IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL GRAVELEY, and GRAVELEY ROOFING CORPORATION, on their own behalf, and on behalf of all others similarly situated,	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, THE MINORITY BUSINESS COUNCIL, ELIZABETH REVEAL, CURTIS JONES, JR., and ANGELA DOWD BURTON	:	No. 90-3620

MEMORANDUM and ORDER

Norma L. Shapiro, J. November 6, 1997

Plaintiffs, Graveley Roofing Corporation ("Graveley Roofing"), and its president, Michael Graveley ("Graveley"), seek damages for injuries sustained by the City of Philadelphia's ("the City") enforcement of an ordinance later declared unconstitutional. Before the court is plaintiffs' motion for class certification. Because plaintiffs have not shown that the requirements for class certification under Fed. R. Civ. P. 23 have been met, plaintiffs' motion will be denied.

FACTS AND PROCEDURAL HISTORY

Graveley, through Graveley Roofing, bid on various public works contracts with the City at times when the City awarded bids by applying Chapter 17-500 ("the Ordinance") to increase the participation of disadvantaged business enterprises ("DBEs") in

City contracting. A group of contractors challenged the constitutionality of the Ordinance in Contractors Ass'n of E. Pa. v. City of Philadelphia ("the Contractors Association action"), assigned to Judge Bechtle. During the pendency of the Contractors Association action (including three separate appeals) to the Court of Appeals), the City was periodically enjoined from enforcing the ordinance in whole or in part. After Judge Bechtle's initial decision, Contractors Ass'n of E. Pa. v. City of Philadelphia, 735 F. Supp 1274 (E.D. Pa. 1990), plaintiffs filed this action for damages from the City's enforcement of the Ordinance. In Contractors Ass'n of E. Pa. v. City of Philadelphia, 893 F. Supp. 419 (E.D. Pa. 1995), Judge Bechtle struck down the Ordinance as unconstitutional as a set-aside in contravention of the Supreme Court's holding in City of Richmond v. J.A. Croson, 488 U.S. 469 (1989). His decision was affirmed by the Court of Appeals. Contractors Ass'n of E. Pa. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996).

DISCUSSION

To obtain class action certification, plaintiffs must establish that all four requirements of Rule 23(a) and at least one of Rule 23(b) are met. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir.), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). Federal Rule of Civil Procedure 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is

> impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
> Fed. R. Civ. P. 23(a).

The plaintiff bears the burden of establishing each of these requirements. See Hutchinson v. Lehman, No. 94-5571, 1995 WL 31616 (E.D. Pa. Jan. 27, 1995); Lloyd v. City of Philadelphia, 121 F.R.D. 246, 249 (E.D. Pa. 1988); see also Anderson v. Home Style Stores, Inc., 58 F.R.D. 125, 130 (E.D. Pa. 1972).

Plaintiffs seek certification under Fed. R. Civ. P. 23(b)(3):

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> . . .
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
> Fed. R. Civ. P. 23(b)(3).

"Because 23(b)(3)'s predominance requirement incorporates the commonality requirement [of 23(a)]," Georgine v. Amchem Products, Inc., 83 F.3d 610, 626 (3d Cir. 1996), and because "special caution must be exercised in class actions of this type." 7A Charles Alan Wright, Arthur Miller, and Mary Kay Kane, Federal Practice and Procedure: Civil 2d., § 1777 (1986), the court will consider commonality and predominance first.

I. COMMONALITY AND PREDOMINANCE

Rule 23(a) requires the proposed representative to show

"questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Under Fed. R. Civ. P. 23(b)(3), plaintiff must demonstrate both that these common questions predominate, and that a class action is superior to other methods for the fair and efficient adjudication of the controversy. Plaintiffs argue that the common claims which predominate are the unconstitutionality of the ordinance, the right to § 1983 relief, the propriety of punitive damages, and the propriety of injunctive relief. They argue that a class action is superior because: individual actions would be costly; there is no other pending litigation; the federal forum is familiar with the ordinance in dispute; and the class action is manageable. Defendants argue that certification under 23(b)(3) is not appropriate because common questions do not predominate and a class action would not be superior.

Plaintiffs proposed a single class composed of three groups: unsuccessful bidders who would have been awarded a contract but for the Ordinance; successful bidders whose profits were diminished because their successful bids would not have included subcontracting to DBEs but for the Ordinance; and bidders who were fined or had payment withheld for failure to comply with the Ordinance. Plaintiffs vigorously deny that these are three subclasses. (Pl. Reply Brief in Support of Class Certification, p. 10). Because the three groups raise different issues with respect to the certification determination, the court will consider them as subclasses.

In the first two subclasses, common questions do not

predominate. First, the constitutionality of the ordinance has been decided in Contractors Association v. City of Philadelphia, 93 F.3d 586 (3d Cir. 1996). That decision by the Court of Appeals collaterally estops the City from relitigating the issue. Second, the City does not deny that members of the plaintiff class harmed by the City's enforcement of the ordinance are entitled to damages. Because the Ordinance violated the U.S. Constitution, plaintiffs can recover the damages under 42 U.S.C. § 1983. The court recognizes that lack of commonality on damage issues will not prevent class certification where there is a common issue of liability. Wilson v. Pa. State Police Dept., 1995 WL 422750 (E.D. Pa. July 17, 1995). But here the common liability issue has already been decided. Not only does the common issue not predominate, there is no longer a common issue.

The propriety of punitive damages against the City is not at issue as no punitive damages can be awarded. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981). Punitive damages against individual defendants would require individual fact-sensitive questions. "[P]unitive damages may be awarded under 42 U.S.C. § 1983 'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" Coleman v. Kaye, 87 F.3d 1491, 1497 (3d Cir. 1996) (quoting Smith v. Wade, 461 U.S. 30, 56 (1983)). Prior to Judge Bechtle's initial decision, Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia, 735 F. Supp. 1274 (E.D. Pa. 1991), the

legality of the Ordinance was unclear. The district court's rulings on the unconstitutionality of the Ordinance were appealed on three separate occasions.

It cannot be said that the defendants initial enforcement of the Ordinance constituted "outrageous behavior, where [their] egregious conduct show[ed] either an evil motive or reckless indifference to the rights of others." Takes v. Metropolitan Edison Co., 655 A.2d 138, 146 (Pa. Super. 1995). Punitive damages might conceivably be awarded to some members of the plaintiff class who might show that an individual defendant's behavior was sufficiently outrageous. Demonstration of egregious conduct will require case-by-case inquiry into the status of the Ordinance at the time of a particular award, and whether the defendant was enjoined from enforcing it at the time of the individual's injury. Because the litigation been pending over seven years, it would be improper to hold all individual defendants at all times subject to the same standard in determining punitive damage issues.

In litigating issues for the first two proposed subclasses, there are many individual fact-specific issues. With respect to bidders who would have been awarded a contract but for the Ordinance, the court would have to examine all reasons for rejection of each losing bid, including: possible disqualification based on Executive Orders not at issue in this action; rejection for commercial and budgetary reasons not involving the Ordinance; or disqualification under the United

States Department of Transportation rules and regulations on federally funded contracts. (Def. Memorandum of Law in Opposition to Pl. Amended Motion for Class Certification, p. 9-10). With respect to successful bidders whose profit margins were reduced because they complied with the Ordinance, the court would have to inquire into: whether the particular bidder had a previous practice of not hiring DBEs; whether the bidder hired the DBEs solely as a result of the Ordinance; and what effect, if any, the requirement to hire DBEs had on its profit margin for the bid in question, since the bid price presumably included the additional cost of the DBE requirement. Thse individual fact-specific questions predominate over common questions in these two subclasses.

With respect to contractors who were fined or had payment withheld for failure to comply with the illegal Ordinance, common issues predominate. The amounts fined or withheld would certainly differ for each contractor, but the common issue of the legality of the City's actions would predominate over individual issues. The court would only have to inquire into the amount and reason for City fines or withheld payments for non-compliance. This subclass satisfies the commonality requirement of 23(a) and the predominance requirement of 23(b)(3).

II. NUMEROSITY

Class certification is based on necessity. Rule 23 provides a remedy when plaintiffs are so numerous it is impracticable to bring each member before the court. There is no precise number

necessary for class certification. The decision of whether or not to certify a class must be based on the particular facts of each case. See, e.g., Fox v. Prudent Resources Trust, 69 F.R.D. 74, 78 (E.D. Pa. 1975).

"'While the absolute number of class members is not the sole determining factor, generally the courts have found the numerosity requirement fulfilled where the class exceeds 100.'" Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 109 (E.D. Pa. 1992) (quoting Fox, 69 F.R.D. at 78); see Kromnick v. State Farm Ins. Co., 112 F.R.D. 124, 127 (E.D. Pa. 1986). Classes comprising as few as twenty-five members have been certified. See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968).

"The numerosity test is one of practicability of joinder." Ulloa v. City of Philadelphia, 95 F.R.D. 109, 115 (E.D. Pa. 1982). Factors in evaluating impracticability of joinder are: 1) the size of the putative class; 2) the geographic location of the members of the proposed class; and 3) the relative ease or difficulty in identifying members of the class for joinder. See Ardrey, 142 F.R.D. at 110 (citing Andrews v. Bechtle Power Corp., 780 F.2d 124, 131-32 (1st Cir. 1985), cert. denied, 476 U.S. 1172 (1986); Kilgo v. Bowman Trans., Inc., 789 F.2d 859, 878 (11th Cir. 1986)); MacNeal v. Columbine Exploration Corp., 123 F.R.D. 181, 185 (E.D. Pa. 1988).

The first two subclasses do not meet the predominance requirement of 23(b)(3), so their numerosity is irrelevant. The

third subclass, meets the predominance requirement, but is not large enough for certification. Neither plaintiffs nor defendants specifically addressed the number of firms who were fined or had payments withheld for failure to comply with the requirements of the Ordinance. At oral argument, plaintiffs' counsel was unable to state the size of this subclass. Defendants asserted that this subclass was comprised of "a handful" of members, most likely two or three, and not more than ten. It has not been established that this class would be sufficiently numerous that joinder would be impracticable.

Geographical diversity favors class certification. See Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980) (denying certification because the 31 proposed class members all worked for the same company and lived in "a compact geographical area"), cert. denied, 449 U.S. 1113 (1981); Browne v. Sabatina, No. 89-1228, 1990 WL 895, at *1 (E.D. Pa. Jan. 5, 1990) (Shapiro, J.) (denying certification of 57 member class because the members all lived in "the same area of Philadelphia"). Members of the plaintiff class are contractors throughout the northeastern United States. (Pl. Reply at 10). When "potential class members are located throughout a number of counties [of several states] joinder . . would be impracticable." Gentry v. C & D Oil Co., 102 F.R.D. 490, 493 (W.D. Ark. 1984). "[M]embers of the class are from [a sufficiently] disparate geographical area." Wilcox v. Petit, 117 F.R.D. 314 (D. Me. 1987)(citing Andrews v. Bechtel Power Corp., 780 F.2d 124, 131-32 (1st Cir. 1985)).

If the class members cannot easily be identified, certification is appropriate. See Ardrey, 142 F.R.D. at 110; Westcott v. Califano, 460 F. Supp. 737, 745 (D. Mass. 1978) aff'd, 443 U.S. 76 (1979). But here the proposed subclasses comprise only contractors who bid on City contracts who can be identified from the City's financial records. It is possible to name and join each contractor fined or whose payment has been withheld for failure to comply with the Ordinance. The ease of identification suggests that certification would be inappropriate.

A class action is not appropriate when proposed class members are able to protect and defend their own interests. Since members of the class can either join this action or file separate actions, they can adequately protect their own interests. See, e.g., Block v. First Blood Assoc., 125 F.R.D. 39, 42-43 (S.D.N.Y. 1989); Stoudt v. E.F. Hutton & Co., 121 F.R.D. 36, 38 (S.D.N.Y. 1988); Vargas v. Meese, 119 F.R.D. 291, 293 (D.D.C. 1987). This action was filed over seven years ago, but commencement of a class action tolls the statute of limitations for individual claims of putative class members until class certification has been denied. See Crown, Cork & Seal Company, Inc. v. Parker, 462 U.S. 345, 353-54 (1983) (citing American Pipe & Construction Company v. Utah, 414 U.S. 538, 554 (1974)). Damages are sufficiently large that individuals members have an interest in pursuing their claims. In addition, individual plaintiffs who prevail may recover attorney fees under 42 U.S.C.

§ 1988.[1] Plaintiffs have not met the requirement of numerosity under Fed. R. Civ. P. 23(a)(1).

III. TYPICALITY

Rule 23(a)(3) requires the proposed representative to show claims "typical" of the class. The inquiry is whether there is potential conflict between claims of the representatives and other class members. See Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir.), cert. denied sub nom., Weinstein v. Eisenberg, 474 U.S. 946 (1985) (citing Weiss v. York Hosp., 745 F.2d 786, 809 n.36 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985)). Typicality "focuses less on the relative strengths of the named and unnamed plaintiffs' cases than on the similarity of the legal and remedial theories behind their claims" Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 472 (5th Cir. 1986).

Graveley and Graveley Corporation's legal theories are the same as those of the rest of the class, i.e., they were injured by the City's enforcement an Ordinance later held unconstitutional in the Contractors Association action. Defendants only argument against typicality is that Graveley never bid on City contracts in his individual capacity. Even if defendants are correct, Graveley Corporation's claims would be typical. The typicality requirement would be satisfied.

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[1] Section 1988 states: "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b) (1994).

IV. ADEQUACY

The named class members must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement focuses on whether the named plaintiff has "the ability and the incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class." Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988); see General Tele. Co. Of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982). The court "can find no potential for conflict between the claims of the complainants and those of the class as a whole." Hassine, 846 F.2d at 179.

Plaintiffs' counsel is adequate. See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir.) ("[T]he plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation ...."), cert. denied, 421 U.S. 1011 (1975). While plaintiffs' counsel seeks to represent three subclasses, there appears to be no conflict of interest among the classes that would disqualify the same counsel from representing all three. See Reynolds v. National Football League, 584 F.2d 280, 286 (8th Cir. 1978) (theoretical conflicts of interest do not require disqualification of counsel).

CONCLUSION

The proposed class does not meet the requirements for class certification under Fed. R. Civ. P. 23. Two of the three subclasses do not satisfy the requirement of 23(b)(3) that common

questions predominate. The third subclass meets that requirement, but not the numerosity requirement of 23(a). Neither the class as a whole, nor any of the subclasses will be certified; plaintiffs' motion for class certification will be denied.

The denial of class certification does not preclude other putative class members from filing individual actions. In an excess of caution, the City has agreed to notify identified members of the putative class that certification has been denied in order that those members may pursue their claims individually.

An appropriate order follows.

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ORDER

AND NOW, this 7th day of November, 1997, upon consideration of plaintiffs' Motion for Class Certification, defendants' response thereto, after a hearing in which counsel for both parties were heard, and for the reasons stated in the attached Memorandum, it is hereby **ORDERED**:

1. Plaintiffs' Motion for Class Certification under Fed. R. Civ. P. 23(b)(3) is **DENIED**.

2. Counsel shall jointly submit for court approval a proposed communication to members of the putative class concerning the denial of class certification within ten (10) days.

Norma L. Shapiro, J.