

CHAPTER 2.

Legal Framework

The legal framework for the disparity study is based on applicable regulations for the Federal DBE Program and other sources, including the Official USDOT Guidance, court decisions related to the Federal DBE Program and relevant court decisions concerning challenges to minority- and women-owned business programs. The applicable federal regulations are located at Title 49 Code of Federal Regulations (CFR) Part 26.

Since the 1980s, there have been lawsuits challenging the constitutionality of the Federal DBE Program and individual state and local agencies' implementation of the Program. Figure 2-1 on the following page provides an overview of some of the recent legal challenges. To summarize:

- The Federal DBE Program has been upheld as valid and constitutional.
- For the most part, state DOTs have been successful in defending against legal challenges. Western States Paving Company, however, was successful in challenging the Washington State Department of Transportation's implementation of the Federal DBE Program.
- Many state and local agencies, especially those in the West (i.e., states within the Ninth Circuit), made adjustments in their implementation of the Federal DBE Program to comply with the United States Ninth Circuit Court of Appeals decision in the *Western States Paving* case, and in accordance with the Official USDOT Guidance issued after the decision.
- The Ninth Circuit Court of Appeals held California Department of Transportation's implementation of the Federal DBE Program was valid and complied with the decision in *Western States Paving*.

Each of the lawsuits identified in Figure 2-1 pertains to state DOT implementation of the Federal DBE Program for USDOT-funded contracts. Appendix B discusses court decisions regarding local and state government implementation of the Federal DBE Program.

Individual companies and trade associations have also challenged the constitutionality of state or local government MBE/WBE programs related to non-federally-funded contracts (including state programs in California, Illinois, Montana, North Carolina and Florida). Appendix B of this report provides a detailed analysis of relevant legal decisions and federal regulations.

Figure 2-1. Legal challenges to state DOT implementation of the Federal DBE Program

State	Successfully defended implementation of Federal DBE Program	Unsuccessfully defended implementation of Federal DBE Program	Ongoing litigation at time of report
California	<i>Associated General Contractors of America, San Diego Chapter v. California DOT</i> ¹		
Illinois	<i>Northern Contracting, Inc. v. State of Illinois</i> ² <i>Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.</i> ³ <i>Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.</i> ⁴		<i>Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.</i> ³ appeal pending <i>Dunnet Bay</i> , Petition for Writ of Certiorari to the Supreme Court pending ⁴
Minnesota	<i>Sherbrooke Turf, Inc. v. Minnesota Department of Transportation</i> ⁵ <i>Geyer Signal, Inc. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al.</i> ⁶		
Montana	<i>Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.</i> appeal pending in the U.S. Court of Appeals, Ninth Circuit ⁷ <i>M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.</i> ⁸		<i>Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.</i> , appeal pending ⁷
Nebraska	<i>Gross Seed Company v. Nebraska Department of Roads</i> ⁹		
Washington		<i>Western States Paving Co., v. Washington State DOT</i> ¹⁰	
<p>¹ <i>Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.</i>, 713 F. 3d 1187, 2013 WL 1607239 (9th Cir. April 16, 2013).</p> <p>² <i>Northern Contracting, Inc. v. Illinois</i>, 473 F.3d 715 (7th Cir. 2007).</p> <p>³ <i>Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.</i>, 2015 WL 1396376 (N.D. Ill, March 24, 2015) <i>appeal pending</i> in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827.</p> <p>⁴ <i>Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.</i>, 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015), Petition for a Writ of Certiorari to the U.S. Supreme Court, pending. Docket No. 15-906; <i>Dunnet Bay Construction Co. v. Illinois DOT, et al.</i> 2014 WL 552213 (C. D. Ill. 2014), affirmed by <i>Dunnet Bay</i>, 2015 WL 4934560 (7th Cir. August 19, 2015).</p> <p>⁵ <i>Sherbrooke Turf, Inc. v. Minnesota Department of Transportation</i>, 345 F.3d 964 (8th Cir. 2003), <i>cert. denied</i>, 541 U.S. 1041.</p> <p>⁶ <i>Geyer Signal, Inc., et al. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al.</i>, 2014 WL 1309092 (D. Minn. March 31, 2014).</p> <p>⁷ <i>Mountain West Holding Company, Inc. v. State of Montana; Montana DOT, et al.</i> U.S. District Court, District of Montana (Billings), 2014 WL 6686734 (D. Mont. Nov. 26, 2014), <i>appeal pending</i> in the U.S. Court of Appeals, Ninth Circuit, Docket Numbers 14-36097 and 15-35003.</p> <p>⁸ <i>M.K. Weeden Construction v. State of Montana, Montana Dept. of Transportation, et al.</i>, 2013 WL 4774517 (D. Mont.) (September 4, 2013).</p> <p>⁹ <i>Gross Seed Company v. Nebraska Department of Roads</i>, 345 F.3d 964 (8th Cir. 2003), <i>cert. denied</i>, 541 U.S. 1041.</p> <p>¹⁰ <i>Western States Paving Co. v. Washington State DOT</i>, 407 F.3d 983 (9th Cir. 2005), <i>cert. denied</i>, 546 U.S. 1170 (2006).</p> <p>See Appendix B for complete discussion of these cases.</p>			

The legal challenges have focused on implementation of race- and gender-conscious program measures such as DBE contract goals. This is important background for the Disparity Study.

To understand the legal context for the disparity study, it is useful to review:

- A. The Federal DBE Program;
- B. Similar state and local programs in the United States; and
- C. Legal standards that race- and gender-conscious programs must satisfy.

A. The Federal DBE Program

The Federal DBE Program includes a number of requirements for state and local governments implementing the program. Three important requirements are:

- **Setting overall goals for DBE participation in USDOT-funded contracts.** (49 CFR Section 26.45)
- **Meeting the maximum feasible portion of the overall DBE goal through race- and gender-neutral means.** (49 CFR Section 26.51)
 - Race- and gender-neutral measures include removing barriers to the participation of businesses in general or promoting the participation of small or emerging businesses.¹
 - If an agency can meet its overall DBE goal solely through race- and gender-neutral means, it must not use race- and gender-conscious measures as part of its implementation of the Federal DBE Program.
- **Appropriate use of race- and gender-conscious measures, such as contract-specific DBE goals.** (49 CFR Section 26.51)
 - Because these measures are based on the race or gender of business owners, use of these measures must satisfy stringent court imposed legal and regulatory standards in order to be legally valid.²
 - Measures such as DBE quotas are prohibited; DBE set-asides may only be used in limited and extreme circumstances (49 CFR Section 26.43).
 - Some state DOTs have restricted eligibility to participate in DBE contract goals programs to certain racial, ethnic and gender groups based on the evidence of discrimination in the state’s transportation contracting industry. ODOT’s operation of the contract goals program for substantially underutilized DBEs at the time of this report is one example.

¹ Note that all use of the term “race- and gender-neutral” refers to “race-, ethnic- and gender-neutral” in this report.

² Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply the “intermediate scrutiny” standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

Figure 2-2 summarizes approaches that state DOTs use to implement the Federal DBE Program:

- All state DOTs set an overall goal for DBE participation.
- All state DOTs use certain neutral measures to encourage DBE participation.
- Many state DOTs use race- and gender-conscious measures such as DBE contract goals to help meet their overall DBE goal.
- Some state DOTs limit participation in race- and gender-conscious measures such as DBE contract goals to those DBE groups for which there is sufficient evidence of discrimination in the state transportation contracting industry (sometimes called “underutilized DBE” or “UDBE” contract goals programs). Implementation of such contract goals programs requires approval of a waiver from USDOT.³ ODOT has implemented a contract goals program limited to certain DBE groups in recent years.
- At present, some states operate a solely neutral program.

Because an individual state DOT sometimes adjusts how it implements the Program, the examples discussed in this Chapter might change after release of this report.

Figure 2-2. Examples of state DOT implementation of the Federal DBE Program

	Set overall DBE goal	Neutral measures*	Race- and gender-conscious measures			Examples
			DBE contract goals	DBE set-asides	Eligible DBEs	
1. Combination of neutral and race- and gender-conscious measures	Yes	Yes	Yes	No	All firms that are certified as DBEs	Most state DOTs
2. DBE set-asides	Yes	Yes	Yes	Yes	All firms that are certified as DBEs	No state DOTs at time of report
3. Substantially underutilized DBE (SUDBE) contract goals	Yes	Yes	Yes Only SUDBEs count toward meeting contract goals	No	Only underutilized DBE groups	ODOT WSDOT California DOT until mid-2012 Colorado DOT in past
4. Entirely race- and gender-neutral program	Yes	Yes	No	No	No contract goals	Montana and Idaho DOTs at present
*Examples: outreach, technical assistance, removing barriers to bidding, small business enterprise programs.						

³ 49 CFR Section 26.15.

B. State and Local MBE/WBE Programs in the United States

In addition to USDOT-funded contracts, ODOT and other agencies award transportation contracts that are solely funded through state or local sources. The Federal DBE Program does not apply to those contracts.

Some state DOTs and other agencies throughout the country operate minority- and women-owned business programs for their non-federally-funded contracts. As examples, the North Carolina Department of Transportation and the Indiana Department of Transportation operate MBE/WBE programs that are similar to the Federal DBE Program.

The State of Oregon has a Minority Business Enterprise (MBE) Program and a Women Business Enterprise (WBE) Program. There is also an Oregon Emerging Small Business (ESB) Program, which is based on business size and age. Some local governments in Oregon apply similar programs as well.

C. Legal Standards that Race- and Gender-Conscious Programs Must Satisfy

The U.S. Supreme Court has established that government contracting programs with race-conscious measures must satisfy the “strict scrutiny” standard of constitutional review. Two key U.S. Supreme Court cases are:

- The 1989 decision in *City of Richmond v. J.A. Croson Company*, which established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments;⁴ and
- The 2005 decision in *Adarand Constructors, Inc. v. Peña*, which established the same standard of review for federal race-conscious programs.⁵

As described in detail in Appendix B, the strict scrutiny standard is very difficult for a government entity to meet. The strict scrutiny standard establishes a stringent threshold for evaluating the legality of race-conscious programs. Under the strict scrutiny standard, a governmental entity must have a strong basis in evidence that:

- There is a *compelling governmental interest* in remedying specific past identified discrimination or its present effects; and
- Any program adopted is *narrowly tailored* to remedy the identified discrimination. There are a number of factors a court considers when determining whether a program is narrowly tailored (see Appendix B).

A government agency must satisfy both components of the strict scrutiny standard. A race-conscious program that fails to meet either one is unconstitutional.

⁴ *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

Constitutionality of the Federal DBE Program. The Federal DBE Program has been held to be constitutional “on its face” in legal challenges to date, although a court may still find that some individual agencies implementing the program fail to meet this legal standard in their implementation of the Program. Appendix B discusses a number of important legal decisions in detail, including *AGC, San Diego Chapter v. California DOT*,⁶ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT*,⁷ *Northern Contracting, Inc. v. Illinois DOT*,⁸ *Sherbrooke Turf, Inc. v. Minn DOT*,⁹ *Gross Seed v. Nebraska Department of Roads, Western States Paving Co. v. Washington State DOT, Adarand Constructors, Inc. v. Slater*,¹⁰ *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.*,¹¹ *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*¹² and *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*¹³

The 2005 Ninth Circuit Court of Appeals decision in *Western States Paving Co. v. Washington State DOT* is important for this disparity study, as Oregon is within the jurisdiction of the Ninth Circuit.

- The Court upheld the constitutionality of the Federal DBE Program.
- However, because the Ninth Circuit found that the Washington State DOT failed to show its implementation of the Federal DBE Program to be narrowly tailored, its operation of the Program was not constitutional.

After that ruling, state departments of transportation within the Ninth Circuit operated entirely race- and gender-neutral programs until studies could be completed to provide information that would allow them to implement the Federal DBE Program in a narrowly tailored manner.¹⁴

The first court review of an agency’s implementation of the Federal DBE Program in the Ninth Circuit after the *Western States Paving* decision was in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.* The Ninth Circuit held Caltrans’ implementation of the Federal DBE Program to be constitutional, which is of particular significance to this study (see Appendix B).¹⁵

⁶ 713 F. 3d 1187 (9th Cir. 2013).

⁷ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015), Petition for a Writ of Certiorari to the U.S. Supreme Court, pending. Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed* in *Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

⁸ 473 F.3d 715 (7th Cir. 2007).

⁹ 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

¹⁰ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) *cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001).

¹¹ *M.K. Weeden Construction* 2013 WL 4774517 (D. Mont. 2013).

¹² *Mountain West Holding Company, Inc.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *appeal pending*.

¹³ *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2015 WL 1396376 (N.D. Ill, March 24, 2015), *appeal pending*.

¹⁴ Disparity studies have been conducted for state DOTs in each Ninth Circuit state — Alaska, Hawaii, Washington, Idaho, Montana, Oregon, California, Nevada and Arizona — as well as many local transit agencies and some airports in those states.

¹⁵ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187 (9th Cir. 2013).

In *Mountain West Holding* and *M.K. Weeden*, two U.S. District Courts in Montana upheld the validity of the MDT DBE Program implementing the Federal DBE Program.¹⁶ The *Mountain West Holding* decision, at the time of this report, has been appealed to the U.S. Court of Appeals for the Ninth Circuit.¹⁷

Constitutionality of state and local MBE/WBE programs. In addition to the Federal DBE Program, some state and local government minority business programs have been found to meet the strict scrutiny standard. Appendix B discusses the successful defense of state and local race-conscious programs, including *Concrete Works of Colorado v. City and County of Denver* and *H.B. Rowe Company, Inc. v. W. Lyndo Tippett, North Carolina Department of Transportation, et al.* (upheld in part)^{18, 19}, and *Kossman Contracting Co., Inc. v. City of Houston* (upheld in part).²⁰

As discussed in Appendix B, many local and state race-conscious programs have been challenged in court and have been found to be unconstitutional. Appendix B discusses the *Western States Paving* decision as well as examples where courts found that operation of a state or local MBE/WBE program did not meet the strict scrutiny standard.

Summary. Court decisions regarding challenges to the Federal DBE Program and to state and local MBE/WBE programs inform the methodology Keen Independent uses in this disparity study and how agencies such as ODOT should interpret the results.

¹⁶ *M.K. Weeden Construction* 2013 WL 4774517 (D. Mont. 2013).

¹⁷ *Mountain West Holding* 2014 WL 6686734 (D. Mont. 2014), *appeal pending*.

¹⁸ *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003).

¹⁹ Program upheld with regard to African American- and Native American-owned subcontractors but held invalid for inclusion of other groups. *H.B. Rowe Company, Inc. v. W. Lyndo Tippett, North Carolina Department of Transportation, et al.*; 615 F.3d 233 (4th Cir. 2010).

²⁰ *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. March 22, 2016) (upheld Houston's MBE/WBE Program with regard to minority- and women-owned businesses, but held invalid as to inclusion of Native American owned businesses).