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DBE/MBE Preferences: Timeless, Timely, or Out of Time Session

Recent Cases and Challenges to State and Local Government MBE/WBE/DBE Programs

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Recent Significant Cases and Challenges to State and Local Government Programs

State	Upheld as valid implementation of State or Local Program	Held invalid implementation of State or Local Government Program	Pending litigation at time of presentation	Upheld constitutionality of Federal DBE Program required to be implemented by state and local governments
California	*Associated General Contractors of America, San Diego Chapter v. California DOT (2013)*[1]			
Colorado				*Adarand Constructors, Inc. v. Slater*, (10th Cir. 2000)[2]
Florida	*South Florida Chapter of the Associated General Contractors v. Broward County, Florida (2008)*[3]			
Illinois	*Northern Contracting, Inc. v. Illinois DOT (2007)*[4] *Dunnet Bay Construction Company v. Illinois DOT (2015) cert denied (2016), cert .denied (2017)*[5] *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al (2016), cert. denied (2017)*[6]			*Northern Contracting*, 2004 WL 422704 (N.D. Ill. 2004)[4] *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*[6]
Minnesota	*Sherbrooke Turf, Inc. v. Minnesota Department of Transportation (2003)*[7] *Geyer Signal, Inc. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al. (2014)*[8]			*Sherbrooke Turf (8th Circuit)*[7] *Geyer Signal (D. Minn.)*[8]
Montana	*M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al. (2013)*[9]	*Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al. (2018)*[10]		
Nebraska	*Gross Seed Company v. Nebraska Department of Roads (2003)*[11]			*Gross Seed (8th Circuit)*[11]
New Jersey	*Geod Corporation v. New Jersey Transit Corporation, et. al. (2010)*[12]			
North Carolina	*H.B. Rowe, Inc. v. W. Lyndo, North Carolina DOT, et al.* (upheld in part) (2010)[13]	*H.B. Rowe, Inc. v. W. Lyndo, North Carolina DOT, et al.* (held invalid in part)[13]		
Texas	*Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Texas 2016) (upheld in part)[14]	*Kossman Contracting Co., Inc. v. City of Houston* (held invalid in part)[14]		
Washington	*Orion Insurance Group v. Washington OMWBE, U.S. DOT, et al.* (2018)[15]	*Western States Paving Co., v. Washington State DOT (2005)*[16]		*Western States Paving (9th Circuit)*[16]

Citations of Recent Cases on Chart (page 2)

1. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187, 2013 WL 1607239 (9th Cir. April 16, 2013).
2. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) cert. *granted* then *dismissed* as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001).
3. *South Florida Chapter of the Associated General Contractors v. Broward County, Florida,* 544 F. Supp.2d 1336 (S.D. Fla. 2008).
4. *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007).
5. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676,* 2015 WL 4934560 (7th Cir. 2015), *cert denied, Dunnet Bay Construction Co. v. Blankenhorn et al.*, 2016 WL 193809 (2016).
6. *Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). *cert. denied,* 2017 WL 497345 (June 26, 2017).
7. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041.
8. *Geyer Signal, Inc., et al. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al.*, 2014 WL 1309092 (D. Minn. March 31, 2014).
9. *M.K. Weeden Construction v. State of Montana, Montana Dept. of Transportation, et al.,* 2013 WL 4774517 (D. Mont.) (September 4, 2013).
10. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.,* 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (Not for Publication), *dismissing in part, reversing in part and remanding* the U.S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). *Petition for Rehearing En Banc*, *denied* (2017). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).
11. *Gross Seed Company v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041.
12. *Geod Corporation v. New Jersey Transit Corporation, et. al.,* 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010).
13. *H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al., 615 F.3d 233 (4th Cir. 2010)*
14. *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Texas 2016).
15. *Orion Insurance Group v. Washington OMWBE, U.S. DOT, et al.* 2018 WL 6695345 (9th Cir. 2018).
16. *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

Croson and Related Case Law Apply "Strict Scrutiny" to MBE/WBE/DBE Programs

» ***City of Richmond v. J.A. Croson***

- Established that "**strict scrutiny**" is applied to a local or state government public contracting program that is race- or ethnic-conscious.
- Whether or not there is strong evidence of discrimination against minority- and women-owned businesses ("MBE/WBEs") that establishes a "compelling governmental interest" for remedial relief.
- Requires that local or state government legislation or programs be "**narrowly tailored**" to achieve an established compelling governmental interest of eradicating identified discrimination in the award of the state or local government's contracts.

Strict Scrutiny: State or Local MBE/WBE Programs

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis. The strict scrutiny analysis is comprised of two prongs:

» The state or local government contract program must serve an established compelling governmental interest; and

» The state or local government contract program must be narrowly tailored to achieve that compelling government interest.

Croson and the cases that follow (see Bibliography) provide the framework for determining:

- Whether or not discrimination or a disparity exists in the utilization of minority- or women-owned businesses; and
- The appropriate measures or remedies the local or state government may adopt in its public contracts.

Compelling Governmental Interest

» Statistical evidence

- Primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial state or local government contracting program (i.e., to prove a compelling governmental interest).
- "Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination."
- Comparison of a government's utilization of MBE/WBE/DBEs in its contracts compared to the relative availability of qualified, willing and able MBE/WBE/DBEs.
- A disparity between utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.

Summary of Key Elements of Recent Cases and Challenges to MBE/WBE/DBE Programs

- A small statistical disparity, standing alone, may be insufficient to establish discrimination.
- Private sector marketplace – “Passive Participant”: “if the City could show that it had essentially become a **'passive participant'** in a system of racial exclusion practiced by elements of the local construction industry, . . . [i]t could take affirmative steps to dismantle such a system.”
- Availability determination.
  - MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of government contract work within a particular geographic market area.
- Utilization determination.
  - Utilization is measured based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.

Summary of Key Elements of Recent Cases and Challenges to MBE/WBE/DBE Programs

- Disparity index.
  - A disparity index is defined as the ratio of the percentage utilization to the percentage availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact or an inference of discrimination. This has been referred to as “The Rule of Thumb” or “The 80 Percent Rule.”
- Two standard deviation test.
  - The standard deviation figure describes the probability that the measured disparity is the result of mere chance.
  - Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant evidence of discrimination.

Summary of Key Elements of Recent Cases and Challenges to MBE/WBE/DBE Programs

» **To satisfy the narrowly tailored prong of the strict scrutiny analysis the following factors are pertinent to MBE/WBE/DBE Programs:**

1) Evidence of specific identified discrimination in the local/state marketplace or relevant contracting industry;
   - Quantitative (statistical) and qualitative (anecdotal) evidence.
2) Serious consideration of workable race-ethnic and gender-neutral remedies;
   - Race-and ethnicity-based measures employed as a last resort.
   - Are neutral measures effective to remedy discrimination.
   - Not required to exhaust all neutral measures.
   - 49 CFR Section 26.51 measures.
3) Flexibility and duration of a race-ethnic-gender conscious remedy;
   - Front-end waivers; good faith efforts; sunset and re-evaluation provisions.
4) Relationship of numerical MBE/WBE/DBE goals to the relevant market;
   - Rational relationship of goals based on availability of qualified MBE/WBE/DBEs (ready, willing and able).

Summary of Key Elements of Recent Cases and Challenges to MBE/WBE/DBE Programs

5) Impact of a race-ethnic-gender conscious remedy on third parties;
   - Cannot be unduly burdensome.
   - Overconcentration (see 49 CFR Section 26.33(a)).

6) Application of the program only to those groups who have suffered discrimination;
   - Evidence of discrimination as to a particular race, gender or ethnic group in the local/state transportation contracting industry.

Summary of Key Elements of Recent Cases and Challenges to MBE/WBE/DBE Programs

- **The narrow tailoring requirement: split in Courts of Appeal regarding implementation of Federal DBE Program by State and Local Governments.**
  1) The Ninth Circuit in *AGC, San Diego Chapter v. California DOT* and *Western States Paving Co. v. Washington DOT* followed by *Mountain West Holdings Co. v. Montana DOT and M.K. Weeden v. Montana DOT,* held:
     - State must have evidence of discrimination within its transportation contracting marketplace to determine whether there is the need for race- or ethnic- conscious remedial action.
     - Mere compliance with the Federal DBE Program does not satisfy strict scrutiny.
     - A narrowly tailored program must apply only to those minority groups who have actually suffered discrimination.
  2) In *Northern Contracting* and recent *Midwest Fence* and *Dunnet Bay* decisions, Seventh Circuit held:
     - A state DOT or recipient of federal funds implementing the Federal DBE Program "is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority."
  3) Seventh Circuit distinguished the Ninth Circuit in *Western States Paving* and Eighth Circuit in *Sherbrooke Turf,* holding a challenge to a state DOT's DBE program is limited to whether the state exceeded its grant of federal authority under the Federal DBE Program.

Examples of Race-, ethnicity-, and gender-neutral measures.

» Examples of race-, ethnicity-, and gender-neutral alternatives for state and local governments to consider include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;

Summary of Key Elements of Recent Cases and Challenges to MBE/WBE/DBE Programs

- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state to acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.

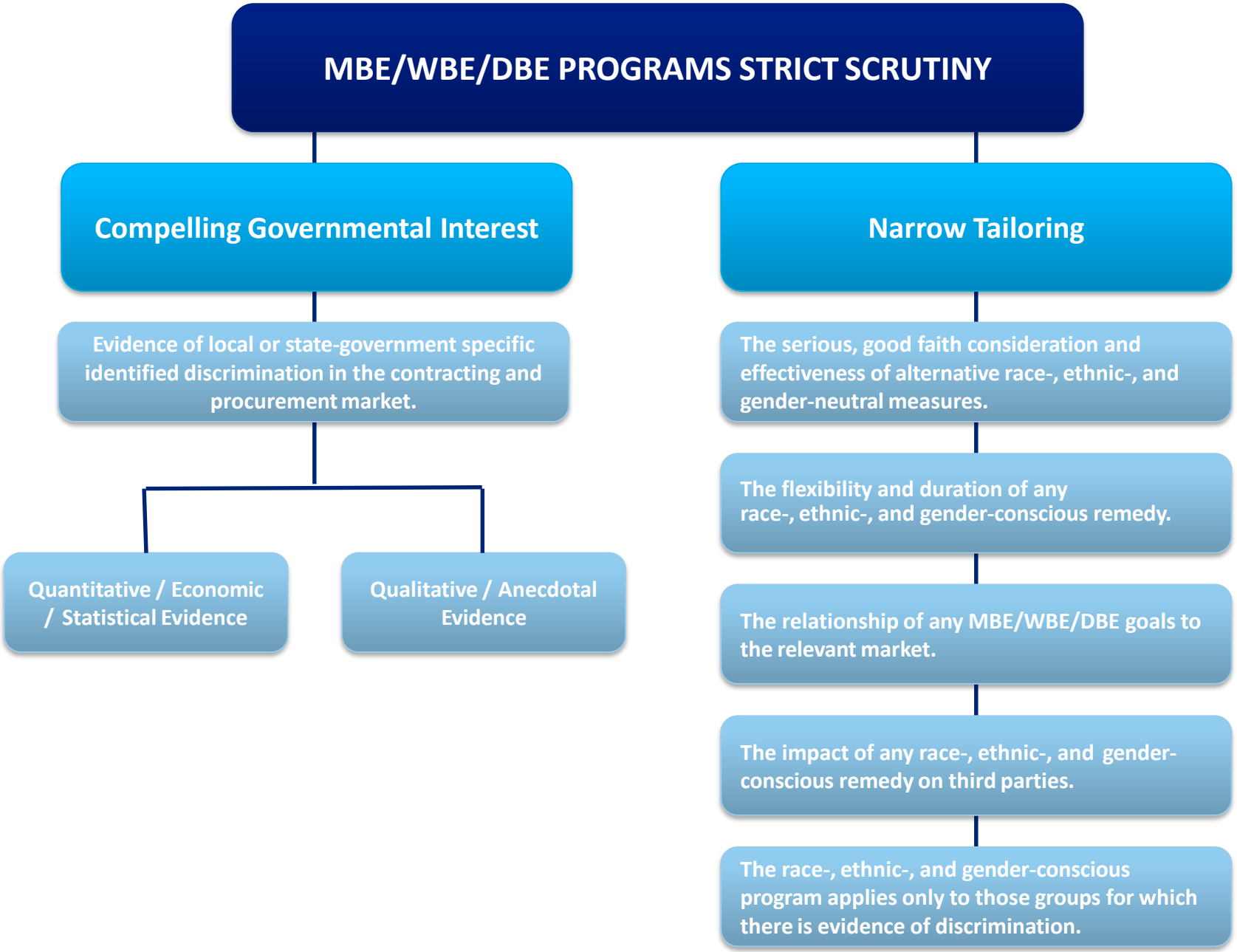
Summary of Key Elements of Recent Cases and Challenges to MBE/WBE/DBE Programs

Challenges that arise under narrow tailoring:

- Built-in flexibility in application of program;
- Good faith efforts provisions to award contract if contractor cannot meet goals (no quota);
- Waiver provisions for contractors to seek waivers relating to meeting goals;
- Rational basis for goals on specific contracts based on availability of qualified, willing and able MBE/WBE/DBE's for that project;
- Graduation provisions for MBE/WBE/DBE's to graduate from the program based on size and revenues;
- Eligibility as MBE/WBE/DBEs only for groups for which there were findings of discrimination in the relevant geographic marketplace;

Summary of Key Elements of Recent Cases and Challenges to MBE/WBE/DBE Programs

- Sunset provisions to end MBE/WBE/DBE programs (they cannot be indefinite);
- Limitation in the geographical scope of the programs to the boundaries of the enacting jurisdiction;
- Cannot impose undue burden on non- MBE/WBE/DBE's;
- Overconcentration by prime contractors of specific kinds of work by MBE/WBE/DBEs that excludes non-MBE/WBE/DBEs as subcontractors;
- Amount of credit for work performed by MBE/WBE/DBEs toward meeting participation goals;
- MBE/WBE/DBEs performing a "commercially useful function" that adds value; and
- Certification of MBE/WBE/DBEs: criteria, requirements, policies and process.


MBE/WBE/DBE PROGRAMS STRICT SCRUTINY
Compelling Governmental Interest
Evidence of local or state-government specific identified discrimination in the contracting and procurement market.
Quantitative / Economic / Statistical Evidence
Qualitative / Anecdotal Evidence
Narrow Tailoring
The serious, good faith consideration and effectiveness of alternative race-, ethnic-, and gender-neutral measures.
The flexibility and duration of any race-, ethnic-, and gender-conscious remedy.
The relationship of any MBE/WBE/DBE goals to the relevant market.
The impact of any race-, ethnic-, and gender-conscious remedy on third parties.
The race-, ethnic-, and gender-conscious program applies only to those groups for which there is evidence of discrimination.

Intermediate Scrutiny

- Certain Federal Courts apply intermediate scrutiny to gender-conscious state or local government contract programs.
- The courts have interpreted this standard to require that gender-based classifications be:
  - Supported by both "sufficient probative" evidence or "exceedingly persuasive justification" in support of the stated rationale for the program; and
  - Substantially related to the achievement of that underlying objective.
- Whether there is a sufficient factual predicate for the claim that women-owned businesses have suffered discrimination in state or local government contracts, and whether the gender-conscious remedy is an appropriate response.

Recent Cases: 2017-2018

***Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (Not for Publication), *dismissing in part, reversing in part and remanding* the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014). *Petition for Panel Rehearing and Rehearing En Banc denied*. Case on remand voluntarily dismissed by stipulation of the parties, and the district court in 2018.**

Note: The Ninth Circuit Court Memorandum provides: "This disposition is not appropriate for publication and is not precedent…"

Mountain West's claims for relief.

- Mountain West sued the Montana DOT ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program.
- Mountain West sought declaratory and injunctive relief against individual defendants, and monetary damages against the State of Montana and MDT for violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq*.

Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al. (cont.)

» Mountain West's claim for monetary damages based on being low-quoting subcontractor to a prime contractor on a project that used DBE goals.

Two-prong test to demonstrate a DBE program is narrowly tailored.

» The Court following the Ninth Circuit in *AGC, San Diego v. California DOT*, stated the two-prong test to demonstrate the DBE program is narrowly tailored:

1) the state must establish the presence of discrimination within its transportation contracting industry; and
2) the remedial program must be limited to those minority groups that have actually suffered discrimination.

Private Right of Action and Discrimination under Title VI.

» Mountain West may state a private claim for damages against Montana under Title VI.

- Ninth Circuit reversed the district court and held that summary judgment for Montana was improper based on:
  - genuine disputes of material fact as to the study's analysis;
  - evidence insufficient to prove a history of discrimination.

Disputes of fact as to evidence from study to consider on remand.

1. Cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender.
2. Study relied on a small survey of a sample of Montana contractors.
3. Study relied on very small sample sizes but did no tests for statistical significance, and admitted that "the result may not be significant statistically."
4. Study gave equal weight to professional services and construction contracts.
5. Montana compared the proportion of available *sub*contractors to the proportion of *prime* contract dollars awarded.

The post-2005 decline in participation by DBEs.

- Ninth Circuit rejected district court's order based on its reliance on the decrease in DBE participation after 2005.
- A decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of DBE discrimination.
- The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide sufficient evidence of discrimination against DBEs.

Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al. (cont.)

- Court cited U.S. DOT statement in *Western States*: "In calculating availability of DBEs, [a state's] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored."

Anecdotal evidence of discrimination.

- Without a statistical basis, the State cannot rely on anecdotal evidence alone.
- "[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."

Conclusion.

- Ninth Circuit dismissed the case in part, reversed in part and remanded to the district court to conduct proceedings including trial.

Dismissal on Remand.

- Case on remand voluntarily dismissed by parties and by the Court (March 2018).

***Orion Insurance Group; Ralph G. Taylor, Plaintiffs v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et. al.,* 2018 WL 6695345 (9th Cir. December 19, 2018).**

- Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law.
- The USDOT and Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), moved for a summary dismissal of all the claims.
- Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African.
- Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.
- Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification.

- Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.
- OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.
- District court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because insufficient evidence he was either Black or Native American.
- By requiring individualized determinations of social and economic disadvantage, the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Claims for violation of equal protection.

- District court dismissed claim that, on its face, the Federal DBE Program violates the Equal Protection Clause.
- District court dismissed claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

- District court found no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals.
- District court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim.

- Plaintiffs asserted that the regulatory definitions of "Black American" and "Native American" are void for vagueness.
- District court dismissed' claims that definitions of "Black American" and "Native American" in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State.

- Plaintiffs' claims dismissed against the State Defendants for violation of Title VI.
- Plaintiffs failed to show the State engaged in intentional racial discrimination.
- The DBE regulations' requirement that the State make decisions based on race held constitutional.

On Appeal Ninth Circuit in Affirming the District Court Held:

- District court correctly dismissed Taylor's claims againt Acting Director of the USDOT's Office of Civil Rights, in her individual capacity.
- District court correctly dismissed Taylor's discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act "under color or state law" as required by the statute.
- District court correctly dismissed Taylor's claims for damages because the United States has not waived its sovereign immunity on those claims.
- District court correctly dismissed Taylor's claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a "program or activity" within the meaning of the statute.

A. Claims under the Administrative Procedure Act

- OMWBE did not act in an arbitrary and capricious manner when it determined it had a "well founded reason" to question Taylor's membership claims and that Taylor did not qualify as a "socially and economically disadvantaged individual."

- OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.
- USDOT did not act in an arbitrary and capricious manner when it affirmed the state's decision because the decision was supported by substantial evidence and consistent with federal regulations.
- USDOT "articulated a rational connection" between the evidence and the decision to deny Taylor's application for certification.

B. Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d

- District court correctly granted summary judgment to federal and state defendants on Taylor's equal protection claims because defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated.
- District court properly granted summary judgment to state defendants on Taylor's discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor's claims.
- Having granted summary judgment on Taylor's claims under federal law, the district court properly declined to exercise jurisdiction over Taylor's state law claims.

State and Local Government DBE Program Implementing Federal DBE Program: Narrow Tailoring.

» The Seventh Circuit found the Federal DBE Program constitutional on its face similar to other federal circuit courts of appeal.

- Court applied factors in determining narrow tailoring:
  - The Federal DBE Program requires states and recipients of Federal funds to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means.
  - The federal program is both flexible and limited in duration.

1. States and local government recipients may apply for waivers, including waivers of "any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts."
2. The regulations require states to remain flexible as they administer the program over the course of the year.
3. States and local government recipients must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary.
4. States and local government recipients must stop using race- and gender-conscious measures if those measures are no longer needed.

- Numerical goals are tied to the relevant markets.
  1. Setting DBE goal focusing on the specific market.
  2. Set DBE goals to reflect actual DBE availability modified by other factors like DBE capacity.

Midwest Fence "mismatch" argument: burden on third parties

- Midwest: undue burden on non-DBEs and program is over-inclusive.
- Regulations include mechanisms to minimize burdens on non-DBEs.
- § 26.33(a) requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market.
  1. Relax standards if enforcement yields negative consequences;
  2. Obtain waivers if state's compliance "impractical";
  3. Contractors can still be awarded the contract if they have documented good faith efforts to meet the goal.

Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority, (cont.)

- Midwest: "mismatch" in the way contract goals are calculated that results in a disproportionate burden on non-DBE specialty subcontractors.
  1. Overall goals set as percentage of all USDOT-assisted contracts.
  2. However, states and local government recipients may set contract goals "only on those [USDOT]-assisted contracts that have subcontracting possibilities."
  3. Contract goals are met almost entirely with subcontractor dollars, which places a heavy burden on non-DBE subcontractors.

4. Mismatch: a state or local government recipient is required to set its overall goal based on all funds it will spend on contracts, but contracts eligible for goals must have subcontracting possibilities:
   - Therefore, disproportionate burden on non-DBE specialty subcontractors because prime contractors satisfy goals using small DBE subcontractors excluding non-DBE subcontractors from receiving work.
   - Court stated that it found **"[t]his prospect is troubling**."

Over-Inclusive argument.

- Midwest: federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is disadvantaged.
- Court: Midwest did not prove that any group was not in fact disadvantaged; regulations require individualized determinations.
  1. Each presumptively disadvantaged firm owner must certify that he or she is socially and economically disadvantaged; and
  2. The presumption can be rebutted.

Midwest Fence's "Speculative" Arguments Rejected:

- Court: Midwest's "strongest" criticism was that IDOT and Tollway did not account for capacity in their determination of availability for DBEs, which courts recognize as a "serious problem".
  1. In this particular case the failure to account for relative capacity did not undermine the substantial basis in evidence.
  2. Midwest itself did not explain how to account for relative capacity.

Narrow Tailoring.

- IDOT and Tollway use race- and gender-neutral alternatives, which have not been sufficient alone to remedy discrimination.
- As for flexibility, IDOT and the Tollway permit front-end waivers when a contractor makes good faith efforts to comply with a DBE goal.
  1. IDOT and Tollway did not grant large numbers of waivers, but no evidence they *denied* large numbers of waivers.
  2. No evidence defendants failed to adhere to the good faith effort guidelines or arbitrarily deny front-end waiver requests.
  3. Rejected as "underdeveloped" Midwest's argument to look at dollar value rather than number of waivers granted.
  4. Defendants granted more front-end waiver requests than they denied, regardless of the dollar amounts.

Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority, (cont.)

» "Mismatch" is Midwest's "best argument" against narrowed tailoring.

1. Court: DBE programs that set goals on only some contracts may foreclose opportunities for a non-DBE specialty subcontractor, but no evidence they are shut-out of the market entirely.
2. Midwest's claim non-DBE subcontractors bear a disproportionate share of the burden as compared to prime contractors "**is troubling**."
3. If Midwest "had presented evidence rather than theory on this point, the result might be different."
4. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine…whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting."
5. IDOT and Tollway had mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs:
   - They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers.

***Rothe Development Inc. v. United States Department of Defense, United States Small Business Administration, et al.,* 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), *affirming on other grounds*, *Rothe Development, Inc. v. United States Department of Defense, U.S. Small Business Administration,* 107 F. Supp. 3d 183, 2015 WL 3536271 (D. D.C., 2015), *cert. denied*, 2017 WL 1375 832 (Oct. 16, 2017).**

- In a split decision, majority of a three judge panel of the U.S. Court of Appeals for the D.C. Circuit upheld the constitutionality of section 8(a) of the Small Business Act for reasons different than district court.
- Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program.
- Court: section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination without presuming that members of certain racial, ethnic, or cultural groups qualify.
- SBA's *regulation* implementing the 8(a) program *does* contain a racial classification: presumption that an individual who is a member of one of five designated groups is socially disadvantaged.

Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., (cont.)

- Rothe challenged the statute on its face and not its implementation.
- Because the Court (unlike the district court) held the statute lacks a racial classification, it applied rational-basis review, not strict scrutiny.
- Statute is supported by a rational basis because it bears a rational relation to some legitimate end.

Dissenting Opinion

- Small Business Act provisions at issue contain a racial classification and require strict scrutiny.

Petition for Writ of Certiorari

- Rothe filed a Petition for Writ of Certiorari, which was denied by SCOTUS on October 16, 2017.

Congressional Findings for Federal Programs Implemented by State and Local Government

FAA Reauthorization Act of 2018, FAST Act of 2015 and MAP-21 Act of 2012

- In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, Fixing America's Surface Transportation Act ("FAST Act") and MAP-21, respectively, which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets," in "federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal ACDBE Program and the Federal DBE Program.
- Congress also found in the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal ACDBE Program and the Federal DBE Program, which apply to local and state government recipients of federal funds. Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

Congressional Findings for Federal Programs Implemented by State and Local Government (con't)

FAA Reauthorization Act of 2018 (October 5, 2018)

- Extends the FAA DBE and ACDBE programs for five years.
- Establishes Congressional findings of discrimination that provides a strong basis there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

Sec. 157 Minority and Disadvantaged Business Participation.

(a) Findings. Congress finds the following:

(1) While significant progress has occurred due to the establishment of the airport disadvantaged business enterprise program (sections 47107(e) and 47113 of title 49, United States Code), discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets across the nation. These continuing barriers merit the continuation of the airport disadvantaged business enterprise program.

(2) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private

agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits. This testimony and documentation shows that race- and gender-neutral efforts alone are insufficient to address the problem.

(3) This testimony and documentation demonstrates that discrimination across the nation poses a barrier to full and fair participation in airport-related businesses of women business owners and minority business owners in the racial groups detailed in 49 C.F.R. Parts 23 and 26, and has impacted firm development and many aspects of airport-related business in the public and private markets.

(4) This testimony and documentation provides a strong basis that there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

» Note: Similar Congressional Findings in Fixing America's Surface Transportation Act (FAST Act) of December 2015 regarding new five year surface transportation authorization law at Section 1101(b), for federally assisted surface transportation markets (FHWA and FTA) (Pub. L. 114-94, H. R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312).

Pending Cases (at the time of this presentation)

Pending cases at the time of this presentation, include:

- *Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc., and Morgan & Thornburg, Incorporated v. Shelby County, Tennessee, Carolyn S. Watkins and John & Jane Does 1-15*, Case No. 2:19-cv-02047-SHL-tmp, United States District Court Western District of Tennessee, Western Division; *pending*.

- *Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd;* and Intervenor *Florida East Coast Chapter of the AGC of America, Inc.*, Case No. 502018CA010511; In the Circuit of the 15th Judicial Circuit in and for Palm Beach County, Florida; *pending*.

Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc., and Morgan & Thornburg, Inc., v. Shelby County, Tennessee, Carolyn S. Watkins and John & Jane Does 1-15, Case No. 2:19-cv-02047-SHL-tmp, United States District Court Western District of Tennessee, Western Division, *pending.*

- Plaintiffs filed this lawsuit in January 2019, for damages and to enjoin Defendants' use of race-based preferences in awarding government construction contracts, and to recover all costs, fees, and expenses.
- MCAM is an association of approximately eighteen mechanical contractors.
- Plaintiff, White Plumbing & Mechanical Contractors, Inc. ("White Plumbing") is a member of MCAM, and the principal owner is a Caucasian female.
- Plaintiff, Morgan & Thornburg, Inc. is a member of MCAM.
- Plaintiffs' claims are based on rights guaranteed by the Fourteenth Amendment to the United States Constitution, and 42 U.S.C., §§ 1981, 1983 and 2000(d).
- This civil action is further based on claims that the Defendants' violated Tenn. Code Ann. § 5-14-108 that requires competitive bidding.

Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc., and Morgan & Thornburg, Inc., v. Shelby County, Tennessee, Carolyn S. Watkins and John & Jane Does 1-15, Case No. 2:19-cv-02047-SHL-tmp, United States District Court Western District of Tennessee, Western Division (con'd)

- Shelby County adopted a MWBE Program based on the results of a Disparity Study.
- The Disparity Study was conducted by an outside contractor and Plainitff alleges it was fatally flawed in several ways in its methodology for determining evidence of statistical or quantitative and qualitative or anecdotal discrimination.
- Plaintiffs assert the Disparity Study does not establish the constitutionally required compelling interest for the MWBE Program's race-based "remedies," in whole or in part as *Croson* requires before using race conscious measures.
- The MWBE Program, Plaintiffs' claim, is not narrowly tailored nor is it the least restrictive means for addressing alleged racial disparities in Shelby County government construction contracts.
- The Disparity Study was used as a factual predicate to adopt—and thereafter implement—the MWBE Program that it is alleged unlawfully mandates construction contracting preferences based on race at the expense of non-MWBE firms and taxpayers.
- In 2018, Plaintiffs allege White Plumbing submitted a quote to a prime contractor that was in the process of submitting a bid for a Shelby County construction contract, and White Plumbing submitted a lower bid than a MWBE sub-contractor who was awarded the sub-contract.

- Plaintiffs allege White Plumbing's bid was the lowest and best bid for the plumbing and mechanical subcontract, and as a result, Shelby County taxpayers were charged approximately $400,000.00 more to complete the project.
- Plaintiffs allege the MWBE Program is unconstitutional for both prime and subcontractors, and ask the Court to declare it as such, and to enjoin Shelby County from further implementing or operating under it with respect to awarding government construction contracts.
- Plaintiffs seek:
    1. An order declaring unlawful and unconstitutional the MWBE Program and Shelby County Municipal Code Section 2-225, as amended;
    2. An order enjoining the County from implementing or operating under the MWBE Program and/or Shelby County Municipal Code Section 2-225, as amended, with respect to awarding government construction contracts;
    3. A Judgment awarding all costs, attorney fees, and expenses; and
    4. A Judgment awarding compensatory damages to the individual Plaintiff, White Plumbing and Mechanical Contractors, Inc. in an amount not less than $500,000.00.

***Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd; Florida East Coast Chapter of the AGC of America, Inc.*, Case No. 502018CA010511; In the Circuit of the 15th Judicial Circuit in and for Palm Beach County, Florida; *pending*.**

- The County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the County as a whole.
- Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination the MWBEs claim they faced trying to get County contracts.
- The documents were sought initially as part of a far-reaching records request by the Associated General Contractors of America (AGC).
- The County filed suit after its unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC.
- In July 2018, Florida ECC of AGC (AGC) requested information related to the disparity study that MTA prepared for the County.

Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd; Florida East Coast Chapter of the AGC of America, Inc. (cont)

- MTA refused to provide the County the public records in their possession.
- Palm Beach sued MTA for breach of contract and seeks specific performance of the contract requiring MTA to transfer all public records.
- The AGC intervened in the case and requests documents from the County and MTA related to its study and its findings and conclusions.
- AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.
- At this time MTA has filed a Motion to Dismiss.
- The ruling may lead to suit on the County MBE/WBE program by the AGC.
- The ruling may have an effect on the disclosure requirement as to documents and records kept by a disparity study or goal methodology consultant and a local or state government.

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