action for failure to exhaust administrative remedies?
>
> II. Did the circuit err procedurally and substantively when it failed to rule on appellants' constitutional challenges as set forth in their second amended complaint, motion for partial summary judgment and motion for separation of questions by the court?
>
> III. Did the circuit court err when it granted DGS' motion in *limine?*

Administration, MSBCA No. 2437 (Dec. 2004).

[4]After the circuit court's opinion was filed, Bramble filed a bid protest and noted an appeal to the MSBCA. In June, 2009, the Board dismissed the appeal, stating that it lacked "jurisdiction to resolve disputes concerning any act or omission of Respondents concerning COMAR 21.11.03."

Bramble also filed a motion to dismiss the cross appeal on the ground that it was "unnecessary."

On the cross appeal, as phrased by DGS, the questions are:

> 1. Did the circuit court properly dismiss the case where Plaintiffs failed to follow the correct procedure for challenging an administrative decision, which was to bring an action for a writ of mandamus?
>
> 2. Did the circuit court properly dismiss Plaintiffs' case where, applying the correct standard of review, there was no evidence that DGS' waiver decision was arbitrary, capricious or illegal?

DGS also filed a motion to dismiss Bramble's appeal on the ground that it is moot. We shall first address the motions to dismiss.

Motions to Dismiss

DGS advised that, on April 16, 2009, while this appeal was pending, the contract for the project was awarded to another contractor, and on November 12, 2009, the project was completed. As a result, DGS moved to dismiss the appeal, pursuant to Md. Rule 8-602(a)(10), on the ground that the case is moot. DGS argues that, because there is no longer a contract to award, there is no longer an existing controversy between the parties and there is no longer an effective remedy which the Court can provide.

Bramble responds by acknowledging that the request for injunctive relief is moot but contends that the claims for damages and attorney's fees, based on alleged civil rights violations, are not moot. Bramble also argues that we should review the issues because they involve matters of public importance and are capable of repetition.

The test for mootness is whether a case presents a controversy between the parties for which the court can fashion an effective remedy. Hamot v. Telos Corporation, 185 Md. App.352, 360 (2009). If otherwise moot, a court may address an issue if it is capable of repetition but is likely to evade review, id. at 363, or it is necessary to prevent harm to the public interest. Id. at 366.

We agree with the parties that the claim for injunctive relief is moot because the contract has been awarded and the project has been completed. Bramble also presented damage claims, including claims for attorney's fees, expenses, and costs. On this record, we cannot determine to our satisfaction if any of the damage claims would be viable, were liability established. Consequently, we decline to dismiss the case on the ground of mootness.

With respect to Bramble's motion to dismiss the cross appeal, and its contention that DGS could have made all of its arguments without noting a cross appeal, we fail to see what is to be gained if we grant the motion. If it is a question of costs on appeal, Bramble may file a motion requesting reconsideration of the award of costs, and we will address the issue at that time. Perceiving no harm, we decline to grant the motion.

Failure to Exhaust Administrative Remedies

Bramble contends the court erred in dismissing its complaint on the ground that it failed to exhaust administrative remedies. DGS agrees, as do we.

Subtitle 2 of Title 15 of the State Fin. & Proc. Article contains procedures to resolve disputes arising out of the administration of procurement contracts. Section 15-211 provides, in pertinent part, that the MSBCA has jurisdiction to decide appeals arising from an action taken "on a protest relating to the formation of a procurement contract." Section 15-215 provides, in pertinent part, that a "protest" includes "a complaint about: (i) the qualifications of a bidder or offeror; or (ii) the determination of the successful bidder or offeror." Pursuant to authority granted in State Fin. & Proc., § 12-101(b), the Board of Public Works has adopted regulations implementing statutes relating to State procurement. COMAR 21.10.02.01 defines "protest" as a "complaint relating to the solicitation or award of a procurement contact."

Pursuant to authority granted to it by the General Assembly in State Fin. & Proc., § 14-303, the State Board of Public Works has also adopted regulations implementing the provisions of the MBE laws. COMAR 21.11.03.14 provides that a protest may not be filed to challenge a decision whether an entity is a certified MBE or concerning an act or omission by a procurement agency administering MBE policies. The MSBCA has interpreted these provisions to mean that it has no jurisdiction to review agency decisions on MBE matters. The General Assembly, which has oversight responsibility for the laws, *see* State Fin. & Proc., §§ 14-305 and 14-307, has not amended the laws or otherwise indicated its disagreement with the MSBCA's interpretation, despite the fact the Board's position has been known for quite some time and the General Assembly has changed the

laws from time to time. We conclude, therefore, that the MSBCA lacked jurisdiction.

If an agency lacks jurisdiction and, thus, cannot provide a remedy, the doctrine of exhaustion of administrative remedies does not apply, and a party may proceed in court. Poe v. City of Baltimore, 241 Md. 303, 308-309 (1966). Consequently, the circuit court erred when it dismissed Bramble's complaint on the ground that it failed to exhaust administrative remedies.

Bramble's Failure to Pursue Administrative Mandamus

DGS contends we should affirm the circuit court's decision in any event because there was no statutory right to judicial review of the administrative decision and the sole remedy was an administrative action pursuant to Md. Rules 7-401 through 7-403. Instead, Bramble filed a declaratory judgment action which, according to DGS, may not be pursued because, when there is a specific procedure available for a particular type of case, that procedure must be followed. *See* Maryland Code (2006 Repl. Vol.), § 3-409(b) of the Courts & Judicial Proceedings Article ("If a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed in lieu of a proceeding under this subtitle.").

Bramble responds by arguing that the question was not raised in circuit court and, thus, is not properly before this Court. Bramble points out that DGS fully litigated the issues presented, and the circuit court had subject matter jurisdiction. In addition, Bramble argues that administrative mandamus is available only when there was an

adjudicatory decision, and there was none in this instance. In fact, according to Bramble, it requested an administrative hearing, but the request was denied.

We decline to affirm the judgment on this ground for the following reasons. The issue was neither raised in nor decided by the circuit court, and the court did not lack subject matter jurisdiction. Moreover, the issues were fully presented. There was no administrative hearing and no contested case proceeding. The decision was administrative, but it was not adjudicatory even though it involved the consideration of facts specific to Bramble and the project in question, as opposed to general facts. Thus, the decision was a non-adjudicatory administrative action. Rule 7-401 states that the administrative mandamus rules govern actions for judicial review of "a quasi-judicial order or action" of an agency. It is unclear whether non-adjudicatory actions are within the scope of Rules 7-401 to 7-403. Assuming they are, an administrative mandamus action under those Rules would not necessarily preclude, in conjunction with or at a later time, a companion action. That may be true here, in light of the constitutional claims for damages and the inability to have made those claims administratively. There is no issue as to timeliness of the action, regardless of its form, discovery occurred, and the issues were fully presented to the circuit court. On the facts of this case, we decline to affirm the judgment on the basis of the form of the action.

Standard of Review

Motions filed by the parties in circuit court sought a ruling as to the applicable standard of review. The court did not rule on the issue in the context of determining liability or the lack thereof because, as stated, it dismissed the case on the ground that Bramble had failed to exhaust administrative remedies.[5] On appeal, both parties urge us to decide the standard of review issue, both take the position the determination is dispositive, and both state we should enter judgment accordingly. The difference in views is that Bramble asserts, if we conclude the strict scrutiny standard applies, the evidence excluded by the circuit court on motion in limine will be relevant, and that evidence establishes a constitutional violation as a matter of law. In contrast, DGS asserts that, if we conclude the strict scrutiny standard does not apply, the substantial evidence test applicable to judicial review of administrative decisions controls, the test is satisfied, and we should affirm the judgment.

Bramble contends that its claims must be reviewed under a strict scrutiny standard and, in some instances, under an intermediate scrutiny standard. Bramble summarizes its contentions in this regard in a footnote in its reply brief, as follows.

> It may be helpful to summarize the various scopes of judicial review applicable to appellants' various state and federal claims: Appellants claim that DGS violated their civil rights under the Fourteenth Amendment of the United States Constitution, the Maryland State Constitution, 42 U.S.C.

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[5]As we shall discuss later, in ruling on DGS's motion in limine, the court opined that the strict scrutiny standard did not apply.

> §§1981 and 1983, and 42 U.S.C. § 2000d. Strict scrutiny must always be applied in reviewing whether DGS' denial of a government benefit *(i.e.*, DGS wrongfully denied a waiver of the 25% overall goal for MBE participation) on the basis of race, violated appellants' state and federal civil rights. *Parents Involved in Cmty. Sch's v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738,2751-52 (2007); *Johnson v. Cal.*, 543 U.S. 499, 505-506 (2005); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 2254 (1995). Under Maryland law, the strict scrutiny test is also required for judicial review of DGS' application of *gender-based* classifications as applied to appellants. *State v. Burning Tree Club, Inc.*, 315 Md. 254, 295-96 (1989). On the other hand, under federal law, the *gender-based* classifications (*i.e.*, DGS wrongfully denied a waiver of the 10% goal for women-owned MBE participation) are reviewed under intermediate scrutiny. *U.S. v. Virginia*, 518 U.S. 515, 533 (1996); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

(References to record extract omitted.)

DGS contends the standard of review is whether the action was arbitrary, capricious, or an abuse of discretion. DGS argues that Bramble is only challenging the denial of a waiver, not the MBE program, and the denial did not involve racial or gender classifications. Moreover, according to DGS, Bramble lacks standing, and to the extent it is challenging the goals set for the project, it waived that claim by not pleading it and by not challenging the goals pre-bid.

Bramble responds and acknowledges that it is not challenging the MBE statutes on their face but is challenging the application of the procedures set forth in the MBE laws. Moreover, Bramble asserts that it is challenging the goals, that the claim was part of the second amended complaint, and it did not waive the claim because it could not know pre-bid that DGS would unconstitutionally apply the waiver provisions.

In support of its position that the strict scrutiny standard applies, Bramble relies on United States v.Virginia, *supra*; Shaw v. Hunt, 517 U.S. 899 (1996); Adarant Constructors, Inc v. Pena, *supra*; City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); United States v. Paradise, *supra;* Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980); W.H. Scott Constr. Co., Inc., v. City of Jackson, Miss., 199 F.3d 206 (5th Cir. 1999); Md. Troopers Assoc., Inc. v. Evans, 993 F.2d 1072 (4th Cir. 1993); Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991); Gen. Contractors of Ohio, Inc. v. Drabik, 50 F. Supp.2d 741 (S.D.Ohio 1999); Concrete Gen., Inc. v. Washington Suburban Sanitary Commission, 779 F. Supp. 370 (D. Md. 1991); and Harrison and Burrowes Bridge Constructors, Inc. v. Laquidara, Inc., 743 F. Supp. 977 (N.D.N.Y. 1990).

Our review of the above cases leads us to the conclusion, however, that DGS is correct. In each case cited above, the overall program or policy was challenged, either facially or as applied. The courts applied the constitutional standard in determining whether the program or policy was constitutional. *See* United States v.Virginia, *supra*, (challenge to the exclusion of women at Virginia Military Institute, a state supported college); Shaw, *supra*, (challenge to a redistricting plan on ground it classified voters by race); Adarant Constructors, Inc., *supra*, (challenge to federal program giving contractors on government projects a financial incentive to hire subcontractors controlled by socially and economically disadvantaged individuals and, in particular, the presumptions used in

identifying such individuals); City of Richmond, *supra*, (challenge to city's policy that 30% of its contracting work should be awarded to minority owned businesses); United States v. Paradise, *supra*, (challenge to a decision by a federal district court, ordering state department of public safety to promote one black state trooper for every white trooper elevated in rank, as long as black candidates were available, pending adoption of an acceptable promotion procedure); Wygant, *supra*, (challenge to school board's policy of using race-based preferences in determining which teachers to lay off); Fullilove, *supra*, (challenge to Congress's inclusion of a 10% set aside for minority owned businesses in the Public works Employment Act of 1977); W. H. Scott Constr. Co., *supra*, (challenge to city's goals program for minority and women owned businesses in the award of construction contracts); Md. Troopers Assoc. Inc., *supra*, (challenge to a consent decree under which the Maryland State Police agreed to hire and promote certain percentages of black troopers); Coral Construction Co., *supra*, (challenge to a minority and women owned business set aside program for public contracts); Gen. Contractors of Ohio, Inc., *supra*, (challenge to statute which provided race based preferences in the award of state construction contracts); Concrete Gen, Inc., *supra*, (challenge to Washington Suburban Sanitary Commission's policy encouraging participation by minority owned businesses in bidding for procurement contracts); Harrison and Burrowes Bridge Constructors, Inc., *supra*, (challenge to set aside programs for minority and women owned businesses, with respect to certain highway projects).

Accepting that appellant is not challenging the MBE program on its face but is challenging the program as applied to it, and recognizing that was true in some of the cases just cited, the relevant distinction is not whether the challenge is facial or as applied. The distinction is between a challenge to the program, its classifications, processes, methodologies, and procedures versus specific administrative application of those structural components in a particular situation. Otherwise, every act done by ever employee involved in a program would be constitutional in nature subject to de novo review, an unworkable result.

In the case before us, appellant challenges the setting of the goals for the project and the denial of a waiver. Assuming the challenge to the goals is properly before us, and that Bramble has standing to assert it,[6] appellant does not challenge the existence of goals or the specific goals contained in the statute, but contends the goals set for this project are subject to constitutional review as a result of the denial of a waiver. Moreover, appellant does not challenge the process for setting goals or the process for acting on a waiver request. It challenges only the decisions made specific to this project and specific to appellant. We conclude that those decisions are reviewable under an arbitrary and capricious standard.

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[6]The claim was not raised during the bid process. We do not find the claim in the second amended complaint, although it was asserted in motion papers. Even so, Bramble does not challenge the goals standing alone but argues that they became unlawful when its waiver request was wrongfully denied. We need not decide the preservation or standing issue.

Motion in Limine

Appellant contends the excluded evidence was relevant to whether DGS's denial of a waiver met the strict scrutiny test. In light of our decision with respect to the standard of review, we perceive no error with respect to the motion in limine.

Conclusion

Appellant's position is that DGS's denial of a waiver does not pass constitutional muster. It does not contend that it is arbitrary and capricious under the administrative law standard. *See* C.N. Robinson Lighting Supply Company v. Board of Education of Howard Co., 90 Md. App. 515, 522 (1992) (arbitrary, capricious, or abuse of discretion). DGS denied the waiver on the ground that Bramble had not made reasonable efforts to comply with the stated goals and gave reasons for its decision. Bramble does not direct us to anything in the record to show that the goals for the project were arbitrary or that the finding of lack of reasonable effort was arbitrary.

We conclude, therefore, that the circuit court erred in denying DGS's motion for judgment. As a result, we affirm the judgment of the circuit court. *See* Robeson v. State, 285 Md. 498, 502 (1979) (appellate court may affirm judgment, even though reason given by circuit court was incorrect).

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.