



# WASQUITO

CIVIL RIGHTS TRAINING SYMPOSIUM | AUSTIN 2019



# Civil Rights Legal Update

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# Race and Gender Conscious Programs

- Designed to eliminate discrimination and to remedy the lingering effects of past discrimination
- Percentage goals for participation are commonly based on the availability of DBEs in a particular area
- Must satisfy constitutional legal standards
- Must be properly and consistently administered

# Legal Framework – Federal DBE Program

- Congress established the DBE Program in 1982
- It has been reauthorized several times, including in Fixing America's Surface Transportation Act (FAST Act) and in the Moving Ahead for Progress in the 21st Century Act (MAP-21)
- USDOT regulations
  - 49 C.F.R. Part 26
  - Airport Concessions – 49 C.F.R. Part 23

# DBE Program

- DBEs are small businesses owned and managed by “individuals who are both socially and economically disadvantaged.”
- Women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA are presumed to be socially and economically disadvantaged.
- The presumption may be rebutted.
  - If an individual’s PNW exceeds \$1.32 million
  - Or an individual’s collective assets lead a reasonable person to conclude that he or she is not economically disadvantaged.
- Certification is also available to individuals who are not presumptively disadvantaged, but can demonstrate actual social and economic disadvantage.

# Constitutional Analysis

- Strict Scrutiny (applies to race or ethnicity)
  - Must be narrowly tailored to serve a compelling government interest.
- Intermediate Scrutiny (applies to gender)
  - Must be substantially related to an important government interest.
- Rational-Basis Test (applies to other bases)
  - Must be reasonably related to a legitimate government interest.

# Strict Scrutiny

- “Compelling interest” in remedying identified discrimination.
  - With respect to the federal DBE program, courts have found that Congress has satisfied this test.
- Remedies must be “narrowly tailored” to that evidence.

# Compelling Interest

“Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction... where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”

- *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

# Narrow Tailoring - Factors

“Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” but it does “require serious, good faith consideration of workable race-neutral alternatives.”

- *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

- Simplifying the bonding process or reducing bonding requirements
- Communications regarding contracting opportunities
- Providing technical assistance and other support services
- Distributing your DBE directory

# Narrow Tailoring – Factors Continued

- The flexibility and duration of the race-conscious remedy
  - Quotas or set-asides are not permitted
  - Sunset provisions
  - Good faith efforts
- The relationship of the numerical goals to the relevant labor market
- And the impact of the remedy on third parties

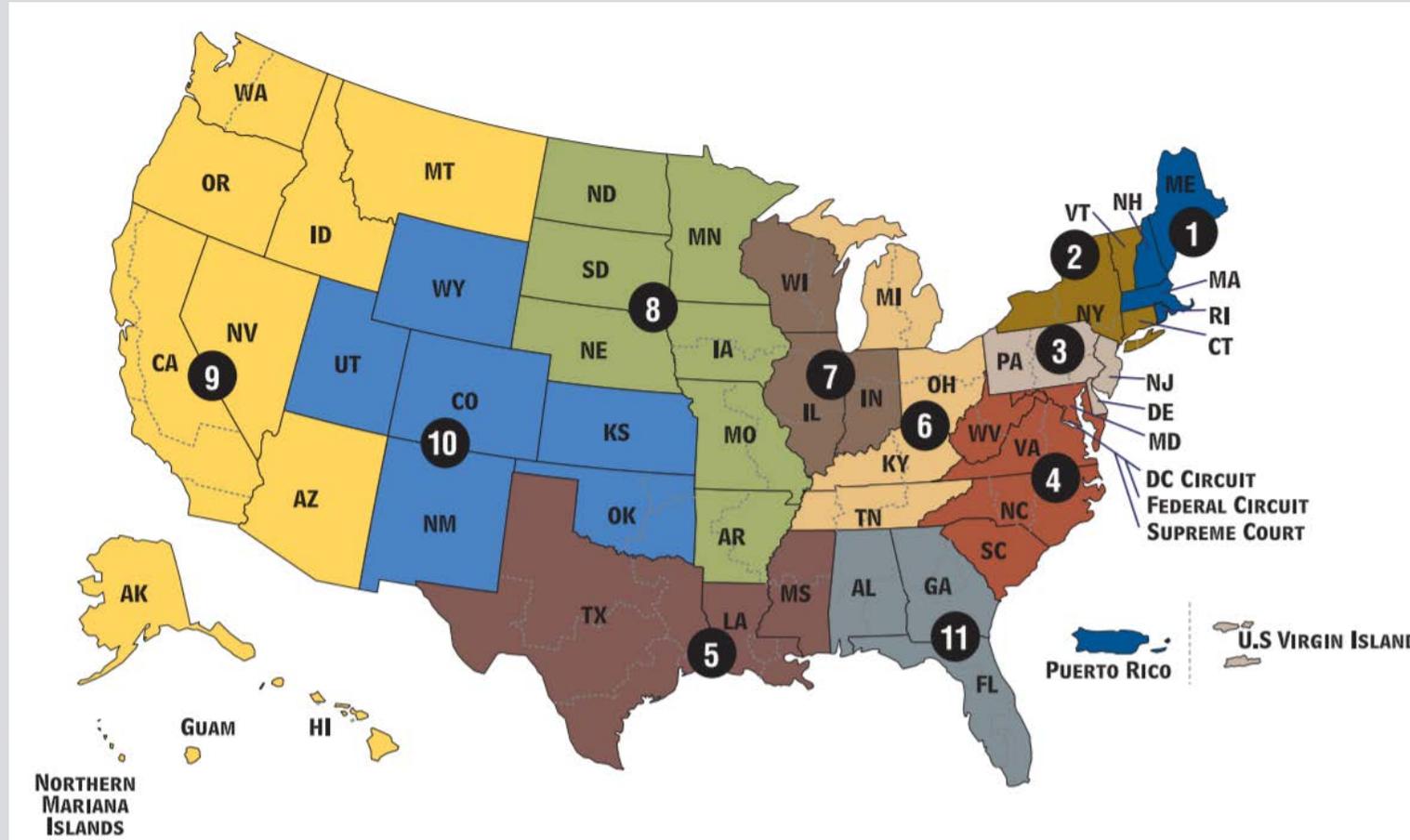
# Distinction between Quotas and Goals

Quotas	Goals
Rigid numbers	Flexible numbers
Not based on specific availability	Considers availability in specific scopes of work
Quotas are less tailored or overinclusive	Goals are more tailored and less overly inclusive
Quotas do not consider good faith efforts	Meeting goals or demonstrating good faith efforts are treated the same
Less socially acceptable	More socially acceptable
Constitutionally suspect	Constitutionally acceptable

# Circuit Split

- In the Ninth Circuit, state and local transportation agencies must provide evidence of discrimination within their own contracting market in order to demonstrate that its DBE program is narrowly tailored.
  - *See Western States Paving, Inc. v. Washington State Dep't of Transp.* and its progeny
- Compare with appellate cases out of the Seventh Circuit where state and local agencies implementing the Federal DBE Program are “insulated from a constitutional attack, absent a showing that the state exceeded its federal authority.”

# The United States Courts of Appeals



—Source: [https://www.uscourts.gov/sites/default/files/u.s.\\_federal\\_courts\\_circuit\\_map\\_1.pdf](https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf)

# Practical Takeaways

- Should you do a disparity study?
- What should you include in the study?
- How should you develop the solicitation documents and scope of work?
- How should you evaluate the proposals?
- How should you address contract performance issues?
- How should you implement your program after the disparity study is completed?

# Solicitation and Scope of Work

- Everything you do can be evidence in a lawsuit
- The agency is not the expert, so keep it general
  - Do not dictate a specific methodology
  - Do not require adherence to legal, scientific, and statistical standards
- Require sample disparity studies from other jurisdictions of similar size and scope
- Request references
- Establish deliverables, including meetings

# Evaluating the Proposals

- Focus on the SOW and responsiveness
- Did the sample studies reflect the methodology accepted in your jurisdiction?
- Conduct interviews
- Caution on placing too much emphasis on price
- Will the personnel be cooperative?

# Addressing Contract Performance Issues

- Begin with a risk assessment based on the contractor's past performance and references
- Insist on a carefully drafted contract
- Include a termination for convenience provision and standard breach provisions
- Consider including performance guarantees and/or liquidated damages, if permissible
- Appoint a contract manager to monitor performance
- Incorporate different ways to monitor, such as site visits and audits

# Implementing Programs

- When adopting or amending a policy or program:
  - Include robust findings based on the study
  - Describe the implementation of race-neutral alternatives
  - Reasonably calculated goals
  - Flexibility in contract-specific goals
- Keep in mind:
  - Agency resources
  - Federal, state, and local procurement law
  - Procurement policies
  - Clear guidance for implementation

# Emerging Issues

- Individuals seeking certification are required to submit signed, notarized statements that they are a member of one of the groups.
- Because eligibility relies on self-identification, this presents certain challenges.
  - Gender identity
  - DNA Testing

# Civil Rights Update

- DBE Program Issues:
  - Contract Goal Setting
  - Overconcentration
  - USDOT Program Waivers
  - Contract Compliance, Monitoring and Enforcement
  - Assistance to D/M/WBEs
- Disparity and Availability Studies
- Defining Success

# DBE Program Issues: Contract Goal Setting

Increased scrutiny under narrow tailoring of DBE 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) and availability in those scopes
  - Agencies without detailed availability studies (or disparity studies for 9th circuit recipients) are often making it up
    - “Are there enough DBEs?”
    - “Is DBE availability high/medium low?”
    - Assumptions about DBEs?
  - Is the process described and the determination documented?
- NY State was recently sued over goal setting methodology and transparency of the process

# DBE Program Issues: Overconcentration

- Defined in Part 26 as DBEs are so heavily represented in a given type of work that non-DBEs are squeezed out
  - This issue has been raised unsuccessfully in some challenges
- What is the definition?
- What is the response?
  - Drop for goal credit?
  - SBE setasides?
  - Additional supportive services?

# DBE Program Issues: Overconcentration

What about overconcentration of non-DBEs?

- DBEs are often “ghettoized”
  - 237110- Highway, Street, and Bridge Construction
    - Non-DBEs received 94 % from NCDOT, with Blacks receiving 0.3%; 88% from WSDOT, with Blacks receiving 0.0%
  - 237990- Other Heavy and Civil Engineering Construction
    - Non-DBEs received 100 % from NCDOT; 94% from WSDOT, with Blacks receiving 0.0%

# DBE Program Issues: USDOT Program Waivers

- Disparity studies recommended dropping certain groups for goal credit (CalTrans, WSDOT, ORDOT, etc.)
- Challenges
  - Certification status must be clear to primes (“UDBEs”)
    - Dropped groups remain “in the program” ⇒ confusion
  - Eligible under the individual approach?
  - Tracking the results
    - Utilization
    - Withdrawals from the program/bankruptcy

# DBE Program Issues: USDOT Program Waivers

- What is the standard
  - Statistical “overutilization”?
    - How to separate from the effect of the program
  - Level playing field and equal opportunities?
  - Role of anecdotal information
- Confusion of cause (contract goals) with effect (utilization)
  - Where have racism and sexism been “fixed”?
- Pilot “no goals” contracts BEFORE seeking waiver?

# DBE Program Issues:

## Contract Compliance, Monitoring and Enforcement

- Prompt payment
  - Pay for sub's completed work even if all subs have not invoiced the prime contractor?
- Diversity Management Software
  - Partial info in; incomplete data collection and monitoring out
- What about professional services?
  - Quality of work to DBEs?
  - Contract goal setting?
- On call or job order contracts
  - Task order goals or overall goal?
  - Transparency of the process

# DBE Program Issues: Assistance to D/M/WBEs

- No new court standards or USDOT guidance
- What is acceptable while maintaining the DBE's independence?
  - Equipment
  - Personnel
    - Blurred roles
    - “Payroll jumping”?
  - Suppliers
    - Joint checks?
    - Price negotiations?

# Disparity/Availability Studies

## National trends

- Different methodologies ⇒ different outcomes
- Different groups experience different degrees of discrimination
  - Blacks remain at the bottom
  - Sexism still constricts women in the construction industry
- Adding groups
  - VBEs
    - Lower legal standard of “rational basis” review: no need for a study
    - Limited data
    - Data that there is a problem?
    - Effect on D/M/WBE programs?

# Disparity/Availability Studies

## LGBT-owned firms

- What standard of review: lower legal standard of “intermediate” review for gender discrimination?
- Virtually no data
- Certification issues
  - What type of proof of sexual orientation?
  - Full transition & change in legal status for transgendered persons?
- Collect contract data?
  - Vendor applications?
  - Bidders lists ?

# Disparity/Availability Studies

- Goals mostly determine utilization
  - Entrenched systems?
  - Poor contract goal setting?
  - Unprepared DBEs?
- **Don't do disparity testing on USDOT contracts outside the 9th Circuit**

# Disparity/Availability Studies

## Limits of Data

- Data = values
  - Unconscious bias
    - “I don’t see color”
- Life experiences
- Choice of variables is critical
  - Amazon Prime refused to deliver to certain zip codes
  - Google searches show women lower paying jobs
  - Reinforcing Facebook feeds
- Data ≠ truth

# Defining Success

- Why isn't the DBE program more effective, especially for Black contractors?
  - Capacity building versus “new” DBEs
  - Unrealistic and national size and PNW limits
  - Lack of focus and assistance to become prime contractors
  - Money, money, money
- What about agency imposed barriers?
  - Prequalification and experience standards/agency “skin in the game”
  - “Who’s in the club?”

# Defining Success

- What does “success” mean?
  - More DBEs get work?
  - DBEs’ revenues increase?
  - Increased DBE prime contracting awards?
  - DBEs enter new lines of business?
  - Construction industry stratification
    - Only a tiny number of firms get large transportation contracts
    - Explosion of very large national firms
- What does “level playing field” mean in the real world?