

**The Florida Bar: Real Property, Probate and Trust Law Section
Construction Law Committee**

Small Business Sub-Committee

May 11, 2015 Report

Subcommittee Chair: Lisa Colon Heron
Smith Currie & Hancock, LLP

**I. *Midwest Fence Corp. v. United States Department of Transportation,
et. al.* Case No. 10 C 5627 (N.D. Ill. March. 24, 2015)**

Almost two years after the Ninth Circuit Court of Appeals in *Assoc. General Contractor's v. Cal. Dep't of Transportation* upheld Caltrans DBE outreach program, on March 25, 2015 United States District Court in Chicago Judge Harry Leinenweber granted summary judgment in favor of the United States Department of Transportation, ("USDOT") the Illinois Department of Transportation ("IDOT") and the Illinois State Tollway Highway Authority (the "Tollway").

Midwest Fence Corp is a non-DBE fencing and guardrail contractor. Midwest brought a constitutional challenge to the federal and Illinois Disadvantaged Business Enterprise programs. Midwest's complaint alleged that the DBE programs violated the Equal Protection clause of the U.S. Constitution, the Civil Rights Act of 1866, The Civil Rights Act of 1964 and the Illinois Civil Rights Act of 2003. Specifically, Midwest asked the court to declare the federal DBE program unconstitutional on its face, that the program lacked congressional authorization and that the authorizing statute is unconstitutional. Additionally, Midwest challenged Illinois application of the federal DBE program as unconstitutional.

On summary judgment the court found that the federal DBE program was constitutional and Illinois application of the DBE program was constitutional. At the heart of the case was the validity of the disparity studies used to substantiate the DBE programs. The court took judicial notice of the evidence presented to Congress in support of the federal program's reauthorization including the statistical and anecdotal evidence. The defendants also presented an expert report that considered ninety five disparity and availability studies concerning women and minority owned businesses. The ninety five reports examined the procurement of over one hundred public agencies in thirty two states. 66% of those studies

indicated that DBEs were significantly underutilized relative to their availability. Ultimately the Defendants argued that the disparities showed by the various studies were not attributed to factors other than race and sex and were consistent with the presence of discrimination in construction and construction related professional services.

Midwest argued that the Defendant's evidence was flawed because the expert failed to account for capacity when measuring availability. According to Midwest the failure to account for capacity skews the results of availability and disparity studies. In support of its position Midwest pointed to the *Rothe Development* case where the Federal Circuit rejected a set of disparity studies that failed to account for capacity.

The court rejected Midwest's argument by distinguishing *Rothe* case one where the evidence used to support the government's compelling interest only included studies from one state, two counties and three cities.

Midwest also argued that the DBE programs unduly burden predominantly majority-owned subcontractors that are small and specialized in trades where DBEs tend to operate. The Court disagreed, reaffirming long-standing precedent that some "sharing of the burden" of affirmative action programs among majority-owned businesses is constitutionally permissible.

In the end the court found that the federal and state DBE programs were constitutional and that Midwest failed to present any affirmative evidence to rebut the disparity study evidence presented by the Defendants.

NEXT MEETING

MAY 27, 2015 @ 12 PM EST.

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