

SMALL BUSINESS PROGRAMS  
SUB COMMITTEE  
JANUARY 2015 REPORT

By  
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**IN THE NEWS**

**A. WOMAN INDICTED FOR OPERATING A SHAM-PASS THROUGH AT CHICAGO O'HARE INTERNATIONAL AIRPORT.**

Three years after charges were originally filed the federal government indicted Elizabeth Perino, owner of Perdel Contracting. Perdel was certified as a WBE and DBE by several governmental agencies including the City of Chicago. The government alleges that Perino took part in a scheme where Perdel acted as a pass-through WBE for a Prime Contractor by making it falsely appear as though Perdel would provide labor and equipment on a multi-million dollar project at O'Hare Airport in order to comply with the WBE participation requirements on the project. The indictment alleges that Perdel did not provide any labor and equipment but instead the work it billed for was performed by the Prime Contractor. Perino is accused of submitting bills for work her company did not perform. In exchange Perdel received 10% of the amounts invoiced by the Prime Contractor to the government.

Perino was first charged in the criminal complaint filed in July 2011 and has been cooperating with the government investigation. The investigation was sparked by a whistleblower lawsuit filed in 2008 by a former project manager employed by Perdel.

For further information see *United States v. Perino*, 11-cr-00492, United States District Court, Northern District of Illinois (Eastern Division)

**II. LEGAL OPINIONS**

**A. FEDERAL**

***Mountain West Holding, Co. Inc. v. State of Montana*, 2014 WL 6686734 (D. Montana, Nov. 26, 2014)**

Plaintiff, Mountain West Holding Company (Mountain West) sued the State of Montana and its Department of Transportation seeking a declaration and injunction that the implementation of Montana's Disadvantaged Business Enterprise program (DBE) violated and continues to violate the Equal Protection Clause of the 14<sup>th</sup> Amendment. Mountain West is a contractor that provides traffic planning and staffing for construction projects. It does not qualify for DBE status. Mountain West's claims stem from the fact that on three occasions in 2012 it was the low bidder on subcontracts but was not awarded the contract.

In response to the 2005 Ninth Circuit decision in *Western States Paving Company v. Washington State Dept of Transportation*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005) where the Court held that a state DBE program can be subjected to an as-applied constitutional challenge, despite the facial validity of the federal program, Montana ceased using race-conscious means in its award of federally assisted contracts. Montana conducted a disparity study to determine whether there was evidence of discrimination in Montana's transportation contracting market. Although the disparity study showed significant underutilization of DBEs in all minority groups in professional service contracts and certain business categories it was recommended that Montana continue to use only race-neutral means in its efforts to meet its DBE utilization goal which was established at 5.83%.

In the following years Montana saw its DBE participation rates drop from a high of 13% in 2006 to 2.8% in 2011. In response Montana adopted a goal methodology for DBE utilization which employed contract goals in 3.27% of its federally assisted contracts. The current goal methodology does not provide for the use of contract goals to meet the overall goal, thus the overall goal will be met through race-neutral methods.

Montana claimed that its DBE program passes strict scrutiny because the DBE program utilized contract goals only after it was presented with both statistical and anecdotal evidence of discrimination. Further, Montana argued that it only began utilizing contract goals after statistical evidence showed that race neutral measures were inadequate.

Mountain West questioned the validity of the findings of the disparity study by claiming that utilization was improperly calculated. The Court found that Mountain West did not meet its burden on summary judgment. The Court found that Mountain West did not provide any evidence indicating that data in the disparity study was invalid. Further the court found that Mountain West failed to rebut the anecdotal evidence of discrimination detailed in the disparity study.

## **B. SBA – OFFICE OF HEARING AND APPEALS**

Size Appeal of: MCH Corporation, Appellant  
RE: Synergy Solutions  
SBA No. SIZ-5622  
December 8, 2014

This is a size protest by MCH Corporation (MCH) challenging the Area Office size determination that Synergy Solutions, Inc. (Synergy) is a small business under the size standard associated with the underlying procurement. MCH claimed that Synergy was affiliated with several companies that were owned and operated by Synergy's owner's parents. Specifically, MCH argued that Synergy is affiliated with the PAI Corporation (PAI) and several nonprofit organizations based on a common ownership and that there is affiliation based on the familial relationship between the owner of Synergy and owners of PAI. MCH argued that Synergy and

PAI are in the same line of business, PAI subcontracted work to Synergy, the owner of Synergy is a former employee of PAI and PAI and Synergy shared a common office for a period prior to the solicitation. Although none of the aforementioned ties existed at the time of the size determination MCH argued that the Area Office was required to give consideration to the historical connections. MCH argued that the historical factors demonstrate that there is no clear fracture between Synergy and PAI.

13 C.F.R. 121.103(f) provides that affiliation may arise among two or more persons with an identity of interest. The cases interpreting this provision creates a rebuttable presumption that close family members have identical interests and must be treated as one person. That presumption is rebutted by showing a clear line of fracture among family members. Factors to be considered in examining a clear line of fracture include whether the firms share offices, employees, facilities or equipment, whether the firms have the same line of business, whether there is financial assistance, loans or subcontracting between the firms.

The OHA found although Synergy and PAI are presumed affiliated based on a family relationship that as of the date of determining Synergy's size the companies had no dealings with each other. Historic ties between a firm and alleged affiliate do not establish current affiliation when the historic ties no longer exist as of the date to determine size.

**SMALL BUSINESS SUBCOMMITTEE MEETING JANUARY 28, 2015 – 12 pm**

**888-376-5050 / PIN 1326538415**