

Western States Paving and its Implications for Agencies in the Ninth Circuit

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Western States Paving Co., Inc. v.
Washington State Department of
Transportation, et al.,
(9th Cir., 2005)

A Case Study

Narrow Tailoring – 9th Circuit

- TEA-21 DBE Program found constitutional on its face
- TEA-21 as applied found unconstitutional
 - ◆ Compelling State Interest
 - ◆ Narrow tailoring

The Court noted . . .

- “. . . Each of the principal minority groups benefited by Washington’s DBE program – Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and women – must have suffered discrimination within the State. If that is not the case, then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”

Each principal minority group benefiting from WDOT's Program must have suffered discrimination in the state.

- Market area.
- Race-specific data, and/or goals.

WDOT - Step 1

- Baseline Availability:

MWDBE Transportation Firms in MWDBE Directory

All Transportation Firms from Census
= 11.17%

WDOT - Step 2: Adjustment

- a) Discrimination barriers (bonding, finance)? No evidence.
- b) Past discrimination? No statistical study.
- c) Capacity, as percentage of work performed over prior 4-5 years = 18 %

Adjusted Goal = 14%

9th Circuit – Step 2

- 18% of subcontracting had gone to DBEs, but % was based exclusively on contracts with affirmative action. Not Sufficient.
- Difference between availability & race neutral results:
- $11.17\% - 9\% = 2.17\%$. Not Sufficient

- “Over simplified statistical evidence” dismissed because “does not account for factors that may reflect the relative capacity of DBE’s”
- “Availability” does not equal “ability to perform”
 - ◆ DBEs’ size, resources, experience
 - ◆ DBE location (concentration in certain geographic areas)
 - ◆ DBEs working on other projects
- Thus, WDOT’s statistical evidence controls for none of these factors.

- Small (2.17%) disparity alone is insufficient to establish existence of discrimination.
 - ◆ “Significant” statistical disparity could create inference of discrimination.
- Absence of anecdotal evidence re discrimination in highway contracting industry
- CONCLUSION: WDOT’s DBE Program found unconstitutional.