SECTION 4

DISADVANTAGED BUSINESS AND LABOR REQUIREMENTS

A. MINORITY AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS

1. Federal-Aid Transportation Projects: EEO and DBE Requirements Under Statutes and Regulations [1]

a. Requirements of USDOT DBE Regulations, 49 C.F.R. Part 26

In reviewing the following summaries of the requirements of the USDOT DBE regulations, it should be borne in mind that these are brief summaries of lengthy and often complex provisions, intended to provide an accessible introduction for a general readership. Any practitioners engaged in handling matters governed by these regulations would be well advised to go beyond these introductory summaries and review the regulations carefully.

i. 49 C.F.R. Part 18, Relevant Requirements.—While the bulk of USDOT DBE requirements are set forth in 49 C.F.R. Part 26, significant requirements are also set forth in 49 C.F.R. Part 18, particularly in 49 C.F.R. § 18.36, which governs procurement on federal-aid transportation projects. This requires state DOT contracts for federal-aid projects to include all clauses required by federal statutes and executive orders and their implementing regulations.[2] It also requires state DOTs to maintain a contract administration system which ensures that contractors perform in accordance with contract terms and conditions.[3] This regulation requires state DOTs to "take all necessary affirmative steps" to assure that minority and women's business enterprises and labor surplus area firms are used as contractors and subcontractors on federal-aid projects, including maintaining solicitation lists of such firms, assuring that they are solicited as subcontractors whenever they are potential sources, dividing subcontract work into smaller tasks to permit maximum participation by such firms, and using the service of the Small Business Administration (SBA) and the Department of Commerce.[4] Further, this regulation incorporates into USDOT's procurement requirements for federal-aid projects the DBE requirements of § 105(f) of the Surface Transportation Assistance Act (STAA) of 1982, Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987, and 49 C.F.R. Part 23.[5] Finally, this regulation incorporates into USDOT's procurement requirements for federal-aid projects the requirement of 23 USC § 140(b) that Indians be given preferential employment on all Indian Reservation road projects and contracts.[6]

[1] Interview with Ann Maestri of NYSDOT.

[2] 49 C.F.R. § 18.36(a).

[3] 49 C.F.R. § 18.36(b)(2).

[4] 49 C.F.R. § 18.36(e).

[5] 49 C.F.R. § 18.36(n).

[6] 49 C.F.R. § 18.36(s).

ii. Part 26, Overview.—Most of USDOT's detailed requirements for participation of DBEs in projects funded by USDOT federal-aid programs are set forth in 49 C.F.R. Part 26. These regulations, significantly amended in 2011 as discussed later in this section,[7] are divided into Subparts covering general provisions; administrative requirements; goals, good-faith efforts, and counting; certification standards; certification procedures; and compliance and enforcement. While each of the subparts covers specific aspects of the DBE program, state DOTs must consider Part 26 in its entirety and must construe its different provisions together to understand fully and clearly how USDOT intends and requires its federal-aid DBE requirements to be administered.

iii. Part 26 Subpart A, General.—The general provisions of USDOT's DBE requirements are set forth in 49 C.F.R. Part 26 Subpart A. Subpart A indicates that its objectives include ensuring nondiscrimination in the award of federal-aid highway projects, to create a level playing field for DBEs to compete on, to ensure that DBE requirements are narrowly tailored, to ensure that only eligible firms participate, to remove barriers to the participation of DBEs in federal-aid projects, and to give state DOTs some flexibility in providing opportunities for DBEs.[8] Subpart A indicates that USDOT DBE requirements apply to state DOTs receiving federal-aid highway funds under ISTEA or TEA-21, but do not apply to any projects performed entirely with state funding and without any federal-aid funding.[9] It provides specific definitions for the terms used throughout Part 26.[10]

Subpart A prohibits state DOTs from discriminating against anyone on the basis of race, color, sex, or national origin in making contract awards. It also prohibits state DOTs from using any administrative methods that have the effect of impairing or defeating the objectives of the program with respect to individuals of any race, color, sex, or national origin.[11]

Subpart A authorizes the U.S. Secretary of Transportation, FHWA, and certain other USDOT units to issue official written interpretations of or written guidance concerning Part 26, so long as certain requirements are met. Only such interpretations and guidance express the official views of USDOT, FHWA, or any of USDOT's other operating administrations.[12]

Subpart A specifies what records state DOTs are required to maintain and submit to USDOT and FHWA as part of the administration of DBE requirements for federal-aid projects.[13]

[7] See USDOT Docket No. OST-2010-0118, Final Rule eff. Feb. 28, 2011, 76 Fed. Reg. 5083 (Jan. 28, 2011).

[8] 49 C.F.R. § 26.1.

[9] 49 C.F.R. § 26.3(a) and (d).

[10] 49 C.F.R. § 26.5.

[11] 49 C.F.R. § 26.7.

[12] 49 C.F.R. § 26.9.

[13] 49 C.F.R. § 26.11.

Subpart A also sets forth, in detail, what specific assurances state DOTs must make to FHWA in each federal-aid financial assistance agreement regarding DBE participation in projects; and what specific assurances state DOTs must obtain from their contractors and contractors must obtain from their subcontractors, regarding use of DBE subcontractors on federal-aid projects.[14]

Subpart A includes provisions establishing procedures for state DOTs to use in applying to the Secretary of Transportation, FHWA, or other USDOT operating administrations for exemptions or waivers from DBE requirements, and criteria governing USDOT and FHWA review and approval or disapproval of such applications.[15]

iv. Part 26 Subpart B, Administrative Requirements.—The administrative requirements which state DOTs must comply with under USDOT's DBE regulations are set forth in 49 C.F.R. Part 26 Subpart B.

Subpart B provides expressly that state DOTs receiving federal-aid funding under statutes to which Part 26 applies are not eligible to receive federal-aid funding from USDOT unless USDOT has approved their DBE programs and they are in compliance with such programs and Part 26. While agencies are not required to submit periodic updates on their DBE programs, they are required to submit any significant changes in their DBE programs to USDOT for approval.[16]

State DOTs receiving federal-aid funding are required by Subpart B to issue, circulate throughout their organizations, and distribute to contractors and DBEs, a signed and dated policy statement expressing their commitment to the DBE program, stating its objectives, and outlining responsibilities for its implementation.[17]

Subpart B also includes an express requirement that state DOTs receiving federal-aid funding have a DBE liaison officer who has direct and independent access to the state DOT's chief executive officer and is responsible for implementing all aspects of the state DOT's DBE program, and requires state DOTs to have adequate staff to administer the program in compliance with Part 26.[18]

Where disadvantaged individuals own and control financial institutions, Subpart B requires state DOTs to investigate the services offered by such institutions, to make reasonable efforts to use such institutions, and to encourage prime contractors to do so as well.[19]

Subpart B also addresses prompt payment issues, including detailed requirements for state DOTs to take certain prompt payment measures in connection with their DBE programs. Such measures include contract clauses requiring contractors to pay subcontractors for satisfactory performance within 30 days from the state DOT's payments to the prime contractors for such work, and payment by prime contractors to subcontractors of retainages within 30 days after satisfactory completion of the subcontractors' work. They also require state DOT DBE programs to include appropriate means of enforcing such prompt payment requirements, with several possible approaches outlined in the regulations.[20]

Under Subpart B, state DOTs must maintain and update DBE directories, including specified types of contact information and NAICS codes for all types of work which each DBE is eligible to be certified.[21] Under USDOT's 2011 amendments to the regulations, the state DBE directories must use the most specific applicable North American Industry Classification System (NAICS) codes to describe the types of work performed by the DBEs, and may not limit the number of NAICS codes listed for each firm.[22]

State DOTs that determine that DBE subcontracting firms are so over-concentrated in certain types of work as to unduly burden the opportunities for non-DBE subcontractors to perform such types of work are required to devise appropriate measures to address this, and to obtain FHWA and/or other USDOT operating administration approval for such measures.[23]

State DOTs are delegated authority by Subpart B to establish a DBE business development program to assist DBEs to gain the ability to compete effectively for work outside the DBE program; and to establish "mentor-protege" programs under which other DBE or non-DBE firms may be the principal source of business development assistance to DBE firms.[24]

Subpart B requires state DOT DBE programs to include monitoring and enforcement mechanisms to ensure that subcontract work is actually performed by the DBEs to which it is committed; to report to USDOT on actual DBE attainments; and to ensure compliance with Part 26 by all "program participants," a term which appears to include not only contractors but also municipalities receiving federal-aid funding for municipal projects through state DOTs.[25]

State DOT DBE programs must also, in accordance with Subpart B, include elements structuring contracting requirements to facilitate competition by small business concerns. Subpart B expressly requires state DOTs to submit such elements to FHWA and/or other USDOT operating administrations for approval by February 28, 2012, and outlines strategies which state DOTs may include in such elements.[26]

[14] 49 C.F.R. § 26.13.

[15] 49 C.F.R. § 26.15.

[16] 49 C.F.R. § 26.21.

[17] 49 C.F.R. § 26.23.

[18] 49 C.F.R. § 26.25.

[19] 49 C.F.R. § 26.27.

[20] 49 C.F.R. § 26.29.

[21] 49 C.F.R. § 26.31.

[22] Jo Anne Robinson, The New DBE Rules, presentation to Transportation Research Board conference in New Orleans, Louisiana, July 2012.

[23] 49 C.F.R. § 26.33.

[24] 49 C.F.R. § 26.35.

[25] 49 C.F.R. § 26.37.

[26] 49 C.F.R. § 26.39.

v. Part 26 Subpart C, Goals, Good-Faith Efforts, and Counting.—The provisions of USDOT's DBE requirements concerning contract DBE goals, good-faith efforts by contractors to comply with such goals, and what criteria govern the counting of DBE participation toward such goals, are set forth in 49 C.F.R. Part 26 Subpart C.

In accordance with federal statutes authorizing USDOT's DBE program, USDOT has established as a national-level aspirational goal that not less than 10 percent of federal-aid funding is to be expended with DBEs, except to the extent that the Secretary of Transportation determines otherwise.[27]

Under Subpart C, state DOTs are not permitted to use quotas for DBEs on federal-aid projects, and may not use set-aside contracts for DBEs unless no other method could reasonably be expected to redress egregious instances of discrimination.[28]

Subpart C sets forth multistep procedures for state DOTs to follow in setting overall DBE participation goals for their federal-aid construction programs. These are sufficiently lengthy and complex that they will not be described in detail here. Suffice it to say that state DOT officials responsible for administration of DBE programs must become thoroughly familiar with their specific requirements.[29]

USDOT may penalize state DOTs that fail to have an approved DBE program or to establish an overall DBE goal; but may not penalize state DOTs that have such programs and goals but fail to meet such goals, unless the state DOTs have failed to administer their DBE programs in good faith. The regulations include specific requirements that state DOTs must follow to demonstrate to USDOT and FHWA that they are administering their DBE programs in good faith, in the event that they fail to meet their DBE goals. These include, among other things, a requirement for the recipient to submit to the appropriate USDOT operating division, such as FHWA, an end of fiscal year report by December 30 if the recipient has failed to meet its overall DBE goal. The report must analyze the reasons for the shortfall, and set forth specific steps to address the problems identified in the analysis and enable the goal to be met the following year. The regulations also authorize FHWA to impose conditions and corrective actions upon any state DOTs failing to meet their DBE goals.[30]

Subpart C sets forth in considerable detail what means state DOTs must use to demonstrate that they meet DBE goals, including maximum feasible use of race-neutral means of facilitating DBE participation.[31] Subpart C also spells out in great detail what procedures state DOTs must use to award federal-aid contracts only to bidders who make good-faith efforts to meet DBE goals.[32] Interestingly, these procedures now include some specific provisions to be followed for handling DBE goals and compliance on DB projects.[33] They also prohibit prime contractors on federal-aid projects from terminating DBE subcontractors without state DOT approval, and specify the circumstances under which this may be permissible.[34] Further, Subpart C includes highly detailed provisions governing who state DOTs are to count as DBE participation in federal-aid projects as counting toward fulfillment of DBE goals, with a focus on ensuring that the work is actually performed by the DBE for whose participation credit is sought.[35]

vi. Part 26 Subpart D, Certification Standards.—The standards for state certification of DBEs for USDOT's federal-aid programs are set forth in 49 C.F.R. Part 26 Subpart D.

The regulations allocate burden of proof in certification proceedings. Women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities determined by the SBA, who certify that they are members of such a group, are entitled to a rebuttable presumption that they are socially and economically disadvantaged. While entitled to such a rebuttable presumption, firms seeking certification still bear the burden of demonstrating, by a preponderance of the evidence, that they meet the regulations' requirements concerning business size, ownership, and control. State DOTs are to make determinations concerning whether the requirements for certification are satisfied by considering all the facts in the record, viewed as a whole. [36] The regulations provide procedures for state DOTs to follow in order to verify the genuineness of an applicant's membership in a presumptively disadvantaged group if the DOTs have a well-founded reason to question the individual's claim of membership in that group.[37] The regulations also provide that an applicant's presumption of entitlement can be rebutted by evidence demonstrating that the individual has a personal net worth in excess of $1.32 million.[38]

Individuals not belonging to a presumptively disadvantaged group may still apply for DBE status. State DOTs are required to make case-by-case determinations on such applications. Such applicants bear the burden of proving that they are socially and economically disadvantaged, as well as meeting the other requirements for certification.[39]

Participation by DBEs in federal-aid projects is based not only upon membership in a presumptively

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[27] 49 C.F.R. § 26.41.

[28] 49 C.F.R. § 26.43.

[29] 49 C.F.R. § 26.45.

[30] 49 C.F.R. § 26.47. *See also* Robinson, *supra* note 22.

[31] 49 C.F.R. § 26.51.

[32] 49 C.F.R. § 26.53.

[33] 49 C.F.R. § 26.53(e).

[34] 49 C.F.R. § 26.53(f).

[35] 49 C.F.R. § 26.55.

[36] 49 C.F.R. §§ 26.61 and 26.67.

[37] 49 C.F.R. § 26.63.

[38] 49 C.F.R. § 29.67(b)(1).

[39] 49 C.F.R. § 26.67(d).

disadvantaged group, but also upon business size. USDOT's regulations require DBEs to be small businesses, and incorporate the definition of such firms established by the SBA. USDOT also requires that, to be certified as DBEs, firms cannot have had average annual gross receipts over the firm's past 3 fiscal years in excess of $22.41 million.[40]

To be eligible for certification as a DBE, firms must be able to demonstrate that they are at least 51 percent owned by socially and economically disadvantaged individuals. Such ownership must be real, substantial, and continuing, going beyond pro forma ownership; the disadvantaged owners must also enjoy the customary incidents of ownership and share in the risks and profits commensurate with their ownership, as shown by the substance and not just the form of the firm's arrangements.[41] USDOT has adopted requirements that establish a number of specific additional tests to determine whether ownership of an applicant firm by disadvantaged persons is genuine.[42]

To be eligible for certification as a DBE, firms must also be independent, and their viability cannot depend upon their relationship with another firm such as a prime contractor. The disadvantaged owners must control the board of directors of the firm; have the power to direct or cause the direction of the firm's management, policy, and operations on a day-to-day as well as long-term basis; and have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged, and the firm's operations.[43] As with ownership, USDOT has adopted requirements that establish a number of specific additional tests to determine whether control of an applicant firm by disadvantaged persons is genuine.[44]

In making certification decisions, state DOTs may consider whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program. This includes evidence of failure to perform a commercially useful function on past projects, although such evidence may not be considered for any other purpose in certification decisions.[45] USDOT has also adopted various other rules governing DBE certification, the basic purpose of which is to prevent the DBE program from being undercut by sham firms controlled by nondisadvantaged contractors.[46]

vii. Part 26 Subpart E, Certification Procedures.—The certification procedure provisions of USDOT's DBE requirements are set forth in 49 C.F.R. Part 26 Subpart E.

The USDOT regulations require each state to establish a single Unified Certification Program (UCP) for the state, covering all DOTs (i.e., municipal as well as state) receiving federal-aid funding from USDOT, and providing "one-stop shopping" for firms seeking certification as DBEs for performing highway subcontracting work within the state.[47] Each UCP is required to maintain a unified directory of DBEs, updated at least once yearly and posted on the Internet as well as available in print.[48] While the UCP may take any form acceptable to the recipients in that state, it is subject to approval or disapproval by the U.S. Secretary of Transportation, and is required to comply with all USDOT directives and guidance concerning certification matters and cooperate fully with USDOT oversight, review, and monitoring.[49]

In making certification decisions, UCPs must follow procedures set forth in the regulations. To summarize briefly, these include such things as collecting the application forms provided by the regulations; interviewing the principals of each firm applying for DBE certification, reviewing their resumes, and performing on-site visits to the firm's offices and any active work sites; analyzing the firm's stock ownership, bonding and financial capacity, work history, and list of equipment owned and licenses held; and requiring that the applicant attest to the truthfulness of the information submitted on the applications form.[50] UCPs are required to safeguard the confidentiality of any proprietary business information obtained during certification reviews, but are also required to making information concerning DBEs available upon written request to other UCPs, DOTs, or recipients considering the eligibility of a DBE firm.[51] Once certified, a DBE firm remains certified unless and until the UCP revokes its certification, although UCPs are authorized to conduct certification reviews 3 years from the date of the firm's most recent certification, or sooner if appropriate in light of changed circumstances.[52]

Two or more states may form a regional UCP, or enter into written reciprocity agreements between UCPs.[53] Even where states do not do so, when a firm certified in one state applies to another state for DBE certification, the new state's UCP may, in its discretion, choose to accept the home state's certification after confirming with the home state that the certification remains valid. If the UCP in another state does not choose to accept the home state certification, the regulations set forth detailed procedures for that UCP to follow in accepting and reviewing the firm's application for DBE certification.[54]

[40] 49 C.F.R. § 26.65; and 13 C.F.R. § 121.402.

[41] 49 C.F.R. § 26.69.

[42] 49 C.F.R. § 26.69(d) through (j).

[43] 49 C.F.R. § 26.71.

[44] 49 C.F.R. § 26.71(c) through (q).

[45] 49 C.F.R. § 26.73(a).

[46] 49 C.F.R. § 26.73(b) through (h).

[47] 49 C.F.R. § 26.81.

[48] 49 C.F.R. § 26.81(g).

[49] 49 C.F.R. § 26.81(a).

[50] 49 C.F.R. § 26.83(a) through (c).

[51] 49 C.F.R. § 26.83(d) and (g).

[52] 49 C.F.R. § 26.83(h); and *see also* 49 C.F.R. § 26.87.

[53] 49 C.F.R. § 26.81(e) and (f).

[54] 49 C.F.R. § 26.85.

When a UCP denies an application for DBE certification, the UCP must provide the firm with a written explanation of the reasons for denial, referencing evidence in the record supporting the decision, and make all documents and information upon which the denial is based available to the firm.[55] When a UCP denies certification to a firm certified by the SBA, the UCP must notify the SBA in writing, including the reason for denial.[56] When a UCP denies an application for certification, it must establish a time perio of no more than 12 months before the firm may reapply.[57] Following an administratively final denial of certification, the firm may appeal the denial to USDOT.[58]

When a UCP or DOT receives a complaint that a currently certified DBE firm is ineligible for such certification, the UCP must treat such a complaint as confidential. It must also review its records concerning the firm, request additional information as needed, and investigate the complaint as necessary. If the UCP finds the complaint unfounded, the UCP must notify both the complainant and the DBE firm. If the UCP finds reasonable cause to believe that the DBE firm is ineligible, however, it must provide written notice to the firm, setting forth the reasons involved, and provide the firm with an opportunity for an informal hearing during which the firm may respond. In any such hearing, the UCP or DOT bears the burden of proving by a preponderance of the evidence that the DBE firm is not eligible for certification, based upon information previously unavailable, concealed, or misrepresented at the time of certification; a change in USDOT certification standards, or a UCP error in granting the original certification.[59]

Firms whose application for DBE status is denied, or whose DBE certification is revoked, may submit administrative appeals to USDOT within 90 days after the UCP or state DOT's final decision. USDOT will then request the UCP to provide a complete copy of the administrative record involved, review such record, and make its decision based upon the record, without making a *de novo* review of the matter or conducting a hearing. USDOT has a policy of determining such appeals within 180 days after receiving the complete administrative record from the UCP. The pendency of such an appeal to USDOT does not stay or suspend the effect of the UCP's denial or revocation, which shall remain in effect unless and until overturned by USDOT.[60] The USDOT regulations specify what actions UCPs, state DOTs, or other recipients are required to take following a USDOT determination on a DBE certification appeal, depending upon the outcome of such appeal.[61]

[55] 49 C.F.R. § 26.86(a).

[56] 49 C.F.R. § 26.86(b).

[57] 49 C.F.R. § 26.86(c).

[58] 49 C.F.R. § 26.86(d); and *see also* 49 C.F.R. § 26.89.

[59] 49 C.F.R. § 26.87.

[60] 49 C.F.R. § 26.89.

[61] 49 C.F.R. § 26.91.

USDOT’s 2011 amendments to its regulations include new procedures involving interstate certification of DBEs. These are discussed separately in connection with the 2011 amendments in Section 4(1)(b), below.

viii. Part 26 Subpart F, Compliance and Enforcement.—The compliance and enforcement provisions of USDOT's DBE requirements are set forth in 49 C.F.R. Part 26 Subpart F.

These regulations begin by indicating that recipients, a category that includes state and municipal DOTs, may be subject to formal enforcement actions by USDOT if they fail to comply with the requirements of Part 26, including the suspension or termination of federal-aid funding or refusal to approve projects, grants, or contracts until deficiencies or remedied. The regulations note, however, that recipients will not be subject to compliance actions if a federal court has ruled the Part 26 requirement involved to be unconstitutional.[62]

Any person who believes that a state or municipal DOT has failed to comply with its obligations under Part 26 may file a written complaint with the FHWA Office of Civil Rights or the equivalent office for any other USDOT operating administration, but must do so within 180 days after the date of the alleged violation or learning of a continuing course of violations. The Office of Civil Rights may protect the complainant's identity. FHWA and other USDOT operating administrations may also review compliance by state or municipal DOTs on their own initiatives at any time. If investigation of a complaint, or such a review, finds reasonable cause to find a state or municipal DOT in noncompliance, FHWA or another appropriate USDOT office will send the state or municipal DOT written notice, including an opportunity to request conciliation proceedings within 30 days. If such a request is made, FHWA or another appropriate USDOT office will pursue conciliation for at least 20, but not more than 120, days from such request. If this results in a written conciliation agreement between FHWA or USDOT and the state or DOT involved, specifying measures the state or municipal DOT has taken or will take to ensure compliance, then the matter is considered closed, subject to ongoing monitoring of implementation of the conciliation agreement. If a state or municipal DOT does not request conciliation, or a conciliation agreement is not signed within 120 days after a request for conciliation, then FHWA or USDOT will undertake enforcement proceedings.[63]

Contractors or DBE subcontractors who attempt to meet DBE goals or other DBE program requirements through false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, may be subject to USDOT suspension or debarment proceedings, and/or proceedings for civil remedies under 49

[62] 49 C.F.R. § 26.101.

[63] 49 C.F.R. § 26.103. Enforcement actions for FAA programs are governed by 49 C.F.R. § 26.105.

C.F.R. Part 31.[64] USDOT may also refer to the DOJ, for criminal prosecution under 18 U.S.C. § 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation in the DBE program or otherwise violates applicable federal statutes.[65]

USDOT's regulations on DBE compliance and enforcement also include provisions protecting the confidentiality of proprietary business information involved in such matters, protecting the confidentiality of information on complainants, and requiring the full and prompt cooperation of all state and municipal DOTs, and of all contractors and subcontractors involved, with USDOT compliance and certification reviews, requests for information, and investigations.[66] The regulations also prohibit state and municipal DOTs, contractors, and any other DBE program participants from intimidating, threatening, coercing, or discriminating against any complainant, witness, or other person participating in any manner in any compliance or enforcement investigation or proceeding.[67]

ix. Part 26, Appendices.—USDOT's Part 26 DBE regulations are accompanied by several appendices. Appendix A provides USDOT administrative guidance concerning what constitutes "good faith efforts" within the meaning of the Part 26 regulations. Appendix B sets forth the Uniform Report of DBE Awards or Commitments and Payments Form that state and municipal DOTs are required to use when reporting to FHWA and USDOT on such matters. Appendix C provides DBE Business Development Program Guidelines. Appendix D furnishes Mentor•Protege Program Guidelines. Appendix E offers USDOT administrative guidance to UCPs and state or municipal DOTs in making individual determinations of social and economic disadvantage in the cases of those who apply for DBE status but are not members of a presumptively disadvantaged group, and seek to demonstrate social and economic disadvantage on an individual basis. Appendix F provides the Uniform Certification Application Form. [68]

b. The 2011 Amendments to 49 C.F.R. Part 26

USDOT conducted a significant rulemaking from 2009 to early 2011, amending 49 C.F.R. Part 26 to address a number of perceived issues concerning the DBE program. According to FHWA's Office of Chief Counsel, this rulemaking followed a series of meetings with various stakeholders in 2008 and 2009, and publication of an Advanced Notice of Proposed Rulemaking in 2009, with Phase I of the new rules going into effect on February 28, 2011.[69] USDOT characterized the completion of this rulemaking as improving the accountability of the DBE program by "increasing accountability for recipients with respect to meeting overall goals, modifying and updating certification requirements, adjusting the personal net worth (PNW) threshold for inflation, providing for expedited interstate certification, adding provisions to foster small business participation, improving post-award oversight, and addressing other issues."[70] Among the issues addressed by the rulemaking were the following.

i. Counting Purchases from Prime Contractors.—USDOT considered, but rejected, construction industry requests for prime contractors and DBEs to be allowed to claim DBE participation credit for construction materials that a DBE had purchased from the prime contractor performing the contract. USDOT indicated that it indicated such a pass-through arrangement as inconsistent with the most important principle of counting DBE participation, namely that credit should only be counted for value added to the transaction by the DBE itself. USDOT also noted that the existing approach, which it decided to leave unchanged, had been part of the DBE regulations since 1999.[71]

ii. Terminations of DBE Firms.—USDOT addressed concerns stated by state and municipal DOTs, prime contractors, contractors' trade associations, and DBE subcontractors alike in revising somewhat the approach taken by the regulations to prime contractors' terminations of DBE firms. Noting that all parties considered this issue to be problematic for different and conflicting reasons, USDOT adopted a somewhat revised approach under which prime contractors can terminate DBE subcontractors for good cause shown, and with the written consent of the recipient, i.e., the state or municipal DOT administering the project.

To terminate a DBE firm, prime contractors must provide written notification to the DBE, with a copy to the recipient, of its intent to request to terminate/substitute the DBE, and the reason therefore. Prime contractors must give DBEs 5 days to respond, unless an emergency situation is involved. Prime contractors must demonstrate good cause for the termination. The new regulation provides nine examples of situations that would show good cause, plus a general provision for "other good cause you determine compels termination." Prime contractors must, prior to termination, also obtain the consent of the state DOT or other recipient to do so. These requirements apply not only to terminations during the course of performing the work, but also to pre-award substitution of previously proposed DBE subcontractors.[72]

USDOT explained that its revised approach would allow prime contractors to terminate and replace DBEs that were genuinely failing to perform subcontract work satisfactorily in accordance with normal industry standards, but would prevent prime contractors from dis-

[64] 49 C.F.R. § 26.107(a) through (d); and *see* 49 C.F.R. pt. 31.

[65] 49 C.F.R. § 26.107(e).

[66] 49 C.F.R. § 26.109.

[67] 49 C.F.R. § 26.109(d).

[68] See 49 C.F.R. pt. 26, Apps. A through F.

[69] Robinson, *supra* note 22.

[70] Summary of USDOT Docket No. OST-2010-0118, Final Rule eff. Feb. 28, 2011, 76 Fed. Reg. 5083 (Jan. 28, 2011).

[71] 76 Fed. Reg. 5083 at 5084, Jan. 28, 2011.

[72] Robinson, *supra* note 22.

missing DBEs arbitrarily merely to profit from performing the work themselves or in situations where the DBE's failure to perform resulted from bad faith or discriminatory actions on the part of the prime contractor.[73]

iii. Personal Net Worth.—USDOT noted that a large majority of those commenting on its rulemaking supported the proposal to raise the PNW cap for DBEs from the prior $750,000 to $1.32 million. USDOT explained that this was appropriate in order to make an inflationary adjustment to adjust the current figure to match the real dollar value of the prior figure, which dated back to 1999, based on consumer price index figures for the intervening years. While USDOT received some objections that raising the cap would benefit firms that were not genuinely disadvantaged or benefit larger DBEs at the expense of smaller ones, and that Individual Retirement Accounts and other retirement assets should be excluded from PNW calculations, it decided to make the inflation adjustment as proposed. Acknowledging comments that a revised USDOT form for making PNW calculations, with additional guidance and instructions, would be helpful, USDOT indicated that it would take this issue under advisement for a future rulemaking on DBE issues, which it hoped to pursue later in 2011.[74]

iv. Interstate Certification.—USDOT's proposal to facilitate interstate certification of DBEs, with a short 30-day review period and the burden of proof resting on any agencies opposing recognition of certifications from other states, drew a large number of comments. In general terms, DBE firms and contractors' trade associations supported USDOT's proposal to make it easier for DBEs certified in their home states to obtain certification in other states. State DOTs, in contrast, expressed concerns that this would tend to undercut the integrity of the DBE program because some states had weak certification programs that allowed ineligible firms to obtain certification. Facilitating interstate certification, they argued, would allow such ineligible firms to work even in states administering strong and thorough certification programs.

While deciding to proceed with measures to make interstate certification easier, USDOT responded to the concerns of state DOTs by revising its proposed approach. In the final rule as adopted, with an effective date of January 1, 2012, a DBE certified in its home state could seek certification in another state, State B, by presenting its home state certification to State B, which would then have 60 days to review it. State B would have the option of accepting the home state's certification as acceptable, thus granting the DBE firm certification in State B as well. If State B concluded, however, that the home state certification was not acceptable and the firm was ineligible for certification, State B would have to provide the applicant with a written statement of the specific and detailed reasons why State B had reached that conclusion, and allow the firm an opportunity to respond. Grounds for State B's denial of certification might include such things as fraud, new information, factual errors, misapplication of certification requirements, State B legal requirements, or failure to supply required information. State B would be required to provide the DBE with an opportunity to be heard regarding its objections. The firm would then bear the burden of proof of demonstrating by a preponderance of the evidence that the firm met the applicable certification requirements. State B would be required to issue its decision within 30 days after the DBE's opportunity to be heard, and would have to enter any certification denials or decertifications in USDOT's Department Office of Civil Rights database.[75]

v. Other Certification-Related Issues.—USDOT's rulemaking solicited comments on whether there should be a requirement for periodic certification reviews or updates of on-site reviews, and on whether firms that withdrew certification applications should be subject to a waiting period before resubmitting such applications. Those submitting responses also commented about arbitrary state limitations on the number of NAICS codes a firm could be certified for; whether state DOTs should be compelled to accept SBA certifications, since SBA had gone to a self-certification process; whether state DOTs should be allowed to consider investments by prime contractors in subcontractors as calling DBE status into question; and whether state DOTs should be allowed to count former personal assets that owners had transferred to DBE firms as counting toward PNW calculations.

In adopting the final rule, USDOT decided not to require updated on-site reviews of certified firms on any specified mandatory interval, leaving that to the discretion of UCPs and state DOTs; but noted that USDOT strongly encouraged UCPs and state DOTs to conduct updated on-site reviews of certified DBEs on a regular and reasonably frequent basis, particularly when they became aware of any changes in circumstances or allegations of misconduct, stating that "regularly updated on-site reviews are an extremely important tool in helping avoid fraudulent firms or firms that no longer meet eligibility requirements from participating in the DBE program." USDOT indicated that it was inappropriate for UCPs and state DOTs to apply the waiting period provision of 49 C.F.R. § 26.86(c) to firms which withdrew and then refiled applications, noting that putting the refiled applications at the end of the line of pending applications was sufficient to protect UCPs from excessive workload associated with refilings. Responding to comments, USDOT adopted a new provision prohibiting UCPs and state DOTs from arbitrarily limiting the number of NAICS codes a DBE firm could be certified for. It also deleted former §§ 26.84 and 26.85 concerning SBA certifications, since SBA had gone to a self-certification process differing from USDOT's DBE proc-

[73] 76 Fed. Reg. 5083, 5084–5085, (Jan. 28, 2011).

[74] 76 Fed. Reg. 5083, 5085–5087 (Jan. 28, 2011).

[75] 76 Fed. Reg. 5083, 5087–5089 (Jan. 28, 2011); and *see* 49 C.F.R. § 26.85(d)(2). *See also* Robinson, *supra* note 22.

ess in important respects. While not adopting a new rule on prime contractor investments in DBEs, USDOT indicated that state DOTs reviewing prime contractor requests to use such DBEs on projects should scrutinize such relationships very closely, with particular attention to the independence, affiliation, and commercially useful function of the DBE. While not prohibiting owner transfers of personal assets to DBEs, USDOT indicated that UCPs and state DOTs could examine such transfers and continue to count the assets toward PNW if they concluded that the transfers had been ruses to circumvent PNW requirements rather than genuine investments in the business.[76]

vi. Accountability and Goal Submissions.—USDOT proposed that if a state or municipal DOT or other recipient failed to meet its overall DBE goal, it would have to analyze the shortfall within 60 days, explain the reasons for it, devise corrective actions, and submit such information to FHWA or other USDOT operating administrations. While there would be no requirement to meet a goal, failing to take these follow-up steps if goals were missed could be considered as a lack of good faith, which could lead to a finding of noncompliance with the program. USDOT also solicited comments on a recent prior rulemaking concerning the submission of goals on 3-year rather than 1-year cycles, with a focus on annual projections within 3-year goals. Both of these proposals drew extensive comments, some of which characterized the accountability measures as establishing quotas rather than goals.

USDOT adopted the accountability provision as proposed, responding to comments by indicating that the program involved goals rather than quotas, and that no recipients would be penalized for failing to meet goals. USDOT pointed out that any effective good-faith effort by recipients to administer the DBE program would necessarily involve measures to evaluate performance, analyze the reasons for any shortfalls, and look for ways to avoid future shortfalls, and that measures requiring efforts to do so would simply promote accountability and transparency, rather than establishing rigid quotas. With regard to 3-year goals and annual projections, USDOT indicated that it had no objections to recipients' preparing and submitting annual projections for administrative purposes, but that the 3-year goal figure would still be applied on an annual basis in terms of determining whether there was any shortfall which would trigger accountability requirements.[77]

vii. Program Oversight.—USDOT's rulemaking proposed to require that recipients (state and municipal DOTs) certify that they had monitored the paperwork and on-site performance of DBE contracts to make sure that DBEs actually performed them. Comments by DBEs supported the proposal, indicating that this would reduce the likelihood that contractors would abuse DBEs after contract award. Comments by some recipients, however, opposed the proposal on the basis that it would be too burdensome administratively, particularly for agencies with small staffs.

USDOT's response to the comments was revealing. USDOT pointed out that, for the DBE program to be meaningful, DBEs actually had to perform the work that was supposedly subcontracted to them, and that its regulations already required recipients to have a monitoring and enforcement mechanism to ensure that DBEs were actually performing the work claimed. USDOT went on to say:

The FHWA review team that has been examining state implementation of the DBE program found that many states did not have an effective compliance monitoring program in place. DBE fraud cases investigated by the Department's Office of Inspector General and criminal prosecutions in the Federal courts have highlighted numerous cases in which recipients were unaware, often for many years, of situations in which non-DBE companies were claiming DBE credit for work that DBEs did not perform.[78]

While refraining for workload reasons from requiring more pervasive monitoring, USDOT decided to require that recipients memorialize the monitoring they were already required to perform and do so on every contract on which DBE participation was claimed, and not just on a sample or percentage of such contracts.[79]

viii. Small Business Provisions, Including Race-Neutral Provisions.—USDOT's Notice of Proposed Rulemaking (NPRM) proposed requiring recipients to add an element to their DBE programs to foster small business participation in contracts, with a focus on race-neutral measures. The majority of commenters supported the proposal, and USDOT decided to adopt it. This included adoption of a new 49 C.F.R. § 26.39, "Fostering Small Business Participation," with state or municipal DOTs or other recipients required to submit to the appropriate USDOT operating divisions by February 28, 2012, the program elements they had developed "to structure contracting requirements to facilitate competition by small business concerns." Recipients were, among other things, allowed to include a race-neutral small business set-aside for prime contracts under a stated amount, such as $1 million. For multi-year DB projects or other large projects, recipients were allowed to require bidders for prime contracts to identify elements of the project or subcontracts of a size that small businesses, including DBEs, could reasonably perform. For prime contracts not involving DBE goals, recipients were allowed to require the prime contractor, rather than performing all of the work itself, to provide subcontracting opportunities of a size that small businesses, including DBEs, could reasonably perform. Recipients were also allowed to structure procurements to facilitate the ability of small businesses, including DBEs, to form joint ventures or consortia that could compete for and perform prime contracts. For recipients to meet a projected portion of their goals through race-

[76] 76 Fed Reg. 5083, 5089–5091 (Jan. 28, 2011).

[77] 76 Fed Reg. 5083, 5091–5093 (Jan. 28, 2011).

[78] 76 Fed. Reg. 5083, 5093 (Jan. 28, 2011).

[79] 76 Fed. Reg. 5083, 5093–5094 (Jan. 28, 2011).

neutral measures, USDOT authorized recipients to ensure that a reasonable number of prime contracts were of a size that small businesses, including DBEs, could reasonably perform. Finally, USDOT expressly required that recipients actively implement such program elements, as part of good-faith implementation of their DBE programs.[80]

USDOT did not, however, take any immediate action on the issue of duplicative bonding requirements for DBEs, deferring action on that to a follow-up rulemaking that USDOT is planning to pursue.[81]

Examples of possible state DOT or other recipient strategies for incorporating small business elements into their DBE programs might include such things as unbundling contracts, small business set-asides, small business goals, structuring procurements to be feasible for joint ventures of small businesses, and reducing the size of prime contracts to be feasible for small businesses to serve as prime contractors.[82] USDOT has also offered administrative guidance to state DOTs and other recipients on related matters such as how to define "small business", whether there should be a PNW requirement, micro-small business programs, supportive services, and implementation.[83]

With regard to efforts by state and municipal DOTs and other recipients to develop and implement such small-business elements of their DBE programs, including race-neutral elements, note that the TRB issued a timely publication in April 2011, just 2 months after USDOT's adoption of these new requirements, analyzing experience to date with the implementation of race-neutral measures in state DBE programs.[84] The research involved in the preparation of this publication, NCHRP Synthesis 416, included a survey of state DOTs. The publication addressed topics including a summary of the state responses to the survey, state strategies for implementing race-neutral measures, state DBE program challenges and solutions, and case examples drawn from the experiences of the Florida, Rhode Island, and Colorado state DOTs.

The authors' conclusions indicated that supportive services and training measures were widely used by the states responding to the survey and were ranked among the most effective measures. They found that some of the strategies considered to be the most effective, including reserving small contracts for small businesses and using targeted loan mobilization programs, could have high payoffs but posed challenges to implement. They indicated that state DOTs considered improving communications between DBEs and prime contractors to be important both for maintaining existing relationships and establishing new relationships between such firms. State DOTs indicated that the most frequent and difficult challenges to the success of state DBE programs included the weak economy, DBE firms' lack of access to capital, high fuel costs, and DBEs' lack of experience and equipment in connection with certain types of work. Those states that employed targeted measures indicated that selecting the right firms to receive such benefits was an important part of being successful.[85]

ix. USDOT on Continuing Compelling Need for DBE Program.—In concluding its evaluation of comments on the NPRM, USDOT noted the existence of a continuing compelling need for the DBE program, citing among other things testimony presented by the DOJ before the House Transportation and Infrastructure Committee in March 2009.[86]

x. Further USDOT Action Anticipated.—USDOT personnel have indicated that the agency is giving active consideration to taking further action in this area, although it is not entirely clear whether such action would come in the form or further rulemaking or would be limited to administrative guidance to recipients. While no major new policy initiatives are apparently contemplated, USDOT is seeking to develop additional program modifications to address various administrative issues raised by people involved in the administration of the DBE program. Among other things, USDOT is apparently seeking to improve its DBE certification application forms and the uniform reports that it requires state DOTs and other recipients to submit.[87]

2. Historical Background: Executive Order 11246 and Its Progeny

While the primary focus of state and municipal DOT officials involved in the ongoing daily administration of DBE requirements now rests upon the USDOT 49 C.F.R. Part 26 regulations discussed above, the DBE program, and related EEO requirements, cannot be fully understood without understanding their historical roots and their development over time, including significant constitutional litigation at the U.S. Supreme Court level in recent decades.

Requirements for "nondiscrimination" in public contracts present few constitutional issues.[88] Instead, they reinforce the requirements of the Fifth and Fourteenth

[80] 49 C.F.R. § 26.39(a) and (b), as adopted by USDOT Docket No. OST-2010-0118, Final Rule eff. Feb. 28, 2011, 76 Fed. Reg. 5083, 5087 (Jan. 28, 2011).

[81] 76 Fed. Reg. 5083, 5094 (Jan. 28, 2011).

[82] Robinson, *supra* note 22.

[83] *Id.*

[84] PATRICK CASEY, ANDREA THOMAS & JAMES THEIL, IMPLEMENTING RACE-NEUTRAL MEASURES IN STATE DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS (NCHRP Synthesis 416, Transportation Research Board, 2011). This publication is available at http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_syn_416.pdf, last accessed on July 18, 2012.

[85] *Id*. at 30.

[86] 76 Fed. Reg. 5083, 5095 (Jan. 28, 2011).

[87] Robinson, *supra* note 22.

[88] Portions of this section are derived from Orrin F. Finch, *Minority and Disadvantaged Business Enterprise Requirements in Public Contracting* Vol. 3, at 1582-N1, Transportation Research Board, The National Academies, Washington, D.C. (1985).

Amendments as well as the statutes designed to implement those constitutional provisions.[89] 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.[90]

a. The Equal Employment Opportunity Program

EEO, affirmative action, and the Minority Business Enterprise (MBE) and DBE programs all have a common origin in Executive Order (EO) 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 EO 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.[91] 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*.[92] 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 EO seizing steel mills was not within the constitutional power of the President.[93] 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 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 than by FHWA, USDOT, or state transportation departments.[94]

b. The Minority and Women Business Enterprise Program

The EEO program was designed to promote affirmative action in the employment of construction workers. Affirmative action for M/WBE in construction developed more slowly than EEO, but had more impact on the industry and on state and local governments.[95]

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

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

[91] 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).

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

[93] 343 U.S. 579, 72 S. Ct. 863 (1952).

[94] 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 C.F.R. Chapter 60," Feb. 1, 1999.

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

Section 8(a) of the Small Business Act of 1953 authorized the Federal SBA to contract directly with small businesses on behalf of various federal procurement agencies.[96] 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.[97]

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."[98] 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…."[99]

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 M/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.[100]

The M/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 M/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 M/WBE goals. If none met the goal, award was to be made to the bidder with the highest M/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.[101]

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 to provide adequate competition for the contract.[102]

Numerous lawsuits were filed challenging the regulations, including *Central Alabama Paving v. James*.[103] In that case, the court concluded that USDOT was acting beyond the bounds of congressional authority in promulgating the M/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 applied to the listed minorities and replaced it with a rebuttable presumption.[104] Congress then passed 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 percent 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[105]

USDOT's next regulations were issued on July 21, 1983.[106] Those regulations followed the lead of the Small Busines Act regulations and provided a rebuttable presumption that the members of designated mi-

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[96] 15 U.S.C. § 637(a)(1)(B).

[97] *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).

[98] 15 U.S.C. § 637(a)(5) (2002).

[99] 15 U.S.C. § 637(a)(6)(A) (2002).

[100] 64 Fed. Reg. 5096 (Feb. 2, 1999).

[101] 45 Fed. Reg. 21184 (Mar. 31, 1980).

[102] *Id*.

[103] 499 F. Supp. 629 (M.D. Ala. 1980).

[104] *See* FINCH, *supra* note 88.

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

[106] 48 Fed. Reg. 33432 (July 21, 1983).

nority 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 Small Busines Act Section 8(a) certifications, and the regulations mandated that the state recipients honor all Small Busines Act Section 8(a) certifications.[107]

In 1987, Section 105(f) of STAA was replaced by Section 106(c) of the 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. [108]

One major change was that women 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*.[109]

Congress then passed ISTEA, in 1991, which continued the requirement that not less than 10 percent of the federal highway funds be spent on contracts or subcontracts with DBEs.[110] 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.[111] Section 1003 also incorporated the Section 8(d) definition of disadvantaged businesses. TEA-21, passed in 1998, also continued the Federal DBE program.[112]

3. Historical Background: Constitutional 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.[113] The Court also addressed whether programs served a compelling state interest and whether "societal discrimination" was an adequate basis for AAP requirements.[114] *Fullilove* upheld the constitutionality of an MBE program established by Congress for public construction for economically depressed communities.[115] *Croson* applied a strict scrutiny standard for local public works projects, and *Adarand* applied the same standard to federal projects.[116] *Adarand* required major changes to the DBE program, resulting in issuance of a new rule by USDOT on February 2, 1999.[117]

a. Fullilove v. Klutznick

The *Fullilove* case involved an AAP created by Congress rather than by EO or administrative action.[118] 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.

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.[119] 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.[120] 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

[107] 48 Fed. Reg. 33432 (July 21, 1983); *see* 13 C.F.R § 124.104(c)(2).

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

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

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

[111] *Id.* § 1003(b)(2)(A).

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

[113] 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).

[114] 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).

[115] *See infra* note 118 and accompanying text.

[116] *See infra* note 129 and note 57, and accompanying text.

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

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

[119] 91 Stat. 116.

[120] 91 Stat. 116; 42 U.S.C. § 6705(f)(2).

were not available at a reasonable price. Otherwise, the contract would be awarded to another bidder.[121]

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….[122]

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.[123]

The Court favored the "nonmandatory" nature of the AAP, referencing the waiver provisions implemented by the regulations.[124] 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.[125] Finally, the Court noted the Act's narrow focus, short duration, and minimal impact on nonminorities innocent of past discriminatory practices.[126]

b. Croson v. City of Richmond

In *J.A. Croson v. City of Richmond,*[127] 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, 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.[128] The Supreme Court affirmed the Fourth Circuit ruling.[129]

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.[130] 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.[131]

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*."'"[132]

The Court found that the city council had not made findings of prior discrimination.[133] The Court affirmed the Fourth Circuit's ruling that the 30 percent set-aside was chosen arbitrarily and was not narrowly tailored.[134]

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."[135] 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

[121] *Id*.

[122] 448 U.S. at 472, 100 S. Ct. 2772.

[123] 448 U.S. at 478.

[124] *Id*. at 488–90.

[125] *Id*. at 481.

[126] *Id*. at 484.

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

[128] 822 F.2d 1355 (4th Cir. 1987).

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

[130] 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)).

[131] *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.

[132] 488 U.S. at 485 (emphasis in original).

[133] *Id*.

[134] *Id*. at 486.

[135] *Id*.

to identify and redress the effects of societal discrimination.[136]

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…."[137]

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….[138]

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."[139]

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.[140]

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."[141]

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."[142]

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….[143]

The majority emphasized that "[n]othing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction."[144] 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….[145]

c. Adarand Constructors v. Pena

Adarand Constructors, Inc. v. Pena answered the question as to whether strict scrutiny would apply to

[136] *Id*. at 491.

[137] *Id*. at 494.

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

[139] *Id*. at 500.

[140] *Id*. at 499.

[141] *Id.* at 505.

[142] *Id.* at 508.

[143] *Id.* at 509–10.

[144] *Id.* at 509.

[145] *Id*. at 510.

federal contracting.[146] 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."[147] 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.[148]

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.'"[149] 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.[150] The Tenth Circuit affirmed, based on its understanding that *Fullilove* set out an intermediate scrutiny standard for race-based federal action.[151] The Supreme Court vacated the court of appeals ruling and remanded the case to the trial court.[152]

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.[153] 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."[154] However, the Court noted that even in so holding, the earlier Court had stated in the *Hirabayashi v. United States* decision that "'distinctions between citizens solely because of their ancestry are by their very nature odious.'"[155]

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.[156] 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….
>
> ….
>
> 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.[157]

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

> 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.[158]

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.[159]

The result of the *Adarand* decision was the adoption of new regulations by the USDOT that were 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.

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[146] 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

[147] 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…
>
> The Contractor will be paid an amount computed as follows:
>
> 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….

[148] *Id*. at 205.

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

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

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

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

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

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

[155] *Id*. at 215 (quoting *Hirabayash*i, 320 U.S. at 100).

[156] *Id*. at 223–24.

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

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

[159] *Id*. at 238–39.

d. Adarand on Remand: Review of Revised USDOT Regulations

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.[160] The Tenth Circuit found on review that because the Colorado DOT had certified Adarand as a DBE, its case was moot.[161] The U.S. Supreme Court vacated that decision and remanded the case to the Tenth Circuit for consideration on the merits.[162]

The Tenth Circuit held that while the SCC failed to pass strict scrutiny, the new USDOT regulations were narrowly tailored and were constitutional.[163] 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.[164] The court found adequate evidence in the many studies considered by Congress in its enactment of amendments to the Federal Highway Act.[165] 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.[166] The most significant obstacles identified were lack of access to capital and inability to get surety bonds.[167] The government also presented evidence that "when minority firms are permitted to bid on subcontracts, prime contractors often resist working with them."[168] 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.[169] The court also found evidence of discrimination in disparity studies, and studies of minority business participation after affirmative action programs were discontinued.[170] 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;[171] (2) there are time limits on the duration of the DBE certification program;[172] (3) the program is flexible, and includes waiver provisions;[173] (4) the program is numerically proportional to the numbers of available firms, and allows good-faith efforts to meet requirements;[174] (5) there is an acceptable burden on third parties;[175] 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.[176]

4. Challenges to AAPs After Croson and Adarand

a. State and Local Programs

Croson and *Adarand* led to challenges being filed against state and local M/WBE programs as well as DBE programs administered by recipients, based on contentions that those programs would not survive strict scrutiny.[177]

Phillips & Jordan, Inc. v. Watts involved a challenge to an FDOT DBE program.[178] 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.[179] 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

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

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

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

[163] 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.

[164] *Id.* at 1164.

[165] *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)).

[166] *Id.* at 1167–68.

[167] *Id.* at 1169

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

[169] *Id.* at 1172.

[170] *Id.* at 1172–75.

[171] *Id.* at 1178–79.

[172] *Id.* at 1179.

[173] *Id.* at 1180–81.

[174] *Id.* at 1181–83.

[175] *Id.* at 1183.

[176] *Id.* at 1183–86.

[177] 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).

[178] 13 F. Supp. 2d 1308 (N.D. Fla. 1998).

[179] FLA. STAT. § 339.0805(1)(b).

private sector.[180] In reviewing the program, the court applied the strict scrutiny analysis mandated by *Croson*.[181] 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.[182]

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.[183] While statistical evidence may serve this purpose, it does not do so where the "identity of the wrongdoers is unknown."[184] 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.[185] The court held that an AAP must be focused on "those who discriminate."[186] A disparity study that relied on "ill-defined wrongs" committed by "unidentified wrongdoers" was insufficient under *Croson*.[187]

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.[188] The Louisiana Health Care Authority had set aside a clinic renovation project as a DBE-only project in its advertisement for bids.[189] 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.[190] 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.[191]

The court relied on *Croson* and *Adarand* for the principle that the same standard applies regardless of what race is burdened or benefited.[192] 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."[193]

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…."[194]

California's M/WBE program was declared to be unconstitutional as violating the equal protection clause in *Monterey Mechanical Co. v. Wilson*.[195] 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*.[196] 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.[197] 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

[180] 13 F. Supp. 2d at 1312, 1314.

[181] *Id*.

[182] *Id*. at 1313.

[183] *Id*.

[184] *Id*.

[185] *Id*. at 1314.

[186] *Id*.

[187] *Id*.

[188] 669 So. 2d 1185 (La. 1996).

[189] LA. REV. STAT. 39:1951 et seq.

[190] 669 So. 2d at 1201.

[191] 669 So. 2d at 1189.

[192] *Id*. at 1198.

[193] *Id*.

[194] *Id*. at 1200.

[195] 125 F.3d 702 (9th Cir. 1998), *rehearing denied*, 138 F.3d 1270.

[196] 91 F.3d 586 (3d Cir. 1996).

[197] *Id*. at 592–93.

highest minority participation was granted a waiver and awarded the contract.[198]

The district court found that the ordinance created a protected segment of city construction work for which non-DBEs could not compete.[199] 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).[200]

The court ultimately rejected the program on the basis that it was not narrowly tailored.[201] 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*.[202] 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.[203]

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.[204]

An example of a program that was upheld after *Croson* is found in *Domar Electric v. City of Los Angeles*.[205] 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 community, 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.[206]

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*.[207] 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.[208]

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*.[209] 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.[210] 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."[211] 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.[212] MnDOT claimed

[198] *Id*. at 593.

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

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

[201] *Id*. at 605.

[202] *Id*. at 606.

[203] *Id*. at 607.

[204] *Id*. at 609.

[205] 9 Cal. 4th 161, 885 P.2d 934, 36 Cal. Rptr. 521 (1994).

[206] 9 Cal. 4th at 167.

[207] *Id*. at 168–69.

[208] *Id*. at 172–73.

[209] 17 F. Supp. 2d 1026 (D. Minn. 1998).

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

[211] 17 F. Supp. 2d. at 1029.

[212] *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

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.[213] 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.[214]

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."[215]

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.'"[216] 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 nonwhite people.[217] 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."[218]

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

5. Narrowly Tailoring the DBE Requirements

During 1999, 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 concluded 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.[219] 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.[220]

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….[221]

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.[222] 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.[223] 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.[224] Also, when a DBE firm is awarded a prime

the purposes of the motions before it, the court did apply strict scrutiny to the gender classifications. *Id*.

[213] *Id*. at 1033–34.

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

[215] *Id*. at 1035.

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

[217] *Id*. at 1036–37.

[218] *Id*. at 1037.

[219] 64 Fed. Reg. at 5100-01 (1999).

[220] 64 Fed. Reg. at 5102-03.

[221] 64 Fed. Reg. at 5097.

[222] 64 Fed. Reg. at 5102.

[223] 64 Fed. Reg. at 5112.

[224] 49 C.F.R. § 26.29 (2000).

contract on the sole basis that it is the lowest responsible bidder, then that is considered to be a race-neutral alternative.[225] 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.[226] 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.[227] These factors can be as significant as price.[228] This was the basis for the requirement of good-faith efforts. "Contractors cannot simply refuse to consider qualified, competitive DBE subcontractors."[229]

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….[230]

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 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.[231]

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."[232] 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.[233] 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.[234]

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.[235]

[225] 64 Fed. Reg. at 5112.

[226] 49 C.F.R. § 26.53(b) (2000).

[227] 64 Fed. Reg. at 5099–5100.

[228] *Id*.

[229] *Id*. at 5100.

[230] 64 Fed. Reg. at 5102.

[231] 64 Fed. Reg. at 5145–56; 49 C.F.R. pt. 26, app. A (2001).

[232] 48 Fed. Reg. 33441-2, July 21, 1983, preamble commentary.

[233] 44 Cal. App. 4th 1391, 52 Cal. Rptr. 2d 395 (1996).

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

[235] 52 Cal. Rptr. 2d at 407.

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.[236]

6. Justifying State Participation in USDOT DBE Program: Conducting Disparity and Availability Studies

Given the *Croson* decision's requirement that race-based standards be narrowly tailored to pass the strict scrutiny test, there have been a series of subsequent cases testing the constitutionality of the DBE program as administered in specific states.[237] In *Northern Contracting, Inc. v. Illinois Department of Transportation*,[238] the U.S. Court of Appeals for the 7th Circuit upheld the Illinois DOT's FFY 2005 DBE plan as narrowly tailored. In *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, [239] the U.S. Court of Appeals for the 8th Circuit upheld the validity of Minnesota DOT's participation in the DBE program. In *Western States Paving Co. v. Washington State Department of Transportation*,[240] however, the U.S. Court of Appeals for the 9th Circuit struck down the Washington State DOT's participation in the DBE program, finding that while the statute and regulations underlying the program facially met the strict scrutiny test, the Washington State DOT's implementation of the program was not sufficiently narrowly tailored.

One of the main factors accounting for the difference between the 7th and 8th Circuit decisions and the 9th Circuit decision was that the Illinois and Minnesota DOTs had undertaken statistical studies of DBE disparity and availability, while the State of Washington DOT had not done so prior to the litigation.[241]

Reflecting federal case law, USDOT's DBE program regulations, 49 C.F.R. Part 26, require that state DOTs narrowly tailor their DBE efforts to actual evidence of discrimination within their state construction markets. In particular, the regulations require that state DOTs and other federal-aid recipients must establish DBE goals based on "demonstrable evidence" of the relative availability of DBE firms compared to all firms ready, willing, and able to participate in federal-aid projects, and that the goal must reflect the state DOT's or other recipient's "determination of the level of DBE participation you would expect absent the effects of discrimination."[242]

While USDOT's regulations do not expressly require state DOTs or other recipients to conduct DBE disparity and availability studies, the 9th Circuit's decision in the *Western States Paving* case discussed above indicates that, as a practical matter, such studies may be, at minimum, highly advisable for a state DOT's participation in the Federal DBE program to withstand judicial review.

Considering this a high priority, the TRB's NCHRP undertook a research project resulting in the publication of a report in 2010 that provides state DOTs with guidelines for conducting such studies.[243] That report is essential reading for state DOTs participating in USDOT's DBE program, especially for those that have not undertaken such a study.

In addition to the state DOTs in Illinois and Minnesota, DOTS in a number of other states have also undertaken availability and disparity studies. Even without a systematic survey, a brief electronic search turns up reports documenting availability and disparity reports issued by, among others, the Arizona DOT,[244] California DOT (CalTrans),[245] Idaho DOT,[246] North Carolina DOT,[247] and Oregon DOT.[248]

What should a state DOT undertaking such a DBE disparity and availability study focus on? The NCHRP

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[236] 64 Fed. Reg. at 5109–5111.

[237] See JOHN WAINRIGHT & COLETTE HOLT, GUIDELINES FOR CONDUCTING A DISPARITY AND AVAILABILITY STUDY FOR THE FEDERAL DBE PROGRAM 3-5 (NCHRP Report 644, Transportation Research Board, 2010); available at http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_644.pdf, last accessed on Nov. 17, 2011; hereinafter cited as "NCHRP Report 644." The discussion of case law here summarizes briefly the longer analysis in that publication.

[238] 2007 U.S. App. LEXIS 4162 (7th Cir. Feb. 7, 2007).

[239] 345 F.3rd 964 (8th Cir. 2003).

[240] 407 F.3rd 983 (9th Cir. 2005).

[241] *Id.* at 997, as cited in NCHRP Report 644, at 5 n.22.

[242] 49 C.F.R. § 26.45.

[243] NCHRP Report 644, This subsection of the 2011 update to this volume is based to a significant extent upon that much longer and more detailed report, which the authors of the 2011 update acknowledge and recommend.

[244] ARIZONA DEPARTMENT OF TRANSPORTATION CIVIL RIGHTS OFFICE/MGT OF AMERICA, INC., AVAILABILITY ANALYSIS AND DISPARITY STUDY FOR THE ARIZONA DEPARTMENT OF TRANSPORTATION—FINAL REPORT (2009).

[245] CALIFORNIA DEPARTMENT OF TRANSPORTATION, AVAILABILITY AND DISPARITY STUDY—FINAL REPORT (2007); available at http://www.dot.ca.gov/hq/bep/study/Avail_Disparity_Study_Final_Rpt.pdf, last accessed on Nov. 17, 2011.

[246] IDAHO DEPARTMENT OF TRANSPORTATION/BBC RESEARCH & CONSULTING, A STUDY TO DETERMINE DBE AVAILABILITY AND ANALYZE DISPARITY IN THE TRANSPORTATION CONTRACTING INDUSTRY IN IDAHO—FINAL REPORT (2007); available at http://itd.idaho.gov/civil/pdf/Disparity/Study.pdf, last accessed on Nov. 17, 2011.

[247] NORTH CAROLINA DOT/EUQUANT, 1 MEASURING BUSINESS OPPORTUNITY: A DISPARITY STUDY OF NCDOT'S STATE AND FEDERAL PROGRAMS: ECONOMIC AND STATISTICAL ANALYSIS–FINAL REPORT (2009).

[248] OREGON DEPARTMENT OF TRANSPORTATION/MGT OF AMERICA INC., DISPARITY STUDY UPDATE FOR THE STATE OF OREGON DEPARTMENT OF TRANSPORTATION—FINAL REPORT (2011); available at http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/sbe/dbe/docs/DisparityUpdate2011_FinalReport.pdf?ga=t,n, last accessed on Nov. 17, 2011.

report, published in 2010, devotes chapters to detailed treatments of the legal standards for DBE programs,[249] designing defensible DBE programs,[250] a model disparity study,[251] and study resource issues,[252] and includes an appendix on the importance of comprehensive subcontract data collection to the performance of effective studies.[253] Rather than trying to summarize or paraphrase that report here, the authors of the 2011 update to this volume simply refer readers to it as the best currently available information on such matters, especially since it is readily available online at the time this update is being prepared.[254]

7. Compliance with and Enforcement of DBE Requirements

a. Compliance and Enforcement: Civil Compliance Under USDOT Regulations

Compliance and enforcement of DBE requirements are governed by 49 C.F.R. Part 26 Subpart F. The provisions of Subpart F are summarized in Section 4(A)(1)(a)(viii) of this current volume, above.

The USDOT regulations contemplate, in general, that state and municipal DOTs will be cooperative and diligent participants in administration of the DBE program, will take effective administrative action to identify and address problems, and will work cooperatively with USDOT and its OIG in dealing with serious problems. Civil compliance begins with administrative efforts by state UCPs to perform thorough and effective reviews of firms during the DBE certification process, and periodic reviews of certification as appropriate. It continues with efforts by state and municipal DOTs to exercise due diligence in the review and approval or disapproval of proposed DBE subcontractors prior to award of federal-aid construction contracts; and to perform appropriate monitoring in the field, by DOT or consultant construction field personnel, of whether DBE subcontractors are actually performing, with their own forces, the work which has been subcontracted to them.

While the regulations contemplate voluntary cooperation by state and municipal DOTs and other recipients, USDOT has the power, either on its own initiative or in response to complaints, to undertake reviews of state or municipal DOT and other recipient compliance with the requirements of the Federal DBE program and its regulations, to undertake efforts at conciliation with nonconforming DOTs and other recipients upon request, and to undertake enforcement actions against noncompliant state or municipal DOTs and other recipients that do not request conciliation or enter into a conciliation agreement resolving the issues to USDOT's satisfaction. Such enforcement actions may potentially include suspension or revocation of federal-aid funding for the DOT's and other recipient's federal-aid construction programs.[255]

USDOT also has authority to investigate prime contractors or DBE subcontractors suspected of seeking to conceal noncompliance with DBE program regulations and requirements through false and fraudulent means and to commence federal suspension or debarment proceedings against them if warranted by the evidence.[256] As discussed in Section 4(A)(1)(b)(vii), above, USDOT actively examined the area of DBE enforcement during 2011, and is pursuing internal administrative initiatives to strengthen its enforcement efforts in this area.

Unintentional, unwitting, minor, technical violations of the DBE regulations, particularly first-time violations, are likely to draw administrative compliance or enforcement efforts by state or municipal DOT personnel. As discussed below, more serious cases may move compliance actions beyond civil enforcement.

b. Federal Criminal Prosecutions for DBE Fraud

When USDOT becomes aware through investigation, either on its own initiative or in response to complaints, of intentional, willful, premeditated efforts to circumvent compliance with the DBE program and conceal such circumvention through false, fraudulent, or deceitful statements or representations, or under circumstances indicating a serious lack of business integrity or honesty, USDOT has authority to refer such cases to the DOJ, for criminal prosecution under 18 U.S.C. § 1001 or other applicable provisions of law.[257]

The DOJ has expressed increasing interest in, and has been devoting increasing efforts and resources to, active investigation of such cases. This is due not only to an interest in supporting the federal policies underlying USDOT's DBE program, but also to a growing recognition that DBE fraud is often related to, or leads to discovery and investigation of, more widespread criminal activity. In some parts of the United States, this has included not merely tax evasion or construction fraud by corrupt construction contractors, but also efforts by organized crime to extort ongoing payoffs from construction contractors, to bribe public officials, or to use DBE subcontracts as a cover for laundering the proceeds of drug smuggling, prostitution, gambling, and other criminal enterprises through purportedly legitimate business activities.

In areas where evidence has revealed DBE fraud to be associated with criminal activities of this type, the DOJ has increasingly turned to assembling multi-agency task forces combining resources and expertise not just from the USDOT OIG, but also from the Federal Bureau of Investigation (FBI), the U.S. Depart-

[249] NCHRP Report 644, at 1 et seq.

[250] *Id.* at 9 et seq.

[251] *Id.* at 29 et seq.

[252] *Id.* at 54 et seq.

[253] *Id.* at 60 et seq.

[254] *Id.*

[255] 49 C.F.R. §§ 26.101 and 26.103.

[256] 49 C.F.R. § 26.107(a) through (d); and *see* 49 C.F.R. pt. 31.

[257] 49 C.F.R. § 26.107(e).

ment of Labor Office of Labor Racketeering, the Internal Revenue Service Criminal Investigation Division, the U.S. Postal Inspection Service, and the Criminal Divisions of U.S. Attorneys' Offices, to conduct sophisticated, multifaceted criminal investigations. Rather than simply reviewing paper or electronic administrative records, such investigations are increasingly relying upon the use of confidential informants, undercover investigators, electronic surveillance, and other investigative tools originally developed for handling organized crime, narcotics and public corruption cases. In prosecuting such cases, the DOJ is making effective use not just of 18 U.S.C. § 1001, but also of other federal statutes with broader reach and stronger penalties, including the federal mail fraud, wire fraud, and Racketeer Influenced and Corrupt Organizations Act (RICO) statutes.[258] Such statutes can include penalties involving terms of federal imprisonment and fines of a size going well beyond traditional assumptions about penalties for white-collar crime. These efforts have resulted in some major convictions, plea bargains and civil settlements.

From 2009 to 2011, the U.S. Attorney, Eastern District of New York (EDNY), pursued federal criminal charges in a DBE fraud case involving Perini Corporation's Civil Division which had been investigated by a multi-agency Federal Construction Fraud Task Force. The case involved NYSDOT and New York City DOT highway and bridge projects totaling approximately $284 million. Prosecutors charged that Perini and its executives submitted DBE subcontractors to obtain award of the contracts, and then used a variety of non-DBE firms to do the actual work, paying the DBE firms three to five percent of the subcontract amounts for processing payroll and other required paperwork. The Perini Corporation paid $9.75 million under a civil settlement to resolve its potential corporate criminal and civil liabilities in the matter. This did not end prosecution of some of the individuals involved, however. After obtaining guilty pleas from owners of some of the DBE firms involved, the U.S. Attorney pursued criminal charges against two Perini executives. On October 29, 2010, John Athanasiou, a former Vice President of Perini Corporation's Civil Division, pled guilty to money laundering and conspiracy charges for his role in the case. Despite those guilty pleas, Zohrab B. Marashlian, the former President of Perini Corporation's Civil Division, who had been paid $14 million in salary and bonuses by Perini during the period involved, chose to take his case to trial. On March 9, 2011, following a 4-week trial, a federal jury found Mr. Marashlian guilty of mail fraud, conspiracy to launder money, and conspiracy to commit mail and wire fraud. Two days after being found guilty, while free on bond but facing a maximum possible sentence of 20 years' imprisonment, a fine of up to $23 million and criminal forfeiture of over $11 million, he committed suicide.[259]

In another DBE case pursued by the U.S. Attorney (EDNY), the Schiavone Construction Company, LLC, entered into a civil nonprosecution agreement with the U.S. Attorney's Office on November 29, 2010, in which it agreed to forfeit $20 million, admitted committing wire fraud and evading DBE requirements on $691 million in federal-aid contracts between 2002 and 2007, including two mass transit projects and a water treatment plant project, and agreed to undertake remedial measures to ensure compliance with the DBE program.[260]

In a DBE fraud case in New York pursued by the U.S. Attorney Southern District New York (SDNY), Skanska USA Civil Northeast Inc. entered into a nonprosecution agreement on March 31, 2011, under which it admitted no wrongdoing but agreed to pay $19.6 million to resolve allegations that it had been involved in DBE fraud. The nonprosecution agreement was announced on the same day that mail fraud and conspiracy indictments were unsealed against a DBE subcontractor, Environmental Energy Associates and two of its owners for helping Skanska evade DBE requirements; Skanska allegedly listed that firm as a DBE subcontractor to obtain the award of multiple federal-aid mass transit projects, even though the firm had no employees or equipment and performed no work.[261]

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[258] *See, e.g.*, 18 U.S.C. §§ 1341, 1343, 1349, 1962, and 1963.

[259] USDOT OIG, Former New York Construction Company Vice President Pleads Guilty in Connection with $19 million DBE Fraud, Oct. 29, 2010, available at http://www.oig.dot.gov/library-item/5431, last accessed on Nov. 18, 2011; U.S. Attorney (E.D.N.Y.), Press Release, Former President of Perini Corp. Civil Division Convicted in $19 Million Disadvantaged Business Entities Fraud, available at http://www.justice.gov/usao/nye/pr/2011/2011mar10b.html, last accessed on Oct. 18, 2011; John Marzulli & Brian Kates, *Construction Exec Commits Suicide Two Days Before Sentencing for $19M Federal Highway Fraud*, N.Y. DAILY NEWS, Mar. 14, 2011, available at http://articles.nydailynews.com/2011-03-14/news/29147042_1_perini-construction-exec-federal-highway, last accessed on Nov. 18, 2011.

[260] William Rashbaum, *Construction Giant Admits Fraud Over Minority Firms*, N.Y. TIMES, Nov. 29, 2010, available at http://www.nytimes.com/2010/11/30/nyregion/30fraud.html, last accessed on Nov. 18, 2010; U.S. Attorney (E.D.N.Y.), Press Release, Schiavone Construction to Pay $20 Million and Costs of Investigations to Resolve Public Works Hiring Fraud, Nov. 29, 2010, available at http://www.justice.gov/usao/nye/pr/2010/2010nov29.html, last accessed on Nov. 18, 2011.

[261] William K. Rashbaum, *Contractor Agrees to Pay $19.6 Million in Fraud Case*, N.Y. TIMES, Mar. 31, 2011, available at http://www.nytimes.com/2011/04/01/nyregion/01fraud.html, last accessed on Nov. 18, 2011; Debra K. Rubin, *Skanska Agrees to $19.6M Payment to Avoid Possible DBE Fraud Charges*, ENRNewYork, Apr. 4, 2011, available at http://newyork.construction.com/new_york_construction_news/2011/0404_SkanskaAgreesPayment.asp, last accessed on Nov. 18, 2011.

In a DBE fraud case in Pennsylvania investigated by a multi-agency federal task force and prosecuted by the U.S. Attorney, Middle District of Pennsylvania, Ernest G. Fink, a former part owner and chief operating officer of Schuylkill Products Inc. and its subsidiary CDS Engineers Inc., manufacturers of prefabricated concrete bridge beams used in federal-aid highway projects in Pennsylvania and surrounding states, pled guilty on August 16, 2010, to conspiracy to defraud USDOT and commit mail and wire fraud. In pleading guilty, Mr. Fink admitted that he used Marikina Construction Corp., a small DBE from Connecticut, to obtain more than 300Pennsylvania Department of Transportation (PennDOT) federal-aid highway contracts and Southeastern Pennsylvania Transit Authority (SEPTA) mass transit projects totaling $136 million over a period of 15 years that his own firms actually performed. Three other construction executives, Marikina owner Romeo P. Cruz, former Schuylkill Products Vice President Dennis F. Campbell, and former CDS Vice President Timothy G. Hubler, had already pled guilty in the case. The U.S. Attorney also indicted Mr. Fink's former co-owner and nephew, Joseph W. Nagle, in the case. His attorneys obtained a trial court ruling to allow Mr. Fink, who had not yet been sentenced following his guilty plea, to testify as a defense witness under a grant of immunity for anything he testified to, which the U.S. Attorney appealed to the U.S. Court of Appeals for the Third Circuit. On August 19, 2011, the Third Circuit refused to grant the appeal, effectively giving Mr. Fink immunity from anything he might testify to during Mr. Nagle's trial from being used against him in connection with his own sentencing on his prior guilty plea.[262] The case against Mr. Nagle went to trial, and the trial took 4 weeks. On April 5, 2012, the jury in the U.S. District Court for the Middle District of Pennsylvania found Mr. Nagle guilty on 26 of the 30 charges in the indictment, including conspiracy to defraud USDOT and commit wire and mail fraud, 11 counts of wire fraud, six counts of mail fraud, conspiracy to commit money laundering, and 11 counts of money laundering.[263]

In a DBE fraud case in Minnesota investigated by the USDOT OIG, the U.S. Attorney's Office (Minnesota), and the Civil Division of the DOJ, Minnesota Transit Constructors agreed on August 24, 2011, to pay the United States $4.6 million to resolve potential exposure to False Claims Act liability based on allegations that the firm committed to using DBE subcontractors to obtain a federal-aid light rail project contract, but then had the work performed by non-DBE subcontractors, with the DBE firms merely used to make it appear that they were doing the work. This case was interesting, in that it may be one of the first times that the False Claims Act has been used effectively for DBE enforcement purposes.[264]

c. Bidder Responsibility: Substitutions

Under USDOT's DBE regulations in effect as of the 2011 update to this volume, including the 2011 amendments to those regulations, state or municipal DOT awards of federal-aid contracts are, among other things, subject to 49 C.F.R. § 26.53. Pursuant to that regulation, when a state or municipal DOT or other recipient has established a DBE goal for a federal-aid project, it may only award the contract for the project to a bidder or offeror who either documents that it has obtained enough DBE participation to meet the goal, or documents that it made adequate good-faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so.[265]

The USDOT DBE regulations allow state or municipal DOTs or other recipients to choose between requiring submission of the necessary DBE documentation as part of the bidder's bid or offeror's offer, or in the alternative, prior to contract award. To document sufficient DBE participation, the bidder or offeror must submit at the required time a list identifying all DBE firms which will participate in the contract, including names and addresses, a description of the work that each DBE firm will perform, the dollar amount of each DBE's participation, written documentation of the contractor's commitment to use each DBE to perform such work, and written confirmation from each DBE that it will be participating as described.[266]

Because submission of an acceptable DBE participation plan identifying each DBE involved and the work it will perform is a legal condition precedent for state or

[262] *$136 Million Fraud—Orwigsburg Man Pleads Guilty in 15-Year Conspiracy to Defraud USDOT*, TIMES NEWS, Aug. 17, 2010, available at http://www.tnonline.com/2010/aug/17/136-million-fraud, last accessed on Nov. 18, 2011; U.S. Attorney (MDPa) Press Release, Former Owner of Schuylkill Products Pleads Guilty to Largest Disadvantaged Business Enterprise Fraud in USDOT History, Aug. 16, 2010, available at http://www.justice.gov/usao/pam/news/2010/Fink_08_16_10.htm, last accessed on Nov. 18, 2011; John Shiffman, *Rare Legal Gambit Succeeds in Fraud Case*, PHILADELPHIA INQUIRER, Aug. 19, 2011, available at http://articles.philly.com/2011-08-19/news/29905574_1_fraud-case-immunity-appeals, last accessed Nov. 18, 2011.

[263] Stephen J. Pytak, *Former Owner of Schuylkill Products Found Guilty in Historic Fraud Case*, REPUBLICAN HERALD, Apr. 7, 2012; available at http://republicanherald.com/news/former-owner-of-schuylkill-products-found-guilty-in-historic-fraud-case-1.1296623, last accessed July 26, 2012; *see also* Former President and Owner of Schuylkill Products Convicted in Largest Disadvantaged Business Enterprise Fraud in Nation's History, FBI press release, Apr. 6, 2012, available at http://www.fbi.gov/philadelphia/press-releases/2012/former-president-and-owner-of-schuylkill-products-convicted-in-largest-disadvantaged-business-enterprise-fraud-in-nations-history, last accessed July 26, 2012.

[264] U.S. Department of Justice Press Release, Minnesota Transit Constructors to Pay U.S. $4.6 Million to Resolve False Claims Act Liability, Aug. 24, 2011, available at http://www.justice.gov/opa/pr/2011/August/11-civ-1080.html, last accessed on Nov. 18, 2011.

[265] 49 C.F.R. § 26.53(a).

[266] 49 C.F.R. § 26.53(b).

municipal DOTs to obtain FHWA concurrence to award a federal-aid contract, contractors are not free simply to substitute other firms, even other certified DBEs, for approved DBE subcontractors listed in the project plan once the plan has been approved by the state DOT and FHWA and the contract has been awarded. USDOT's regulations expressly prohibit contractors from terminating any approved DBE and substituting another firm, without obtaining the state DOT's prior written approval, being able to demonstrate good cause for terminating the previously submitted DBE, and providing the previously submitted DBE with written notice and 5 days to respond.[267] USDOT does not leave the issue of "good cause" up to the unfettered discretion of either the contractor or the state DOT; to constitute "good cause" justifying the termination of a previously submitted DBE, the reason for termination must fit within one of nine specific reasons set forth in the regulations, or constitute "other good cause" in USDOT's view.[268]

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.[269] 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."[270]

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.[271]

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.[272] 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 M/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 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.[273]

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.[274]

d. Bidder Responsibility: Submission of Supplemental AAP Information After Bid Opening

As noted above, USDOT's DBE regulations give state or municipal DOTs or other recipients a choice between requiring bidders to submit the requisite DBE information as part of their sealed bids, or offerors in their offers; or, in the alternative, requiring them to submit such information prior to contract award.[275] Aside from the timing of submission, USDOT's regulatory requirements concerning the contents of such submissions are the same.[276]

Where the state DOT requires the information to be submitted as part of the sealed bid or offer, and 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.[277] The low bid was rejected as being

[267] 49 C.F.R. § 26.53(f).

[268] 49 C.F.R. § 26.53(f)(3).

[269] 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).

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

[271] 64 Fed. Reg. at 5115, 5134 (1999); 49 C.F.R. § 26.53(b)(3) (2000).

[272] 593 F. Supp. 529 (E.D. Pa. 1984).

[273] *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.

[274] 330 N.W.2d 693 (Minn. 1983).

[275] 49 C.F.R. § 26.53(b)(3).

[276] 49 C.F.R. § 26.53(b)(2).

[277] 577 F. Supp. 869 (E.D. Wis. 1984).

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.[278]

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.[279] 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.

USDOT's regulations do, as indicated above, allow state or municipal DOTs or other recipients the option of requiring bidders or offerors to submit their DBE plans subsequent to bid or offer opening, but prior to contract award. A variety of concerns have been expressed, however, 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.[280]

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.[281] 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 gives a bidder a substantial advantage or benefit not enjoyed by other bidders."[282] 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.[283]

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.[284] For these

[278] *Id*. at 871.

[279] 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).

[280] 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).

[281] 40 Wash. App. 480, 698 P.2d 1120 (1985).

[282] 698 P.2d at 1122 (quoting Duffy v. Village of Princeton, 240 Minn. 9, 60 N.W.2d 27, 29 (1953).

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

[284] *See* Section 2 for a discussion of prequalification and postqualification.

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.[285] 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.[286] 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.[287] The agency's subsequent determination is final and not appealable to USDOT.[288]

8. Certifications and Appeals

As discussed in Section 4(A)(1)(a)(6) and (7), above, state certification of DBEs is governed by USDOT regulations 49 C.F.R. Part 26 Subpart D.[289] Readers are referred to that section for a discussion of current (as of the 2011 update to this volume) USDOT requirements governing state certification organizations, practices, and procedures, which have been revamped in recent years. The following discussion of certification is retained from prior editions of this volume, but should be considered primarily for historical purposes, including case law that may have influenced the development of the USDOT regulations over time, rather than for practical application at this point.

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.[290]

Amendments to the DOT regulations were filed to implement the changes.[291] USDOT determined that it was already administering uniform standards for certification and added only a requirement that recipients compile and update their DBE directories annually.[292]

a. The Certification Process

Certification of DBEs 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.[293]

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 Small Business Act regulations.[294] As of 2000, this meant that the business concern or entity seeking certification had gross receipts of not more than $16.6 million as an average for the prior 3 years, but the Secretary has authority to adjust this amount for inflation, and has done so since that time.[295] Different figures and formulas apply as to certain specialty firms and manufacturers.[296]

Next, the entity must be owned and controlled by a qualifying disadvantaged individual or individuals.[297] 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.[298] 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.

[285] 64 Fed. Reg. at 5115.

[286] 49 C.F.R. § 26.53(d) (2000).

[287] 49 C.F.R. § 26.53(d)(2) (2000).

[288] 49 C.F.R. § 26.53(d)(5) (2000).

[289] 49 C.F.R. § 26.61 et seq.

[290] 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).

[291] 52 Fed. Reg. 39225-39231 (Oct. 21, 1987).

[292] 49 C.F.R. pt. 26, subpt. C, § 26.45 (f)(1) (Oct. 21, 1987).

[293] 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).

[294] *See* 5 U.S.C. § 632(a)(2001).

[295] 49 C.F.R. § 26.65(b) (2000).

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

[297] *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).

[298] 49 C.F.R. §§ 26.69, 26.71 (2000).

i. Ownership.—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.[299] 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.[300]

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.[301] 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."[302] 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…."[303]

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 non-disadvantaged 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.[304] 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."[305] 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.[306] 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."[307]

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.[308] 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 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.[309] 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.[310]

The district court held this to be an abuse of discretion.[311] 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

[299] 441 A.2d 660 (D.C. App. 1982).

[300] *Id*. at 668.

[301] 715 So. 2d 297 (Fla. App. 1998).

[302] 49 C.F.R. § 26.69(e) (2000).

[303] *Id.*

[304] 715 So. 2d at 298.

[305] 64 Fed. Reg. at 5118 (comment to 49 C.F.R. § 26.69(g)(2)).

[306] 49 C.F.R. § 26.69(h) (2000).

[307] *Id*.

[308] 12 F. Supp. 2d 25 (D.D.C. 1998).

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

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

[311] *Id*. at 28.

expertise alone was not enough to determine who has control.[312] 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."[313] 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."[314] 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.[315]

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.[316] 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.[317] 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.[318]

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.[319] 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.[320]

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.[321] 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 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."[322]

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

[312] *Id*. at 29.

[313] *Id*.

[314] 49 C.F.R. § 26.71(g) (2000).

[315] *Id*.

[316] 64 Fed. Reg. at 5122.

[317] 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).

[318] 49 C.F.R. § 26.81(e) (2000).

[319] 49 C.F.R. § 26.5 (2001).

[320] 49 C.F.R. § 26.67 (2000).

[321] 49 C.F.R. § 26.67 sets this limit at $750,000, excluding the assets of the firm being certified.

[322] 49 C.F.R. § 26.63 (2000).

must follow the challenge procedures and make a determination from the facts presented by all sides.[323]

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.[324]

c. Certification Denials, Challenges, and Appeals

The regulations provide that a denial of certification must be in writing.[325] The recipient is expected to establish a time period of no more than 12 months that the firm must wait to reapply.[326]

The applicant may appeal a denial of certification to USDOT.[327] Only USDOT has jurisdiction to consider such a denial of certification by a recipient agency.[328] 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.[329] 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.[330]

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.[331] 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.[332]

9. Counting DBE Participation

As discussed in Section 4(A)(1)(a)(vii), above, counting DBE participation is governed by USDOT regulations 49 C.F.R. Part 26 Subpart C.[333] Readers are referred to that section for a discussion of current (as of the 2011 update to this volume) USDOT requirements governing the counting of DBE certification, which have been revamped in recent years. The following discussion of counting DBE participation is retained from prior editions of this volume, but should be considered primarily for historical purposes, including case law that may have influenced the development of the USDOT regulations over time, rather than for practical application at this point.

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....[334]

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.[335] Section 26.55 addresses in detail what types of work, equipment rental, and purchase of materials count toward the DBE goal.[336]

If a DBE joint ventures with a non-DBE, only the portion of the work that the DBE joint venturer performs with its own forces may be counted toward the DBE goal.[337]

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[323] 49 C.F.R. § 26.87 (2000).

[324] 49 C.F.R. pt. 26, app. E.

[325] 49 C.F.R. § 26.85(a) (2000).

[326] 49 C.F.R. §26.85(b) (2000)

[327] 49 C.F.R. §§ 26.85(c), 26.87 (2000).

[328] 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).

[329] 49 C.F.R. § 26.89(c) (2000).

[330] 49 C.F.R. § 26.89(e) (2001).

[331] 49 C.F.R. § 26.87(d) (2000).

[332] 49 C.F.R. § 26.89(e) (2000).

[333] 49 C.F.R. § 26.41 et seq.

[334] 64 Fed. Reg. at 5115.

[335] 64 Fed. Reg. at 5115.

[336] 49 C.F.R. § 26.55 (2000).

[337] 49 C.F.R. § 26.55(b) (2000).

a. The Captive DBE and the Mentor–Protégé Program

As discussed in Section 4(A)(1)(a)(4) of this current volume, above, DBE mentor protégé programs are governed by USDOT regulations 49 C.F.R. Part 26 Subpart B.[338] Readers are referred to that section for a discussion of current USDOT requirements governing mentor protégé programs, which have been revamped in recent years. The following discussion of mentor protégé programs is retained from prior editions of this volume, but should be considered primarily for historical purposes, including case law which may have influenced the development of the USDOT regulations over time, rather than for practical application at this point.

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 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 protégé program in the 1999 rules. It permits established firms to assist fledgling firms in providing specialized assistance to satisfy a mutually beneficial special need.[339]

Only firms that have already been certified as DBEs are eligible to participate in a mentor protégé program. This is intended to prevent the use of "captive" protégé s that are set up by contractors to help them in meeting DBE goals.[340] The mentor and the protégé must enter into a written development plan to be approved by the state highway agency. The protégé 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 protégé 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 protégé 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.[341]

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."[342] 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.[343]

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.[344]

c. Monitoring Contract Compliance

As discussed in Section 4(A)(1)(a)(viii) and Section 4(A)(6), above, compliance and enforcement aspects of DBE programs are governed by USDOT regulations 49 C.F.R. Part 26 Subpart F.[345] Readers are referred to those sections for discussions of current (as of the 2012 update of this volume) USDOT requirements governing compliance and enforcement aspects of DBE programs, an area in which both the USDOT regulations and USDOT and state DOT administrative practices have been revamped extensively in recent years. The following discussion of compliance is retained from prior editions of this volume, but should be considered primarily for historical purposes, including case law which may have influenced the development of the USDOT regulations over time, rather than for practical application at this point.

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

[338] See especially 49 C.F.R. § 26.35.

[339] 49 C.F.R. § 26.35 and pt. 26, app. D (2000).

[340] 64 Fed. Reg. at 5107.

[341] 49 C.F.R. § 26.35 (b)(2)(i) (2000).

[342] 49 C.F.R. § 26.55(c) (2000).

[343] 49 C.F.R. § 26.55(c)(1) (2000).

[344] *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.

[345] 49 C.F.R. § 26.101 et seq.

rules are intended to verify that the work committed to DBEs at contract award is actually performed by them.[346]

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.[347] 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.[348] 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."[349] Some organizations and states have advocated 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.[350] 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.

10. Administrative Aspects of Management of DBE Issues by State DOTs

As discussed in Section 4(A)(1)(a)(iv), above, administrative aspects of the DBE program are governed by USDOT regulations 49 C.F.R. Part 26 Subpart B.[351] Readers are referred to that section for a discussion of current (as of the 2011 update of this volume) USDOT requirements governing USDOT requirements for state and municipal DOT administration of DBE requirements, which have been revamped in recent years.

The TRB considered administration of DBE programs by state and municipal DOTs and other recipients of federal aid for transportation projects to be of sufficient interest that the TRB's NCHRP commissioned a study, which was published in 2005.[352] While about 6 years old at the time of the 2011 revision of this volume, and not reflecting the significant amendments to the Federal DBE regulations enacted by USDOT's 2011 rulemaking, that publication remains the best general-purpose study available of state DOT administration of Federal DBE requirements. State and municipal DOT personnel involved in the administration of Federal DBE requirements on federal-aid highway and bridge projects would almost certainly find that publication worth consulting for its discussions of general administrative practices and contract administration practices involved in management of DBE requirements on transportation projects.

11. 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.

a. The Commerce Clause

The Commerce Clause prohibits the states from unduly burdening Interstate commerce in their regulatory activity.[353] 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.*[354] 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.[355]

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[346] 49 C.F.R. § 26.37 (2000).

[347] 49 C.F.R. § 26.53(f)(1) (2000).

[348] 49 C.F.R. § 26.53(f)(2) (2000).

[349] 49 C.F.R. § 26.37(a) (2000).

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

[351] 49 C.F.R. § 26.21 et seq.

[352] GARY SMITH, MANAGEMENT OF DISADVANTAGED BUSINESS ENTERPRISE ISSUES IN CONSTRUCTION CONTRACTING—A SYNTHESIS OF HIGHWAY PRACTICE (NCHRP Synthesis 343, Transportation Research Board, 2005).

[353] 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).

[354] 460 U.S. 204, 103 S. Ct. 1042, 75 L. Ed. 2d 201 (1983).

[355] *Id.* at 210.

In a later case, the Court of Appeals of Wisconsin upheld the DOT'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.[356] 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.[357]

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.[358]

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.[359] 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.[360] Second, the remedy was not narrowly tailored in that it gave a preference to all Alaska residents, regardless of their qualifications.[361] 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.[362]

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.[363] 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."[364]

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.[365] 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 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.[366]

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.[367] 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."[368] 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

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

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

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

[359] 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978).

[360] *Id*. at 526–27.

[361] *Id*. at 527.

[362] *Id*. at 530–31.

[363] 465 U.S. 208, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984).

[364] 465 U.S. at 222 (citations omitted).

[365] 80 Ill. Dec. 36, 102 Ill. 2d 295, 464 N.E.2d 1019 (1984).

[366] *Id.* at 1022.

[367] 694 P.2d 60 (Wyo. 1985).

[368] *Id*. at 63.

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.[369]

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.[370]

A bidding preference statute was upheld against an equal protection challenge in *Equitable Shipyards v. Washington State Department of Transportation.*[371] 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?"[372]

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.[373] 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."[374]

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.[375] 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."[376] It applied this standard to the regional preference statute, holding that the statute would be scrutinized "closely."[377] 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."[378]

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.[379] 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 has paid state taxes for the previous 2 years.[380] It did not require or even encourage contractors to hire state residents. Thus, the court found that the statute created a burden and not a benefit.[381] 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.[382]

In contrast, the Nevada Supreme Court found a very similar statute constitutional.[383] 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.[384] 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

[369] *Id.*

[370] 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.

[371] 93 Wash. 2d 465, 611 P.2d 396 (1980).

[372] *Id.*

[373] 611 P.2d at 404 (citations omitted).

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

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

[376] *Id.* at 632.

[377] *Id.* at 633.

[378] *Id.* at 634.

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

[380] *Id.* at 1069.

[381] *Id.*

[382] *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).

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

[384] *Id.* at 745.

extend the time period from 2 to 5 years, in order to "demonstrate a presence here even more convincingly."[385]

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,[386] the Secretary of Transportation and Federal Highway Administrator have promulgated regulations requiring the bidding procedure to be nondiscriminatory.[387] They have further required that the selection of labor to be employed by a contractor shall be of its own choosing.[388] Prohibition of discriminatory hiring practices is provided in the Required Contract Provisions for Federal-Aid Contracts.[389]

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…."[390]

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.[391] 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.[392] 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 performed.[393] 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.[394]

The Act also deals with related matters, including payment of fringe benefits,[395] withholding of contract funds from the contractor to assure compliance with the wage standards,[396] and termination of contracts because of failure to pay wages according to predetermined rates.[397] 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.[398]

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

[385] *Id*. at 746.

[386] 23 U.S.C. § 112(a).

[387] 23 C.F.R. § 635.107(e).

[388] 23 C.F.R. § 635.124(b), Claim Awards & Settlements; FHWA LABOR COMPLIANCE MANUAL, §§ 208-2, 508-3, app. C-9.

[389] 23 C.F.R. § 633.207.

[390] 67 Ohio St. 2d 356, 423 N.E.2d 1095, 1097 (1981).

[391] 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, at 1295.

[392] 40 U.S.C. §§ 276a-276a-7 now codified at 40 U.S.C. §§ 3141–3144 (2003).

[393] 40 U.S.C. § 3142(b) (2003).

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

[395] 40 U.S.C. § 3141(2)(B) (2002).

[396] 40 U.S.C. § 3142(c)(3) (2003).

[397] 40 U.S.C. § 3143 (2003).

[398] 40 U.S.C. § 3144 (2003).

to projects on roadways classified as local roads or rural minor collectors.[399] 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).[400]

Davis-Bacon requirements are also incorporated in relevant provisions of FHWA regulations, including 23 C.F.R. § 635.117(f), which provides that:

> (f) The advertisement or call for bids on any contract for the construction of a project located on the Federal-aid system either shall include the minimum wage rates determined by the Secretary of Labor to be prevailing on the same type of work on similar construction in the immediate locality or shall provide that such rates are set out in the bidding documents and shall further specify that such rates are a part of the contract covering the project.

FHWA regulations, 23 C.F.R. § 635.309(f) also provide in connection with FHWA authorization for state or municipal DOTs or other federal-aid recipients to advertise federal-aid highway or bridge projects for bid, that: "(f) Minimum wage rates determined by the Department of Labor in accordance with the provisions of 23 U.S.C. 113, are in effect and will not expire before the end of the period within which it can reasonably be expected that the contract will be awarded."

A variety of issues have arisen over the years regarding Davis-Bacon prevailing wage requirements for federal-aid projects. In 2008, the Director of FHWA's Office of Program Administration issued a memorandum to all FHWA Division Administrators, Directors of Field Services, and FHWA's Acting Resource Center Manager providing guidance in this area.[401] The memorandum addressed nine recurrent issues of interpretation. State or municipal DOT personnel involved in administration of Davis-Bacon requirements on federal-aid projects should refer directly to that memorandum for details. In brief, the memorandum indicated the following. FHWA interprets the scope of 23 U.S.C. §113 to include any construction work within the right-of-way of a federal-aid highway, including wetlands, landscaping, or other work that might not appear to be highway construction. FHWA also interprets the scope of 23 U.S.C. § 113, in light of 23 U.S.C. §101, to include arterials and collectors, but not to include highways classified as local roads or rural minor collectors. FHWA takes the position that Davis-Bacon requirements are triggered by use of federal-aid funding for any portion of a construction contract, regardless of the amount of federal-aid participation, but are not triggered by minor construction activities on a roadway which is not a federal-aid highway needed to connect to a federal-aid highway. FHWA further takes the position that emergency highway or bridge repair work performed under contract is subject to Davis-Bacon, but that emergency work involving only debris removal and related cleanup is not subject to Davis-Bacon. Emergency repairs performed by state or municipal agency employees are also not subject to Davis-Bacon. For projects involving railroad and utility relocation or adjustment, work performed by a construction contractor under a highway contract let by a state or municipal DOT is subject to Davis-Bacon, but work performed by railroads, utility companies, or contractors retained by them is not subject to Davis-Bacon. Subsurface utility engineering or location services are not subject to Davis-Bacon. Projects involving the building, alteration, or repair of ferryboats and terminals located on or servicing a federal-aid highway route are subject to Davis-Bacon. For High Priority and other congressionally designated projects located within the right-of-way of a federal-aid highway, Davis-Bacon applies. This includes rail line construction projects located within the right-of-way of a federal-aid highway, but not rail line construction projects located outside such right-of-way. Safe Routes to School and Non-motorized Transportation Pilot projects are subject to Davis-Bacon. Finally, warranty or repair work is subject to Davis-Bacon if such work is required in the original construction contract.

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 determina-

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[399] *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).

[400] 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).

[401] Dwight A. Horne, Director, FHWA Office of Program Administration, Memorandum, Information: Applicability of Prevailing Wage Rate Requirements to Federal-Aid Construction Projects, June 26, 2008; available at http://www.fhwa.dot.gov/construction/contracts/080625.pdf, last accessed on Nov. 20, 2011.

tion 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.[402]

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.[403] 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.[404]

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.[405] 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.[406] 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 furnished by state transportation agencies in consultation with the Administrator.[407]

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.[408]

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.[409] 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.[410]

The Davis Bacon Act requires the Secretary of Labor to set wage rates for the various classifications of work.[411] 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.[412]

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.[413] FHWA will approve state rates that are higher than the federal rates, recognizing the states' abilities to establish their own rates under state law.[414]

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[402] 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 399.

[403] 29 C.F.R. § 1.2(a)(1) (2001).

[404] 29 C.F.R. § 1.2(a)(1) (2001).

[405] 29 C.F.R. § 1.1(a) (2001).

[406] 29 C.F.R. § 1.3 (2001).

[407] 29 C.F.R. § 1.3(b) (2001).

[408] 29 C.F.R. § 1.4 (2001).

[409] 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).

[410] *Id.* 783 P.2d at 1124.

[411] 40 U.S.C. § 3142(b) (2003).

[412] 23 U.S.C. § 113(b) (2001).

[413] *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).

[414] *See* CACC Manual, *supra* note 399, at section II.A.4.

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.[415] 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.[416]

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.[417]

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.[418]

Once the Secretary of Labor has made a wage rate determination, its correctness is not subject to judicial review.[419] 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.[420] If the Administrator denies reconsideration, the interested party may appeal the determination to the Administrative Review Board.[421] 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.[422]

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.[423]

[415] 29 C.F.R. § 1.5(b) (2001).

[416] CACC Manual, *supra* note 399.

[417] 29 C.F.R. § 1.5(a) (2001).

[418] 29 C.F.R. § 1.6(b) (2001).

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

[420] 29 C.F.R. § 1.8 (2001).

[421] 29 C.F.R. § 1.9; 29 C.F.R. pt. 7 (2001).

[422] 29 C.F.R. § 7.2 (b) (2001).

[423] 29 C.F.R. § 7.4(b) (2001).

The transportation agency is required to incorporate the published applicable wage determinations in federal-aid contracts.[424] 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.[425]

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.[426] 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. [427]

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.[428]

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.[429] Ordinarily this is an hourly rate; however, it may be

[424] CACC Manual, *supra* note 399.

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

[426] 40 U.S.C. § 3141 (2003).

[427] 40 U.S.C. § 3141(2)(B) (2003).

[428] *Id.*

[429] 29 C.F.R. § 5.25 (2001).

expressed as a formula or a method of payment that can be converted into an hourly rate.[430] 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.[431] 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.[432]

Determination of contribution rates is facilitated when a regularly established fund, plan, or program is involved.[433] 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.[434] 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.[435] 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.[436]

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*.[437] 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.[438]

The court noted that under Davis-Bacon, the employer's obligation may be met either solely by payment 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.[439] 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.[440]

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."[441] 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.[442] 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.[443] 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.[444] 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

[430] 29 C.F.R. § 5.25(b) (2001).

[431] 29 C.F.R. § 5.26 (2001).

[432] *Id.*

[433] 29 C.F.R. § 5.27 (2001).

[434] 29 C.F.R. § 5.28 (2001).

[435] 40 U.S.C. § 3141(2)(B)(ii) (2003); 29 C.F.R. § 5.28(b) (2001).

[436] 29 C.F.R. § 5.28(c) (2001).

[437] 312 U.S. App. D.C. 67, 54 F.3d 900 (D.C. Cir. 1995).

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

[439] *Id.* 54 F.3d at 902.

[440] *Id.*

[441] *Id.* at 903.

[442] *Id*. at 902.

[443] *Id*. at 904.

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

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.[445] 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."[446]

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 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."[447]

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;…."[448]

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).[449] 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.[450]

The District of Columbia Circuit interpreted that language as not including workers employed at borrow pits and batch plants located about 2 mis away from the project, and overruled a contrary interpretation by the Secretary of Labor.[451] 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 mi 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."[452] 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."[453] 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.[454] 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.[455] 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.[456] The Davis-Bacon Act and state equivalent statutes allow payment of reduced wages to

[445] CACC Manual, *supra* note 399.

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

[447] 40 U.S.C. § 3142(c)(1) (2003).

[448] 29 C.F.R. § 5.2(l)(1) (2001).

[449] 29 C.F.R. § 5.2(l)(2) (2001).

[450] 29 C.F.R. § 5.2(l)(3) (2001); *see also* CACC Manual, *supra* note 399.

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

[452] 101 F.3d 1111, 1115 (6th Cir. 1996).

[453] *Id.*

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

[455] 29 C.F.R. § 5.2(m) (2001).

[456] 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*.

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.[457] The Department of Labor determines the adequacy of apprenticeship programs through its Bureau of Apprenticeship and Training.[458] States may apply similar standards to their own apprenticeship programs.[459] 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.[460]

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."[461]

The implications of this exception were considered in *Siuslaw Concrete Construction Company v. State of Washington, Department of Transportation*.[462] 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.

State apprenticeship programs may not, however, impermissibly discriminate against out-of-state contractors. In a 2011 decision, *Tri-M Group, LLC v. Sharp*, the U.S. Court of Appeals for the Third Circuit affirmed a decision by the U.S. District Court for the District of Delaware, which held that the State of Delaware's refusal to recognize out-of-state registered apprentices discriminated against out-of-state contractors without advancing a legitimate state interest, in violation of the dormant Commerce Clause.[463] Until stopped by the courts, Delaware's Department of Labor had administered its state apprenticeship program requirements to allow in-state public works contractors to pay a reduced apprentice rate to Delaware-registered apprentices, while prohibiting out-of-state contractors from sponsoring an in-state apprenticeship program, and requiring them to pay the higher mechanic's rate to apprentices registered elsewhere than Delaware, unless they set up and maintained a permanent office location within Delaware.

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.[464] It also serves to protect employers by eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans.[465] To this end, ERISA includes a preemption clause.[466] However, it is not intended to preempt areas of traditional state regulation.[467]

Issues arose among courts as to whether the states' requirements for apprenticeship programs were preempted by ERISA.[468] 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.[469] 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

[457] 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….

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

[459] *See* Cal. 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).

[460] *Id.*

[461] 23 U.S.C. § 113(c) (2001).

[462] 784 F.2d 952 (9th Cir. 1986).

[463] 638 F.3d 406 (3d Cir. 2011).

[464] 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)).

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

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

[467] 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).

[468] *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).

[469] 57 F.3d 712 (9th Cir. 1995).

Ninth Circuit came to the same conclusion regarding the State of Washington's apprenticeship program.[470]

In a similar case, the Eighth Circuit held that Minnesota's apprenticeship program was not preempted by ERISA.[471] 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.[472]

The United States Supreme Court took the opportunity to resolve this issue in its review of the Ninth Circuit's decision in *Dillingham Construction*.[473] 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.[474] 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.[475]

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 concerned—'reporting, disclosure, fiduciary responsibility, and the like.'"[476]

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."[477]

In a 2004 decision, the U.S. Court of Appeals for the Ninth Circuit followed the U.S. Supreme Court's ruling in *Dillingham*, holding in *Associated Building Contractors of Southern California Inc. v. Nunn et al.*[478] that ERISA did not preempt amendments to California statutes which established minimum wages and benefits on public and private construction projects for state-registered apprentices.

In a 2006 decision, *Oregon-Columbia Brick Masons v. Or. Bureau of Labor & Indus.*, the U.S. Court of Appeals for the Ninth Circuit affirmed a ruling by the U.S. District Court for the District of Oregon that ERISA did not preempt certain Oregon state statutes, regulations, and actions concerning apprenticeship programs.[479] After the Oregon State Apprenticeship and Training Council rejected certain unions' applications to register as apprenticeship programs, on the grounds that they did not offer any programs that satisfied any needs unmet by existing programs, under a state statutory needs provision. Rejecting a claim that federal funding made the state laws, regulations, and actions subject to preemption by ERISA, the court found that the state needs requirement did not distinguish between funded and unfunded plans and was thus not tied to the issue of federal funding.

In a 2008 decision, the U.S. Court of Appeals for the Sixth Circuit revisited a 1992 ruling that ERISA had preempted two state apprentice-training requirements. In *Associated Builders & Contractors, Saginaw Valley Area Chapter, et al. v. Michigan Department of Labor and Economic Growth*,[480] the Sixth Circuit reversed a lower court decision denying a state government motion to dissolve a federal injunction, issued in 1992,[481] which had prevented the state from enforcing two state apprentice-training requirements. The 1992 injunction had been based on a determination that ERISA had preempted the state apprentice-training requirements. The state had complied with the injunction for many years, but sought to dissolve it in light of the U.S. Supreme Court's decision in the *Dillingham* case, discussed above. Overturning a lower court, the Sixth Circuit held that the 1992 injunction had to be dissolved, and the state had to be allowed to enforce its apprentice-training requirements, in light of the *Dillingham* case.

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

[471] 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*.

[472] *Id.* at 979.

[473] Cal. Div. of Labor Standards v. Dillingham, 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997).

[474] *Id.* 117 S. Ct. at 837.

[475] *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).

[476] *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)).

[477] *Id.* at 842.

[479] 356 F.3d 979 (9th Cir. 2004).

[479] 2003 U.S. Dist. LEXIS 28066 (D. Or. Sept. 18, 2003).

[480] 543 F.3d 275 (6th Cir. 2008.

[481] 817 F. Supp. 49, 54 (E.D. Mich. 1992).

Apprenticeship programs do not stand alone, and interact with other programs as well. In a 2010 decision, *Johnson, et al. v. Rancho Santiago Community College District, et al.*, the U.S. Court of Appeals for the Ninth Circuit affirmed most of a decision by the U.S. District Court for the Central District of California granting summary judgment to defendants in a case filed by nonunion apprentices claiming that a college district's decision to participate in a project labor agreement (PLA) violated their due process and equal protection rights and also violated ERISA and the National Labor Relations Act (NLRA).[482] The PLA required all contractors and subcontractors on covered projects to agree to the PLA, required that contractors use union hiring halls to obtain workers, and required that all workers on covered projects become union members within 7 days of their employment. The Ninth Circuit held that entering into the PLA constituted market participation not subject to preemption by ERISA or the NLRA, reflected an interest in the efficient procurement of goods and services, and did not violate the nonunion apprentices' constitutional rights. The Court noted that there was no law requiring that non-union apprentices remain eligible for all construction projects; and that the PLA did not deprive the nonunion apprentices of the opportunity to pursue careers as electricians because they were free to join a union apprenticeship program supplying workers for the college district's projects. The only regard in which the Ninth Circuit modified the District Court's decision was to dismiss ERISA preemption claims by apprentices who had graduated from their apprenticeship programs, indicating that those claims were moot because they did not have reasonable expectations of being subject to a PLA as apprentices again. The U.S. Supreme Court subsequently denied certiorari.

Considering another aspect of the relationship between apprenticeship programs and ERISA, the U.S. Court of Appeals ruled in a 2009 case, *In Re: Halpin*, upholding decisions by a U.S. bankruptcy court and the U.S. District Court Northern District of New York (NDNY), that after an electrical contractor filed for bankruptcy, the debtor's unpaid contributions to union apprenticeship and other benefit funds were not "assets" within the meaning of ERISA, so the contractor was not a fiduciary over those funds and could not be held personally liable for their nonpayment despite the bankruptcy filing.[483]

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.[484] 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.[485] 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.

g. State "Prevailing Wage" Laws

As discussed above, federal-aid highway and bridge projects are subject to federal Davis-Bacon requirements.

The Davis-Bacon Act expressly includes the District of Columbia within its provisions. Thus, while Washington, D.C., may not have its own local prevailing wage law, construction projects within that city are subject to Davis-Bacon requirements.

Aside from the Federal Davis-Bacon Act, 32 of the 50 states in the United States have established their own prevailing wage requirements, which will apply to highway and bridge projects even when such projects are funded entirely with state or municipal funding, and no federal-aid funding is involved which would trigger Davis-Bacon requirements. The states that have done so include Alaska, Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, the State of Washington, West Virginia, Wisconsin, and Wyoming.

There are eight states that reportedly have never enacted any state prevailing wage laws: Georgia, Iowa, Mississippi, North Carolina, North Dakota, South Carolina, South Dakota, and Virginia.[486] In addition, there are nine other states that used to have state prevailing wage laws, in which such laws have been repealed or held unconstitutional by state courts: Alabama, Arizona, Colorado, Florida, Idaho, Kansas, Louisiana, New Hampshire, and Oklahoma.[487]

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[482] Johnson et al. v. Rancho Santiago Comm. College Dist., 623 F.3d 1011.

[483] Rahm v. Halpin, 370 B.R. 45, 2007 U.S. Dist. LEXIS 41524 (N.D.N.Y. 2007).

[484] 501 N.Y.S.2d 653, 492 N.E.2d 781, 67 N.Y.2d 854 (1986).

[485] N.Y. GEN. MUN. LAW § 103.

[486] George C. Leef, *Prevailing Wage Laws: Public Interest or Special Interest Legislation*, 30 CATO JOURNAL, No. 1, 137, 139 (2010; available at http://www.cato.org/pubs/journal/cj30n1/cj30n1-7.pdf, last accessed on Nov. 17, 2010.

[487] *Id.*

State and municipal DOTs located in states with prevailing wage laws, and contractors and subcontractors working in those states, should become familiar with the applicable state prevailing wage statutes and regulations, as those will apply even to projects that do not involve any federal-aid funding. Such prevailing wage requirements may vary from state to state, and it is beyond the scope of this current volume to provide a detailed survey of all such provisions. The Associated Builders and Contractors, Inc. (ABC), a trade association of construction contractors, has however established a Web site that provides links to information on the prevailing wage statutes, regulations, and other related requirements in the states with state prevailing wage requirements listed above.[488]

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)[489] and the Contract Work Hours and Safety Standards Act of 1962.[490] 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.[491] 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.[492]

The language of the FLSA is directed to "persons engaged in commerce, or in the production of goods for commerce."[493] 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.[494] 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.[495]

In recent years, the longstanding requirements described above have been supplemented by the regulations of the U.S. Department of Labor's OSHA under the Contract Work Hours and Safety Standards Act of 1962. In particular, OSHA considers work performed by contractors on highway and bridge construction, reconstruction, rehabilitation, and repair projects to be subject to 29 C.F.R. Part 1926, Safety and Health Regulations for Construction.

At the time of the 2011 update to this current volume, 29 C.F.R. Part 1926 includes 28 subparts, each of which includes multiple sections. Every state and municipal DOT undertaking and exercising construction inspection over federal-aid highway and bridge projects, and every contractor and subcontractor working on such projects, should have personnel thoroughly familiar with the requirements of Part 1926. These regulations are too lengthy and complex to be summarized readily in this volume. It is, however, worth focusing briefly on OSHA regulations applicable to two areas in which fatal or serious personal injury construction accidents occur all too frequently on highway and bridge construction projects.

The first such area involves falls from elevated structures. OSHA safety requirements applicable to work on elevated structures include 29 C.F.R. §§ 1926.28, "Personal protective equipment;" 1926.104, "Safety belts, lifelines, and lanyards;" 1926.105, "Safety nets," 1926.106, "Working over or near water," 1926 Subpart L (§§ 1926.450 *et seq*.), "Scaffolds," 1926 Subpart M (§§ 1926.500 *et seq*.), "Fall protection," 1926 Subpart R (§§ 1926.750 et seq.), "Steel erection," especially § 1926.760, "Fall protection," and 1926 Subpart X (§§ 1926.1050 *et seq*.), "Ladders."

OSHA considers contractors responsible to ensure that construction workers on bridge projects and on highway projects involving work on elevated structures or in elevated locations not only have fall protection equipment in good working condition, but also use such equipment in performing their work. Aside from such personal protective equipment, OSHA also expects that elevated work areas be equipped with scaffolds and/or safety nets complying with OSHA requirements, and

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[488] Associated Builders and Contractors, Inc., State Prevailing Wage Laws, 2008.

[489] 29 U.S.C. §§ 201–19 (2001).

[490] 40 U.S.C. §§ 327–34 (2001).

[491] 29 U.S.C. § 207 *et. seq.* (2001); 40 U.S.C. § 328(a) (2001).

[492] 40 U.S.C. § 333 (2001).

[493] 29 U.S.C. §§ 202(a).

[494] 40 U.S.C. §§ 328–29.

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

that equipment for projects involving work on elevated areas over water also includes life preservers or bouyant work vests, ring buoys with at least 90 ft of line spaced no more than 200 ft apart, and at least one lifesaving skiff (boat) available for rescuing any employees who fall into the water. Any contractor whose personnel have a fatal or serious personal injury accident involving a fall from structure on a highway or bridge project, where OSHA determines that the safety equipment required by these regulations was not available at the project site, was not in good repair, or was not in use, can expect to incur concerted OSHA enforcement action, beginning with immediate shutdown of the construction project and in all likelihood resulting in very substantial fines.

The second such area involves the collapse of trenches or excavations. The applicable OSHA regulations are found in 29 C.F.R. Part 1926 Subpart P (§§ 1926.650 *et seq.*), "Excavations," particularly § 1926.651, "Specific excavation requirements," and § 1926.652, "Requirements for protective systems." There are a number of detailed requirements in OSHA's excavation regulations that state and municipal DOTs and contractors need to be familiar with, but among the most important are the requirements for adequate sloping or benching systems and shoring of all excavations, except for those made entirely in stable rock or those less than 5 ft deep, to protect employees against caveins, which could bury them alive in soil. Any contractor whose personnel have a fatal or serious personal injury accident involving a cave-in of an excavation on a highway or bridge project, and who has failed to employ adequate sloping, benching, and shoring of excavations to protect employees against cave-ins, can expect to incur concerted OSHA enforcement action, beginning with immediate shutdown of the construction project and in all likelihood resulting in very substantial fines.

Both because the protection of construction workers' lives and safety is important, and because the consequences following fatal or serious personal injury accidents can be quite severe for all concerned, state and municipal DOTs and their contractors would be well advised to pay focused and ongoing attention to full compliance with all safety requirements required by OSHA regulations for work on elevated structures and work in excavations. OSHA enforcement personnel generally consider fatal and serious personal injury construction accidents involving falls from elevated structures or cave-ins of excavations to be almost entirely preventable occurrences, consider contractors on whose construction sites such accidents occur to be culpable, and often seek to apply the maximum penalties possible under the circumstances. As OSHA takes such matters very seriously, contractors and state and municipal DOTs or other owners should not have high expectations regarding cooperation about the duration of project shutdowns for OSHA investigations or about leniency in OSHA's selection of administrative charges or penalties against contractors.

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.[496] These statements are submitted to the contracting agency.[497] The contracting agency should review these statements for completeness, checking periodically items such as classification, hourly rates, fringe benefits, and overtime pay.[498]

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.[499] 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 pay those funds directly to laborers and mechanics who have not been paid the wages due to them.[500] Contractors who have failed to meet their obligations under the Davis-Bacon Act are also subject to debarment for a period of 3 years.[501]

4. Project Labor Agreements

The NLRA allows the formation of PLAs on public works projects.[502] PLAs 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 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. Executive Order 13502 of 2009

PLAs are the subject of a Presidential EO No. 13502, issued on February 6, 2009. [503] This EO sets forth na-

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[496] 29 C.F.R. § 3.3(b) (2001).

[497] 29 C.F.R. § 3.4(a) (2001).

[498] CACC Manual, *supra* note 399.

[499] Required Contract Provisions, *supra* note 495, § IV.8; 29 C.F.R. § 5.8 (2001).

[500] 40 U.S.C. § 3144 (2003).

[501] *Id.*

[502] 29 U.S.C. §§ 158(e), (f).

[503] Presidential Executive Order No. 13502, issued on Feb. 6, 2009, 74 Fed. Reg. 6985, Feb. 11, 2009. Note that Executive Order No. 13502 of Feb. 6, 2009, rescinds prior Executive Orders Nos. 13202 of Feb. 17, 2001, and 13208 of Apr. 6, 2001, and directs the heads of federal agencies to revoke expeditiously any agency orders, rules, or regulations implementing those prior Executive Orders.

tional policy on the use of PLAs on large-scale federal construction contracts, defined as highway or other construction, repair, rehabilitation, alteration, or improvement projects undertaken by federal agencies through contractors where the total cost of such a project is $25 million or more.[504]

Finding that labor disputes on large projects, especially complex projects involving multiple contractors, can be unusually disruptive, the EO declares it to be the policy of the Federal Government to encourage federal agencies to consider requiring the use of PLAs on large federal projects.[505] EO authorizes federal agencies, when awarding contracts in connection with large-scale projects, to determine on a case-by-case basis whether use of a PLA would help to achieve economy and efficiency in federal procurement, producing labor management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and be consistent with law.[506] If a federal agency finds that such circumstances exist, the agency is authorized, if appropriate, to require that every contractor or subcontractor on the project agree, for that project, to negotiate or become a party to a PLA with one or more appropriate labor organizations.[507]

If a federal agency decides to use a PLA on a large and complex project, the EO authorizes such a PLA to bind all contractors and subcontractors on the project through the inclusion of appropriate language in all project solicitation and contract documents; to allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements; to contain guarantees against strikes, lockouts, and similar job disruptions; and to provide effective, prompt, and mutually binding procedures for resolving labor disputes arising during the PLA.[508]

The EO does not, however, require federal agencies to use PLAs on all federal projects or preclude the use of PLAs in circumstances not covered in the EO. It also does not require contractors or subcontractors to enter into PLAs with any particular labor organization.[509]

The EO directs the Federal Acquisition Regulatory Council to amend the FARs to implement the provisions of the Order within 120 days after the date of the Order.[510]

While encouraging federal agencies (including USDOT), EO 13502 does not expressly require state or municipal DOTs or other recipients of federal-aid funding to enter into PLAs on all projects. The EO does, however, direct the head of OMB, in consultation with the Secretary of Labor and others as appropriate, to provide the President with recommendations within 180 days after issuance of the Order concerning whether broader use of PLAs, with respect both to federal construction contracts and "construction projects receiving federal financial assistance," would help to promote the economical, efficient, and timely completion of such projects.[511]

b. FHWA Administrative Guidance to States

On May 7, 2010, just over a year after the issuance of EO 13502, FHWA's Administrator issued a memorandum, "Interim Guidance on the use of Project Labor Agreements," to all FHWA Division Administrators and FHWA Directors of Field Services nationwide, providing FHWA's administrative interpretation of it. [512] He indicated that this memorandum superseded FHWA's prior October 5, 2001, administrative guidance on PLAs. The memorandum was characterized as providing "interim" guidance because OMB had not yet provided the President with recommendations concerning the use of PLAs on federal-aid projects. The Administrator indicated that when OMB did so, he would provide further guidance conforming to OMB's recommendations.

The FHWA guidance memorandum indicates that a state DOT wishing to obtain FHWA consent to require a contractor on a federal-aid project to use a PLA may submit a written appliucation to the appropriate FHWA Division Office. The application must assert that the use of a PLA for the particular federal-aid project involved will advance the interest of the government, describing the basis for that determination and providing reasonable documentation demonstrating its factual underpinnings; and that the PLA will be consistent with law. While the EO applies only to large-scale projects costing $25 million or more, the memorandum indicates that FHWA will consider state DOT requests for use of PLAs on federal-aid projects of less than $25 million if the project would otherwise comply with FHWA's guidance.

The FHWA guidance memorandum indicates that, to satisfy the requirement that the use of a PLA will advance the interest of the government, the state DOT must make a reasonable showing that the use of a PLA on the project will advance the interest of the government in reducing construction costs and achieving economy and efficiency, producing labor management stabuility, and assure compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment

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[504] Presidential Executive Order No. 13502, at § 2 (b) through (e).

[505] Presidential Executive Order No. 13502, at § 1(b) of that Order.

[506] Presidential Executive Order No. 13502, at § 3(a).

[507] Presidential Executive Order No. 13502, at § 3(b).

[508] Presidential Executive Order No. 13502, at § 4.

[509] Presidential Executive Order No. 13502, at § 5.

[510] Presidential Executive Order No. 13502, at § 6.

[511] Presidential Executive Order No. 13502, at § 7.

[512] FHWA Memorandum, Interim Guidance on the use of Project Labor Agreements, May 7, 2010; available at http://www.fhwa.dot.gov/construction/contracts/100507.cfm, most recently accessed on Nov. 19, 2011.

standards, and other matters as appropriate. The memorandum lists factors which state DOTs may consider in doing so, including, but not limited to the size and complexity of the project; the importance of the project and the need to adhere to a certain timeline; the risk of labor unrest on the project and any circumstances that may lead to a heightened risk of labor disruption (providing several examples omitted here); the impacts of a labor disruption to the users, the operation of the facility, and the region; the costs of delay should a labor disruption occur; and the available labor pool relative to the particular skills required to complete the project. In addition to stating that any one or more of these factors may be adequate to justify the use of a PLA, the memorandum indicates that this is not an exclusive list, and that other factors may also reasonably permit a state to conclude that the use of a PLA is appropriate. If the state DOT provides evidence that FHWA's Division Office considers reasobly adequate, the Division Office may consider the requirement for advancing government interest satisfied, unless it has some reason for concern that the state DOT's conclusion or evidence is incomplete or inadequate.[513]

In reviewing PLAs, FHWA Division Offices will also check to ensure that they are in compliance with law. Among other things, PLAs must be used and structured in such a manner as to be effective in securing competition. They must not prohibit any contractor from bidding for or working as a subcontractor on the project and must lead to a cost-effective use of federal funds.[514] The latter requirement can be satisfied by the same evidence showing that the PLA is in the interest of the government. PLAs must be in compliance with DBE requirements,[515] FHWA restrictions on the use of labor employment preferences,[516] EEO requirements,[517] and all other applicable Title 23 U.S.C. and C.F.R. requirements.

In considering state PLA requests, FHWA Division Offices will also review the terms of the PLAs, which must meet a series of requirements to be valid. They must bind all contractors and subcontractors on the project through inclusion of appropriate specifications in all solicitations and contract documents. They must allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements. They must include guarantees against strikes, lockouts, or other job disruptions. They must incorporate procedures for resolving labor disputes on the project which are mutually binding, prompt, and effective. They must also provide mechanisms for labor management cooperation on productivity, quality of work, safety, health, and other issues of mutual concern. Finally, they must also fully conform to all statutes, regulations, and EOs.[518]

As the EO does not make PLAs mandatory, and FHWA's guidance memorandum makes the process for PLA review and approval dependent upon a state DOT first submitting a request for such approval, current federal policy grants state DOTs discretion over whether to request the use of PLAs on their projects or not. In actual practice, their use will depend upon the policy perspectives of the various state governments regarding the usefulness and appropriateness of PLAs. If a state DOT chooses to use PLAs on major projects, however, the EO and FHWA's guidance memorandum provide clear procedures and guidelines for them to follow in doing so. Following the federal procedures and guidelines and obtaining FHWA approval should, in turn, make PLAs more defensible if challenged through judicial review.

c. 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.[519] 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."[520] 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.[521] The

[513] *Id.* at 2–3.

[514] 23 C.F.R. § 112.

[515] 49 C.F.R. pt. 26.

[516] 23 C.F.R. § 635.117(b).

[517] 23 C.F.R. pt. 230.

[518] FHWA, *supra* note 513, at 3.

[519] 507 U.S. 218, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993).

[520] 113 S. Ct. at 1194 (citing 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)).

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

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.[522]

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.[523] 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.[524] 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.[525]

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.[526] 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) requirements that all contractors and subcontractors agree to be bound by the PLA.[527]

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."[528] *Garmon* holds that the NLRA preempts state regulation, even of activities that NLRA only arguably prohibits or protects.[529] 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.[530] However, this doctrine applies only to the state's role as a regulator, and not to its activities as a construction project owner.[531]

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 emploer 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."[532] 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.[533]

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.[534] 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.

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[522] *Id*. at 1198.

[523] *Id*. at 1197.

[524] *Id*.

[525] *Id*. at 1198.

[526] 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).

[527] 113 S. Ct. at 1193.

[528] *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)).

[529] *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).

[530] *Id*.

[531] *Id.* at 1196.

[532] 29 U.S.C. § 152(2).

[533] 113 S. Ct. at 1198.

[534] 825 F. Supp. 238 (D. Minn. 1993); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144.

ii. Former Executive Order 13202.—President Obama's EO No. 13502 of 2009 (discussed above), the EO governing the use of PLAs on federal-aid projects at the time the 2012 update to this volume was being prepared, replaced two prior EOs concerning the same subject.

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.[535] 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 President Clinton's memorandum and extended the PLA prohibition to federally assisted projects.

EO 13202 required 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 were awarded by recipients of federal funds might

(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).[536]

EO 13202 allowed an exemption for "special circumstances…in order to avert an imminent threat to public health or safety or to serve the national security."[537] However, it also provided that the possibility of a labor dispute is not such a "special circumstance."[538]

EO 13202 did not prohibit voluntary agreements between contractors or subcontractors and labor unions.[539] FHWA, under EO 13202, did not consider such an agreement to be a PLA where it was not required by the owner agency in the construction contract.[540]

EO 13202 was challenged by labor unions in *Building and Construction Trades Department, AFL-CIO v. Allbaugh*.[541] 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.[542]

In a 2011 ruling in *Idaho Building and Construction Trades Council, AFL-CIO, et ano., v. Wasden*, the U.S. District Court for the District of Idaho, ruling on cross motions for summary judgment, has granted two unions summary judgment and denied the Attorney General of Idaho's motion for summary judgment, holding two amendments to Idaho's Right To Work Act, the Open Access to Work Act and the Fairness in Contracting Act, to interfere with and be preempted by the NLRA.[543] The Open Access to Work Act prohibited state and municipal agencies in Idaho from entering into project labor agreements or otherwise requiring contractors to pay any specified wage scale or provide specified employee benefits except as required by federal wage laws applicable to federally-funded public works projects, and imposed state criminal penalties for any violations. The Fairness in Contracting Act prohibited certain conduct related to what unions refer to as "job targeting programs," prohibiting contractors and subcontractors from receiving any wage subsidies on behalf of its employees, prohibiting unions from paying any wages subsidies to its members in order to subsidize a contractor or subcontractor, and prohibiting any funds derived from wages and collected by unions to subsidize contractors or subcontractoras. In attempting to defend the statutes, the State Attorney General was supported by amicus briefs filed by a contractors; trade association and by the National Right to Work Legal Foundation. Discussing federal case law concerning NLRA preemption of state regulation of labor unions under *Garmon, Machinists, Boston Harbor*, and subsequent leading federal precedents, the Court found both statutes preempted by the NLRA under multiple federal precedents.

In another 2011 ruling, in *Building Industry Electrical Contractors Association et ano. v. City of New York et ano.*, the U.S. District Court for the Southern District of New York held, in the face of a challenge by contractors' trade associations, that certain PLAs entered into by New York City agencies under the provisions of a New York State statute enacted in 2008, State Labor Law Section 222, which exempted municipal projects from compliance with the requirements of New York State's Wicks Law (Section 101 of the General Municipal Law) where the municipal agencies pursuing the projects were operating under a PLA. In late 2009, the Mayor of New York City anounced that the City had entered into three major PLAs covering rehabilitation and renovation of City-owned structures, eight specified new construction projects for the City Department of Design and

[535] *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.

[536] E.O. 13202.

[537] E.O. 13202 § 5.

[538] *Id.*

[539] *Id.*; *see also* CACC Manual, *supra* note 535.

[540] *Id.*

[541] 295 F.3d 28 (D.C. Cir. 2002).

[542] *Id*.

[543] 836 F. Supp. 2d 1146 (U.S. Dist. Ct. Idaho 2011).

Construction, and three new projects for the City Department of Sanitation. The contractors' trade associations claimed that the PLAs were preempted by the NLRA and that they violated contractors' rights under 42 U.S.C. § 1983. They also sought for the court to exercise supplemental jurisdiction over state law claims challenging the PLAs as arbitrary, capricious, and an abuse of discretion under New York State's Civil Practice Law and Rules Article 78. Following a detailed analysis, the court found the PLAs in question to represent proprietary rather than regulatory conduct by the City, and therefore held that the PLAs were not preempted by the NLRA or violative of § 1983. The court also declined to exercise supplemental jurisdiction to determine state law Article 78 claims, which it said would be more appropriately heard in state court.

d. 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*.[544] 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.[545]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.[546] The court thus concluded that the agency needed specific statutory authority to use a PLA 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.[547] 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."[548] In reversing the trial court, the Appellate Division assumed that the use of a PLA discourages competition in the bidding process.[549] 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.[550] 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.[551] 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.[552] 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.[553]

[544] 137 N.J. 8, 644 A.2d 76 (1994).

[545] 644 A.2d at 94; N.J.S.A. 40A:11-13.

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

[547] 88 N.Y.2d 56, 643 N.Y.S.2d 480, 486, 666 N.E.2d 185 (1996).

[548] *Id.*

[549] 207 A.D. 2d 26, 620 N.Y.S.2d 855, 857 (1994).

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

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

[552] *Id.* at 858.

[553] *Id.*

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.[554] 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.[555]

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; 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.[556]

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.[557] 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."[558]

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.[559]

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."[560] 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.[561]

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.[562] 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.[563]

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

[554] 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).

[555] *Id.* 643 N.Y.S.2d at 482–83.

[556] *Id*. at 483.

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

[558] *Id*.

[559] *Id.* at 485.

[560] *Id.*

[561] *Id.*

[562] *Id.*

[563] *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.

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.[564] 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*.[565] 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 project, and economic and financial interests.[566] 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.[567]

e. 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.[568]

A federal district court in Missouri considered whether the PLA violated the associational rights of contractors.[569] 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.[570]

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.[571] 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.[572] 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.[573] 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 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.[574] 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.

f. 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 to have standing. Further, it held that a contractor's association must have a member who submitted a bid for the association to have standing.[575]

[564] 240 A.D. 2d 739, 662 N.Y.S.2d 773 (1997).

[565] 956 P.2d 422 (Alaska 1998).

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

[567] *Id*. at 432–33.

[568] *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)).

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

[570] *Id*. at 976.

[571] 85 F.3d 257 (6th Cir. 1996).

[572] *Id.* at 260.

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

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

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