SECTION 4

DISADVANTAGED BUSINESS AND LABOR REQUIREMENTS

A. MINORITY AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS

1. Executive Order 11246 and its Progeny

Requirements for "nondiscrimination" in public contracts present few constitutional issues.[1] Instead, they reinforce the requirements of the Fifth and Fourteenth Amendments as well as the statutes designed to implement those constitutional provisions.[2] Eventually, however, nondiscrimination requirements gave way to affirmative action requirements. Affirmative action plans were designed to redress the lingering effects of past discrimination and gave rise to significant constitutional questions.[3]

a. The Equal Employment Opportunity Program

Equal Employment Opportunity (EEO), affirmative action, and the Minority Business Enterprise (MBE) and Disadvantaged Business Enterprise (DBE) programs all have a common origin in Executive Order 11246. As early as 1941, President Roosevelt under the War Manpower Act ordered that provisions of nondiscrimination be included in all federal defense contracts. The rationale was that nondiscrimination would ensure a large work force in the wartime effort. This order was continued by all succeeding presidents and led to the issuance of Executive Order 11246 on September 24, 1965, by President Johnson. This order expanded the 1941 order to apply to all federally-assisted construction contracts, and mandated that contractors and subcontractors take affirmative action to ensure that no applicant for employment was discriminated against by reason of race, color, religion, sex, or national origin. The Department of Labor was made responsible for the administration of the EEO program and was authorized by the President to adopt regulations to implement the order. This new obligation of affirmative action was more than a prohibition against discrimination. It called for establishment of goals and monitoring of achievement.

Each bidder on a federally-assisted contract was required to submit an affirmative action plan (AAP) with a schedule of goals to be achieved in employing minority workers for several trades involved in the construction. Each AAP had to receive Department of Labor approval before the low bidder could be awarded the contract. However, an alternative developed whereby the bidder or the specifications could incorporate any of the several "hometown plans" approved by the Department of Labor for the community involved.[4] Hometown plans were tripartite plans involving the contractors, the unions, and the minority community. The success of the plans therefore depended on the ability of the community leaders to work with unions and local contractors' associations to obtain mutual concurrence in a plan acceptable to the Department of Labor.

One of the first legal challenges to the program involved a hometown plan known as the "Philadelphia Plan" in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*.[5] The challenge was that the Philadelphia Plan was social legislation of local application enacted by the federal executive without congressional or constitutional authority. The court's decision rested on the power of the President, rather than Congress, to impose fair employment conditions incident to the power to contract.

The opinion relied upon Justice Jackson's opinion in *Youngstown Sheet & Tube Company v. Sawyer,* in which the Court held that an executive order seizing steel mills was not within the constitutional power of the President.[6] In that opinion, Justice Jackson divided presidential authority into three categories: (1) presidential acts responding to an express or implied authorization of Congress; (2) measures inconsistent or incompatible with the expressed or implied will of Congress; and (3) actions taken in the absence of either congressional grant or denial of authority, express or implied. The third category took into account three interrelated features: the possibility of concurrent authority, congressional acquiescence in conferring executive authority, and the fact that the test of authority may depend more on events than on theories of law.

The Third Circuit then traced the development of Executive Order (EO) 11246 from the original 1941 EO requiring nondiscrimination covenants in all defense contracts. Based on a historical analysis of EO 11246, the court concluded that the executive action was a valid exercise of contract authority within Justice Jackson's third category. This conclusion was fortified by acquiescence of Congress, since it had for many years continued to appropriate funds for both federal and federal-aid projects with knowledge of the preexisting EOs.

EO 11246 and its implementing regulations at 41 C.F.R. Part 60 are enforced by the U.S. Department of Labor, Office of Federal Contract Compliance, rather

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[1] Portions of this section are derived from *Minority and Disadvantaged Business Enterprise Requirements in Public Contracting* by Orrin F. Finch, published by Transportation Research Board in SELECTED STUDIES IN HIGHWAY LAW, vol. 3, at 1582-N1.

[2] *See*, 49 C.F.R. pt. 21 (2001).

[3] *See* Note, *Executive Order No. 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U. L. REV. 590 (1969).

[4] For a history of the development of the home town plan theories *see* Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972); Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1970); and Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341 (1970).

[5] 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854, 92 S. Ct. 98.

[6] 343 U.S. 579, 72 S. Ct. 863 (1952).

than by FHWA, USDOT, or state transportation departments.[7]

b. The Minority Business Enterprise Program

The EEO program was designed to promote affirmative action in the employment of construction workers. Affirmative action for minority-and women-owned businesses in construction developed more slowly than EEO, but had more impact on the industry and on state and local governments.[8]

Section 8(a) of the Small Business Act of 1953 authorized the federal Small Business Administration (SBA) to contract directly with small businesses on behalf of various federal procurement agencies.[9] Through its regulatory authority, the SBA developed a set-aside program for socially and economically disadvantaged small businesses. The absence of congressional authority for this preferential program was challenged in a number of equal protection cases, but these challenges were largely unsuccessful for lack of standing based on the plaintiffs' inability to show that they would otherwise qualify for certification and participation under the Small Business Act.[10]

However, Congress supplied legislative authority in 1978, requiring eligibility for 8(a) status to include both social *and* economic disadvantage. Socially disadvantaged persons were defined as those "…who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."[11] Economic disadvantage also had to be proved. It was defined as: "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged…."[12]

This involved an examination of the individual's total net worth. While the individual had to qualify socially and economically, it was the business entity, whether sole proprietorship, partnership, or corporation, that received the certification. But to qualify for certification, the business entity had to also be at least 51 percent owned and controlled by socially and economically disadvantaged individuals and qualify as a "small" business.

In 1980, USDOT instituted the MBE/WBE program for all recipients of federal transportation funds. The program was not initiated in response to specific congressional direction, but was based on Title VI of the Civil Rights Act and on several transportation statutes containing general provisions directing federal agencies to prevent discrimination.[13]

The MBE/WBE program was unique in several respects. First, each transportation agency or "recipient" was directed to prepare overall annual goals for federal approval and to establish specific goals for minorities and women businesses for each construction contract. Second, traditional award to the lowest responsible bidder was modified to require a two-step bidding process in which (1) bids were opened to determine prices, and then (2) those bidders desiring to remain in competition were to submit their MBE/WBE participation documentation by a stated date and time. Award was then to be made to the lowest responsible bidder with a "reasonable price" meeting the specific MBE/WBE goals. If none met the goal, award was to be made to the bidder with the highest MBE/WBE participation and a "reasonable price." A "reasonable price" was the highest price at which the agency would award the contract if there were a single bidder.[14]

The regulation also permitted "set-asides" where authorized by state law and found necessary for the state to meet its annual goal. A further condition for use of set-asides provided that there must be at least three capable MBEs identified as available to bid on the contract in order to provide adequate competition for the contract.[15]

Numerous lawsuits were filed challenging the regulations, including *Central Alabama Paving v. James*.[16] In that case, the court concluded that USDOT was acting beyond the bounds of congressional authority in promulgating the MBE/WBE regulations and had not determined prior to issuing the regulations whether prior discrimination had occurred against the minority groups and women favored by the program.

c. Good Faith Efforts and the DBE Program

In the early 1980s, USDOT issued new interim regulations eliminating the two-step bidding process, and replacing it with a good faith effort standard for contract award. This permitted the states to award to the low bidder even if the MBE or WBE goal was not met, provided that the bidder could demonstrate that it made good faith efforts to secure minority or women subcontractors but was unable to achieve the goal. The new regulations also eliminated the conclusive presumption of social and economic disadvantage being

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[7] FHWA Order 4710.8, "Clarification Of Federal Highway Administration (FHWA) And State Responsibilities Under Executive Order 11246 And Department Of Labor (DOL) Regulations in 41 CFR Chapter 60," Feb. 1, 1999.

[8] *See* Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 GEO. WASH. L. REV. 61 (1980).

[9] 15 U.S.C. § 637(a)(1)(B).

[10] *See, e.g.,* Fortec Constructors v. Kleppe, 350 F. Supp. 171, 173 (D.D.C. 1972) (SBA had authority to designate projects for SBA subcontract awards and plaintiff could not challenge the award without alleging denial of a right and opportunity to compete under the 8(a) certification program, i.e., that it was entitled to and was denied 8(a) status).

[11] 15 U.S.C. § 637(a)(5) (2002).

[12] 15 U.S.C. § 637(a)(6)(A) (2002).

[13] 64 Fed. Reg. 5096 (Feb. 2, 1999).

[14] 45 Fed. Reg. 21184 (Mar. 31, 1980).

[15] *Id*.

[16] 499 F. Supp. 629 (M.D. Ala. 1980).

applied to the listed minorities and replaced it with a rebuttable presumption.[17] Congress then passed the Surface Transportation Assistance Act (STAA) of 1982, which included a one-sentence provision in Section 105(f):

> Except to extent the Secretary [of Transportation] determines otherwise, not less than ten percentum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto.[18]

USDOT's next regulations were issued on July 21, 1983.[19] Those regulations followed the lead of the SBA regulations and provided a rebuttable presumption that the members of designated minority groups are socially and economically disadvantaged. For example, a wealthy minority or woman business owner would be ineligible because he or she was not economically disadvantaged. The DBE program was restricted to those identified with a minority group and those with SBA Section 8(a) certifications, and the regulations mandated that the state recipients honor all SBA Section 8(a) certifications.[20]

Section 105(f) of STAA was replaced by Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA):

> Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I, II, and III of this Act or obligated under titles I, II, and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.[21]

One major change was that WBEs were presumptively included within the class of socially and economically disadvantaged individuals: "The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; *except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection*."[22]

Congress then passed the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), which continued the requirement that not less than 10 percent of the federal highway funds be spent on contracts or subcontracts with DBEs.[23] Section 1003 of ISTEA defined a "small business" as one with average annual gross receipts of less than $15,370,000 for the preceding 3 years, with the amount to be adjusted upward for inflation in subsequent years.[24] Section 1003 also incorporated the Section 8(d) definition of disadvantaged businesses. The Transportation Equity Act for the 21st Century (TEA-21), passed in 1998, also continued the federal DBE program.[25]

2. Review of Affirmative Action Programs

The U. S. Supreme Court has reviewed a number of affirmative action cases that have ultimately required significant changes in the DBE program. These decisions show the development of the strict scrutiny standard of review that now applies to these programs.

In one case, the Court struck down an AAP in an admissions policy for university medical students.[26] The Court also addressed whether programs served a compelling state interest and whether "societal discrimination" was an adequate basis for AAP requirements.[27] *Fullilove* upheld the constitutionality of an MBE program established by Congress for public construction for economically depressed communities.[28] *Croson* applied a strict scrutiny standard for local public works projects, and *Adarand* applied the same standard to federal projects.[29] *Adarand* required major changes to the DBE program, resulting in issuance of a new rule by USDOT on February 2, 1999.[30]

a. Fullilove v. Klutznick

The *Fullilove* case involved an AAP created by Congress rather than by EO or administrative action.[31] This case later served as the basis for adding Section 105(f) of the STAA of 1982 establishing the DBE program for federal-aid highway appropriations.

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[17] *See* FINCH, *supra* note 1.

[18] Pub. L. No. 97-424.

[19] 48 Fed. Reg. 33432 (July 21, 1983).

[20] 48 Fed. Reg. 33432 (July 21, 1983); *see* 13 C.F.R § 124.104(c)(2).

[21] Pub. L. No. 100-17 (Apr. 2, 1987), § 106(c)(1).

[22] Pub. L. No. 100-17 (Apr. 2, 1987), § 106(c)(2)(B) (emphasis added).

[23] Pub. L. No. 102-240, 105 Stat. 1914.

[24] *Id*., § 1003(b)(2)(A).

[25] Pub. L. No. 105-178 (June 9, 1998).

[26] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 57 L. Ed. 2d 750 (1978) ("strict scrutiny" test applied to protect minorities against discrimination would apply equally to protect any and all members of society, including nonminorities from discrimination).

[27] Wygant v. Jackson Board of Educ., 476 U.S. 267, 106 S. Ct. 1842 90 L. Ed. 2d 260 (1986) (more tenured white teachers were laid off in preference to retaining probationary minority teachers in order to maintain affirmative actions gains in minority hirings; providing minority role models was not a compelling state interest and reliance on societal discrimination failed to provide the needed evidence of prior acts of discrimination; means chosen were not narrowly tailored to accomplish purpose).

[28] *See infra* note 31 and accompanying text.

[29] *See infra* note 42 and note 57, and accompanying text.

[30] *Id*.; 49 C.F.R. pt. 26 (2000).

[31] Fullilove v. Klutznick, 448 U.S. 448, 100 S. Ct. 2758 65 L. Ed. 2d 902 (1980).

In May 1977 Congress enacted the Public Works Employment Act (PWEA), appropriating $4 billion for federal grants to state and local governments for local public works projects.[32] The main objective was to alleviate widespread unemployment. It included an MBE provision requiring that "…no grant shall be made under this Chapter for any local public works project unless the applicant gives satisfactory assurance…that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises" with provision for administrative waiver by the Secretary of Commerce.[33] Regulations issued by the Secretary required competitive bidding and award by local entities to prime contractors responsive to the MBE requirements. The 10 percent MBE goal could be waived if the bidder could demonstrate that MBE subcontractors were not available at a reasonable price. Otherwise, the contract would be awarded to another bidder.[34]

The Supreme Court held that the objectives of the MBE provisions of the Act were within the proper exercise of the powers of Congress and passed constitutional muster. The MBE provision fell within Congress's broad constitutional authority, and the means selected, using racial and ethnic criteria as described in the legislation and implemented by the regulations, did not violate constitutional guarantees of nonminorities.

The most significant basis of the holding was that the AAP was enacted by Congress:

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the…general Welfare…" and "to enforce, by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment….[35]

Also, Congress was not required to make findings or create a record. The Court found that the legislative history of the PWEA was sufficient to support a congressional conclusion that minorities had been denied effective participation in public contracts.[36]

The Court favored the "nonmandatory" nature of the AAP, referencing the waiver provisions implemented by the regulations.[37] The AAP thus was able to avoid the "quota" stigma and possible disqualification. The Court also noted the competitive bidding requirement, which created incentives to prime contractors to meet their MBE obligations to qualify as responsive bidders and to seek out the most competitive, qualified, and bona fide minority subcontractors.[38] Finally, the Court noted the Act's narrow focus, short duration, and minimal impact on nonminorities innocent of past discriminatory practices.[39]

b. Croson v. City of Richmond

The City of Richmond advertised for competitive bids to refurbish the plumbing fixtures in its city jail. By ordinance, the City had established a minority preference program that required nonminority-owned prime contractors to subcontract at least 30 percent of the total contract to MBEs. J.A. Croson submitted the only bid and provided no minority participation, although it had contacted several minority suppliers without success. Croson requested a waiver of the MBE requirement, which the City denied. A major portion of the contract involved the purchase of plumbing fixtures, so Croson next arranged for a minority supplier, but at a price higher than the original supplier relied upon in the bid. The City also rejected the higher contract price to accommodate the MBE supplier.

The federal district court upheld the City's minority plan. The Fourth Circuit Court of Appeals initially affirmed,[40] but on remand following a Supreme Court order directing reconsideration in light of an intervening decision, the Fourth Circuit reversed the judgment on the basis that the ordinance violated the federal Equal Protection Clause.[41] The Supreme Court affirmed the Fourth Circuit ruling.[42]

For the first time, a majority agreed that racially based preference programs would be subject to the constitutional strict scrutiny test. This case also reinforced the Court's earlier plurality ruling in *Wygant v. Jackson Board of Education* that reliance on "societal discrimination" will not suffice.[43] The effect of these two principles of strict scrutiny and inability to rely on societal discrimination meant that classifications based on race would be presumed invalid. Justice O'Connor's opinion, which was divided into six distinct parts, represented the majority views of the Court on all but Part II, which dealt with whether *Fullilove* provided authority for local legislative bodies to adopt an AAP without independent findings of past discrimination.[44]

Part I affirmed the court of appeals based on the earlier *Wygant* ruling against reliance on "societal discrimination:" "As the court read this requirement, '[f]indings of *societal* discrimination will not suffice; the findings must concern "prior discrimination *by the government unit involved*."'"[45]

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[32] 91 Stat. 116.

[33] 91 Stat. 116; 42 U.S.C. § 6705(f)(2).

[34] *Id*.

[35] 448 U.S. at 472, 100 S. Ct. 2772.

[36] 448 U.S. at 478.

[37] *Id*. at 488–90.

[38] *Id*. at 481.

[39] *Id*. at 484.

[40] J.A. Croson v. City of Richmond, 779 F.2d 181 (4th Cir. 1985).

[41] 822 F.2d 1355 (4th Cir. 1987).

[42] Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

[43] 488 U.S. at 486 (citing Wygant v. Jackson Board of Educ., 476 U.S. 267 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986)).

[44] *See* Contractors Ass'n of Eastern Pa. v. City of Phila., 735 F. Supp. 1274, 1288–92 (E.D. Pa. 1990) for an extensive discussion of Justice O'Connor's opinion by Chief Judge Bechtle.

[45] 488 U.S. at 485 (emphasis in original).

The Court found that the city council had not made findings of prior discrimination.[46] The Court affirmed the Fourth Circuit's ruling that the 30 percent set-aside was chosen arbitrarily and was not narrowly tailored.[47]

The City relied heavily on *Fullilove v. Klutznick*, arguing that *Fullilove* was controlling and provided the City with "sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry."[48] In distinguishing *Fullilove*, Justice O'Connor viewed Sections 1 and 5 of the Fourteenth Amendment as limitations on the powers of the states and an enlargement of the power of Congress to identify and redress the effects of societal discrimination.[49]

In Part III-A, for the first time in a majority holding, the Supreme Court ruled that all classifications based on race will be subject to strict scrutiny, whether they benefit or burden minorities or nonminorities. Thus, all such classifications by states and local governments would be presumed invalid: "We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification…."[50]

In Part III-B of the majority opinion, the Court set out the requirement that the "factual predicate" underlying the AAP be supported by adequate findings of past discrimination without reliance on generalized assertions of past discrimination:

> We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*…Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy….[51]

The Richmond City Council had attempted to establish a factual predicate by relying on the exclusion of blacks from skilled construction trade unions and training programs, and on statements made by proponents of the plan that there had been past discrimination in the industry and that minority business had received less than 1 percent of the prime contracts from the City, while minorities represented 50 percent of the city's population. But the majority disagreed that this was adequate: "None of these 'findings,' singly or together, provide the city of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary.' There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry."[52]

The Court concluded that the City was applying its preferential program as a strict quota rather than attempting to use its provisions as a goal. For example, Croson was a sole bidder who demonstrated what could be described as good faith efforts to secure a minority supplier both before and after the bidding, yet the City rejected its bid.

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admission, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.[53]

The Court concluded that, "none of the evidence presented by the City points to any identified discrimination in the Richmond construction industry," and ruled that as a consequence, "the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race."[54]

In Part IV, the Court observed that without the specificity needed to identify the past discrimination, it could not assess whether the Richmond Plan was narrowly tailored. But the majority did not view the 30 percent quota as being narrowly tailored to any legitimate goal. Justice O'Connor noted the City's failure to consider any alternatives to the race-based quota system, its rigid adherence to the 30 percent quota, and its refusal to grant a waiver. "Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination."[55]

Part V concerns the failure of the City to explore possible "race-neutral devices" to increase contracting opportunities for small contractors of all races:

> Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms….[56]

The majority emphasized that "[n]othing we say today precludes a state or local entity from taking action

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[46] *Id*.

[47] *Id*. at 486.

[48] *Id*.

[49] *Id*. at 491.

[50] *Id*. at 494.

[51] *Id*. at 498 (citations omitted; emphasis in original).

[52] *Id*. at 500.

[53] *Id*. at 499.

[54] *Id.* at 505.

[55] *Id.* at 508.

[56] *Id.* at 509–10.

to rectify the effects of identified discrimination within its jurisdiction."[57] At the same time the Court noted the importance of adequate findings:

> Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics….[58]

c. Adarand Constructors v. Pena

Adarand Constructors, Inc. v. Pena answered the question as to whether strict scrutiny would apply to federal contracting.[59] Adarand Constructors was a Colorado construction company that specialized in guardrail work. As such, it regularly competed for subcontracts on highway construction projects. In 1989, the Central Federal Lands Highway Division of FHWA awarded a prime contract to Mountain Gravel & Construction Company. The terms of the direct federal construction contract provided that Mountain Gravel would receive additional compensation if it gave subcontracts to "socially and economically disadvantaged individuals."[60] Adarand was not certified as a DBE. The subcontract that Adarand competed for was awarded to a DBE, despite the fact that Adarand was the low bidder. The prime admitted that but for the additional payment the prime would receive for hiring the DBE, it would have hired Adarand.[61]

Federal law required that the construction contract state that "'the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.'"[62] Adarand claimed that the provision discriminated on the basis of race in violation of the Fifth Amendment obligation not to deny anyone equal protection of the law. The district court had granted the government's summary judgment motion.[63] The Tenth Circuit affirmed, based on its understanding that *Fullilove* set out an intermediate scrutiny standard for race-based federal action.[64] The Supreme Court vacated the court of appeals ruling and remanded the case to the trial court.[65]

The Court reviewed the development of its views regarding rights protected by the Fifth Amendment, beginning with the 1940s cases that upheld the internment of Japanese Americans.[66] Those cases resulted in the Court's holding that there is a difference between the rights protected by the Fourteenth Amendment and those protected by the Fifth Amendment, and that the Fifth Amendment "provides no guaranty against discriminatory legislation by Congress."[67] However, the Court noted that even in so holding, the earlier Court had stated in the *Hirabayashi* decision that "'distinctions between citizens solely because of their ancestry are by their very nature odious.'"[68]

The Court noted that despite the uncertainty in their details, the cases through *Croson* established three general propositions with respect to governmental race classifications: (1) skepticism, or a requirement that a racial preference receive "a most searching examination"; (2) consistency, or a requirement that the same standard apply whether a particular class is burdened or benefited; and (3) congruence, or the application of the same standard under either the Fifth Amendment or the Fourteenth Amendment.[69] Applying these principles, Justice O'Connor concluded as follows:

> Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny….
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> ….
>
> Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[70]

Finally, Justice O'Connor set out the requirement that remedies be narrowly tailored:

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[57] *Id.* at 509.

[58] *Id*. at 510.

[59] 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

[60] 515 U.S. at 205, 209. The subcontracting compensation clause at issue provided:

> Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals…
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> The Contractor will be paid an amount computed as follows:
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> 1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount….

[61] *Id*. at 205.

[62] *Id*. (citations omitted).

[63] Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992).

[64] Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994).

[65] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204–05, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

[66] *Id*. at 213–14 (citing Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 137, 87 L. Ed. 1774 (1943)).

[67] *Id*. at 213 (citations omitted).

[68] *Id*. at 215 (quoting Hirabayashi, 320 U.S. at 100).

[69] *Id*. at 223–24.

[70] *Id*. at 224, 227.

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it…When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.[71]

The Court remanded *Adarand* to the district court for a determination of whether any of the ways that the government was using the subcontractor compensation clauses could survive strict scrutiny.[72]

The result of the *Adarand* decision was the adoption of new regulations by the USDOT that are intended to be consistent with the requirements of strict scrutiny, and that provide a remedy for demonstrated discrimination, but that do not rely on the "societal discrimination" that had been a basis for racial preference programs in the past.

3. Challenges to AAPs After *Croson* and *Adarand*

a. State and Local Programs

Croson and *Adarand* led to challenges being filed against state and local DBE programs, based on contentions that those programs would not survive strict scrutiny.[73]

Phillips & Jordan, Inc. v. Watts involved a challenge to a Florida Department of Transportation (FDOT) DBE program.[74] FDOT was authorized under state law to implement a program to remedy disparities based on race, national origin, and gender, based on a showing of past and/or continuing discrimination in the award of state-funded highway contracts.[75] The program required annual goals for minority participation, and allowed FDOT to set aside contracts for DBEs. The goals and set-asides were supposed to be based on a finding of "significant disparity" in a disparity study.

FDOT set aside certain maintenance contracts for black or Hispanic-owned businesses, despite the fact that there was no evidence that the agency had ever discriminated against these groups in the award of maintenance contracts. Rather, FDOT claimed it was a "passive participant" in discrimination practiced in the private sector.[76] In reviewing the program, the court applied the strict scrutiny analysis mandated by *Croson*.[77] The "strong basis in evidence" that *Croson* required as proof of past discrimination could not be based on "societal discrimination" or on an unsupported assumption regarding past discrimination in a particular industry. Rather, it must be based on a showing of the agency's own active or passive participation in past or present discrimination, possibly by prime contractors, bonding companies, or financial institutions.[78]

Defending its program, FDOT argued that it must have been a passive participant in discrimination based on its disparity study, which compared the number of contracts awarded by FDOT with the number of available DBEs. The court rejected this argument, noting that any such discrimination must be demonstrated with particularity.[79] While statistical evidence may serve this purpose, it does not do so where the "identity of the wrongdoers is unknown."[80] The court found that FDOT officials had merely speculated that FDOT had been a possible participant in discrimination by primes, bonding companies, and financial institutions, with no evidence to establish who may have engaged in any discriminatory practices.[81] The court held that an AAP must be focused on "those who discriminate."[82] A disparity study that relied on "ill-defined wrongs" committed by "unidentified wrongdoers" was insufficient under *Croson*.[83]

In *Louisiana Associated General Contractors v. State*, the Louisiana Supreme Court held that its own state constitution precludes any AAP, even one that passes strict scrutiny under *Croson*. The court held that the Louisiana Bid Preference Act violated the equal protection requirements of the state constitution.[84] The Louisiana Health Care Authority had set aside a clinic renovation project as a DBE-only project in its advertisement for bids.[85] The program created a bid preference for minority contractors, in that all contractors could bid, but a certified MBE would receive the bid if its bid was within 5 percent of the lowest responsive and responsible bid, provided that the MBE agreed to contract for the amount of the lowest bid.[86] AGC challenged the specification on the grounds that it violated equal protection. The court enjoined the receipt and acceptance of bids, and also enjoined the agency from continuing to advertise the project as a set-aside. The agency readvertised the project without the set-aside provision; however, the court did not consider the issue moot as the agency intended to bid future contracts as set-asides.[87]

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[71] *Id*. at 237 (citation omitted).

[72] *Id*. at 238–39.

[73] For a summary of court decisions on state and local DBE/M/WBE programs following Croson, *see* D. Rudley and D. Hubbard, *What a Difference A Decade Makes: Judicial Response To State And Local Minority Business Set-Asides Ten Years After*, City of Richmond v. J.A. Croson, 25 S. ILL. U. L.J. 39–93 (2000).

[74] 13 F. Supp. 2d 1308 (N.D. Fla. 1998).

[75] FLA. STAT. § 339.0805(1)(b).

[76] 13 F. Supp. 2d at 1312, 1314.

[77] *Id*.

[78] *Id*. at 1313.

[79] *Id*.

[80] *Id*.

[81] *Id*. at 1314.

[82] *Id*.

[83] *Id*.

[84] 669 So. 2d 1185 (La. 1996).

[85] La. R.S. 39:1951 *et seq*.

[86] 669 So. 2d at 1201.

[87] 669 So. 2d at 1189.

The court relied on *Croson* and *Adarand* for the principle that the same standard applies regardless of what race is burdened or benefited.[88] The court found even less tolerance for the program in the state constitution than in the U.S. Constitution, however, holding that the state constitution allows *no* scrutiny to be applied to the program. Rather, the court held that when a law discriminates against a person by classifying him or her on the basis of race, "it shall be repudiated completely, regardless of the justification behind the racial discrimination."[89]

The state agency utilized the program in part to qualify for federal funds. The court refused to allow this as a basis for what it considered a prohibited discriminatory program, and found that the "absolute and mandatory language used in the prohibition against laws which discriminate on the basis of race found in the constitution does not change simply because the state may stand to lose federal funds…."[90]

California's MBE/WBE program was declared to be unconstitutional as violating the equal protection clause in *Monterey Mechanical Co. v. Wilson*.[91] Despite the fact that the program allowed contractors to either comply with the contract goals or show good faith efforts to do so, the court found that the program was not supported by evidence of past or present discrimination against the protected groups. The state did not present any evidence of past or present discrimination, relying only on general findings stated in the legislation. Finding that the program also was not narrowly-tailored, the court noted that the program included a number of minority groups who were highly unlikely to be found in California.

A city ordinance allowing set-aside contracts was challenged by a contractor association in *Contractor's Association of Eastern Pennsylvania v. City of Philadelphia*.[92] The ordinance allowed the use of set-asides for black contractors; if there were insufficient black contractors available for competitive bidding, then the goal could be met through subcontracting.[93] The City utilized the subcontracting portion of the ordinance exclusively, and did not create set-asides. Meeting the subcontracting goal was considered an element of responsiveness. Good faith efforts were to be considered, however, if at least one bidder met the goal; then all others were presumed not to have used good faith efforts. If no bidder met the goals, the one who had the highest minority participation was granted a waiver and awarded the contract.[94]

The district court found that the ordinance created a protected segment of city construction work for which non-DBEs could not compete.[95] Relying on *Croson*, the court applied strict scrutiny, noting that a program can withstand strict scrutiny only if it is "narrowly tailored to serve a compelling state interest." The court then set out the test as follows:

> The party challenging the race-based preferences can succeed by showing either (1) that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role or (2) that there is no "strong basis in evidence" for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. (citation omitted).[96]

The court ultimately rejected the program on the basis that it was not narrowly tailored.[97] Where the only identified discrimination was by the City in its award of prime contracts, a program that focused exclusively on subcontracting did not provide a narrowly tailored remedy. The court thus declared the subcontracting portion of the ordinance unconstitutional under *Croson*.[98] Regarding the set-aside provision, the City did not have evidence to show that a 15 percent set-aside was necessary to remedy the discrimination, where that figure was much higher than the percentage of minority firms qualified to do City construction work.[99]

The court also addressed the ordinance's failure to include race-neutral measures, such as relaxed bonding or prequalification requirements for newer businesses. In addition, the City could have used training and financial assistance programs to assist disadvantaged contractors of all races. Because these measures were available to the City, the court found that to the extent the program did not utilize race-neutral measures, it was not narrowly tailored and was thus unconstitutional.[100]

An example of a program that was upheld after *Croson* is found in *Domar Electric v. City of Los Angeles*.[101] A bidder challenged a contractor "outreach" program that was required by a city ordinance as being inconsistent with the city charter and with competitive bidding rules. The program required only that contractors make a good faith effort to include DBEs as subcontractors; it did not require bid preferences or quotas, nor did it allow the City to set aside contracts for DBEs. The ordinance stated that a contractor's good faith efforts would be evaluated by considering its efforts in (1) identifying and selecting specific work items for subcontracting to DBEs, (2) advertising that work to DBEs, (3) providing information to the DBE contractor commu-

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[88] *Id*. at 1198.

[89] *Id*.

[90] *Id*. at 1200.

[91] 125 F.3d 702 (9th Cir. 1998), *rehearing denied*, 138 F.3d 1270.

[92] 91 F.3d 586 (3d Cir. 1996).

[93] *Id*. at 592–93.

[94] *Id*. at 593.

[95] Contractors Ass'n of Easton Pa. v. City of Pa., 893 F. Supp. 419, 426 (E.D. Pa. 1995).

[96] *Id*. 91 F.3d at 597.

[97] *Id*. at 605.

[98] *Id*. at 606.

[99] *Id*. at 607.

[100] *Id*. at 609.

[101] 9 Cal. 4th 161, 885 P.2d 934, 36 Cal. Rptr. 521 (1994).

nity, and (4) negotiating in good faith with DBE subcontractors that were interested in subcontracting. The program set goals, but a bidder's failure to meet the goal in its bid did not disqualify the bidder or render its bid nonresponsive. There was no advantage gained from meeting the goal, nor was there a disadvantage from not meeting the goal.[102]

Domar was the low bidder, but failed to provide documentation of its good faith efforts by the deadline. The contract was then awarded to the next low bidder, and Domar appealed. The superior court denied its appeal, but the court of appeals reversed, finding the outreach program unconstitutional under *Croson*.[103] The California Supreme Court reversed, holding that the outreach program was constitutional. The program did not conflict with the city charter, even though it was not specifically authorized by the charter. It was also consistent with the goals of competitive bidding, such as excluding favoritism and corruption. The court reasoned that competitive bidding requirements necessarily imply that there be equal opportunities provided to all who may be interested in bidding. The outreach program only required that minority and women businesses be contacted and equal opportunities provided to them to bid on subcontracts.[104]

b. Federal Programs

A federal court examined the constitutionality of USDOT's DBE program in light of the *Adarand* decision in *In re Sherbrooke Sodding Company*.[105] This case was both a facial and an as-applied challenge to the DBE program authorized by ISTEA in 1991 as well as the Minnesota Department of Transportation's (MnDOT) DBE program.[106] The court also considered a 1996 memorandum in which FHWA directed the states to "count the participation of DBE primes as 100 percent both towards meeting overall recipient goals and…toward meeting contract-specific goals."[107] The result of this change in policy was that DBE prime contractors were exempt from DBE subcontract requirements, which would continue to apply to non-DBE primes.

The court noted that under *Adarand*, the government bears the burden of showing that the DBE program is constitutional by proving that its race and gender classifications are narrowly tailored to serve a compelling governmental interest.[108] MnDOT claimed that it was simply implementing a federal government program, and was therefore relieved from any duty to show that the program was narrowly tailored to serve a compelling state interest.[109] The court assumed that MnDOT was properly implementing the program, and turned to USDOT for proof that the program should survive strict scrutiny.

USDOT claimed (1) that Congress had made an adequate finding of past discrimination to support a compelling governmental interest, and (2) that Congress was not required to make such findings on a state or local basis, but rather could do so nationally. The court agreed with this argument, relying in part on the decision on remand in *Adarand* in which the district court in Colorado found that Congress had a "strong basis in evidence" to support a race-conscious program.[110]

The court then focused its analysis on whether the DBE program was narrowly tailored. The court found no evidence that Congress considered race-neutral alternatives to the DBE program. Noting that the Supreme Court had suggested several potential race-neutral measures in *Croson*, none of which were evident in the USDOT program, the court found a lack of such alternatives to "strongly suggest the DBE program is Constitutionally flawed."[111]

The court further found that the DBE program was not limited in duration, where *Adarand* required that such a program "'will not last longer than the discriminatory effects it is designed to eliminate.'"[112] However, due to ISTEA's sunset provision, the court did not consider this factor significant. More significant were the problems that the program placed an undue burden on innocent parties, was not sufficiently flexible, and tended to haphazardly include as DBE's virtually all non-white people.[113] The court held regarding the lack of flexibility: "Whatever the terminology or palliative applied, whether the program be called an 'aspirational goal' or ameliorated by a 'flexible waiver,' the bottom line is that there is still a quota that is imposed by the government. This quota penalizes some and advantages other, each without Constitutional justification."[114]

The court thus held that the USDOT DBE program failed to pass strict scrutiny as required by *Adarand*.

4. Narrowly Tailoring the DBE Requirements

In response to the *Adarand* and *Sherbrooke Sodding* decisions, USDOT undertook a substantial revision of the DBE program in order to develop a program that would withstand strict scrutiny. First, the agency con-

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[102] 9 Cal. 4th at 167.

[103] *Id*. at 168–69.

[104] *Id*. at 172–73.

[105] 17 F. Supp. 2d 1026 (D. Minn. 1998).

[106] Pub. L. No. 102-240, 105 Stat. 1914 (1991); 49 C.F.R. (1996).

[107] 17 F. Supp. 2d. at 1029.

[108] *Id*. at 1033. Although the Supreme Court has not indicated that it would apply strict scrutiny to gender-based classifications, this court was invited by the parties to do so, and for the purposes of the motions before it, the court did apply strict scrutiny to the gender classifications. *Id*.

[109] *Id*. at 1033–34.

[110] *Id*. at 1034–35 (citing Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556, 1576–77 (D. Colo. 1997).

[111] *Id*. at 1035.

[112] *Id*. (quoting Adarand, 515 U.S. at 238).

[113] *Id*. at 1036–37.

[114] *Id*. at 1037.

cluded that the Congressional debate surrounding the adoption of TEA-21 provided sufficient findings of a compelling governmental interest in remedying any discrimination in federally-assisted transportation contracting.[115] The remainder of the rule adoption process was directed at creating a program that was narrowly tailored to address that discrimination. USDOT addressed each element of the narrow-tailoring test set out in *Adarand*: (1) determining the necessity of relief; (2) considering the efficacy of alternative (race-neutral) remedies; (3) providing for flexibility of relief, through use of waivers and good faith efforts standards; (4) limiting duration of relief to the time needed to effect the remedy; (5) setting goals in relation to the relevant market; (6) considering the impact on the rights of third parties; and (7) inclusion of appropriate beneficiaries.[116]

The language in TEA-21 largely retained the 10 percent goal contained in previous legislation, which had always been applied by USDOT as requiring that each contract have a 10 percent DBE goal. However, USDOT's new rules recharacterized the meaning of the statutory goal language, interpreting it as a national overall goal:

> Section 26.41 makes clear that the 10 percent statutory goal contained in ISTEA and TEA-21 is an aspirational goal at the national level. It does not set any funds aside for any person or group. It does not require any recipient or contractor to have 10 percent (or any other percentage) DBE goals or participation. Unlike former part 23, it does not require recipients to take any special administrative steps (e.g. providing a special justification to DOT) if their annual overall goal is less than 10 percent. Recipients must set goals consistent with their own circumstances. (§ 26.45) There is no direct link between the national 10 percent aspirational goal and the way a recipient operates its program….[117]

a. Race-Neutral Alternatives

One of the reasons that the court found the USDOT program to not be narrowly tailored was its lack of race-neutral alternatives. As part of its revision, USDOT required recipients to first rely on race-neutral measures to meet the "maximum feasible portion" of their overall DBE goals.[118] Race-neutral alternatives include measures such as outreach, technical assistance, procurement process modifications, and other means of increasing opportunities for all small businesses, not just DBEs.[119] It may also include relaxing bonding requirements and prequalification standards for new or small businesses. Prompt payment requirements for all subcontractors are also race-neutral and have the effect of assisting DBEs that cannot tolerate delay in payment.[120] Also, when a DBE firm is awarded a prime contract on the sole basis that it is the lowest responsible bidder, then that is considered to be a race-neutral alternative.[121] Recipients are expected to estimate how much of the overall goal they can meet through the use of race-neutral alternatives. Only then are they to set contract DBE goals.

b. Flexibility Through Contract Goals and Good Faith Efforts Standards

Under the 1999 regulations, the contract is to be awarded to the lowest responsible bidder meeting the specified DBE goals or demonstrating good faith efforts in its attempt to meet the goals.[122] One of the significant points made by the 1999 regulations is that in setting contract goals, they do not intend that a recipient be required to accept a higher bid from a DBE prime contractor when a non-DBE has submitted a lower bid. Thus the rule does not interfere with state and local requirements to award to the lowest responsible bidder. The comment to the rule notes that selection of subcontractors by bidders is not subject to any low-bid rule; a bidder may select any subcontractor that it wants, and generally does so based on its familiarity and experience with a subcontractor, the quality of the subcontractor's work, and the subcontractor's reputation in the community.[123] These factors can be as significant as price.[124] This was the basis for the requirement of good faith efforts. "Contractors cannot simply refuse to consider qualified, competitive DBE subcontractors."[125]

The 1999 rules made major changes to the use of contract goals, in the interest of addressing the "flexibility" issue identified in *Adarand*. As noted earlier, the 10 percent goal in TEA-21 was interpreted by USDOT to be an overall national "aspirational" goal, and not a goal for any given contract.

> Recipients have broad discretion to choose whether or not to use a goal on any given contract, and if they do choose to use a contract goal, they are free to set it at any level they believe is appropriate for the type and location of the specific work involved….[126]

In addition to providing flexibility to recipients in implementing DBE programs, flexibility is provided for each individual contract in that if a bidder fails to meet any goals established for that contract, it may satisfy the regulatory requirement by showing that it made good faith efforts to do so. Examples of what might constitute good faith efforts are listed in Appendix A to the 1999 rule. These include (1) soliciting the interest of DBEs through all "reasonable and available means," such as attendance at pre-bid conferences and advertising; (2) selecting portions of the work that may be subcontracted to DBEs, breaking out contract items

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[115] 64 Fed. Reg. at 5100-01 (1999).

[116] 64 Fed. Reg. at 5102-03.

[117] 64 Fed. Reg. at 5097.

[118] 64 Fed. Reg. at 5102.

[119] 64 Fed. Reg. at 5112.

[120] 49 C.F.R. § 26.29 (2000).

[121] 64 Fed. Reg. at 5112.

[122] 49 C.F.R. § 26.53(b) (2000).

[123] 64 Fed. Reg. at 5099–5100.

[124] *Id*.

[125] *Id*. at 5100.

[126] 64 Fed. Reg. at 5102.

into "economically feasible units"; (3) providing interested DBEs with adequate information; (4) negotiating in good faith with interested DBEs; (5) not rejecting DBEs as unqualified without a thorough investigation of their capabilities; (6) making efforts to assist DBEs in obtaining bonds, lines of credit, or insurance; (7) assisting DBEs in obtaining necessary equipment and supplies; and (8) utilizing minority and women's organizations for recruitment of DBEs.[127]

Any analysis of good faith efforts must be made against this standard, although other factors, positive or negative, can legitimately be considered when included in the bidding specifications. For example, a bidder is not obligated to accept a minority whose price is "unreasonable."[128] This means that it is not sufficient that all the lowest subcontract prices were accepted and none were minorities. It must be demonstrated by the bidder that good faith negotiations were conducted with minorities and that their prices were unreasonable.

However, a system that required bidders to subcontract with DBEs regardless of price would likely violate the standards of *Croson* and *Adarand*. In *Monterey Mechanical Co. v. Sacramento Regional Sanitary District*, the California court of appeals found that a local requirement that M/WBE subcontracts could be rejected only for "significant price difference" violated the state statutory standard for evaluating good faith efforts.[129] By requiring the bidder to accept a much higher priced M/WBE, the local agency effectively required that a bidder preference be accorded M/WBE subcontractors. In addition, the court found that the "negotiation in good faith" requirement only applies where there are interested M/WBEs with whom to negotiate on price. It did not require the bidder to "encourage" or "persuade" M/WBEs to submit subcontractor bids.[130]

Objective standards for judging good faith efforts are difficult to discern from case law. The task imposed on state highway agencies is to analyze all the relevant facts and apply their best judgment. The natural course of action for an agency is to attempt to save a low bid where possible. The agency's exercise of its discretion will generally be upheld unless a clear abuse of discretion can be proved. The best course of action is to set out all of the standards in the bid specifications and then apply them as uniformly as possible. The *Monterey Mechanical* court did, however, find that it was reasonable to use a comparative approach in evaluating good faith efforts. Although "comparative compliance" is not the standard, it is more reasonable for an agency to more closely scrutinize the efforts of a bidder who comes nowhere near the goal, as opposed to one who closely approaches it.[131]

c. Setting Overall Goals

The comments to the final 1999 rule include extensive discussion of how overall goals should be set. USDOT set out a two step process that includes determining a base figure for the overall goal, and then making adjustments to that figure to account for conditions affecting the availability of DBEs in a given area.[132]

5. Compliance with DBE Requirement as Element of Responsiveness or Responsibility

Whether a contractor has met DBE goals is usually treated as a bid responsiveness issue rather than as a lack of bidder responsibility. A failure to include a DBE plan with the bid is a material deviation and renders the bid nonresponsive.[133] The Minnesota court held that this was not an omission that could be corrected by the bidder after bid opening. "Whether or not other bidders would be prejudiced by subsequential insertion, the government's broad policy objective [of minority participation] may be prejudiced by the omission."[134]

The 1999 revision to the FHWA DBE rules allows recipients to consider compliance with DBE requirements as a matter of either responsibility or responsiveness. Although there were arguments to be made for one or the other, USDOT took the position that recipients should be allowed to exercise their discretion in how to treat this issue.[135]

a. Substitutions

Where the state chooses to treat compliance as a matter of responsiveness, bidders occasionally have problems if they include a subcontractor DBE who turns out not to have been certified in time for bid submission. Several cases have considered whether such bidders may substitute a certified DBE after bid opening but prior to award. Although these cases address AAPs decided prior to *Adarand* and the 1999 USDOT rules, the analysis regarding responsiveness is still valid.

In *Regional Scaffolding & Hoisting Co. v. City of Philadelphia*, the low bidder was not permitted to substitute for an uncertifiable MBE.[136] The specifications required that the listed MBE be certified before the time of award to be counted toward the goal. It also provided that failure to submit a completed schedule of MBE/WBE participation or request for waiver with the proposal would result in rejection of the bid as nonresponsive. In addition, the listing of a minority or female

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[127] 64 Fed. Reg. at 5145–56; 49 C.F.R. pt. 26, app. A (2001).

[128] 48 Fed. Reg. 33441-2, July 21, 1983, preamble commentary.

[129] 44 Cal. App. 4th 1391, 52 Cal. Rptr. 2d 395 (1996).

[130] *Id*., 52 Cal. Rptr. 2d at 406–07.

[131] 52 Cal. Rptr. 2d at 407.

[132] 64 Fed. Reg. at 5109–5111.

[133] Bolander & Sons Co. v. City of Minneapolis, 438 N.W.2d 735, 738 (Minn. App. 1989) *review granted, aff'd*, 451 N.W.2d 204 (1990).

[134] *Id*. at 738 (quoting Northeast Constr. Co. v. Romney, 485 F.2d 752, 759 (D.C. Cir. 1973)).

[135] 64 Fed. Reg. at 5115, 5134 (1999); 49 C.F.R. § 26.53(b)(3) (2000).

[136] 593 F. Supp. 529 (E.D. Pa. 1984).

constituted a representation that the listed subcontractor was available and capable of completing the work with its own forces.

Two of the low bidder's subcontractors, listed as an MBE and as a WBE, were not certified at the time of bidding and failed to obtain certification in time for the award. The regulations applicable to the program permitted substitutions after award where the subcontractor withdrew from the project. The low bidder here requested the right to substitute before award. This request was denied by the City. The court concluded that the City's consistent "no substitution" policy was not arbitrary or capricious.[137]

However, where compliance was treated as a matter of responsibility, the court allowed substitution even after award. In *Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*, the Supreme Court of Minnesota held that the prime contractor's listing of a nonminority subcontractor in its winning bid did not result in a binding subcontract, and that the contractor was free to use a different subcontractor to fulfill its MBE obligations.[138]

b. Submission of Supplemental AAP Information After Bid Opening

Where the state considers compliance to be an element of responsiveness, failure to submit the required MBE information as specified will result in a nonresponsive bid, provided that the requirement in the bid specifications is unambiguous and valid. In *James Luterbach Const. Co. v. Adamkus*, the specifications directed bidders to supply certain information regarding their efforts to comply with a 10 percent MBE goal, and warned that failure to submit that information "may" cause rejection of the bid as nonresponsive.[139] The low bid was rejected as being nonresponsive because it had set out "0" minority participation, even though the bidder had offered supplemental information saying that the "0" was inadvertent and that the 10 percent goal would be met. The bidder appealed the Village's determination to the EPA regional administrator, who concluded that the Village had acted improperly in rejecting the low bid. The court upheld EPA's ruling, finding that the use of "may" in the specifications failed to make MBE compliance an element of responsiveness.[140]

In *Noel J. Brunell & Son, Inc. v. Town of Champlain*, the low bidder failed to complete its bid documents by filling in its MBE participation to achieve the 10 percent goal.[141] The Town refused to award on the basis that it was an incomplete, nonresponsive bid. The contractor contended the information was not required because the specifications stated that within 5 days the low bidder would be notified to supply detailed information regarding each MBE to be employed on the project. The court held in favor of the bidder, as the specifications were considered to treat MBE participation as an element of responsibility rather than responsiveness.

There are concerns about considering efforts made after bid opening to secure the award, as opposed to good faith efforts expended before bid opening in preparation of the bid. One of these is that if a bidder is not required to secure minority commitments in advance of bid preparation, the low bidder is provided with the option of "bid shopping" for DBE subcontractors to meet the goal or be disqualified for the award as it chooses. Another is that this practice tends to lead to negotiations between the low bidder and the agency over what further efforts and participation will be accepted as a condition for award.

Another concern of public agencies is that subsequent submittals of information can provide the low bidder with an option for the award. By withholding the documentation the bid becomes nonresponsive, or the bidder not responsible, providing an escape from the proposal should the bidder so choose, and giving that bidder an advantage over other bidders. WSDOT has made such an action subject to a bond forfeiture:

> Failure to return the insurance certification and bond with the signed contract as required in Section 1-03.3, or failure to provide Disadvantaged, Minority or Women's Business Enterprise information if required in the contract, or failure or refusal to sign the contract shall result in forfeiture of the proposal bond or deposit of this bidder. If this should occur, the Contracting Agency may then award the contract to the second lowest responsible bidder or reject all remaining bids. If the second lowest responsible bidder fails to return the required documents as stated above within the time provided after award, the contract may then be awarded successively in a like manner to the remaining lowest responsible bidders until the above requirements are met or the remaining proposals are rejected.[142]

In a Washington State case, *Land Const. Co. v. Snohomish County*, the court held that the bidder could not substitute a certified WBE after bid opening where it would provide the bidder with a substantial advantage over other bidders.[143] The specifications required each bidder to list only certified MBE and WBE subcontractors. The low bid was rejected because the WBE listed was not on the WSDOT list of certified WBEs and no substitution was permitted.

The court recognized that the awarding authority could waive an irregularity if it was not material. "The test of whether a variance is material is whether it

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[137] *Id*. at 536. It was probably significant that the city rejected all bids rather than award to the next bidder, whose price was considered unreasonable.

[138] 330 N.W.2d 693 (Minn. 1983).

[139] 577 F. Supp. 869 (E.D. Wis. 1984).

[140] *Id*. at 871.

[141] 95 Misc. 2d 320, 407 N.Y.S.2d 396 (App. 1979), *aff'd*, 64 A.D. 2d 757, 408 N.Y.S.2d 447 (1978).

[142] Washington State Department of Transportation, Standard Specifications for Road, Highway, and Bridge Construction, § 1-03.5 (2002) (available on WSDOT's Web site, www.wsdot.wa.gov).

[143] 40 Wash. App. 480, 698 P.2d 1120 (1985).

gives a bidder a substantial advantage or benefit not enjoyed by other bidders."[144] The conclusion was that allowing substitution would be a material variation in bidding and that the bid was not responsive:

> Land Construction would enjoy a "substantial advantage" over other bidders if permitted to submit the low bid with a non-certified WBE and then substitute a certified WBE after the bids are opened in that it could refuse to make such a substitution if it discovered that its bid was too low. Because it is the acceptance, not the tender, of a bid for public work which constitutes a contract Land Construction would have no obligation to perform under a bid containing a non-certified WBE. Before its bid is accepted, Land Construction could not be compelled to substitute a certified WBE. Snohomish County could not accept this low bid until it contained a certified WBE. If Land was permitted to make this substitution after the bids are opened, control over the award of public work contracts would pass from the municipality involved to the low bidder.[145]

Although commenters on the proposed rule advocated that the rule should state whether compliance was a responsibility or responsiveness matter, USDOT concluded that agencies should retain this discretion. This was also in keeping with the fact that agencies deal with responsibility differently—some have extensive prequalification requirements, under which only prequalified bidders are allowed to bid. Others, particularly smaller agencies, deal with responsibility through postqualification measures, in which only the low bidder must submit evidence of responsibility.[146] For these agencies, addressing DBE compliance as part of a responsibility determination is more cost effective. Commenters pointed out that requiring that DBE compliance be an element of responsiveness serves to deter bid-shopping.[147] However, agencies retain the ability to require that even though documentation might be submitted only after the low bidder has been identified, it must have been prepared and commitments obtained prior to bid opening.

The importance of the distinction goes mainly to questions of due process and necessity for a hearing before rejecting a bid or bidder. Generally, if a low responsive bidder is determined not to be responsible, it is entitled to a hearing before the agency. However, a bid may be rejected as nonresponsive without providing a hearing to the bidder. This too is addressed in the 1999 regulations. If a bidder's good faith efforts are questioned, an opportunity for administrative reconsideration must be provided, regardless of whether the agency has treated the issue as an element of responsibility or of responsiveness.[148] The bidder must be afforded the opportunity to provide written documentation and meet with an agency representative on whether it either met the DBE goal or made good faith efforts. The agency must assign a different individual to evaluate the bidder's request than whoever made the initial determination.[149] The agency's subsequent determination is final and not appealable to USDOT.[150]

6. Certifications and Appeals

In 1987, Congress required the Secretary of Transportation to establish minimum uniform criteria for DBE certifications:

> The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resumes of principal owners, financial capacity, and type of work preferred.[151]

Amendments to the DOT regulations were filed to implement the changes.[152] USDOT determined that it was already administering uniform standards for certification and added only a requirement that recipients compile and update their DBE/WBE directories annually.[153]

a. The Certification Process

Certification of DBEs and WBEs is a state function subject to review by USDOT on appeals taken by applicants who are denied certification or by third parties challenging a certification. The state must certify that the applicant is (1) a small business entity, (2) owned, and (3) controlled by, (4) an economically, and (5) socially disadvantaged person.[154]

Each word in this definition is critical. First, the applicant is a "concern" or "entity," which may be a corporation, partnership, or sole proprietorship. This entity, as opposed to the qualifying individual or individuals, must be a "small business concern" as defined in Section 3 of the Small Business Act and as implemented in the SBA regulations.[155] Currently this means that the business concern or entity seeking certification has gross receipts of not more than $16.6 million as an average for the prior 3 years, but the Secretary has

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[144] 698 P.2d at 1122 (quoting Duffy v. Village of Princeton, 240 Minn. 9, 60 N.W.2d 27, 29 (1953).

[145] *Id*. (citation omitted).

[146] *See* Section Two for a discussion of prequalification and postqualification.

[147] 64 Fed. Reg. at 5115.

[148] 49 C.F.R. § 26.53(d) (2000).

[149] 49 C.F.R. § 26.53(d)(2) (2000).

[150] 49 C.F.R. § 26.53(d)(5) (2000).

[151] Pub. L. No. 100-17 § 106(c)(4). This same language was included in TEA-21. Pub. L. No. 105-178, tit. I, subtit. A. §1101(b)(4).

[152] 52 Fed. Reg. 39225-39231 (Oct. 21, 1987).

[153] 49 C.F.R. pt. 26, subpt. C, § 26.45 (f)(1) (Oct. 21, 1987).

[154] 49 C.F.R. pt. 26, subpt. D (2000); 49 C.F.R. § 26.67(a)(2)(i)(iii) (personal net worth criteria for qualification of individual).

[155] *See* 5 U.S.C. § 632(a)(2001).

authority to adjust this amount for inflation.[156] Different figures and formulas apply as to certain specialty firms and manufacturers.[157]

Next, the entity must be owned and controlled by a qualifying disadvantaged individual or individuals.[158] Ownership means that 51 percent or more of the business must be owned by eligible individuals, and control means that the eligible business owners themselves control and direct the firm's management and daily business operations.[159] These appear as straightforward propositions, but in closely held or family-owned business arrangements it may be difficult to distinguish between actual conditions and appearances.

i. Ownership.—In order to meet the requirement for ownership, the minority's or woman's interest must encompass the risks and benefits that normally accompany ownership of a business. If the interest does not include those risks and benefits, then it may be inadequate to establish minority or woman ownership.

In *American Combustion, Inc. v. Minority Business Opportunity Commission*, ACI had been certified as an MBE under the District of Columbia's Minority Contracting Act.[160] ACI submitted the lowest bid on a mechanical construction contract, bidding in joint venture with a nonminority firm. However, ACI's certification had expired and it was given an opportunity to reapply. Another bidder protested ACI's minority status. Following a hearing by the Commission, the reapplication was denied. Stock in ACI was supposedly owned by two minorities and three whites, with controlling ownership held by the minorities. The hearing revealed that the stock ownership of the black owners was actually in the form of "options," because the stock was purchased with little or nothing down and the balance was to be paid from bonuses and profits with no risk of financial loss to the minorities. Thus, it was concluded that no bona fide transfer of ownership had taken place, and the court refused to enjoin award of the contract to the second bidder or to reinstate ACI's certification.[161]

In another case, *Agricultural Land Services v. State*, the female co-owner's personal loans to the company, which constituted 60 percent of its assets, were not considered capital investments under the 1987 rule.[162] The disadvantaged owner's contribution must be an actual investment of capital and not a loan.

USDOT rules address this issue in stating that capital contributions of the minority owner must be "real and substantial."[163] Examples of insufficient contributions include "a promise to contribute capital, [or] an unsecured note payable to the firm or an owner who is not a disadvantaged individual…."[164]

ii. Control of Business.—State law will determine the legality of particular business arrangements. For example, if a qualifying minority owns controlling interest in a close corporation, but control is in a four-person board of directors, a majority of three is required for corporate action. Therefore, the minority is not in control. However, if state law permits a by-law amendment delegating total control to the minority owner with controlling interest, the requirement would be satisfied if that individual actually is in control.

Agricultural Land Services also addressed the issue of when a business is family-owned and is owned and operated by both disadvantaged and nondisadvantaged individuals. Such a business cannot be presumed to be controlled or owned by the disadvantaged individual, even if the members jointly handle business responsibilities and decision-making.[165] The firm must describe how the disadvantaged owner exercises majority control.

The USDOT rules specifically address situations when a woman business owner has acquired the business due to the death of her husband or in a divorce settlement. In these cases, the assets are considered to be "unquestionably hers."[166] However, if a woman owner acquires the business as a gift, then the business is presumed not to be held by a socially and economically disadvantaged individual.[167] To overcome this presumption, the owner must prove by clear and convincing evidence that the transfer was not made for the purpose of obtaining DBE certification and that the disadvantaged individual actually controls the "management, policy, and operations of the firm."[168]

A District of Columbia case, *Jack Wood Constr. Co. v. United States Dept. of Transp.*, prompted USDOT to more clearly explain what is meant by "control" of the firm.[169] In that case, the court had overturned a USDOT decision denying DBE certification based on the woman owner's lack of control of the business. Mr. and Mrs. Wood were joint owners of the company. The business had been certified as a DBE after the owner transferred some of his shares to his daughter, making it more than 51 percent female owned. Mrs. Wood had always been involved in the company's bidding and decision-making, but Mr. Wood provided the technical expertise. After

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[156] 49 C.F.R. § 26.65(b) (2000).

[157] *See* 13 C.F.R. pt. 121 regarding determinations of business size.

[158] *See* Lane Constr. Corp. v. Hennessy, 98 Misc. 2d 500, 414 N.Y.S.2d 268 (App. 1979) (firm with a majority of its stock owned by women sought to compel the state transportation commission to place its name on the MBE/WBE registry; in denying the application the court held that majority ownership alone was not sufficient).

[159] 49 C.F.R. §§ 26.69, 26.71 (2000).

[160] 441 A.2d 660 (D.C. App. 1982).

[161] *Id*. at 668.

[162] 715 So. 2d 297 (Fla. App. 1998).

[163] 49 C.F.R. § 26.69(e) (2000).

[164] *Id.*

[165] 715 So. 2d at 298.

[166] 64 Fed. Reg. at 5118 (comment to 49 C.F.R. § 26.69(g)(2)).

[167] 49 C.F.R. § 26.69(h) (2000).

[168] *Id*.

[169] 12 F. Supp. 2d 25 (D.D.C. 1998).

Mr. Wood's death, Mrs. Wood inherited his shares in the company, with the remaining shares still being owned by their daughter. Mrs. Wood then relied on another male employee for technical expertise in bid preparation, but retained the decision-making authority on what jobs to bid and the amount of the company's bid.

After certifying the company as a DBE for 14 years, the Arkansas Highway and Transportation Department determined that the company did not qualify as a DBE because Mrs. Wood, even though she was president of the company, did not meet the federal standard for control of the firm.[170] Rather, the agency found that a male employee "controlled" the company as he had the technical expertise and that Mrs. Wood lacked the background and ability "to independently control the operations of [the] business" under the federal regulation.[171]

The district court held this to be an abuse of discretion.[172] The agency had relied on a regulation that applies to "owners" of firms, and because the male employee relied on by Mrs. Wood was not an owner, that rule did not apply. The court also held that technical expertise alone was not enough to determine who has control.[173] USDOT had always had a policy of requiring that a DBE owner "must have an overall understanding of, and managerial or technical competence and experience directly related to the type of business in which the business is engaged."[174] The court interpreted this policy as requiring that the owner have technical *or* managerial competence, but not both. Mrs. Wood clearly had managerial competence, having been involved in all corporate decision-making for 30 years, including what jobs to bid and at what price, and equipment acquisition. Her reliance on an employee to handle technical aspects of bid preparation was no different than what was done in other companies.

USDOT clarified its rule in 1999 to address this issue. The most significant change with regard to the *Wood* case is the change from "technical *or* managerial competence" to "technical *and* managerial competence."[175] At the same time, the rule acknowledges that technical tasks may be delegated, or that others may be relied on for some technical expertise:

> The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.[176]

Whether Mrs. Wood would have qualified as a DBE under this regulation is unclear from the opinion. However, clearly there was a difference of opinion between USDOT and the court as to whether she did even under the previous rule. The new rule was intended to prevent a woman from claiming that she controls a business where her role in running the business has been limited to managerial and accounting functions, rather than actual construction-related work.

iii. Uniform Certification Program.—No Interstate reciprocity requirement exists that obligates one state to honor certifications of another state. USDOT has had a concern that a reciprocity requirement would lead to "forum shopping" by ineligible businesses.[177] However, the 1999 rule requires that states set up a Unified Certification Program (UCP) within each state by March 2002, with the goal being a system of "one-stop shopping" for certification with all recipients within a given state.[178] The rule also allows two or more states to form regional UCPs, and allows UCPs to enter into written reciprocity agreements with other states or other UCPs.[179]

b. Determining Social and Economic Disadvantage

The individual or individuals qualifying the business as a DBE must be both socially and economically disadvantaged. Certain defined minorities are rebuttably presumed to be socially and economically disadvantaged, including African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans.[180] In addition, other minorities or individuals found to be disadvantaged by the SBA under Section 8(a) of the Small Business Act are included. The states must accept and cannot challenge an 8(a) certification except through SBA.[181]

Apart from 8(a) certifications, the specified minorities are not presumed to be economically and socially disadvantaged. For example, a wealthy minority would not be economically disadvantaged, as he or she would not meet the requirements for limits on personal net worth.[182] Likewise, the qualifying individual must actually be a member of one of the defined minority groups to establish social disadvantage. The rules set out a

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[170] *Id*. at 27 (citing 49 C.F.R. § 23.53(a)(3)–(4) (1987)).

[171] *Id*. at 28 (quoting 49 C.F.R. § 23.53(a)(2)–(3) (1987)).

[172] *Id*. at 28.

[173] *Id*. at 29.

[174] *Id*.

[175] 49 C.F.R. § 26.71(g) (2000).

[176] *Id*.

[177] 64 Fed. Reg. at 5122.

[178] 49 C.F.R. pt. 26, subpt. E § 26.81 *et. seq*. (2000); *see also* CalTrans Web site for a description of its Uniform Certification program and application, www.dot.ca.gov (Doing Business with CalTrans, Civil Rights Program).

[179] 49 C.F.R. § 26.81(e) (2000).

[180] 49 C.F.R. § 26.5 (2001).

[181] 49 C.F.R. § 26.67 (2000).

[182] 49 C.F.R. § 26.67 sets this limit at $750,000, excluding the assets of the firm being certified.

standard for evaluating whether one is actually part of a minority group, including "whether the person has held himself out to be a member of the group over a long period of time" and "whether the person is regarded as a member of the group by the relevant community."[183]

As to eligible minorities who are presumptively disadvantaged, the states are not burdened with the obligation of inquiring into the actual social and economic situation to make determinations for every firm seeking certification. Disadvantaged status is presumed. However, if a third party challenges this status the state must follow the challenge procedures and make a determination from the facts presented by all sides.[184]

The states are authorized to make individual determinations of social and economic disadvantage regarding individuals who are not part of a presumptive group. Appendix E to 49 C.F.R. Part 26 provides guidance and standards for making social and economic disadvantage determinations. Three elements must be shown to support a finding of social disadvantage: (1) social disadvantage arising from color, national origin, gender, physical handicap, or long-term isolation from mainstream American society; (2) demonstration that the individual personally suffered substantial and chronic disadvantage in American society and not in other countries; and (3) demonstration that the disadvantage must have negatively affected the individual's entry into or advancement in the business community. Evidence of social disadvantage to establish these points can include denial of equal access to employment opportunities, credit or capital, or educational opportunities, including entry into business or professional schools.

Economically disadvantaged individuals are usually socially disadvantaged as well because of their limited capital and credit opportunities. Therefore, the guidelines direct that a determination first be made as to social disadvantage based on factors other than economic considerations. If social disadvantage is found in accordance with the described elements, an economic determination is made.[185]

c. Certification Denials, Challenges, and Appeals

The regulations provide that a denial of certification must be in writing.[186] The recipient is expected to establish a time period of no more than 12 months that the firm must wait to reapply.[187]

The applicant may appeal a denial of certification to USDOT.[188] Only USDOT has jurisdiction to consider such a denial of certification by a recipient agency.[189] Any firm that believes that it was wrongfully denied certification must file its appeal with USDOT within 90 days after denial of certification unless the time period is extended by USDOT for good cause.[190] USDOT is required to make its decision based on the recipient's administrative record; it does not conduct a de novo review and does not hold a hearing. USDOT will affirm the recipient's decision unless it is not supported by substantial evidence in view of the entire administrative record, or unless it is inconsistent with the regulations regarding certification.[191]

If a recipient is considering removing a firm's DBE status, it must hold an informal hearing and give the firm an opportunity to respond to the agency's reasons for removing its eligibility.[192] The agency must maintain a complete record of the hearing; this facilitates USDOT's review on the administrative record. The agency's decision to remove a firm's eligibility must be made by separate agency personnel from those who originally sought to remove the firm's certification.[193]

7. Counting DBE Participation

The comment to the rules notes:

> In a narrowly tailored program, it is important that DBE credit be awarded only for work actually being performed by DBEs themselves. The necessary implication of this principle is that when a DBE prime contractor or subcontractor subcontracts work to another firm, the work counts toward DBE goals only if the other firm is itself a DBE….[194]

Under the former regulations, if the prime contractor was a DBE, then the entire contract counted as 100 percent DBE participation. Under the 1999 rules, the DBE prime contract counts only to the extent that the DBE does the work itself or subcontracts with DBE subcontractors. Along the same lines, the rule requires that DBE bidders meet the same contract goals or good faith efforts required of non-DBE bidders.[195] Section 26.55 addresses in detail what types of work, equipment rental, and purchase of materials count toward the DBE goal.[196]

If a DBE joint ventures with a non-DBE, only the portion of the work that the DBE joint venturer per-

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[183] 49 C.F.R. § 26.63 (2000).

[184] 49 C.F.R. § 26.87 (2000).

[185] 49 C.F.R. pt. 26, app. E.

[186] 49 C.F.R. § 26.85(a) (2000).

[187] 49 C.F.R. §26.85(b) (2000)

[188] 49 C.F.R. §§ 26.85(c), 26.87 (2000).

[189] Mabin Constr. Co. v. Missouri Highway and Transp. Comm'n, 974 S.W.2d 561 (Mo. App. 1998) (state court lacked subject matter jurisdiction to consider state agency's denial of DBE certification, because regulations required that appeal be made to USDOT, whose decision was reviewable only by the federal courts).

[190] 49 C.F.R. § 26.89(c) (2000).

[191] 49 C.F.R. § 26.89(e) (2001).

[192] 49 C.F.R. § 26.87(d) (2000).

[193] 49 C.F.R. § 26.89(e) (2000).

[194] 64 Fed. Reg. at 5115.

[195] 64 Fed. Reg. at 5115.

[196] 49 C.F.R. § 26.55 (2000).

forms with its own forces may be counted toward the DBE goal.[197]

a. The Captive DBE and the Mentor-Protege Program

One of the most difficult areas of enforcement for state highway agencies has been the "captive" DBE. A prime contractor may aid, assist, or encourage a female or minority member of the contracting firm to establish another contracting business in order to take on subcontracting work for the prime contractor. Usually the individual has gained competence and experience in the prime contractor's business and is assured of future continuing business from the mentor. Characteristically these new firms become closely identified with the prime contractor. Equipment, workers, and even working capital may be supplied by the prime contractor, and the prime may own a financial interest in the fledgling firm.

FHWA has recognized that these arrangements can be beneficial to the program to bring new minorities and women into the mainstream of construction contracting. This assumes that they are not used as fronts but are permitted to grow in independence as they gain business experience to supplement their technical competence. FHWA included guidelines for the mentor-protege program in the 1999 rules. It permits established firms to assist fledgling firms in providing specialized assistance to satisfy a mutually beneficial special need.[198]

Only firms that have already been certified as DBEs are eligible to participate in a mentor-protege program. This is intended to prevent the use of "captive" proteges that are set up by contractors to help them in meeting DBE goals.[199] The mentor and the protege must enter into a written development plan to be approved by the state highway agency. The protege firm must remain responsible for management of the new firm, and the two firms must remain separate and independent business entities. The development plan must be of limited duration and contain developmental benchmarks that the protege should achieve at successive stages of the plan. This is to permit proper monitoring of the development of the DBE firm to be certain that progress is being achieved toward a goal of independence.

The mentor-protege program is not intended to be a substitute for the DBE program. The 1999 rule requires that a mentor may count only one-half of the work done by a protege firm toward its DBE goal.[200]

b. "Commercially Useful Function"

A particular concern regarding counting DBE participation involves the application of the requirement that each DBE subcontractor perform a "commercially useful function."[201] The rules define the performance of a commercially useful function as follows:

> A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved…To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work and other relevant factors.[202]

In addition, FHWA has suggested additional elements that a state agency may use to determine whether the DBE subcontractor is performing a commercially useful function. These include (1) the DBE's management of the work; (2) whether the DBE is using its own work force; (3) whether it rents or leases equipment, or owns its own equipment; and (4) whether it is using its own materials.[203]

c. Monitoring Contract Compliance

Contract compliance involves monitoring each project to be certain that the contractor continues with its good faith efforts to achieve the contract goals. The monitoring and enforcement requirements of the 1999 rules are intended to verify that the work committed to DBEs at contract award is actually performed by them.[204]

As part of the recipient's DBE program, the recipient must require that the prime contractor not terminate a DBE subcontractor for convenience and then perform the work with its own forces.[205] Further, when a DBE subcontractor is terminated for default or fails to complete its work for any reason, the prime contractor is required to make good faith efforts to find another DBE to substitute for the terminated DBE.[206] The same actions cited as good faith efforts in preparing a bid should also be required for substitution. Substitution is required for at least the same amount of work on the contract, but it need not be for exactly the same item of work.

The rules do not provide for specific enforcement mechanisms, stating only that recipients must implement appropriate mechanisms to ensure compliance with the program requirements, "applying legal and contract remedies available under Federal, state and local law."[207] Some organizations and states have advo-

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[197] 49 C.F.R. § 26.55(b) (2000).

[198] 49 C.F.R. § 26.35 and pt. 26, app. D (2000).

[199] 64 Fed. Reg. at 5107.

[200] 49 C.F.R. § 26.35 (b)(2)(i) (2000).

[201] 49 C.F.R. § 26.55(c) (2000).

[202] 49 C.F.R. § 26.55(c)(1) (2000).

[203] *See* FHWA Web page entitled "Contract Administration Core Curriculum, Participant's Manual and Reference Guide 2001, Chapter II B," found at http://www.fhwa.dot.gov/programadmin/contracts/cor_IIB.htm.

[204] 49 C.F.R. § 26.37 (2000).

[205] 49 C.F.R. § 26.53(f)(1) (2000).

[206] 49 C.F.R. § 26.53(f)(2) (2000).

[207] 49 C.F.R. § 26.37(a) (2000).

cated the use of liquidated damage provisions as an enforcement device to ensure goal achievement. This appears to be a convenient and effective means to ensure results, but actually poses problems.[208] Liquidated damages have worked well for owners and contractors in controlling timely completion of the work. However, they have not worked well in other areas to compel performance. They may be challenged as unenforceable penalties, except where actual out-of-pocket damages are quantified. Also, a stipulated damage provision in the contract for failure to achieve the goal could be used by a contractor as an invitation to incur the penalty as a cost of doing business, and include its cost in the bid price rather than employ the good faith efforts that were promised.

8. Review of New Regulations Under *Adarand* Standard

The U.S. Supreme Court remanded the *Adarand* case to the district court for a determination of whether the USDOT regulations met the new standard of review that it set out in that case. The federal district court subsequently held that the Subcontractor Compensation Clause (SCC) was unconstitutional as not being narrowly tailored.[209] The Tenth Circuit found on review that because the Colorado Department of Transportation had certified Adarand as a DBE, its case was moot.[210] The U.S. Supreme Court vacated that decision and remanded the case to the Tenth Circuit for consideration on the merits.[211]

The Tenth Circuit held that while the SCC failed to pass strict scrutiny, the new USDOT regulations were narrowly tailored and were constitutional.[212] The court noted the standard set out by the Supreme Court, which required that the government prove a compelling interest with evidence of past and present discrimination in federally-funded highway construction.[213] The court found adequate evidence in the many studies considered by Congress in its enactment of amendments to the Federal Highway Act.[214] The government's evidence demonstrated two particular barriers to minority participation in subcontracting: those that created a barrier to the formation of minority-and women-owned firms, and those that acted as a barrier to participation by DBEs.[215] The most significant obstacles identified were lack of access to capital and inability to get surety bonds.[216] The government also presented evidence that "when minority firms are permitted to bid on subcontracts, prime contractors often resist working with them."[217] The court concluded that the government's evidence established "the kinds of obstacles minority subcontracting businesses face," and that these obstacles are different from those faced by other new businesses.[218] The court also found evidence of discrimination in disparity studies, and studies of minority business participation after affirmative action programs were discontinued.[219] The court therefore concluded that there was evidence to support the contention that there was a compelling interest to be served by the DBE requirements.

The court further found that the new USDOT regulations were narrowly tailored to address the compelling interest. The court based this conclusion on the fact that (1) the program relies in large part on race-neutral means of achieving its goals;[220] (2) there are time limits on the duration of the DBE certification program;[221] (3) the program is flexible, and includes waiver provisions;[222] (4) the program is numerically proportional to the numbers of available firms, and allows good faith efforts to meet requirements;[223] (5) there is an acceptable burden on third parties;[224] and (6) the DBE program is neither over- nor under-inclusive in that minority firms above a certain gross income level are ineligible for it.[225]

9. Bidder Preferences

Bidder preference statutes were adopted in many states during the Great Depression to preserve job opportunities for state residents. Decades later, many states still give statutory preferences to resident contractors and require hiring of local workers, citing to the same need to provide employment opportunities to state residents. Even where these statutes have stood for years, they may still be challenged on constitutional grounds where they have been more recently amended. In other cases, challengers may argue that economic conditions no longer justify the preference. Challenges have alleged violations of the Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause.

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[208] *See* DiMambro-Northend Assoc. v. Blanck-Alvarez, Ind., 251 Ga. 704, 309 S.E.2d 364 (1983).

[209] Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997).

[210] Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999).

[211] Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000).

[212] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000). The court noted that by the time of this decision, the SCCs were no longer used by FHWA in its direct federal contracts. *Id*. at 1159 n.4.

[213] *Id*. at 1164.

[214] *Id*. at 1167 (citing "The Compelling Interest for Affirmative Action in Federal Procurement," 61 Fed. Reg. 26,050, 26,051–52 & nn.12–21 (1996)).

[215] *Id*. at 1167–68.

[216] *Id*. at 1169

[217] *Id*. at 1170 (citing 61 Fed. Reg. at 26, 058–59).

[218] *Id*. at 1172.

[219] *Id*. at 1172–75.

[220] *Id*. at 1178–79.

[221] *Id*. at 1179.

[222] *Id*. at 1180–81.

[223] *Id*. at 1181–83.

[224] *Id*. at 1183.

[225] *Id*. at 1183–86.

a. The Commerce Clause

The Commerce Clause prohibits the states from unduly burdening Interstate commerce in their regulatory activity.[226] Generally, a preference statute will not be found to have violated the Commerce Clause if it applies only to actions in which the agency is acting as a market participant rather than as a regulator.

The U.S. Supreme Court upheld a City of Boston preference in *White v. Massachusetts Council of Construction Employers.*[227] The Court stated in that case:

> If the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.[228]

In a later case, the Court of Appeals of Wisconsin upheld the Department of Transportation's bid requirement that contractors supplying road salt stockpile the salt at locations within the state, finding that it did not violate the Commerce Clause.[229] Relying on *White*, the court found that the department was not acting as a regulator:

> The department is not attempting to control any transactions other than the one in which it is involved: the purchase of road salt for state and municipal use. It is not employing its regulatory powers to dictate who may, or may not, buy or sell road salt in Wisconsin; nor is it requiring that Glacier, or any other businesses, do anything other than have the purchased salt in specified locations at a specified time—hardly an unusual or oppressive provision in a purchase contract. And, as we have said, Glacier is free to contract with other municipalities and counties on its own terms. The department is simply a party to a contract for the purchase of road salt and, when acting as a proprietor, a government shares the same freedom from the Commerce Clause that private parties enjoy.[230]

b. The Privileges and Immunities Clause

The Privileges and Immunities Clause prohibits discrimination by a state against citizens of other states, unless noncitizens are a "peculiar source of evil" at which the statute is directed and the remedy is narrowly tailored.[231]

In *Hicklin v. Orbeck*, the United State Supreme Court struck down a state statute known as the "Alaska Hire" statute, which contained a residential hiring preference for all employment arising out of oil and gas leases.[232] The Court held that it violated the Privileges and Immunities Clause, because it required private employers to discriminate against nonresidents, and there was no showing that out-of-state hiring was the cause of unemployment in the state. First, the State did not show that the influx of out-of-state workers was the cause of unemployment; rather, lack of adequate education and training and the remoteness of some Alaska residents was more likely the cause.[233] Second, the remedy was not narrowly tailored in that it gave a preference to all Alaska residents, regardless of their qualifications.[234] Lastly, the discriminatory effect went beyond the area in which the State had a proprietary interest, and applied to private employers as well. The only basis for application of the statute was the state ownership of oil and gas resources.[235]

In *United Building and Construction Trades Council v. The Mayor and Council of the City of Camden*, the U.S. Supreme Court held that Camden's AAP discriminated against residents of other states, and thus violated the Privileges and Immunities Clause.[236] The Court stated that a law preferring local workers for public construction projects burdens a fundamental right and is covered by the Privileges and Immunities Clause. However, the Court noted that the clause is not absolute:

> [The Privileges and Immunities Clause] does not preclude discrimination against citizens of other States where there is a "substantial reason" for the difference in treatment. "[The] injury in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them."…As part of any justification offered for the discriminatory law, nonresidents must somehow be shown to "constitute a peculiar source of the evil at which the statute is aimed."[237]

In *People ex rel. Bernardi v. Leary Construction Co.*, the Illinois Supreme Court used this to create a two-part test to determine when state actions violated rights protected by the Privileges and Immunities Clause.[238] First, the state must identify nonresidents as being a "peculiar source of evil" at which the statute is directed. Second, the discrimination must bear a substantial relationship to the evil that nonresidents present. In a municipal painting contract, the court found that nothing in the record established a relationship between nonresident employment on public works projects and resident unemployment. Accordingly, nonresident laborers could not be considered a "peculiar

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[226] U.S. CONST. ART. I § 8, cl. 3; Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960).

[227] 460 U.S. 204, 103 S. Ct. 1042, 75 L. Ed. 2d 201 (1983).

[228] *Id.* at 210.

[229] Glacier State Distribution Services, Inc. v. Wis. Dep't of Transp., 221 Wis. 2d 359, 585 N.W.2d 652, 658 (1998).

[230] *Id*., 585 N.W.2d at 658–59 (citations omitted).

[231] CONST. ART. IV § 2, cl. 1; Toomer v. Witsell, 334 U.S. 385 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

[232] 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978).

[233] *Id*. at 526–27.

[234] *Id*. at 527.

[235] *Id*. at 530–31.

[236] 465 U.S. 208, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984).

[237] 465 U.S. at 222 (citations omitted).

[238] 80 Ill. Dec. 36, 102 Ill. 2d 295, 464 N.E.2d 1019 (1984).

source" of the evil of unemployment, and so there was not a sufficient reason to interfere with the right of a citizen to cross state lines to work.[239]

Applying this standard, the Wyoming Supreme Court in *State v. Antonich* ruled that the State's Preference for State Laborers Act did not violate the Privileges and Immunities Clause of the United States Constitution.[240] This statute required contractors to employ available Wyoming laborers for public works projects in preference to nonresident workers, with provision for certification by the State employment office if local resident employees possessing the necessary skills are not available. Analyzing the *City of Camden* and the "Alaska Hire" case, the court concluded that the preference did in fact discriminate against nonresidents regarding a fundamental right. At the same time it viewed the statute as narrowly tailored to address a valid state goal of ensuring employment of its citizens, stating that it "precisely fits the particular evil identified by the State."[241] First, the statute's applicability was limited only to qualified state residents. Contractors were required to contact local employment offices for qualified workers, and if none were available could hire from out of state. Second, it applied in the State's proprietary role in carrying out government-funded projects. Third, it specifically addressed unemployment in the construction industry.[242]

c. The Equal Protection Clause

When challenged under the Equal Protection Clause of the Fourteenth Amendment, a bidder preference statute must pass only minimal scrutiny as economic legislation. While the right of an individual to employment is considered a fundamental right, the right of a company to bid on public works is not.[243]

A bidding preference statute was upheld against an equal protection challenge in *Equitable Shipyards v. Washington State Department of Transportation.*[244] In considering bids for new state ferries, the WSDOT was authorized by statute to add a 6 percent "penalty" to the bids of out-of-state shipbuilding companies when determining the lowest responsible bidder. When this action was challenged by the otherwise low bidder as being arbitrary and capricious, and thus unconstitutional, the court found that a reasonable basis existed for the preference that was sufficient to withstand constitutional attack. The court's inquiry involved a three-part test: "(1) Does the classification apply alike to all members of the designated class? (2) Does some basis in reality exist for reasonably distinguishing between those within and without the designated class? (3) Does the classification have a rational relation to the purpose of the challenged statute?"[245]

The court noted that ferry construction was exempt from the state sales tax and that lost revenues from the tax exemption would be partially offset if the shipbuilding occurred in Washington, because the work would generate secondary economic activity. The court also pointed out that construction out-of-state would increase the state's administrative costs for inspecting the work, and that there was a greater potential for delay.[246] The court concluded: "We are convinced that a rational relation exists between the purposes of RCW 47.60.670 and its classifications of in-state and out-of-state shipbuilding firms."[247]

The Alaska Supreme Court found a regional preference law that benefited residents of economically distressed zones to be unconstitutional under the state constitution's equal protection clause.[248] Acknowledging that the Alaska Constitution's equal protection clause provides greater protection than its federal equivalent, the court determined that "the right to engage in an economic endeavor within a particular industry is an 'important' right for state equal protection purposes."[249] It applied this standard to the regional preference statute, holding that the statute would be scrutinized "closely."[250] The court concluded that the statute essentially benefited one class of workers over another. "We conclude that the disparate treatment of unemployed workers in one region in order to confer an economic benefit on similarly-situated workers in another region is not a legitimate legislative goal."[251]

d. Payment of State and Local Taxes as Basis for Preference

The Arizona Supreme Court found unconstitutional a bid preference statute that granted a preference to contractors who had paid state taxes for 2 consecutive years.[252] The court found that the statute did not further any constitutionally permissible state interest in preventing unemployment, or in benefiting contractors who contributed to the state's public funds or the state's economy. The statute did not even require that the contractor have an office or any presence within the state, only that it have paid state taxes for the previous 2 years.[253] It did not require or even encourage contrac-

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[239] *Id.* at 1022.

[240] 694 P.2d 60 (Wyo. 1985).

[241] *Id*. at 63.

[242] *Id*.

[243] Note that the Privileges and Immunities Clause applies to "citizens," while the Equal Protection Clause applies to "persons." Thus while a corporation may allege a violation of Equal Protection as a "person," it is not a "citizen" with rights under the Privileges and Immunities Clause.

[244] 93 Wash. 2d 465, 611 P.2d 396 (1980).

[245] *Id*.

[246] 611 P.2d at 404 (citations omitted).

[247] *Id*. (citations omitted).

[248] State, by and Through Dep'ts of Transp. and Labor v. Enserch Alaska Constr., Inc., 787 P.2d 624 (Alaska 1989).

[249] *Id*. at 632.

[250] *Id*. at 633.

[251] *Id*. at 634.

[252] Big D Constr. Corp. v. Court of Appeals for State of Ariz., Division One, 163 Ariz. 560, 789 P.2d 1061 (1990).

[253] *Id*. at 1069.

tors to hire state residents. Thus, the court found that the statute created a burden and not a benefit.[254] The court noted the statute's Depression origins, but found that it had been altered to no longer suit its original purpose. One of the original purposes of the statute had been to benefit "resident" contractors, and that requirement had been removed by amendment.[255]

In contrast, the Nevada Supreme Court found a very similar statute constitutional.[256] In that case, the preference statute required that bidders have paid state taxes for 60 successive months counting back from submission of their bids. The court found that the statute created a preference for contractors who had a "permanent and continuing presence" in the state, which benefited residents and the state economy and fostered warranty work.[257] The goal of the statute was in fact to have the contractor establish a presence in the state, and not just to have contributed to the state's tax revenues. The statute had recently been amended to extend the time period from 2 to 5 years, in order to "demonstrate a presence here even more convincingly."[258]

e. Federally Funded Projects

State laws providing for preferential treatment of local contractors in bidding or preferential hiring of local labor or suppliers in performance of a public construction contract may not be used in federally-funded work. Under statutory authority to approve methods of bidding used in federally-funded contracts,[259] the Secretary of Transportation and Federal Highway Administrator have promulgated regulations requiring the bidding procedure to be nondiscriminatory.[260] They have further required that the selection of labor to be employed by a contractor shall be of its own choosing.[261] Prohibition of discriminatory hiring practices is provided in the Required Contract Provisions for Federal-Aid Contracts.[262]

f. Contract Requirements

Even where there is an adequate justification for the use of a bidder preference, the standards under which the preference will be applied must be established prior to bidding and must be set out in the bid documents. The Ohio Supreme Court addressed this problem in *City of Dayton, ex rel. Scandrick v. McGee*, a case in which the agency was found to have abused its discretion in the use of bidder preferences:

> The evil here is not necessarily that "resident" bidders are preferred but that there are absolutely no guidelines or established standards for deciding by how "many percentages" a bid may exceed the lowest bid and yet still qualify as the "lowest and best bid." Absent such standards, the bidding process becomes an uncharted desert, without landmarks or guideposts, and subject to a city official's shifting definition of what constitutes "many percentages…."[263]

B. LABOR STANDARDS

The Secretary of Transportation and the Federal Highway Administrator are responsible for requiring that the states' contracting officers require compliance with federal labor standards in federal-aid highway construction contracts and subcontracts.[264] Failure of a contractor or subcontractor to comply with federal labor standards may constitute a violation of federal law directly by the contractor, and also a violation by the state highway agency of the federal statutes or regulations prescribing the terms on which federal funds are used.

In addition to a violation of federal law, the failure to enforce these labor standards also may place the contractor-employer in an unfair competitive advantage with regard to the unsuccessful bidders, and denies to the employees the benefits of federal labor standards. Similarly, enforcement of the standards beyond their proper scope may infringe on the contractor's rights both under the law and the contract.

1. Minimum Wage Standards

Federal regulations governing minimum wages that are applicable to federally-funded highway projects include the Davis-Bacon Act, which mandates payment of prevailing wages, and the Contract Work Hours and Safety Standards Act, which requires payment of minimum wages and adherence to a 40-hour work week.

a. Application of the Davis-Bacon Act to Federal-Aid Highway Projects

The basic federal legislation dealing with wage standards for public construction contracts is the Davis-Bacon Act, enacted in 1931.[265] It requires that federal public works contracts provide for minimum wage rates and payment of laborers and mechanics according to the prevailing rates in the area where the work is per-

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[254] *Id*.

[255] *Id*. at 1070 (although a rational basis for the privileges granted by the statute may have existed at the time it was enacted in 1933, it has ceased to exist).

[256] City of Las Vegas v. Kitchell Contractors, Inc., 768 F. Supp. 742 (D. Nev. 1991).

[257] *Id*. at 745.

[258] *Id*. at 746.

[259] 23 U.S.C. § 112(a).

[260] 23 C.F.R. § 635.107(e).

[261] 23 C.F.R. § 635.124(b), Claim Awards & Settlements; FHWA LABOR COMPLIANCE MANUAL, §§ 208-2, 508-3, app. C-9.

[262] 23 C.F.R. § 633.207.

[263] 67 Ohio St. 2d 356, 423 N.E.2d 1095, 1097 (1981).

[264] Portions of this article are derived from *Labor Standards in Federal-Aid Highway Construction Contracts*, by Ross D. Netherton, published by Transportation Research Board and included in SELECTED STUDIES IN HIGHWAY LAW, vol. 3, p. 1295.

[265] 40 U.S.C. §§ 276a-276a-7 now codified at 40 U.S.C. §§ 3141–3144 (2003).

formed.[266] The dual purposes of the Davis-Bacon Act are to give local laborers and contractors a fair opportunity to participate in building programs when federal money is involved, and to protect local wage standards by preventing contractors from basing bids on wages lower than those prevailing in the area.[267]

The Act also deals with related matters, including payment of fringe benefits,[268] withholding of contract funds from the contractor to assure compliance with the wage standards,[269] and termination of contracts because of failure to pay wages according to predetermined rates.[270] Additional incentives for compliance are supplied by provisions for direct payment of restitution wages to employees by the Comptroller General of the United States from retained funds under the contract, and disqualification of violators of the law from bidding on future federal contracts.[271]

The Davis Bacon Act applies to all federal-aid construction contracts that exceed $2,000 and to all related subcontracts on federal-aid highways; it does not apply to projects on roadways classified as local roads or rural minor collectors.[272] Application of Davis-Bacon to the federal-aid highway program is set out in 23 U.S.C. § 113 (a):

> The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the construction work performed on highway projects on the Federal-aid highways authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931, known as the Davis-Bacon Act (40 U.S.C. 276a).[273]

Because the state highway agency, or local unit of government working in cooperation with the state highway agency, is the contracting agency for federal-aid highway construction, it has the primary responsibility for assuring contractor notification of and compliance with the predetermined prevailing wage rates. In the performance of these responsibilities, several specific steps must be taken by the contracting agency, which include assuring that (1) requests for determination of prevailing wage rates are submitted when required; (2) applicable wage rates and labor standards clauses are incorporated into all contract specifications, and in all contracts and subcontracts; (3) wage rate determinations are posted conspicuously at the jobsite; (4) laborers and mechanics are paid weekly at rates not less than those prescribed for the classes of work that they actually perform; (5) jobs are correctly classified in accordance with standards and procedures of the Department of Labor; and (6) failures on the part of contractors or subcontractors to comply with requirements of either the contract or the law are corrected or adjudicated.[274]

b. Determination of Prevailing Wage Rates

The "prevailing wage" for a specific classification is the wage paid to the majority of those employed in that classification in the area where the proposed work is to be done.[275] If a single rate cannot be identified for the majority of those in the classification, the Secretary is directed to use an average of the wages paid, weighted by the total employed in the classification.[276]

The authority to predetermine wage rates is given by statute to the Secretary of Labor, but it actually is exercised by the Administrator, Wage and Hour Division, Employment Standards Administration.[277] The Administrator carries on a continuing program to compile data and to encourage voluntary submission of wage rate data by contractors, contractor associations, labor organizations, public officials, and other interested parties.[278] In determining a prevailing wage rate, however, the regulations require that the Administrator insure accuracy by giving preference to data that reflect actual conditions in the labor market. Thus the regulations prescribe that wage rates will be determined by reference to (1) statements showing wage rates on specific projects, identifying contractors, locations, costs, dates, types of work, and the like; (2) signed collective bargaining agreements; (3) wage rate determinations for public construction by state and local officials pursuant to state prevailing wage laws; and (4) information fur-

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[266] 40 U.S.C. § 3142(b) (2003).

[267] L.P. Cavett Co. v. United States Dep't of Labor, 101 F.3d 1111, 1113 (6th Cir. 1996).

[268] 40 U.S.C. § 3141(2)(B) (2002).

[269] 40 U.S.C. § 3142(c)(3) (2003).

[270] 40 U.S.C. § 3143 (2003).

[271] 40 U.S.C. § 3144 (2003).

[272] *See* FHWA CONTRACT ADMINISTRATION CORE CURRICULUM MANUAL (hereinafter CACC Manual), § II.A.4, Payment of Predetermined Minimum Wage (2001) (available on FHWA Web site, www.fhwa.dot.gov, Contract Administration Group page.

[273] 23 U.S.C. § 113 (2002). For legislative history of the application of Davis Bacon to highway projects, *see* Appalachian Regional Act of 1965, as amended, 40 U.S.C. App. § 402, for inclusion of federal labor standards in construction contracts for projects on the Appalachian Development Highway System and local access roads; 102 CONG. REC. 9156-9171 (Senate debate in which excerpts from letters from 29 state highway departments were introduced as evidence of how the Davis-Bacon Act would affect highway construction); HOUSE COMM. ON PUBLIC WORKS, FEDERAL HIGHWAY AND HIGHWAY REVENUE ACTS OF 1956, H.R. REP. NO. 2022, 84th Cong., 2d Sess., 12–13, 25–32 (1956); 41 Op. Att'y Gen. 488 (1960).

[274] 29 C.F.R. § 5.5(a); 29 C.F.R. § 5.5(a)(7), 5.5(b)(2) (2001); *see also* CACC Manual, § II.4, *supra* note 272.

[275] 29 C.F.R. § 1.2(a)(1) (2001).

[276] 29 C.F.R. § 1.2(a)(1) (2001).

[277] 29 C.F.R. § 1.1(a) (2001).

[278] 29 C.F.R. § 1.3 (2001).

nished by state transportation agencies in consultation with the Administrator.[279]

All agencies using wage determination must furnish the Wage and Hour Division annual outlines of their proposed construction programs, indicating estimated number of projects for which determinations will be needed.[280]

The prevailing wage as paid in the "locality" requires that the wage be calculated based on the average rate paid to workers in the county in which the work is performed, not at a particular plant.[281] Where the employees perform more unusual work, the rate must be based on that paid to other workers for the same or similar work, even if they are considered to be in different classifications. For example, where the rate was being determined for shipyard boilermakers, it was not adequate to look only at what shipyard boilermakers were being paid. Where their work was of the same type and similar in nature to that of pipefitters in the construction industry, the wages paid to pipefitters had to be considered in determining the prevailing wage.[282]

The Davis Bacon Act requires the Secretary of Labor to set wage rates for the various classifications of work.[283] With respect to job classifications for highway work, § 113 of Title 23 U.S.C. sets out further requirements:

> In carrying out the duties of subsection (a) of this section, the Secretary of Labor shall consult with the highway department of the State in which a project on any of the Federal-aid systems is to be performed. After giving due regard to the information thus obtained, he shall make a predetermination of the minimum wages to be paid laborers and mechanics in accordance with the provisions of subsection (a) of this section which shall be set out in each project advertisement for bids and in each bid proposal form and shall be made a part of the contract covering the project.[284]

Because of the nature of the federal-aid highway program and other programs providing federal funds administered by state or local agencies, it is possible for transportation construction contracts to provide that wage rates must comply with both the federal standards in the Davis-Bacon Act and with state standards. The two sets of standards may differ in their language or interpretations such that employers are obligated to pay higher rates under one than under the other. In these instances, courts have taken the position that these minimum wage rates are to be treated as a floor, but not as a ceiling.[285] FHWA will approve state rates that are higher than the federal rates, recognizing the states' abilities to establish their own rates under state law.[286]

i. Requests for Wage Rate Determinations.—There are two processes for obtaining wage determinations from the Department of Labor. Both are initiated with a request from the federal agency that is required to comply with the Davis Bacon Act.

A federal agency may request that the Secretary make a general wage determination for particular types of construction work in particular areas, when wages are well-settled and there is likely to be a significant amount of construction in that area.[287] Notices of wage rate determinations are published in the Federal Register. Davis Bacon wage rates are now available on the Department of Labor's Web site at www.access.gpo.gov/davisbacon.[288]

For determinations on one or more classifications for which there is not a general wage determination, the federal agency may submit a request form to the Department of Labor requesting a determination. The agency must provide a detailed description of the work, indicating the type of construction involved, and must provide any pertinent wage information.[289]

ii. Legal Effects of Wage Rate Determinations and Changes to Determinations.—After prevailing wage rates for job classifications in the area of a construction project are determined, the contracting agency is responsible for seeing that they are inserted in the project advertisement and in the construction contract.[290]

Once the Secretary of Labor has made a wage rate determination, its correctness is not subject to judicial review.[291] It may, however, be challenged in administrative review proceedings. First, an interested party may ask the Administrator for reconsideration, in which case it must provide the Administrator with argument or data to support its position.[292] If the Administrator denies reconsideration, the interested party may appeal the determination to the Administrative Review Board.[293] An "interested person" includes a contractor, subcontractor, or contractor association who is likely to seek work under a contract with the wage determination; a laborer, mechanic, or labor union likely to seek employment under such a contract; or a federal, state, or local agency concerned with administration of such a contract.[294]

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[279] 29 C.F.R. § 1.3(b) (2001).

[280] 29 C.F.R. § 1.4 (2001).

[281] Lockheed Shipbuilding Co. v. Department of Labor and Indus., 56 Wash. App. 421, 783 P.2d 1119 (Wash. App. 1989), *review denied*, 791 P.2d 535, 114 Wash. 2d 1018 (1989).

[282] *Id.*, 783 P.2d at 1124.

[283] 40 U.S.C. § 3142(b) (2003).

[284] 23 U.S.C. § 113(b) (2001).

[285] *See* Ritchie Paving, Inc. v. Kansas Dep't of Transp., 232 Kan. 346, 654 P.2d 440 (1982) (applying KAN. STAT. § 44-201, and holding that the higher of either the federal or state would prevail).

[286] *See* CACC Manual, *supra* note 272, at section II.A.4.

[287] 29 C.F.R. § 1.5(b) (2001).

[288] CACC Manual, *supra* note 272.

[289] 29 C.F.R. § 1.5(a) (2001).

[290] 29 C.F.R. § 1.6(b) (2001).

[291] Nello L. Teer Co. v. United States, 348 F.2d 533, 539–40, 172 Ct. Cl. 255 (Ct. Cl. 1965).

[292] 29 C.F.R. § 1.8 (2001).

[293] 29 C.F.R. § 1.9; 29 C.F.R. pt. 7 (2001).

[294] 29 C.F.R. § 7.2 (b) (2001).

A request for review will not interfere with the contract advertisement or award schedule. The Board will "under no circumstances" request postponement of contract action because of the filing of a petition.[295]

The transportation agency is required to incorporate the published applicable wage determinations in federal aid contracts.[296] An addendum must be circulated if notice of an amendment of a general wage determination is published in the Federal Register 10 days or more prior to bid opening.[297]

c. Fringe Benefit Provisions of the Davis-Bacon Act

The Davis-Bacon Act requires that the prevailing wage rate determined for federal and federally-assisted construction include not only the basic hourly rate of pay, but also all amounts contributed by the contractor or subcontractor for certain fringe benefits.[298] The statute is specific regarding the items included in this component of the wage rate.

> [F]or medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of those benefits, the amount of —
>
> (A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person under a fund, plan or program; and
>
> (B) the rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected.[299]

The Davis-Bacon Act is open-ended in its coverage of these benefits. By providing for determinations regarding "other bona fide fringe benefits," it contemplates that the Secretary may recognize new fringe benefits as they come into general use and prevalence in an area.

Whether such benefits are provided through conventional insurance programs or trusts, they must be based on voluntary commitments to the employee-beneficiaries rather than an obligation imposed by federal, state, or local law. Accordingly, funds to pay for health benefits, pensions, vacations, and apprenticeship programs are distinguishable from payments made by an employer for workmen's compensation insurance under compulsory or elective state laws.[300]

Under this section, the Secretary is required to make separate findings as to the rates of contribution or costs of fringe benefits to which employees may be entitled.[301] Ordinarily this is an hourly rate; however, it may be expressed as a formula or a method of payment that can be converted into an hourly rate.[302] Whatever form is used to describe an employer's contribution, it must show that the contribution is made irrevocably to a trustee or third party not affiliated with the employer.[303] The trust or fund into which the contribution is made must be set up in such a way that the contractor-employer can in no way recapture any of the funds for itself, or have the funds diverted to its benefit.[304]

Determination of contribution rates is facilitated when a regularly established fund, plan, or program is involved.[305] However, a contractor or subcontractor may, through an enforceable commitment, undertake to carry out a financially responsible plan or program for the benefit of its employees.[306] Since this plan or program is financed from general assets of the employer, it is called an "unfunded plan," and the determination is directed to the cost reasonably to be anticipated in providing the benefits. In addition to showing its actuarial soundness, an unfunded plan must meet four basic criteria, namely: (1) it must be reasonably expected to provide the benefits described in the Davis-Bacon Act; (2) it must represent a legally enforceable commitment; (3) it must be carried out under a financially responsible program; and, (4) it must have been communicated in writing to the employees affected.[307] In addition to these criteria, and as a further safeguard against the possible use of "unfunded plans" to avoid compliance with the law, the Secretary is authorized to direct a contractor-employer to set aside in a separate account sufficient funds to meet future obligations under the plan.[308]

The District of Columbia Circuit considered the adequacy of a fringe benefit plan under the Davis-Bacon Act in *Tom Mistick & Sons, Inc. v. Reich*.[309] The contractor had made contributions to an employee benefit plan in an amount that constituted the difference between the prevailing wages paid in the locality and the actual cash wages paid to each employee. This was challenged as not being a "bona fide fringe benefit plan" under Davis-Bacon.[310]

The court noted that under Davis-Bacon, the employer's obligation may be met either solely by payment

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[295] 29 C.F.R. § 7.4(b) (2001).

[296] CACC Manual, *supra* note 272.

[297] *Id.*; 29 C.F.R. § 1.6(c)(2)(i)(A) (2001).

[298] 40 U.S.C. § 3141 (2003).

[299] 40 U.S.C. § 3141(2)(B) (2003).

[300] *Id.*

[301] 29 C.F.R. § 5.25 (2001).

[302] 29 C.F.R. § 5.25(b) (2001).

[303] 29 C.F.R. § 5.26 (2001).

[304] *Id.*

[305] 29 C.F.R. § 5.27 (2001).

[306] 29 C.F.R. § 5.28 (2001).

[307] 40 U.S.C. § 3141(2)(B)(ii) (2003); 29 C.F.R. § 5.28(b) (2001).

[308] 29 C.F.R. § 5.28(c) (2001).

[309] 312 U.S. App. D.C. 67, 54 F.3d 900 (D.C. Cir. 1995).

[310] *Id.*, 54 F.3d at 902; 40 U.S.C. § 3141(2)(B)(ii) (2003).

of cash wages in the prevailing amount, or by a combination of cash wages and irrevocable contributions to an employee fringe benefit plan or program.[311] In *Mistick*, contributions to a fringe benefit plan were made for the contractor's employees for all work covered by Davis-Bacon, and were irrevocable. The funds were placed in individual employee interest-bearing trust accounts managed by a neutral trustee. The cost of administering the accounts was not deducted from the accounts. Only the trustee, at the request of the employee, could make withdrawals from the accounts. Upon termination of their employment, the employees received the balance in the accounts.[312]

The Labor Department requires that "the amount contributed by an employer must bear a reasonable relationship to the actual rate of costs or contributions required to provide benefits for the employee in question."[313] The Administrator of the Wage and Hour Division of the Department of Labor determined that the plan was not bona fide because (1) contributions were greater than and not reasonably related to the costs of benefits, and (2) disbursements had been made for expenses not recognized as fringe benefits under Davis-Bacon. The court then found that the plan did in fact pass the "reasonable relationship" test.[314] The Labor Department had taken the position that it was insufficient that the employee would eventually receive the proceeds of the benefit fund, but rather argued that the employee was entitled to receive the prevailing wage at the time the work was performed. However, Davis-Bacon specifically allows use of the fringe benefit plan in conjunction with the cash wage, which necessarily implies that the employee will not get all payment due at the time of the work. Mistick's plan was essentially a pension plan with added benefits such as medical and disability insurance and vacation and sick leave, and was thus more generous than most employee fringe benefit plans.[315] The court thus found that even though contributions were greater than those required only for the insurance benefits, the plan actually benefited the employees.

i. Whether Plans Are Preempted by ERISA.—The Ninth Circuit found that California's prevailing wage law was not preempted by the Employee Retirement Income Security Act of 1974 (ERISA), even though it "referred to" ERISA plans.[316] The state statute measured the "prevailing wage" as the prevailing cash wage plus the prevailing benefits contribution by employers in a given locality. The statute referred to the benefits plans, which are ERISA plans, but the court found that the statute did not "refer to" them in enough detail to warrant ERISA preemption. Fringe benefit costs were calculated without regard to whether they were contributions to ERISA plans, and the employers' obligations to pay prevailing wages did not depend on the existence of an ERISA plan. The law did not impose any additional burden on an ERISA plan, nor did it require an employer to take any action regarding those plans.

d. Classification of Laborers and Mechanics

Proper classification of laborers and mechanics is considered a key factor in successful accomplishment of the goals of the Davis-Bacon Act.[317] This involves categorizing laborers and mechanics according to the work they actually perform, in terms of the comprehensive classification nomenclature adopted by the Secretary of Labor. Construction contract specifications are prepared with this in mind, and the states' standard specifications for highway construction furnish detailed descriptions of the work from which job descriptions can be developed. Traditionally, construction work has been performed by recognized craft classifications—carpenters, surveyors, truck drivers, electricians, heavy equipment operators—for which the regular duties are standardized. Where this situation exists, and the practices of the construction industry and labor organizations agree on correlation of duties and classifications, the craft classifications provide a reliable initial index for classifying work on highway projects. Another well-regarded test for job classification is the employee's use of the "tools of a trade."[318]

No single system of classification has succeeded in listing and assigning distinctive definitions to all construction job classifications. Therefore, differences may arise between the duties actually performed by a worker, his or her payroll designation, and the classification for which the contracting officer has requested a wage rate determination. Incomplete or improper classification may result in over- or under-payment of wages, wage disputes, and possible violation of contract terms. Accordingly, doubtful classifications should be clarified to the greatest possible extent, and contracting officers should minimize the chances for disputes by seeking agreement of all parties concerned with wage

[311] *Id.*, 54 F.3d at 902.

[312] *Id.*

[313] *Id.* at 903.

[314] *Id.* at 902.

[315] *Id.* at 904.

[316] WSB Elec., Inc. v. Curry, 88 F.3d 788 (9th Cir. 1996), *cert. denied*, 519 U.S. 1109, 117 S. Ct. 945 (1997).

[317] CACC Manual, *supra* note 272.

[318] *See,* 29 C.F.R. § 5.2(m) (2001).

rate determinations before they are incorporated into project announcements or contracts.

e. "Site of the Work"

Another issue that has been considered is whether workers whose jobs are mainly located away from the construction site should be covered. The statutory provision refers to "mechanics and laborers employed directly on the site of the work."[319]

The regulations define "site of the work" as "[T]he physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, *provided* that such site is established specifically for the performance of the contract or project;…."[320]

The definition may include such facilities as batch plants or borrow pits, provided that they are dedicated exclusively, or nearly exclusively, to the project or contract, and also provided that they are adjacent or virtually adjacent to the site of the work defined in § 5.2(l).[321] The "site of the work" does not include home offices, fabrication plants, or other facilities whose location and operation are not determined by the particular contract or project.[322]

The District of Columbia Circuit interpreted that language as not including workers employed at borrow pits and batch plants located about 2 miles away from the project, and overruled a contrary interpretation by the Secretary of Labor.[323] The Sixth Circuit later relied on this decision in *L.P. Cavett Co. v. United States Department of Labor*, where it concluded that truck drivers who drove over 3 miles from a batch plant at a quarry to the job site were not considered "mechanics and laborers employed directly on the site of the work."[324] The court found that the quoted language was not ambiguous, and that it means "only employees working directly on the physical site of the public work under construction."[325] The court also noted that expanding the geographic proximity in the manner being advocated by the Labor Department would create a problem with determining which off-site workers are closely enough "related" to the project to be covered by the statute.

Further, the Sixth Circuit held that the Davis-Bacon language was not modified by the Federal-Aid Highway Act, which does not contain the "site of the work" language, but which refers specifically to the Davis-Bacon Act.[326] The current rules defining "site of the work" were adopted in response to this decision.

f. Use of Apprenticeship Programs

Apprentices and trainees are included within the definition of "laborers and mechanics" in the regulations.[327] However, amendments to the Davis-Bacon Act allow apprentices and trainees to be paid a lower wage provided that they are enrolled in approved programs.

Apprenticeship programs are considered necessary to the effective administration of a prevailing wage program. It is essential to any apprenticeship program that an employer be allowed to pay apprentices a lower wage than what it pays fully trained and qualified journeyman employees.[328] The Davis-Bacon Act and state equivalent statutes allow payment of reduced wages to apprentices so long as the employer uses an apprenticeship program that meets the standard issued under the National Apprenticeship Act, known as the Fitzgerald Act.[329] The Department of Labor determines the adequacy of apprenticeship programs through its Bureau of Apprenticeship and Training.[330] States may apply similar standards to their own apprenticeship programs.[331] Although public works contractors are not required to use apprentices, they are allowed to, and if they do they may pay the reduced apprentice wage only to those apprentices in approved programs.[332]

In addition, there is an exemption for those apprentices and trainees employed in equal opportunity employment programs: "The provisions of the section shall not be applicable to employment pursuant to apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting equal employment opportunity in connection with Federal-aid highway construction programs."[333]

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[319] 40 U.S.C. § 3142(c)(1) (2003).

[320] 29 C.F.R. § 5.2(l)(1) (2001).

[321] 29 C.F.R. § 5.2(l)(2) (2001).

[322] 29 C.F.R. § 5.2(l)(3) (2001); *see also* CACC Manual, *supra* note 272.

[323] Ball, Ball, & Brosamer, Inc. v. Reich, 24 F.3d 1447 (D.C. Cir. 1994).

[324] 101 F.3d 1111, 1115 (6th Cir. 1996).

[325] *Id.*

[326] *Id.* at 1116; 23 U.S.C. § 113(a).

[327] 29 C.F.R. § 5.2(m) (2001).

[328] Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Dep't of Labor and Indus., 47 F.3d 975, 981 (8th Cir. 1995), *reh'g denied*.

[329] 29 U.S.C. § 50 (1999) authorizes the Secretary of Labor to:

> Formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship….

[330] *See generally* 29 C.F.R. pt. 29 (1999) for standards and procedures regarding federal approval of apprenticeship programs.

[331] *See* California Division of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 117 S. Ct. 832, 835, 136 L. Ed. 2d 791 (1997).

[332] *Id.*

[333] 23 U.S.C. § 113(c) (2001).

The implications of this exception were considered in *Siuslaw Concrete Construction Company v. State of Washington, Department of Transportation*.[334] The contractor argued that the state department of transportation could not require the contractor to pay wages higher than those required by federal regulations. However, the court found that there was insufficient evidence of congressional intent to occupy the field of minimum wages in order to support a finding of preemption.

i. Relationship of Apprenticeship Programs to ERISA.—Since the enactment of ERISA, these programs have been challenged in a number of states as being preempted by ERISA. The purpose of ERISA is to promote the interests of employees and their beneficiaries in employee benefit plans.[335] It also serves to protect employers by eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans.[336] To this end, ERISA includes a preemption clause.[337] However, it is not intended to preempt areas of traditional state regulation.[338]

Issues arose among courts as to whether the states' requirements for apprenticeship programs were preempted by ERISA.[339] An apprenticeship program that is a joint effort of management and labor, or a "joint apprenticeship committee," is an "employee welfare benefit plan" as defined in ERISA. The problem has been to determine what the state may regulate with respect to apprenticeship programs without encountering the ERISA preemption. Unlike other issues that have been raised with respect to ERISA, such as use of project labor agreements by contracting agencies, the apprenticeship program is considered part of the state's regulatory role rather than its role as a construction project owner.

In *Dillingham Construction, N.A. v. County of Sonome*, the Ninth Circuit held that a program that required state approval of apprenticeship programs before contractors could pay reduced wages conflicted with ERISA and was therefore preempted by it.[340] The court found that the program, which required state approval of what the court considered an employee benefit plan under ERISA, "related to" an employee benefit plan and was therefore preempted. Following that decision, the Ninth Circuit came to the same conclusion regarding the State of Washington's apprenticeship program.[341]

In a similar case, the Eighth Circuit held that Minnesota's apprenticeship program was not preempted by ERISA.[342] The only difference in that state program appeared to be that the State of Minnesota program allowed approval of the apprenticeship program by either the state or the federal government. However, the court stated more broadly that the purpose of ERISA in protecting employee benefit plans was not hindered by the state's regulation of wages and labor in state-funded construction. Rather, this was within the scope of the state's traditional police power, which Congress did not intend to preempt with ERISA.[343]

The United States Supreme Court took the opportunity to resolve this issue in its review of the Ninth Circuit's decision in *Dillingham Construction*.[344] Reversing the Ninth Circuit, the Court held that California's prevailing wage law, specifically its apprenticeship program requirements, did not "relate to" employee benefit plans, and thus was not preempted by ERISA.

The Court stated that a state law "relates to" a covered employee benefit plan if it "has a connection with" or if it "references" such a plan.[345] Because the range of apprenticeship programs that were eligible for state approval was broader than just those that arguably qualified as ERISA plans (joint apprenticeship committee plans), the law did not make "reference to" an ERISA plan.[346]

The Court then considered whether the apprenticeship program "had a connection to" ERISA plans. Given that both the federal government and the states regulated apprenticeship programs prior to ERISA, the Court concluded that Congress expected those programs to continue after ERISA's enactment. The Court noted that: "The wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs are, however, quite remote from the areas with which ERISA is expressly

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[334] 784 F.2d 952 (9th Cir. 1986).

[335] WSB Elec., Inc. v. Curry, 88 F.3d 788, 791 (9th Cir. 1996) *cert. denied*, 117 S. Ct. 945 (1997) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)).

[336] *Id*. at 791 (quoting Shaw, 463 U.S. at 99).

[337] ERISA, § 514(a); 29 U.S.C. § 1144(a).

[338] WSB, 88 F.3d at 791 (citing Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724, 740, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985).

[339] *See* Inland Empire Chapter of Associated General Contractors v. Dear, 77 F.3d 296 (9th Cir. 1996) (Washington apprenticeship program preempted by ERISA); Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minn. Dep't of Labor and Indus., 47 F.3d 975 (8th Cir. 1995), *reh'g denied* (Minn. apprenticeship program not preempted by ERISA).

[340] 57 F.3d 712 (9th Cir. 1995).

[341] Inland Empire Chapter of Associated General Contractors v. Dear, 77 F.3d 296 (9th Cir. 1996).

[342] Minn. Chapter of Associated Builders and Contractors, Inc. v. Minn. Dep't of Labor and Indus., 47 F.3d 975 (8th Cir. 1995), *reh'g denied*.

[343] *Id.* at 979.

[344] Dillingham, *supra* note 331.

[345] *Id.,* 117 S. Ct. at 837.

[346] *Id.* at 838. In contrast, the Court had found that a prevailing wage statute was preempted where it expressly referred to an ERISA-covered plan, in which the obligation imposed on the employer was measured by reference to the level of benefit provided by that employer under an ERISA plan. District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125, 128, 132, 113 S. Ct. 580, 121 L. Ed. 2d 513 (1992).

concerned—'reporting, disclosure, fiduciary responsibility, and the like.'"[347]

Thus the Court refused to find that ERISA preempted the prevailing wage law and apprenticeship standards, which it found to be part of an "area of traditional state regulation."[348]

ii. Consistency with Competitive Bidding.—Other apprenticeship programs have been challenged as being inconsistent with the requirements of competitive bidding. In *Associated Builders and Contractors v. City of Rochester*, the court struck down an apprenticeship program "precondition," in which the successful bidder had to agree to participate in the state program.[349] The requirement in effect created a bidder preference for those bidders whose employees participated in a state-approved apprenticeship program. The court found that this precondition was not linked to the interests embodied in the competitive bidding statutes. An applicable state statute required that the City utilize competitive bidding.[350] The municipal ordinance that established the apprenticeship program preference was found to be inconsistent with competitive bidding statute, and there was not specific statutory authorization for it. The court pointed out that the main purpose of the competitive bidding law was the protection of the public fisc. The requirement for apprenticeship training, while a desirable goal, was not intended to affect the qualification of an otherwise responsible low bidder.

2. Hours and Conditions of Work

Federal legislation prescribing standards for hours of work and conditions of the work environment is contained in the Fair Labor Standards Act of 1938 (FLSA)[351] and the Contract Work Hours and Safety Standards Act of 1962.[352] Both prescribe a standard workweek of 40 hours. Compensation for work in excess of these levels is specified as not less than one and one-half times the basic rate of pay.[353] The Contract Work Hours and Safety Standards Act also provides that employers shall not require their employees to work in surroundings or work conditions that are unsanitary, hazardous, or dangerous to their health or safety, as determined by regulations of the Secretary of Labor.[354]

The language of the FLSA is directed to "persons engaged in commerce, or in the production of goods for commerce."[355] The Contract Work Hours and Safety Standards Act applies to construction projects to which the United States is a party, or which are done on behalf of the United States, or which are wholly or partially financed by grants or loans given or guaranteed by the United States.[356] In the case of federal-aid highway construction projects, the application of the federal law's wage and hour standards is achieved by reading 40 U.S.C. §§ 328 and 329 together. Section 328(b) provides that the 40-hour workweek "shall be a condition of every contract of the character specified in section 329…and of any obligation of the United States…in connection therewith." Section 329, in turn, extends the standards to contracts "financed in whole or in part by loans or grants from…the United States or any agency or instrumentality thereof under any statute of the United States providing wage standards for such work…."

Requirements for adherence to the 40-hour workweek have been incorporated into the Required Contract Provisions for Federal-Aid Construction Contracts:

> No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers, mechanics, watchmen, or guards (including apprentices, trainees, and helpers described in paragraphs 4 and 5 above) shall require or permit any laborer, mechanic, watchman, or guard in any workweek in which he/she is employed on such work, to work in excess of 40 hours in such workweek unless such laborer, mechanic, watchman, or guard receives compensation at a rate not less than one-and-one-half times his/her basic rate of pay for all hours worked in excess of 40 hours in such workweek.[357]

3. Compliance with Wage and Hour Requirements

Contractors are required to submit weekly payroll statements documenting the wages paid to laborers and mechanics in the previous weekly payroll.[358] These statements are submitted to the contracting agency.[359] The contracting agency should review these statements for completeness, checking periodically items such as classification, hourly rates, fringe benefits, and overtime pay.[360]

The Required Contract Provisions for Federal-Aid Construction Contracts include a provision for withholding liquidated damages for days on which the contractor did not pay overtime.[361] These liquidated damages of $10 per day per employee are forwarded to the Department of Labor to support their enforcement activities.

The Comptroller General has the ability under the Davis-Bacon Act to withhold funds from payments due the contractor for payment of prevailing wages, and to

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[347] *Id.* at 840 (quoting N.Y. State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 115 S. Ct. 1671, 1680, 131 L. Ed. 2d 695 (1995)).

[348] *Id.* at 842.

[349] 501 N.Y.S.2d 653, 492 N.E.2d 781, 67 N.Y.2d 854 (1986).

[350] N.Y. GEN. MUN. LAW § 103.

[351] 29 U.S.C. §§ 201–19 (2001).

[352] 40 U.S.C. §§ 327–34 (2001).

[353] 29 U.S.C. § 207 *et. seq.* (2001); 40 U.S.C. § 328(a) (2001).

[354] 40 U.S.C. § 333 (2001).

[355] 29 U.S.C. §§ 202(a).

[356] 40 U.S.C. §§ 328–29.

[357] Required Contract Provisions for Federal-Aid Construction Contracts, § IV.7

[358] 29 C.F.R. § 3.3(b) (2001).

[359] 29 C.F.R. § 3.4(a) (2001).

[360] CACC Manual, *supra* note 272.

[361] Required Contract Provisions, *supra* note 357, § IV.8; 29 C.F.R. § 5.8 (2001).

pay those funds directly to laborers and mechanics who have not been paid the wages due to them.[362] Contractors who have failed to meet their obligations under the Davis-Bacon Act are also subject to debarment for a period of 3 years.[363]

4. Project Labor Agreements

The National Labor Relations Act (NLRA) allows the formation of project labor agreements on public works projects.[364] Project labor agreements are collective bargaining agreements entered into by the public agency and a representative union. They provide generally for recognition of that union as the representative of all employees on the project, compulsory union dues, and mandatory use of union hiring halls. Where a project specification calls for a project labor agreement, or PLA, the successful bidder must agree to be bound by the terms of the PLA as a condition of award. Although several issues of consistency with state and federal law have been raised with respect to PLAs, they have usually been found to be valid when challenged.

a. Consistency with Federal Law

i. Consistency with NLRA.—In *Building and Construction Trades Council v. Associated Builders and Contractors*, the United States Supreme Court considered whether PLAs are consistent with the requirements of the NLRA.[365] The Massachusetts Water Resources Authority (MWRA) had been ordered to clean up Boston Harbor in part by adding treatment facilities for sewer discharges that entered the harbor. The project manager negotiated a PLA with the Building and Construction Trades Council (BCTC), which was designed to assure labor stability over the length of the project. MWRA then included a specification in its bid package that each successful bidder must agree to abide by the terms of the PLA.

Associated Builders first filed a complaint with the National Labor Relations Board (NLRB). The NLRB found that the PLA was valid under Section 8(e) of the NLRA, which contains the exception allowing PLAs. Associated Builders then sought to enjoin the use of the specification on the grounds that it violated the NLRA. The district court denied the injunction, but the First Circuit reversed, finding that the specification was preempted under NLRA. The appeals court found that the PLA was barred by the preemption doctrine set out in *San Diego Building Trades Council v. Garmon*, in which the Court held that the NLRA preempted state or local regulation that constituted a pervasive intrusion into the bargaining process, but not "peripheral regulation."[366] The First Circuit also considered the PLA to be preempted under *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, which held that the State could not regulate activities that Congress intended to be unrestricted by government.[367] The Supreme Court reversed the First Circuit, holding that the NLRA does not preempt the enforcement by a state agency, acting as an owner of a construction project, of an otherwise lawful pre-hire collective bargaining agreement, such as the PLA in this case.[368]

The Court held that the preemption doctrines of *Garmon* and *Machinists* apply only to state labor *regulation*. The State may act without the effect of preemption when it is acting as a proprietary, not as a regulator or policy-maker.[369] As support for its conclusion, the Court cited to the 1959 amendments to the NLRA. Sections 8(e) and 8(f) had previously prohibited this type of agreement by prohibiting agreements that require an employer to refrain from doing business with anyone who does not agree to be bound by a pre-hire agreement. However, the amendments specifically allowed pre-hire collective bargaining agreements in construction contracts. These amendments were intended to accommodate conditions specific to the construction industry, both public and private.[370] These conditions include the short term nature of employment in the construction industry, which makes post-hire collective bargaining difficult, and the contractor's need for a steady supply of labor and predictable costs. Further, pre-hire agreements had been a long-standing custom in the construction industry.[371]

In this particular use of a PLA, the Court noted that the agency had been ordered pursuant to the Clean Water Act to undertake the harbor cleanup.[372] Compliance with this court order required construction to proceed without interruption, and made no allowance for delays caused by labor strikes. The project manager had been hired by MWRA to advise the agency on labor relations, and suggested the use of a PLA. The project manager then negotiated the PLA, which included terms such as (1) recognition of the BCTC as exclusive bargaining agent for all craft employees on the project; (2) use of specified methods of resolving all labor-related disputes; (3) a requirement that all employees be required to become union members within 7 days of employment; (4) primary use of BCTC's hiring halls to supply the project's craft labor force; (5) a 10-year no-strike commitment on the part of the union; and (6)

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[362] 40 U.S.C. § 3144 (2003).

[363] *Id.*

[364] 29 U.S.C. §§ 158(e), (f).

[365] 507 U.S. 218, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993).

[366] 113 S. Ct. at 1194 (citing 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)).

[367] *Id.* (citing 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976)).

[368] *Id.* at 1198.

[369] *Id.* at 1197.

[370] *Id.*

[371] *Id.* at 1198.

[372] United States v. Metropolitan District Comm'n, 757 F. Supp. 121, 123 (D. Mass. 1991), *rev'd* Associated Builders and Contractors, Inc. v. Mass. Water Resources Auth., 935 F.2d 345 (1st Cir. 1991).

requirements that all contractors and subcontractors agree to be bound by the PLA.[373]

The Court noted that NLRA does not contain a specific preemption. A statute or state activity is not preempted by federal law unless it actually conflicts with federal law, or would frustrate a federal scheme, or unless the Court discerns that "Congress sought to occupy the field to the exclusion of the States."[374] *Garmon* holds that the NLRA preempts state regulation, even of activities that NLRA only arguably prohibits or protects.[375] A state cannot establish standards that are inconsistent with NLRA, or provide regulatory or judicial remedies. For example a state could not debar a contractor based on NLRA violations.[376] However, this doctrine applies only to the state's role as a regulator, and not to its activities as a construction project owner.[377]

Thus, under the amendments to Sections 8(e) and (f) of the NLRA, the Court found that the use of a project labor agreement to prohibit an employer from hiring contractors unless they agree to abide by the PLA was valid. However, the Court noted that Sections 8(e) and (f) are not specifically applicable to the states, as "state" is excluded from the definition of "employer."[378] Still, the Court considered the general goals of Sections 8(e) and (f) to be relevant in determining the intent of Congress with respect to the states.[379]

In *Minnesota Chapter of Associated Builders and Contractors v. County of St. Louis*, the court held that a PLA was not a "state law" that was preempted by ERISA.[380] Because it applied to only one project and not to all of the agency's projects generally, it was not a "state law" of general application, even though it specified particular benefits that must be paid by contractors to employees.

ii. Executive Order 13202.—In June 1997, President Clinton issued a Presidential Memorandum entitled "Use of Project Labor Agreements for Federal Construction Projects." This memorandum prohibited the requirement of PLAs in direct federal contracts.[381] However, it did not prohibit their inclusion in contracts for federally-assisted projects. President George W. Bush issued EO 13202 in February 2001, which rescinded the memorandum and extended the PLA prohibition to federally-assisted projects.

EO 13202 requires that "neither the awarding Government authority nor any construction manager acting on behalf of Government shall, bid specifications, project agreements, nor other controlling documents for construction contracts" that are awarded by recipients of federal funds may

> (a) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction projects(s); or
>
> (b) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).[382]

EO 13202 allows an exemption for "special circumstances…in order to avert an imminent threat to public health or safety or to serve the national security."[383] However, it also provides that the possibility of a labor dispute is not such a "special circumstance."[384]

The EO does not prohibit voluntary agreements between contractors or subcontractors and labor unions.[385] FHWA does not consider such an agreement to be a PLA where it is not required by the owner-agency in the construction contract.[386]

Executive Order 13202 was challenged by labor unions in *Building and Construction Trades Department, AFL-CIO v. Allbaugh*.[387] The plaintiffs challenged the president's authority to issue the EO, and contended that it was preempted by the NLRA. The district court granted the plaintiffs' request for a preliminary injunction. The D.C. Circuit reversed, holding that the President has constitutional authority to issue EOs, and that the NLRA did not preempt the EO where it applied only to federal government contracts, and was not regulatory in nature.[388]

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[373] 113 S. Ct. at 1193.

[374] *Id*. at 1194 (quoting Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724, 747–48, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)).

[375] *Id*. at 1195 (citing San Diego Building Trades Council v. Gorman, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775) (1959).

[376] *Id.*

[377] *Id.* at 1196.

[378] 29 U.S.C. § 152(2).

[379] 113 S. Ct. at 1198.

[380] 825 F. Supp. 238 (D. Minn. 1993); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144.

[381] *See* FHWA Contract Administration Core Curriculum Participant's Manual and Reference Guide 2001, available on FHWA's Web site at http://www.fhwa.dot.gov/programadmin/contracts/cor_V.htm for a summary of the applicability of the memorandum and executive order to FHWA and federally-assisted contracts.

[382] E.O. 13202.

[383] E.O. 13202 § 5.

[384] *Id.*

[385] *Id*.; *see also* CACC Manual, *supra* note 381.

[386] *Id.*

[387] 295 F.3d 28 (D.C. Cir. 2002).

[388] *Id*.

b. Consistency with State Law

i. Consistency with Competitive Bidding.—The most significant question regarding the use of PLAs under state law is whether the use of a PLA is consistent with the statutes, regulations, and policies of competitive bidding. Contractors have also raised constitutional questions, such as whether the requirement of abiding by a PLA violates the contractor's right to equal protection.

The New Jersey Supreme Court considered whether the use of a PLA violated the state constitution's guarantee of equal protection in *George Harms Construction Company v. New Jersey Turnpike Authority*.[389] The contractor had alleged that the state had improperly coerced construction workers in their choice of bargaining representatives by favoring one group of unions over others. Although identifying the petitioner's constitutional claims, the court did not resolve them.

Rather, the court decided the case on the issue of whether the requirement for a PLA violated the state's statutes requiring competitive bidding of public works projects. The court compared the PLA requirement to a "sole source" specification, and questioned whether the agency could choose a sole source for labor, citing to a New Jersey statute that prohibits the use of sole sources.[390]The court found that the specification requiring the PLA had the effect of lessening competition, and was thus contrary to public bidding requirements. The specification was not "'drafted in a manner to encourage free, open and competitive bidding'" as required by New Jersey law.[391] The court thus concluded that the agency needed specific statutory authority to use a PLA, in order to overcome the conflict with competitive bidding requirements.

Other states' courts have examined the *Harms* decision in light of their own public bidding statutes and the general policies underlying competitive bidding, and have concluded that PLAs are consistent with both. In *New York State Chapter, Inc., Associated General Contractors v. New York State Thruway Authority*, the contractors had sought a declaratory ruling that the use of a PLA on a bridge refurbishment contract was illegal, and asked for an order to halt the bidding process.[392] Following the *Harms* decision, the New York Supreme Court ruled in the contractors' favor, concluding that the "policy of using PLA's contravenes two of the purposes of [the competitive bidding statutes] in discouraging competition by deterring non-union bidders, and postering favoritism by dispensing advantages to unions and union contractors."[393] In reversing the trial court, the Appellate Division assumed that the use of a PLA discourages competition in the bidding process.[394] The court concluded, however, that this does not necessarily mean that it is inconsistent with competitive bidding. The purpose of public bidding statutes is not to have "unfettered competition," but to get the best work at the lowest price and to guard against favoritism, extravagance, fraud, and corruption. Specifications are not necessarily illegal because they might tend to favor one contractor or manufacturer over another. Rather, they may be found to be illegal when they are drawn for the benefit of one contractor or manufacturer, and not in the public interest.[395] A specification that has the impact of reducing competition must be based on a public interest, and not for the benefit of a particular contractor.

The court concluded that the agency's decision to use a PLA was rationally based on reasons that were well-grounded in the public interest. These included the need to accommodate conditions unique to the construction industry, noted by the Supreme Court in *Building and Construction Trades Council* as the short-term nature of employment in the construction industry, which makes post-hire collective bargaining difficult, and the contractor's need for a steady supply of labor and predictable costs.[396] Further, the court determined that the use of a PLA advanced the goal of obtaining the best product at the lowest price. The court concluded that the PLA was also consistent with the policy of avoiding favoritism and corruption in that it applied to union and non-union contractors alike, and prohibited discrimination against union members or non-union members in hiring.[397] The court stated that the decision should not be considered a blanket approval of all PLAs, only a holding that the state's competitive bidding statutes do not prohibit PLAs.[398]

ii. Standard of Review and Necessity of Agency Record.—In a decision affirming the Appellate Division in this case, the New York Court of Appeals further stated that PLAs are neither absolutely prohibited nor absolutely permitted by competitive bidding laws.[399] Rather, the court held that the use of a PLA is by its nature anti-competitive, but will be sustained for a particular project where the record supports the agency's determination that a PLA is justified by interests that are consistent with the policies underlying competitive bidding.[400]

The Court of Appeals noted that the PLA included the typical requirements that all bidders (1) hire workers through union hiring halls; (2) follow specified dispute resolution procedures; (3) comply with union wage, benefit, seniority, and apprenticeship requirements;

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[389] 137 N.J. 8, 644 A.2d 76 (1994).

[390] 644 A.2d at 94; N.J.S.A. 40A:11-13.

[391] *Id*. at 95; N.J.S.A. 40A:11-13.

[392] 88 N.Y.2d 56, 643 N.Y.S.2d 480, 486, 666 N.E.2d 185 (1996).

[393] *Id*.

[394] 207 A.D. 2d 26, 620 N.Y.S.2d 855, 857 (1994).

[395] *Id*., 620 N.Y.S.2d at 857.

[396] Citing Building and Construction Trades Council, 113 S. Ct. at 1198.

[397] *Id*. at 858.

[398] *Id*.

[399] N.Y. State Chapter, Associated General Contractors v. N.Y. State Thruway Auth., 88 N.Y.2d 56, 643 N.Y.S.2d 480, 482 666 N.E.2d 185 (1996).

[400] *Id*., 643 N.Y.S.2d at 482–83.

and (4) contribute to union benefit funds, together with the union's promise of "labor peace" throughout the life of the contract. The court then concluded that by requiring bidders to conform to a variety of union practices and limiting each bidder's autonomy in negotiating its own employment terms with a labor pool that includes non-union workers, PLAs do have an anticompetitive impact on the bidding process. As such, they are unlike the usual bid specification. However, PLAs also provide efficiencies to be gained by the public project.[401]

In examining the anticompetitive nature of the PLA specification, the court looked at *Gerzof v. Sweeney*, a New York case that examined the use of narrowly-drawn specifications that limit who might bid on a project. In that case, the bid specification required experience constructing three generators of a specific type, and had the effect of eliminating all but one manufacturer.[402] While such a specification is not illegal per se, there must be a clear showing that its use is in the public interest. Based on the ruling in *Gerzof*, the court concluded that New York Competitive Bidding statutes "do not compel unfettered competition, but do demand that specifications that exclude a class of would-be bidders be both rational and essential to the public interest."[403]

The two central purposes of New York's competitive bidding statutes were pointed out as (1) protection of the public fisc by obtaining the best work at the lowest possible price, and (2) prevention of favoritism, improvidence, fraud, and corruption. If an agency uses a specification that impedes competition to bid on its work, then the use must be rationally related to these two purposes. If not, it may be found invalid.[404]

Although the practical effect of the test by the court is that a rational basis must be established by the record, the court noted that "more than a rational basis" must be shown because of the broad scope of PLAs. The court placed the burden on the agency of showing that the decision to use a PLA "had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes."[405] The court refused to allow agencies to approve PLAs in a "pro forma" manner.

In this particular case, the court considered the following information from the agency's record. The PLA was being used for a toll bridge refurbishment project that would take 4 years to complete, including deck replacement under traffic. The agency determined that efficiency in completing the project was important to protect a major revenue-producing facility, maximize public safety, and minimize the inconvenience to the traveling public.[406]

The agency further considered that in the history of work on this particular bridge, union contractors had performed over 90 percent of the work. Based on the size and complexity of the project, it would subject to the jurisdiction of 19 local unions, all of whom would have separate labor contracts setting out different standard hours of work and different benefits requirements. The last time that the Thruway Authority had awarded a contract to a nonunion contractor, a labor dispute had erupted that required police assistance, and the bridge was picketed.[407] The court found that the Thruway Authority had assessed the specific project needs and demonstrated on the record that a PLA was directly tied to competitive bidding goals. The PLA could not be said to promote favoritism because it applied whether a contractor was union or nonunion. The fact that nonunion contractors may be disinclined to submit bids did not amount to preclusion of competition like that identified in *Gerzof* as violative of competitive bidding laws. The agency's detailed record documented the likely cost savings, the fact that toll revenues would not be interrupted, the size and complexity of the project, and a history of labor unrest. This record was sufficient to support the court's determination that the PLA was adopted in conformity with public bidding laws.[408]

While there is a need that a record be created by an agency contemporaneously with its decision to use a PLA, that record need not be formal or extensive. In *Albany Specialties, Inc. v. County of Orange*, the construction manager had analyzed the potential advantages of a PLA in a letter to the agency, including the prior high use of union labor, the fact that other jobs in the area had had significant delays due to labor disruptions, and that avoiding these delays would also avoid their associated costs.[409] The court found that this met the requirements for an adequate record set out in the *New York State Ch., AGC v. Thruway Authority* case.

The Alaska Supreme Court came to a very similar conclusion on the use of PLAs in *Laborers Local # 942 v. Lampkin*.[410] The Borough of Fairbanks had required a PLA for a school renovation project, and approved a resolution to support the mayor's use of a PLA in the project. The resolution set out the rationale for the PLA, including general justifications based on other agencies' experience, benefit to the school renovation

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[401] *Id*. at 483.

[402] *Id*. at 484 (citing 16 N.Y.2d 206, 264 N.Y.S.2d 376, 211 N.E.2d 826 (1965)).

[403] *Id*.

[404] *Id.* at 485.

[405] *Id.*

[406] *Id*.

[407] *Id*.

[408] *Id*. at 486. On the contrary, the court found in a companion case involving the Dormitory Authority of the State of New York that there was no contemporaneous record to support the use of a PLA. There was no documentation of potential cost savings, nor any documented history of labor unrest. Post hoc rationalization cannot substitute for the agency's consideration of the goals of competitive bidding prior to signing the PLA. *Id.,* 643 N.Y.S.2d at 487–89

[409] 240 A.D. 2d 739, 662 N.Y.S.2d 773 (1997).

[410] 956 P.2d 422 (Alaska 1998).

project, and economic and financial interests.[411] The school renovation project was the largest and most complex project in the borough's history, involving work on a school of over 1400 students. There was a significant interest in assuring that it was completed on time and within its budget. Failure to complete it on time would be harmful to all residents, particularly students. The court found this record sufficient to support the use of the PLA. The court adopted the rationale of the New York cases in finding that the PLA did not violate the applicable procurement code.[412]

c. Constitutional Issues

Constitutional issues have been raised with respect to PLAs based on both federal and state constitutional provisions guaranteeing equal protection. The main argument is that the requirement violates equal protection by favoring union contractors and union employees. However, courts have rejected that argument on the grounds that the PLAs considered applied equally to all, union and nonunion contractors alike. Further, they have prohibited any discrimination against union or nonunion employees on that basis or their union status.[413]

A federal district court in Missouri considered whether the PLA violated the associational rights of contractors.[414] In upholding the use of the PLA, the court found that the agency had a rational basis in its desire to have an efficient, productive, and harmonious workforce without work stoppages or delays. Applying the rational basis test, the court found that the PLA requirement did not "'directly and substantially interfere'" with the contractor's associational rights.[415]

The contractor in *Enertech Electrical v. Mahoning County Commissioners* argued that it was entitled to damages under § 1983 for the agency's refusal to award it a contract after the contractor refused to sign the PLA.[416] Enertech, the low bidder, alleged that it was deprived of its right to the award of the contract without due process. It also alleged abuse of discretion by the county and demanded its lost profits.

To support a claim for damages under § 1983, a bidder must demonstrate that it had a constitutionally protected property interest in a publicly bid contract.[417] This can be accomplished by showing either that the contract was awarded and then withdrawn, or that the agency abused its discretion in the award. Enertech argued that the county did not have discretion to condition the award of the contract on the bidder's willingness to sign the PLA. However, the court noted that the Ohio Supreme Court has held that under the language of Ohio's public bidding statute, which requires award to the "lowest and best bidder," that agencies are not limited to acceptance of the lowest dollar bid.[418] The agency therefore has the discretion to make a qualitative determination as to the lowest and best bid.

The court then concluded that the county did not abuse its discretion by determining that the "best" bidder would be one who was willing to ratify the PLA. The contract terms requiring the PLA had been included in the contract in order to secure labor harmony, and were not inconsistent with the competitive bidding statute's policy to provide for open and honest competition in bidding and protect the public from favoritism and fraud.[419] Because Enertech was never the lowest *and best* bidder, it could not show that it was deprived of a right to the contract without due process; it had no constitutionally protected interest in the contract.

d. Standing to Challenge a PLA

The Ohio court considered the issue of standing to challenge a PLA, and concluded that an individual contractor must have submitted a bid on that project in order to have standing. Further, it held that a contractor's association must have a member who submitted a bid in order for the association to have standing.[420]

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[411] *Id.* at 427 n.2.

[412] *Id*. at 432–33.

[413] *See, e.g*., State ex rel. Associated Builders and Contractors, Central Ohio Chapter v. Jefferson County Board of Comm'rs, 106 Ohio App. 3d 176, 665 N.E.2d 723, 725–26 (1995), *review denied*, 74 Ohio St. 3d 1499, 659 N.E.2d 314 (1996); Laborers Local # 942 v. Lampkin, 956 P.2d 422, 436 (Alaska (1998)).

[414] Hanten v. School District of Riverview Gardens, 13 F. Supp. 2d 971 (E.D. Mo. 1998).

[415] *Id*. at 976.

[416] 85 F.3d 257 (6th Cir. 1996).

[417] *Id.* at 260.

[418] *Id*. at 260 (citing Cedar Bay Constr., Inc. v. City of Fremont, 50 Ohio St. 3d 19, 552 N.E.2d 202, 205 (1990)).

[419] *Id*. (citing Cedar Bay Constr., 552 N.E.2d at 204).

[420] State ex rel. Associated Builders and Contractors, Central Ohio Chapter v. Jefferson County Board of Comm'rs, *supra* note 409.