











# DBE Recent Legal Cases and Challenges

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- » Orion Insurance Group, a Washington Corporation, Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 18, 2018), affirming, 2017 WL 3387344 (W.D. Wash. 2017).
- » United States v. Taylor, 232 F. Supp. 3d 741 (W.D. Penn. 2017). Final judgment and termination of case on March 13, 2018.
- » FAA Reauthorization Act of 2018
- » Miscellaneous
- 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 W.L. 497345 (June 26, 2017).

# Recent Legal Cases and Challenges to the Federal DBE Program and Implementation of the Federal DBE Program

State	Successfully defended implementation of Federal DBE Program	Unsuccessfully defended implementation of Federal DBE Program	Pending litigation at time of presentation	Upheld Constitutionality of the Federal DBE Program
California	Associated General Contractors of America, San Diego Chapter v. California DOT (2013) <sup>1</sup>			
Colorado				Adarand Constructors, Inc. v. Slater, (10th Cir. 2000) <sup>2</sup>
Florida	South Florida Chapter of the Associated General Contractors v. Broward County, Florida (2008) <sup>3</sup>			
Illinois	Northern Contracting, Inc. v. Illinois DOT (2007) <sup>4</sup>			Northern Contracting, 2004 WL 422704 (N.D. III. 2004) <sup>4</sup>
	Dunnet Bay Construction Company v. Illinois DOT (2015), cert. denied, (2016) <sup>5</sup>			Midwest Fence Corp. v. United States DOT, Illinois DOT, et al. <sup>6</sup>
	Midwest Fence Corp. v. United States DOT, Illinois DOT, et al (2016), cert. denied, (2017) <sup>6</sup>			
	Sherbrooke Turf, Inc. v. Minnesota Department of Transportation (2003) <sup>7</sup>			Sherbrooke Turf (8 <sup>th</sup> Circuit) <sup>7</sup> Geyer Signal (D. Minn.) <sup>8</sup>
Minnesota	Geyer Signal, Inc. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al. (2014) <sup>8</sup>			Coyor Orginal (D. Willin)
Montana	M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al. (2013) <sup>9</sup>	Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al. (2018) <sup>10</sup>		
Nebraska	Gross Seed Company v. Nebraska Department of Roads (2003) <sup>11</sup>			Gross Seed (8th Circuit)11
New Jersey	Geod Corporation v. New Jersey Transit Corporation, et. al. (2010) <sup>12</sup>			
Pennsylvania	U.S. v. Taylor (2018) <sup>13</sup>			<i>U.S. v. Taylor</i> (W.D. Penn. 2018) <sup>13</sup>
Washington	(Orion Insurance Group v. Washington OMWBE, U.S. DOT, et al. 2018) 15	Western States Paving Co., v. Washington State DOT		Western States Paving (9 <sup>th</sup> Circuit) <sup>14</sup>
		(2005) <sup>14</sup>		Orion Ins (9th Cir. 2018) 15

# Citations of Recent Cases on Chart (page 3)

- 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. 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 Corp. v. United States DOT, Illinois DOT, et al., 840 F.3d 932, 2016 WL 65414 (7<sup>th</sup> Cir. 2016), cert. denied, 2017 WL 497345 (2017).
- 5. Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041.
- Geyer Signal, Inc., et al. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al., 2014 WL 1309092 (D. Minn. 2014).
- 9. M.K. Weeden Construction v. State of Montana, Montana Dept. of Transportation, et al., 2013 WL 4774517 (D. Mont.) (2013).
- 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 Panel Rehearing and Rehearing En Banc filed with the U.S. Court of Appeals for the Ninth Circuit by Montana DOT, May 30, 2017, denied on June 27, 2017. The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).
- Gross Seed Company v. Nebraska Department of Roads, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041.
- 22. Geod Corporation v. New Jersey Transit Corporation, et. al., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. 2010).
- 13. U.S. v. Taylor, 232 F. Supp. 3d 741 (W.D. Penn. 2017). Final judgment and termination of case on March 13, 2018.
- <sup>14.</sup> Western States Paving Co. v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).
- 15. Orion Insurance Group v. Washington OMWBE, U.S. DOT, 2018 WL 6695345 (9th Cir. 2018)

- » If a recipient of U.S. DOT funds implementing the Federal DBE Program determines it is necessary to utilize race- and ethnicconscious measures, it is subject to the "strict scrutiny" analysis applied by the courts.
  - 1) The first prong of the strict scrutiny analysis requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination;
    - Courts hold in implementing the Federal DBE Program, recipients do not need to independently satisfy this prong; Congress has satisfied the compelling interest test.
  - 2) The second prong requires a recipient's implementation of the Federal DBE Program be "narrowly tailored" to remedy identified discrimination in that recipient's transportation contracting market.

- » To satisfy the narrowly tailored prong of the strict scrutiny analysis the following factors are pertinent to implementation of the Federal DBE Program:
  - Evidence of specific identified discrimination in the local/state transportation contracting industry;
    - Quantitative (statistical) and qualitative (anecdotal) evidence.
  - Serious consideration of workable race-ethnic and gender-neutral remedies;
    - Application of 49 CFR Section 26.51 measures.
    - Are neutral measures effective to remedy discrimination.
    - Not required to exhaust all neutral 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 DBE goals to the relevant market;
    - Rational relationship of goals based on availability of qualified DBEs (ready, willing and able) (follow USDOT regulations and guidance).

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

#### » The narrow tailoring requirement: split in Courts of Appeal.

- 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 raceor 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.

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) Dismissed on Remand in March 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. The case was dismissed by the district court on March 14, 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'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).

# U.S. v. Taylor, 232 F. Supp. 3d. 741 (W.D. Penn. 2017). Final judgment and case terminated March 2018.

- » Court upheld the Indictment against Defendant Taylor on multiple counts arising out of a scheme to defraud the Federal DBE Program.
- » Court upheld the federal DBE regulations in issue against a challenge to the Federal DBE Program.
- » Court rejected a challenge to the authority of the U.S. DOT to promulgate the federal DBE regulations claiming the U.S. DOT exceeded its authority.
- » Court found that the legislative history and executive rulemaking with respect to statutory provisions and regulations sufficient to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes.
- » Defendant subsequently pleaded guilty, and court issued final Judgment sentencing the Defendant. The case was terminated in March 2018.

Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), affirming, 2017 WL 3387344 (W.D. Wash. 2017)

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.

#### FAA Reauthorization Act of 2018 (October 5, 2018)

#### FAA Reauthorization Act of 2018 (October 5, 2018)

- » Extends the FAA DBE and ACDBE programs for five years.
- » Contains an additional prompt payment provision.
- » Increases in the size cap for highway, street, and bridge construction for construction firms working on airport improvement projects.
- » 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. 150 Definition of Small Business Concern.

- » Section 47113(a)(1) of title 49, United States Code, is amended as follows:
- 'Small business concern'
- A. Has the meaning given the term in section 3 of the Small Business Act (15 U.S.C. 632); but in the case of a concern in the construction industry, a concern shall be considered a small business concern if the concern meets the size standard for the NAICS Code 237310, as adjusted by the SBA;

## FAA Reauthorization Act of 2018 (October 5, 2018) (cont)

#### 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.

## FAA Reauthorization Act of 2018 (October 5, 2018) (cont)

- (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.
- (b) Prompt Payments.
- (1) Reporting of Complaints. Not later than 120 days after the date of enactment of this Act, the Administrator of the FAA shall ensure that each airport that participates in the Program tracks, and reports to the Administrator, the number of covered complaints made in relation to activities at the airport.
- (2) Improving Compliance.
- (A) In General. The Administrator shall take actions to assess and improve compliance with prompt payment requirements under 49 C.F.R. Part 26.
- (B) Contents of Assessment. In carrying out subparagraph (A), the Administrator shall assess (i) whether and how airports are enforcing prompt payment language in contracts are being satisfied; (ii) whether and how airports are enforcing prompt payment requirements; (iii) the processes by which covered complaints are received and resolved by airports; (iv) whether improvements need to be made to (I) better track covered complaints received by airports; and (II) assist the resolution of covered complaints in a timely manner; (v) whether changes to prime contractor

### FAA Reauthorization Act of 2018 (October 5, 2018) (cont)

specifications need to be made to ensure prompt payments to subcontractors; and (vi) whether changes to prime contractor specifications need to be made to ensure prompt payment of retainage to subcontractors.

- (C) Reporting. The Administrator shall make available to the public a report describing the results of the assessment completed under this paragraph, including a plan to respond to such results.
- (3) Definitions. In this subsection, the following definitions apply:
- (A) Covered Complaint. The term "covered complaint" means a complaint relating to an alleged failure to satisfy a prompt payment requirement under 49 C.F.R. Part 26.
- (B) Program. The term "Program" means the airport disadvantaged business enterprise program referenced in subsection (a)(1) of the FAA Modernization and Reform Act of 2012 (49 U.S.C. 47113).

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 15<sup>th</sup> Judicial Circuit in and for Palm Beach County, Florida; pending.

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 15<sup>th</sup> 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 they say they faced trying to get county contracts.
- » Those 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 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.

# The U.S. DOT's Office of General Counsel approved in 2018 new guidance documents related to the DBE program

- » Compliance with Requirements for Timely Processing of Certification Applications clarifies the responsibility of Unified Certification Programs (UCPs) to track their progress in reviewing DBE certification applications, communicate with applicant firms, and ensure certification decisions are made within regulatory deadlines.
- » Guidance on State or Local MWBE Program Contract Goals sets forth USDOT's position that state and local business participation program goals cannot be applied to federal-aid contracts.
- » Prompt Payment Section Sample Template provides a sample that recipients may implement through their DBE Program Plans to encourage monitoring and enforcement of the regulation requiring prime contractors to promptly pay and release retainage to subcontractors.
- » Guidance on Procedures for Submitting Good Faith Efforts Information on Design-Bid-Build Contracts.
  - Recipients must request that all contract bidders/offerors submit DBE subcontractor information.
  - On a design-bid-build contract, recipients may request this information be submitted at the time of bid (responsiveness) or within 5 days of bid (responsibility).

# The U.S. DOT's Office of General Counsel approved in 2018 new guidance documents related to the DBE program (cont)

- This guidance clarifies that the DBE regulations require that all bidders (not just low bidders) submit the required DBE subcontractor information under both the responsiveness and the responsibility approaches.
- » Guidance on Calculating the PNW of Individuals That Own Multiple Businesses.
  - Under the DBE and Airport Concession DBE regulations an individual's ownership interest in an applicant firm is not included in the calculation of the PNW.
  - For individuals that own multiple businesses or a holding/parent company with subsidiary companies, the regulations instruct certifying agencies to exclude from the PNW calculation the value of the ownership interest held in only the firm seeking DBE certification, which may be a subsidiary company.
  - This guidance clarifies that only an individual's ownership interest in the subsidiary firm applying for DBE certification is excluded from the PNW calculation.
- » Guidance on Training for DBE Certification Application Review Staff.
- » Guidance on Recipient Responsibilities for Oversight and Monitoring of DBE Participation.

Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017)

#### 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 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 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.
    - States must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary.
    - 4. States 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.
  - 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: "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.
  - However, states 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 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.
  - 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.
  - 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.
- » "Mismatch" is Midwest's "best argument" against narrowed tailoring.
  - 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.
  - Midwest's point that non-DBE subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling."
  - 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 at a minimum 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.

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