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DBE Recent Legal Cases and Challenges

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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)*[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*[4] *(2007)* *Dunnet Bay Construction Company v. Illinoi DOT (2014)*[5]		*Midwest Fence Corp. v. United*[6] *States DOT, Illinois DOT, et al.* *Dunnet Bay*[5] appeal pending in U.S. Court of Appeals, Seventh Circuit	*Northern Contracting*, 2004 WL 422704 (N.D. Ill. 2004)[4]
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. (2014)*[10]		*Mountain West Holding,*[10] *appeal pending in the U.S. Court of Appeals, Ninth Circuit*	
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]			
Washington		*Western States Paving Co., v. Washington State DOT (2005)*[13]		*Western States Paving (9th Circuit)*[13]

Citations of Recent Cases on Chart (page 3)

[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. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), *appeal pending* in the U.S. Court of Appeals, Seventh Circuit, Docket No. 14-1493.

[6] *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, Eastern Division, Decision on Motion to Dismiss: 2011 WL 2551179 (N.D. Ill. 2011).

[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 Company, Inc. v. State of Montana, Montana DOT, et al.* 2014 WL 668 6734 (D. Mont. Nov. 26, 2014), *appeal pending in the U.S. Court of Appeals, Ninth Circuit, Docket No. 14-36097.*

[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] *Gross Seed Company v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041.

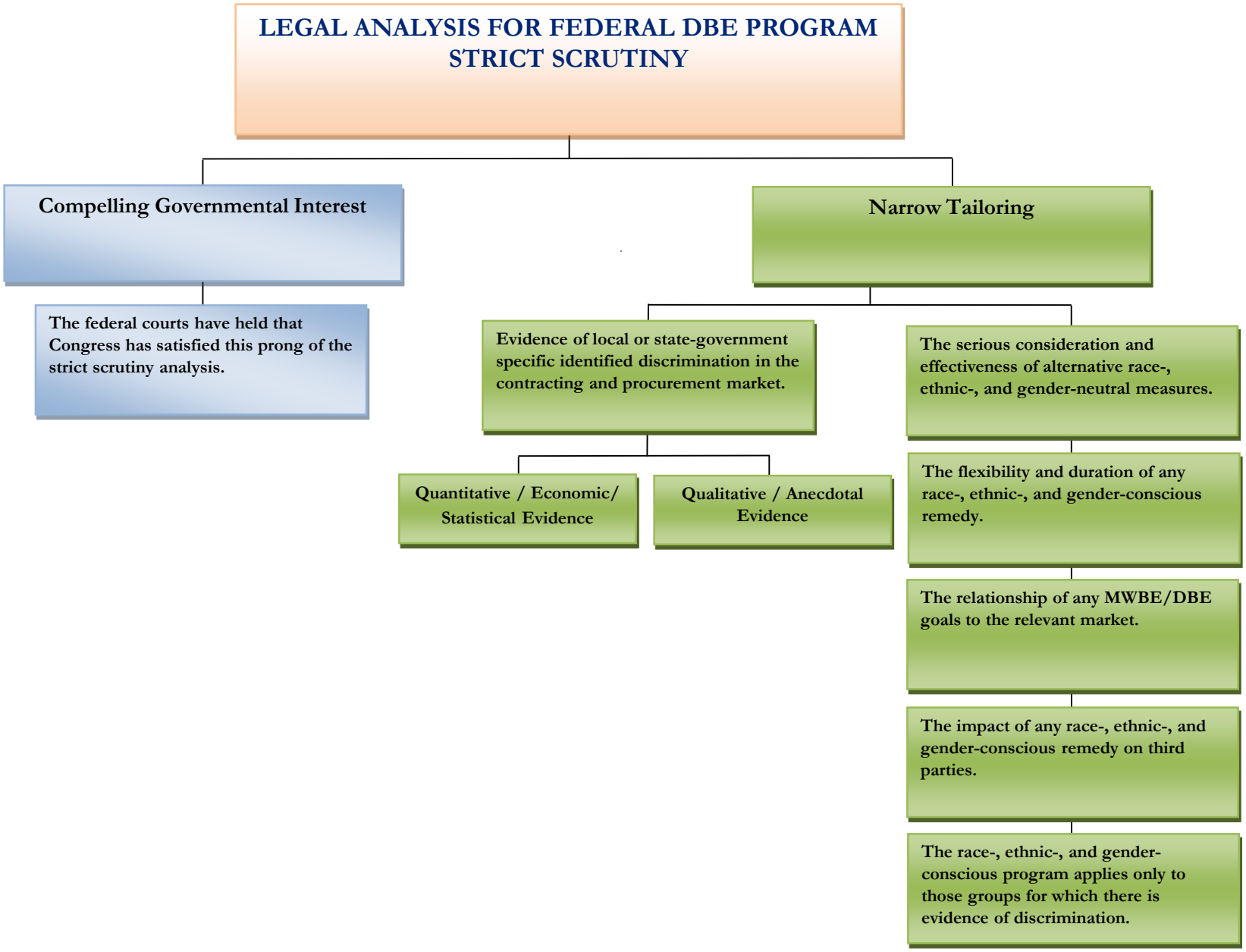
[14] *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

Summary of Recent Cases for Implementing Federal DBE Program

- **If a recipient has evidence that there is discrimination or its effects in their geographic market transportation industry, and determines it is necessary to implement race- and ethnic-conscious measures, then it is subject to the "strict scrutiny" analysis as 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.
     i. Certain federal courts have held that, with respect to the Federal DBE Program, recipients do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.
  2) The second prong of the strict scrutiny analysis requires that a recipient's implementation of the Federal DBE Program be “narrowly tailored” to remedy identified discrimination in a particular recipient's transportation contracting and procurement market.

Summary of Recent Cases for Implementing Federal DBE Program

- **To satisfy the narrowly tailored prong of the strict scrutiny analysis the following factors may be pertinent to a recipients' implementation of the DBE Program:**
  1) Evidence of specific identified discrimination in the local/state transportation contracting industry;
  2) Serious consideration and effectiveness of workable race-ethnic and gender-neutral remedies;
  3) Flexibility and duration of a race-ethnic-gender conscious remedy;
  4) Relationship of numerical DBE goals to the relevant market;
  5) Impact of a race-ethnic-gender conscious remedy on third parties; and
  6) Application of the program to those minority groups who have suffered discrimination.


LEGAL ANALYSIS FOR FEDERAL DBE PROGRAM
STRICT SCRUTINY
Compelling Governmental Interest
The federal courts have held that Congress has satisfied this prong of the strict scrutiny analysis.
Narrow Tailoring
Evidence of local or state-government specific identified discrimination in the contracting and procurement market.
Quantitative / Economic/ Statistical Evidence
Qualitative / Anecdotal Evidence
The serious 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 MWBE/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.

Summary of Recent Key Cases for Implementing Federal DBE Program

» **The narrow tailoring requirement has several components.**

1) The Ninth Circuit in *AGC, San Diego Chapter v. California DOT* and *Western States Paving Co. v. Washington DOT* held a state must have independent evidence of discrimination within the state's own transportation contracting marketplace to determine whether there is the need for race- or gender-conscious remedial action.
2) Mere compliance with the Federal DBE Program does not satisfy strict scrutiny.
3) A narrowly tailored program must apply only to those minority groups who have actually suffered discrimination.
4) In the *Northern Contracting* decision, the Seventh Circuit held "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority."
5) The Seventh Circuit distinguished the Ninth Circuit decision in *Western States Paving* and the Eighth Circuit decision in *Sherbrooke Turf*. The Court held that the challenge to the state DOT's DBE program is limited to whether the state exceeded its grant of federal authority under the Federal DBE Program.

- **Factual and procedural background.**
  - Plaintiff Mountain West Holding Co., Inc. ("Mountain West"), is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers.
  - Mountain West sued the Montana DOT ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program.
  - Mountain West claims:
    1) State did not have a strong basis in evidence to show past discrimination in the highway construction industry in Montana;
    2) the implementation of race, gender, and national origin preferences were not necessary or appropriate;
    3) Montana has instituted policies and practices which exceed the U.S. DOT DBE requirements;
    4) Montana's DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals; and
    5) Montana's DBE Program is not narrowly tailored because it disregards differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services.

- **Montana DOT 2009 disparity study.**
  - study indicated significant underutilization of DBEs in all minority groups in "professional services" contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in "business categories combined," slight underutilization of nonminority women in "business categories combined," and overutilization of all groups in subcontractor "construction" contracts.
  - anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including an exclusive "good ole boy network".
  - despite these findings, the study recommended that Montana DOT employ only race-neutral means to meet its overall goal.
  - Montana followed the recommendations in the study, and used for several years only race-neutral means to accomplish its overall goal for DBE utilization of 5.83%.
  - Subsequently, for fiscal years 2011-2014, Montana employed DBE contract goals: 3.27% of 5.83% for contract goals, which were a primary subject of the case.

- **Montana's DBE utilization after ceasing the use of contract goals.**
  - In 2006, Montana achieved a DBE utilization rate of 13.1%, however, after Montana ceased using contract goals, the rate of DBE utilization declined sharply.
  - The utilization rate dropped, such that in 2011, it was 2.8%.
  - Montana DOT prepared a new Goal Methodology for DBE utilization for fiscal years 2014-2016, which US DOT approved.
  - The approved new goal methodology does not provide for the use of contract goals, but overall goal is to be made through race-neutral means.
- **The two-prong test to demonstrate that a DBE program is narrowly tailored.**
  - The Court, citing and following *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196 (2013) stated the test to demonstrate that the DBE program is narrowly tailored is:
    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.

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

- A state implementing the facially valid federal DBE program need not demonstrate an independent compelling interest for its DBE program because when Congress passed the relevant legislation it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry.
- A state need only demonstrate that its program is narrowly tailored.
- States can meet the evidentiary standard if, looking at the evidence in its entirety, "the data shows substantial disparities in utilization of minority firms suggesting that public dollars are being poured into 'a system of racial exclusion practiced by elements of the local construction industry.'"
- Narrow tailoring does not require a state to parse its DBE Program to distinguish between certain types of contracts within the transportation contracting industry.
- A state DBE program need not require minority firms to attest that they have been discriminated against in the relevant jurisdiction because such a requirement is contrary to federal regulation.

- **Statistical evidence.**
  - Montana's DBE program passes strict scrutiny.
  - Mountain West did not refute by evidence the study findings:
    1) underutilization of all minority groups in the award of professional services contracts in Montana's transportation contracting market.
    2) Underutilization of Asian Pacific Americans and Hispanic Americans in the award of contracts in business categories combined in Montana's transportation contracting market.
    3) Underutilization of non-minority women in business categories combined.
  - Mountain West merely disputed the validity of the findings in the study and argued the methods the study used in gathering the evidence were flawed.
  - Mountain West provided no evidence indicating that the data showing significant underutilization was invalid.

- **Anecdotal evidence.**
  - Substantial anecdotal evidence of discrimination in Montana's transportation contracting market, including evidence of a "good ole boy network."
  - The Court said that in AGC, San Diego, the Ninth Circuit noted "federal courts and regulations have identified precisely [the factors associated with good ole boy networks] as barriers that disadvantage minority firms because of the lingering effects of discrimination.
  - No requirement that anecdotal survey evidence must be supported by affidavits.
  - The Court pointed out the Ninth Circuit held in AGC, San Diego that "substantial statistical disparities alone would give rise to an inference of discrimination, and certainly … statistical evidence combined with anecdotal evidence passes constitutional muster."
- **Precipitous drop in utilization.**
  - DBE utilization in Montana's transportation contracting industry dropped precipitously after 2006 when Montana ceased using contract goals.
  - This fact "strongly supports [Defendants'] claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination."

- **Conclusion and holding.**
  - The Court held that Montana presented sufficient evidence to demonstrate discrimination in Montana's transportation contracting industry.
  - Montana's DBE program is sufficiently narrowly tailored to address discrimination against only those groups that have actually suffered discrimination in the state's transportation contracting industry based on the following:
    1) statistical evidence suggests that all minority groups in professional services are significantly underutilized;
    2) there is evidence of an exclusive "good ole boy network" within the state contracting industry; and
    3) DBE underutilization dramatically increased after 2006 when the State ceased using contract goals.
- **Appeal Pending.**
  - The decision of the District Court has been appealed by Mountain West to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 14-36097 (December 26, 2014).

Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014), appeal pending in the U.S. Court of Appeals for the Eighth Circuit

- Plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied.

Procedural Background.

- Geyer Signal is a small, Caucasian male-owned business that performs traffic control work on road construction projects.
- The USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants, which was granted.
- The Federal Defendants moved for summary judgment and the State Defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional.
  - The Court states the "heart of Plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work."

Geyer Signal, Inc. v. Minnesota, DOT (cont.)

  - Plaintiffs contend DBEs cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary.
  - Plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract.
  - Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non–DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination".

» Plaintiffs argued the DBE Program is not narrowly tailored because DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors.

» Plaintiffs brought two facial challenges to the Federal DBE Program.

1) The DBE Program is unconstitutional because it is "fatally prone to overconcentration" where DBE goals are met disproportionately in areas of work that require little overhead and capital.

2) The DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is "reasonable" without defining a reasonable increase in cost.

Geyer Signal, Inc. v. Minnesota, DOT (cont.)

- Plaintiffs also brought three as-applied challenges based on MnDOT's implementation of the DBE Program.
  1) There is no evidence of discrimination against DBEs in government contracting in Minnesota.
  2) MnDOT has set impermissibly high goals for DBE participation.
  3) To the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so.
- **Facial Challenge Based on Overconcentration**
  - Compelling government interest. Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in remediating the effects of past discrimination in the government contracting markets.
  - The Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest.
  - The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination.

Geyer Signal, Inc. v. Minnesota, DOT (cont.)

Congressional evidence of discrimination: disparity studies and barriers.

- Plaintiffs argued the evidence relied upon by Congress is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants.
- The Court found that Plaintiffs did not raise any specific issues with respect to the Federal Defendants' evidence of discrimination.
- Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program.
  - minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities.
  - Credit discrimination against MBE/WBEs.
  - Statistically significant underutilization of MBE/WBEs in public contracting.
  - Discrimination existed in MnDOT contracting when no race-conscious efforts were utilized.

Geyer Signal, Inc. v. Minnesota, DOT (cont.)

- Rejected Plaintiffs' argument that because Congress found multiple forms of discrimination against MBE/WBEs, Congress failed to also find that such businesses specifically face discrimination in public contracting.
- Evidence presented demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, which show a strong link between racial disparities in the disbursements of public funds and the channeling of those funds due to private discrimination.
  - The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination.
  - The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination.
- Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for the Federal DBE Program.
- Court rejects Plaintiffs' general critique of the evidence and methodology of the studies relied upon by the Federal Defendants as failing to meet their burden of proof.
  - rejected argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program.

Geyer Signal, Inc. v. Minnesota, DOT (cont.)

- Court held Plaintiffs failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.
- Plaintiffs did not dispute the various aspects of the Federal DBE Program that courts have found demonstrate narrowly tailoring. Instead, Plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration.

- Plaintiffs argued if recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of work.
- On this facial challenge, Plaintiffs must establish that the overconcentration is unconstitutional, and there are no circumstances under which the Federal DBE Program could be operated without overconcentration.
- Court held Plaintiffs' claim fails concluding there are circumstances under which the Federal DBE Program could be operated without overconcentration.

Geyer Signal, Inc. v. Minnesota, DOT (cont.)

- First, Court found Plaintiffs fail to establish DBE Program goals will always be fulfilled in a manner that creates overconcentration.
  - Recipients set goals for DBE participation based on the availability of ready, willing and able DBEs to participate.
  - The DBE Program takes into account, when determining goals, that there are certain types of work DBEs may never be able to perform.
  - If there is a type of work that no DBE can perform, there will be no evidence of the availability of ready, willing and able DBEs in that type of work.
  - Those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination.
- Second, even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program provides ample mechanisms to address such a problem.
  - A recipient retains flexibility in setting individual contract goals and may consider the type and location of work involved, and the availability of DBEs for the work of the particular contract.
  - A recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present.

Geyer Signal, Inc. v. Minnesota, DOT (cont.)

- Regulations provide for prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a DBE can acquire.
- Recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, overconcentration threatens operation of the DBE Program.
- Recipient's ability to tailor specific contract goals to combat overconcentration.

» Federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other measures to assist DBEs in performing work outside of the specific field in which non-DBEs are unduly burdened or DBEs are overconcentrated.

– Because the DBE Program provides avenues to combat overconcentration, Plaintiffs' facial challenge failed.

As-Applied Challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored.

» Alleged Failure to Find Evidence of Discrimination.

– To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds was otherwise unreasonable in its analysis and in relying on its results."

Geyer Signal, Inc. v. Minnesota, DOT (cont.)

- It is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts."
  - Plaintiffs did not present affirmative evidence that no discrimination exists in Minnesota's public contracting.
  - As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting.
  - It would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts.
  - Criticisms fail to establish that MnDOT was unreasonable in its analysis.

Alleged Inappropriate Goal Setting.

- Plaintiffs second challenge was to the goals MnDOT set for DBE performance.
  - Disputes over the data collection and calculations used to support goals that are no longer in effect are moot.
  - Rejected challenges that the 2013–2015 goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets.
  - Because these challenges identify only a different interpretation of the data and do not establish that MnDOT unreasonably relied on studies, Plaintiffs arguments as to narrow tailoring and goal setting failed.

Geyer Signal, Inc. v. Minnesota, DOT (cont.)

- **Alleged overconcentration in the traffic control market.**
  - Plaintiffs argue MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration.
  - No statistically significant overconcentration of DBEs in Plaintiffs' type of work.
  - Plaintiffs relied upon six other contractors that bid on MnDOT contracts, which Plaintiffs believe perform the same type of work.
  - No authority that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar.
  - Because Plaintiffs did not show that MnDOT's overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work, it did not establish MnDOT violated narrow tailoring by failing to identify or address overconcentration.
- **Holding**. The Court granted the Federal Defendants' and state Defendants' motions, and dismissed the claims asserted by the Plaintiffs.

Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. Feb 12, 2014), appeal pending in the U.S. Court of Appeals for the Seventh Circuit

- Plaintiff Dunnet Bay sued the Illinois DOT (IDOT) challenging the IDOT DBE Program and its implementation of the Federal DBE Program, claiming that IDOT's program is not narrowly tailored.
- Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on:
  1) an unwritten no-waiver policy;
  2) requiring Dunnet Bay to meet DBE goals;
  3) denying Dunnet Bay a waiver of the goals despite its good faith efforts; and
  4) other allegations.
- Dunnet Bay filed a Motion for Summary Judgment, asserting that:
  1) IDOT had departed from the federal regulations implementing the Federal DBE Program;
  2) IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest; and
  3) therefore, the actions of IDOT could not withstand strict scrutiny.

- IDOT also filed a Motion for Summary Judgment, asserting that:
  1) All applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program; and
  2) Because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack.
- **Factual Background**
  - Dunnet Bay is owned by two white males and is engaged in the business of general highway construction.
  - DBE goal set for the Project at issue was 22 percent.
  - Dunnet Bay's bid was the lowest received by IDOT; was over budget, and identified 8.2% for DBEs.
  - The second low bidder projected DBE participation of 22 percent.
  - IDOT rejected Dunnet Bay's bid determining it had not demonstrated good faith efforts to meet the DBE goal.
  - The Court found that the federal regulations provide the state DOT may consider the ability of other bidders to meet the goal in determining good faith efforts.

- **IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority.**
  - The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of pass discrimination in the national construction market."
  - The state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority."
  - Any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority."
  - The Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*.

- Court found IDOT employed a thorough process before arriving at the 22 percent DBE participation goal.
- Court stated "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Thus this challenge fails under *Northern Contracting.*"
- Court concluded there is no basis for finding the DBE goal was arbitrarily set or that IDOT exceeded its federal authority.

» **The alleged "no-waiver" policy.**

- The Court held that there was not a no-waiver policy considering all the testimony and factual evidence.
- The Court found IDOT did not exceed its federal authority because it did not adopt a "no-waiver" policy.
- The Court concluded that this challenge also failed based on *Northern Contracting*.

- **IDOT's decision to reject Dunnet Bay's bid based on lack of good faith efforts did not exceed IDOT's authority under federal law.**
  - IDOT has significant discretion under federal regulations and is called upon to make a "judgment call" regarding the efforts establishing a good faith attempt to meet DBE goals;
  - Court unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts;
  - The strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is the fact its DBE participation was eight percent while other bidders reached the 22 percent goal;
  - IDOT's decision rejecting Dunnet Bay's bid was consistent with and did not exceed IDOT's authority under the federal regulations;
  - The Court rejected as significant certain technical violations such as to provide Dunnet Bay with a written explanation;
  - Because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration; and
  - IDOT was not required to hold a reconsideration hearing.

- **Dunnet Bay lacked standing to raise an equal protection claim.**
  - Significant ruling because Dunnet Bay was a rejected low bidder.
  - Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals.
  - Any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract.
  - Dunnet Bay was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment.
  - Dunnet Bay did not prove that another contractor did not have to meet the same requirements it did.
  - Dunnet Bay was not deprived of the ability to compete on an equal basis.
- **Dunnet Bay did not establish Equal Protection violation.**
  - In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects.

- Dunnet Bay was treated the same as other bidders.
- Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts.
- Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause.
- Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law.

» **Appeal Pending.**

- Dunnet Bay has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.

M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (September 4, 2013)

- This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation ("DOT") and others, to the DBE Program adopted by Montana DOT implementing the Federal DBE Program.
- **Factual Background and Claims**.
  - Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project.
  - Montana DOT established a DBE goal of 2%.
- Weeden did not meet the 2% DBE requirement.
  - Weeden was the only bidder out of the six bidders who did not meet the 2% DBE goal.
- Montana DOT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden failed to demonstrate good faith efforts.
  - The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make good faith efforts.

M.K. Weeden Construction v. State of Montana Department of Transportation, et al. (cont.)

- Weeden claimed that Montana DOT's DBE Program violated the Equal Protection Clause, asserting there was no evidence of discrimination in the Montana highway construction industry.
- **No proof of irreparable harm and balance of equities favor Montana DOT.**
  1) Weeden did not prove that it would suffer irreparable harm based on the fact in the past four years, Weeden had obtained six state highway construction contracts;
  2) Thus, Court concluded as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts; and
  3) There is little risk of irreparable injury in the event Montana DOT awards the Project to another bidder.

- **Second, the Court found the balance of the equities did not tip in Weeden's favor.**
  - The Court held the other five bidders were able to meet and exceed the 2% DBE requirement without any difficulty.
  - The Court found that Weeden's bid is not responsive to the requirements, therefore it is not the lowest responsible bid.
- **No Standing.**
  - Since Weeden is a prime contractor, the Court held Weeden lacks standing to assert its equal protection claim.
  - Prime contractor is not permitted to challenge Montana DOT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract.

Court applies AGC v. California DOT; evidence supports narrowly tailored DBE program.

- Montana DOT presented significant evidence of underutilization of DBE's generally that supports a narrowly tailored race and gender preference program.
- Although some business categories do not have evidence showing discrimination (construction in contrast to professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented."
- The Ninth Circuit held that a state's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination.
- Instead, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry."
- It is enough that the anecdotal evidence supports Montana's statistical data showing a pervasive pattern of discrimination.

- Court noted there is no allegation that Montana DOT exceeded any federal requirement or did not comply with U.S. DOT regulations.

Due Process claim.

- Court rejected Weeden's assertion it has a protected property right in the contract that has not been awarded where the government retains discretion to determine the responsiveness of the bid.
- Montana law requires that an award of a public contract for construction must be made to the lowest responsible bidder and confers broad discretion.
- A low bidder obtains no vested property right until the contract has been awarded.
- Weeden was granted notice, hearing and an appeal from Montana DOT's decision denying the good faith exception to the DBE contract requirement.

Holding and Voluntary Dismissal.

- Court denied Weeden's application for Temporary Restraining Order and Preliminary Injunction. Weeden filed a Voluntary Dismissal.

- Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males is challenging the constitutionality and the application of the USDOT DBE Program.
- Midwest Fence also challenges IDOT's implementation of the Federal DBE Program for federally funded projects, IDOT's implementation of its own DBE Program for state-funded projects and the Illinois State Toll Highway Authority's separate DBE Program.
- The federal district court issued an Initial Order denying the Defendants' Motion to Dismiss for lack of standing, denying the federal Defendants' Motion to Dismiss certain Counts of the Complaint, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but gave leave to Midwest to re-plead certain allegations subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al*., 2011 WL 2551179 (N.D. Ill. June 27, 2011).

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. (cont.)

- Midwest Fence in its Third Amended Complaint challenges the constitutionality of the Federal DBE Program on its face and as applied, and challenges the IDOT's implementation of the Federal DBE Program.
- Midwest Fence seeks a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional.
- Midwest Fence seeks relief from the IDOT Defendants, including:
  1) A declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional;
  2) A declaration that IDOT does not follow the USDOT regulations;
  3) A declaration that the IDOT DBE Program is unconstitutional and other relief including damages against the IDOT; and
  4) As against the Tollway defendants, a declaration that the Tollway's DBE Program is unconstitutional, and a request for damages.
- This case, at the time of this presentation, is currently in the dispositive motions and pretrial stage of the litigation. All parties have filed dispositive motions (Motions for Summary Judgment) with the Court that are currently pending.

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