

Legal Update

Missouri Department of Transportation Civil Rights Symposium 2017

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City of Richmond v. J.A. Croson Co.

- Race-based public contracting programs are subject to strict scrutiny
- Court struck down Richmond's 30% MBE quota
- Government defendant has burden of production
- Plaintiff has ultimate burden of proof
- Government can use its spending powers to eradicate private discrimination to avoid being a "passive participant" in a discriminatory marketplace

City of Richmond v. J.A. Croson Co.

- No need to prove the agency discriminated
- “Societal” discrimination not sufficient
- All racial & ethnic groups must suffer in the local marketplace
- Disparities between population & agency utilization of minorities & women is insufficient
- Race-neutral measures must be seriously considered
- Strict scrutiny need not be fatal in fact: some affirmative action programs are permissible

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Adarand v. Peña

- Applied strict scrutiny to federal enactments through the 5th Amendment
- USDOT & other agencies reviewed contracting affirmative action programs
- Led to major revisions to USDOT, USEPA, USDOD, etc. regulations (e.g., 49 CFR Part 26 for the USDOT Disadvantaged Business Enterprise Program for federal-aid transportation contracts)

Strict Scrutiny as Applied

- Two pronged test
 - Strong basis in evidence of the government’s “compelling interest” in remedying discrimination
 - Remedies must be “narrowly tailored” to that evidence
- Ultimate question of law not fact; standard of review is *de novo*
- “Intermediate scrutiny” for gender?
- Location & size subject to “rational basis” scrutiny

AGC of San Diego v. CalTrans

- CalTrans Disparity Study
 - Found insufficient disparities for Hispanics & Subcontinent Asians
 - Recommended a DBE goal of 13.5%, 6.75% to be met through contract goals
- USDOT approved dropping Hispanic & Subcontinent Asian males from goal credit
- DBE group & San Diego NAACP intervened
- Caltrans conducted a study “update” that found dropping Hispanic & Subcontinent Asian males lead to disparities in their utilization

AGC of San Diego v. CalTrans

- Summary judgment in CalTrans favor
 - AGC did not have associational standing because it did not identify individual members harmed by the program
 - Statistical & anecdotal evidence of discrimination in the California transportation industry was sufficient
 - No need to show specific acts of deliberate discrimination
 - No need to show underutilization in every industry category; the test is a pervasive, discriminatory system
 - No requirement to verify anecdotes
 - No requirement for separate goals by industry category
 - CalTrans applies many race-neutral measures

Mountain West Holding Co. v. Montana DOT

- Summary judgment in MTDOT's favor
 - MTDOT's disparity study found underutilization of DBEs for all groups in most categories & anecdotal evidence of continuing discrimination
 - Study recommended only race-neutral measures to meet 5.83% goal; utilization then dropped from 13.1% to 2.8%
 - USDOT recipient does not have to independently establish its compelling interest
 - Drop in participation is relevant & probative
 - No requirement to distinguish between industries
 - Plaintiff cannot simply dispute the methodology & finding; it must show that the data are invalid

M.K. Weeden Construction. v. Montana DOT

- Plaintiff failed to meet 2% DBE contract goal
- Summary judgment for agency
 - Plaintiff failed to make good faith efforts
 - Other bidders met the goal
 - Failure to make good faith efforts = non-responsiveness
 - Obtained 6 MTDOT contracts over 6 years, so irreparable harm
 - No standing because plaintiff wasn't subjected to race-based barrier to its ability to compete for prime contracts

Dunnet Bay v. Illinois DOT

- Narrow tailoring case
- Plaintiff low bidder failed to meet 20% DBE goal
- Made some but not all possible good faith efforts
 - Contacted DBEs; some followup; didn't contact supportive services
- Bid exceeded the program estimate
- Plaintiff was left off prequalified bidders list
- Did IDOT adopt a “no waivers” policy?

Dunnet Bay v. Illinois DOT

- Holding for IDOT
 - Plaintiff general contractor did not have standing to bring the lawsuit
 - Could compete on equal footing with other GCs
 - DBE program can include white males but is limited by size & PNW limits plaintiff could not satisfy
 - Contract was rebid so no injury from DBE program
 - IDOT's annual & contract goal setting method was reasonable & met Part 26
 - There was no “no waiver” policy
 - Plaintiff failed to make good faith efforts

Geyer Signal, Inc. v. Minnesota DOT

- DBE program is facially constitutional (again)
 - Program can be operated without “overconcentration”
 - Several approaches to address the problem
- MnDOT’s program is narrowly tailored
 - Plaintiff failed to prove that “better data” were available; that MnDOT was “unreasonable” in relying on existing data; or that discrimination no longer exists
 - Rejected challenge to methodology to set contract goals
 - Overconcentration analysis based on NAICS codes was reasonable

Midwest Fence v. Illinois DOT & Illinois Tollway

- Summary judgment for both agencies & USDOT
 - Controlling case law upheld IDOT's DBE Program in 2007
 - Inadequate recent disparity study for the Tollway so counsel relied on a 2006 availability study; new disparity study recently completed
 - IDOT correctly applied Part 26
 - Tollway's program largely mirrors Part 26, including accepting ILUCP certifications & adopting personable worth & size limits
 - Plaintiff has ample opportunities on contracts

Race-Neutral/Small Business Programs

- Increasing defaults to SBE programs
 - No need for disparity studies because size & location are not protected classifications
 - Inadequate to remove systemic race & gender barriers because the vast majority of firms are small
 - BUT only remedies to increase access to prime contract opportunities
 - What basis for annual or contract goal setting since the great majority of firms are “small”?

Race-Neutral/Small Business Programs

- DBE Program must include small business element (49 C.F.R. § 26.39)
- Possible strategies
 - Race-neutral small business set-asides or points
 - Unbundling
 - On contracts without goals, mandated subcontracting
 - Fostering small business joint ventures
 - Disfavored: SBE contract goals added to D/M/WBE contract goals

Veteran Business Programs

- Increased development of Veteran-Owned Small Business & Service Disabled Veteran-Owned Small Business programs
 - Lower legal standard of “rational basis” review
 - DBE program does not include veterans component
 - Federal goal is 3% for SDVOSBs; Veterans Administration’s goal is 7% for SDVOSBs
 - Major problems with self-certification, pass throughs & ownership & control
 - Data that there is a problem? Effect on D/M/WBE programs?

LGBTQ Programs

- Increased interest from lawmakers
- Lower legal standard of “intermediate scrutiny” for gender discrimination?
- Beneficiaries are mostly White males
- No data available
- Certification issues
 - What type of proof of sexual orientation?
 - Full transition & change in legal status for transgendered persons?
 - Certify under the individual approach of Part 26?
- Collect contract data
 - Vendor applications?
 - Bidders lists?

Prosecutions for D/M/WBE Fraud

- Major focus of USDOJ Inspector General
- Local law enforcement interest is increasing
- Types of successful fraud prosecutions
 - False information in certification applications
 - Lack of independence from non-certified firm
 - Passthroughs/fronts where the certified firm did not perform the work
 - False business cards & vehicle decals
 - False certified payrolls, invoices, other documents
 - Failure to fully perform a commercially useful function

Trending

- Increased scrutiny under narrow tailoring
 - D/M/WBE annual goal setting
 - Apply a “but for” adjustment?
 - D/M/WBE contract goal setting
 - Can you explain how the number was derived?
 - Must be based on the scopes of work of the contract (including the prime dollars) & availability in those scopes
 - Consider the size of the contract: subcontracting realistic?
 - Cannot use the same goal in every contract or rely on an overall annual goal
 - Is the process described & the determination documented?

Trending

- Good faith efforts reviews
 - Standards must be detailed
 - How much notice to give D/M/WBEs?
 - How many &/or what percentage must be contacted?
 - What is the role of price?
 - Waiver request procedures must be clear & easily accessible
 - Use forms & checklists
 - Allow sufficient time for consideration
 - When are requests due
 - With the bid or proposal
 - Specified number of days after
 - “Cure” period?

Trending

- Greater oversight of DBE substitutions or terminations
 - Primes must receive prior written agency approval
 - Good cause means:
 - Failure to execute a contract
 - Failure to perform to normal industry standards
 - Failure to meet reasonable bonding requirements
 - Bankruptcy or credit unworthiness
 - Suspension or debarment from public work
 - Determination by the agency of lack of responsibility
 - Voluntary withdrawal by the D/M/WBE
 - Ineligibility for goal credit for work committed
 - Death or incapacity of the D/M/WBE owner
 - Other good cause determined by the agency, not the contractor

Trending

- Issues of overconcentration
 - Defined in Part 26 as DBEs are so heavily represented in a given type of work that non-DBEs are squeezed out
 - If recipient finds overconcentration, it should take mitigating measures
 - This issue has been raised unsuccessfully in some challenges
 - Recipients should collect data
 - What response?
 - Drop for goal credit?
 - What about overconcentration of non-DBEs?

Trending

- Commercially useful functions issues
 - Role of joint venture partners
 - Installation only
 - Use of prime's equipment
 - Common employees
 - Price negotiations with suppliers
 - How much help is too much help?

Trending

- Limits of data & & statistical analysis
 - Statistics can only support inferences; they don't "prove" anything
 - Data & methodology are not value neutral
 - Lens brought to bear affects the research paradigm
 - Unintended & implicit biases
 - Amazon Prime refused to deliver to certain zip codes
 - Google searches show women lower paying jobs
- Increased focus on the "racial wealth gap"
 - "Wealth" versus "income"
 - Community economic strength
 - Development of power



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