Construction Law

Published by the Construction Law Section of the Washington State Bar Association

Volume 43 Summer 2014 Number 2

Incoming Chair's Report

by Scott Sleight – Ahlers & Cressman PLLC – Seattle, WA

I am excited and honored to serve as Chair of the Construction Law Section. First, compliments and thanks are due to our departing Chair, Tom Larkin. Tom has been very active within the Section for more than eight years. During my time on the Board, Tom has repeatedly volunteered to serve on committees, culminating with his run on the Executive Committee. This is despite taking an "in house" position that has required substantial travel. Tom spearheaded last year's Fall Forum that included a report on the financing and construction of Husky Stadium, and to the benefit of all in attendance, an extensive behind the scenes tour of the stadium. Tom, you will be a tough act to follow and thank you for continuing to set high standards for our Section's activities and accomplishments.

As part of serving on the Executive Committee, the Bar Association offers meetings during which officers of the many various sections learn about what other sections are doing for their members. My participation in these has left me pleased with the efforts of the Construction Section Council to offer beneficial events to the members of this Section. But our goal is to continue to improve and offer events that meet the interests of our members. We recently held our annual Midyear CLE, which had over 85 attendees and webcast participants. We are currently planning our Fall Forum, which we plan to have as a tour of an exciting project with some socializing. This year the Section hosted a new event, a February Dinner/Winter Forum, which will be continued in February 2015. I have prepared a summary list of our typical annual events below to take note of. Additional information is available at www.wsba.org/legal-community/section/construction-law.

Summary of Events

October - Fall Forum:
- Discussion on local construction projects and topics

February - Annual Dinner / Winter Forum

Spring - Construction 101 CLE:
- Rotating venues in state
- 2015 will be in Bellingham

June - Midyear CLE and Section meeting

Quarterly Newsletter

Law School Scholarship Program:
- Being evaluated for 2015

Special Projects:
- Standard form contracts
- Jury instructions
- E-mail ideas

Because our goal is to serve the interests of our members, please feel free to email or call me with any ideas for events or projects. In addition, we are always looking for articles for the quarterly newsletter. Please email Athan Tramountanas at *athant@scblaw.com* with articles.

I would like to introduce our new Council members, with terms ending in 2017: Amber Hardwick, Jennifer Beyerlein and Brett Hill. If you are interested in filling positions opening in June 2015, please email me, as we are always looking for new participants and believe that anyone interested will find that serving on the Council is extremely rewarding. It continues to be for me, and I look forward to another great year.

Warm Regards,
Scott Sleight

In This Issue

Outgoing Chair's Report

by Tom Larkin – Fidelity National Law Group – Seattle, WA

Greetings, Section members! It was great seeing so many of you at the Midyear CLE on June 13. As I mentioned during the CLE, it is hard to believe my term as Chair is up. I have been part of the Council/Executive Committee for the past nine years and have enjoyed every minute of it; I look forward to staying involved as a Past Chair for many years to come. As I ride off into the sunset (not really), I know the Section is in great hands with Scott Sleight as the new Chair. Scott has been involved with council as long as I've been on it and brings great leadership and knowledge to the Chair position. Thank you to all the Council and Executive Committee members who I have worked with over the past years, especially Bob Olson, who was the Chair when I first came onto the Council, and Rob Crick, who helped talk me into moving onto the Executive Committee. It has been a privilege to work with and learn from all of you.

– Tom

David Ashbaugh Inducted into Hall of Fame

by Athan Tramountanas –
Short Cressman & Burgess PLLC – Seattle, WA

The University of Washington Construction Industry Hall of Fame inducted attorney David Ashbaugh on May 30, 2014. The induction took place during the Hall of Fame banquet at the Chihuly Garden and Glass at Seattle Center.

John Schaufelberger, dean of the College of Built Environments at the UW, noted that Mr. Ashbaugh was selected for his strong support of the construction industry and education. Mr. Ashbaugh made substantial contributions to the construction industry beyond his legal practice, including mentoring attorneys and construction firm leaders. He served on the boards of AGC of Washington, AGC Education Foundation, and the UW Construction Industry Advisory Council.

Accepting on his behalf was his daughter (and law partner), Becki Ashbaugh. In her remarks, Ms. Ashbaugh noted that her father was proud to learn of his selection to the Hall of Fame shortly before his death earlier this year.

Also selected for induction into the 2014 class of the University of Washington Construction Industry Hall of Fame were Howard S. Wright and George Schuchart Sr. The University of Washington Department of Construction Management holds the banquet every two years. Selections for the Hall of Fame are made by the Department of Construction Management and its Construction Industry Advisory Council. The three new inductees join 35 others in the Hall of Fame, dating back to 1995. Mr. Ashbaugh is the second attorney inducted to the Hall of Fame – Sam E. Baker, Jr. was inducted in 2006.

Construction Law Section 2013-2014

Officers

Scott Sleight, Chair
Ahlers & Cressman PLLC
999 3rd Ave., Ste. 3800
Seattle, WA 98104-4023
(206) 287-9900
sleight@ac-lawyers.com

John Evans, Chair-elect
John Evans Law, PLLC
1001 Fourth Ave., Ste. 4400
Seattle, WA 98154
206-389-1527

Marisa Bavand, Vice-chair
Groff, Murphy PLLC
300 E. Pine St.
Seattle, WA 98722-2029
(206) 628-9500
mbavand@groffmurphy.com

Ron J. English, Secretary
Seattle Public Schools Office of General Counsel
MSC 32-151
P.O. Box 34165
Seattle, WA 98124-1165
(206) 252-0651
renglish@seattleschools.org

Annmarie Petrich, Treasurer
Attorney at Law
1900 Nickerson St., Ste. 209
Seattle, WA 98119-1650
(206) 282-1262
annmarie@abpetrich.com

Ex Officio Chairs

Athan Tramountanas
Short Cressman & Burgess PLLC
999 Third Ave., Ste. 3000
Seattle, WA 98104
(206) 682-3333
athant@scblaw.com

Past Chairs

Alan B. Bornstein (2004-05)
Ron English (2005-06)
Bob Olson (2006-07)
Andrew Maron (2007-08)
Bryan Caditz (2008-09)
Robert H. Crick, Jr. (2009-11)
Thomas H. Wolfendale (2011-12)
Joseph Scuderi (2012-13)
Thomas P. Larkin II (2013-14)

Council Members

Term Ending 2015

Jason Piskel
Piskel Yahne Kovarik PLLC
522 W Riverside Ave., Ste. 410
Spokane, WA 99201-0519
(509) 321-5930
jason@pyklawyers.com

Randy Thiel
Thiel Keaton PLLC
701 5th Ave., Ste. 4775
Seattle, WA 98104-7097
(206) 838-2515
rthiel@thielkeaton.com

Athan Tramountanas
Short Cressman & Burgess, PLLC
999 Third Ave., Ste. 3000
Seattle, WA 98104
(509) 321-5930

Term Ending 2016

Sherman Knight
Knight Mediation
5400 Carillon Pt.
Kirkland, WA 98033-7357
(425) 576-8777
knight@mediate.com

Mark Berg
P.O. Box 13410
Seattle, WA 98198-1006
(206) 310-9482
mark.berg@alaskaair.com

Roy Lundin
Oseran Hahn Spring Straight & Watts PS
10900 NE 4th St., Ste. 1430
Bellevue, WA 98004-8357
(425) 455-3900
rlundin@ohswlaw.com

Term Ending 2017

Amber L. Hardwick
Green & Yalowitz, PLLC
1420 Fifth Ave., Ste. 2010
Seattle, WA 98101-4800
(206) 622-1400

Jennifer McMillan Beyerlein
Lane Powell PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98111-9402
(206) 223-7000

Brett Hill
Ahlers & Cressman PLLC
999 3rd Ave., Ste. 3800
Seattle, WA 98104-4023
(206) 287-9900
bhill@ac-lawyers.com

BOG Liaison

Brad Furlong
Furlong - Butler Attorneys
825 Cleveland Ave
Mount Vernon, WA 98273-4210
(360) 336-6508
bef@furlongbutler.com

Young Lawyers Liaison

Amber L. Hardwick
Green & Yalowitz, PLLC
1420 Fifth Ave., Ste. 2010
Seattle, WA 98101-4800
(206) 622-1400

EPA's New Stormwater Rule For Construction Sites

by Marjan Foruzani – Short Cressman & Burgess PLLC – Seattle, WA

On March 6, 2014, the U.S. Environmental Protection Agency ("EPA") published a new rule that may impact stormwater management practices at construction sites. The rule, effective May 5, 2014 (the "2014 Rule"), removes numeric turbidity limits and modifies several non-numeric requirements in stormwater permits issued under the Clean Water Act.

Who Will Be Affected by the Rule?

The 2014 Rule applies to all construction projects subject to a National Pollutant Discharge Elimination System (NPDES) permit, which generally includes sites involving the construction, development or subdivision of one or more acres of land.

What Does This Change Mean?

NPDES permits issued under the Clean Water Act are commonly administered by states under delegated authority from the federal government. Although the 2014 Rule is intended to provide greater flexibility to permittees in complying with construction stormwater permits, the practical effects of these changes will depend on how each delegated state decides to implement them. In Washington, for example, the state administers the Construction Stormwater General Permit. Pursuant to EPA's 2009 Rule, Washington's permit currently contains numeric effluent limits for turbidity. States may generally impose more stringent requirements than their federal counterparts. It therefore remains to be seen whether and how Washington will revise its General Permit, which is set to expire on December 31, 2015. In states or territories where EPA is the permitting authority, however, the changes imposed by the 2014 Rule have been effective since May 5, 2014.

Background

In December 2009, EPA adopted a rule containing effluent limitation guidelines and standards for stormwater discharges from construction sites disturbing one or more acres of land (the "2009 Rule").

The 2009 Rule established a numeric effluent limit for turbidity at sites involving the disturbance of 10 or more acres of land. Turbidity refers to the cloudiness of water due to the presence of suspended or dissolved particles.

The 2009 Rule also imposed the following non-numeric requirements:

- Erosion and sediment controls;
- Soil stabilization;
- Dewatering;
- Pollution prevention measures;
- Restriction of certain wash water discharges and discharges of pollutants used in vehicle and equipment operation and maintenance; and
- Utilization of surface outlets for discharging from basins and impoundments.

Immediately upon EPA's publication of the 2009 Rule, several industry groups filed suit against EPA challenging the rule. The suit focused largely on the numeric effluent limit for turbidity, which was alleged to have been established without sufficient data. EPA ultimately settled the suit in December 2012, and adopted the 2014 Rule as part of the settlement.

Summary of the 2014 Rule

The following is a summary of notable changes effected by the 2014 Rule:

- Removal of the numeric turbidity effluent limit and associated monitoring requirements;
- Addition of a definition for the term "infeasible" to clarify instances where entities may qualify for exceptions to soil compaction, soil stabilization, surface outlet and buffer requirements[1];
- Addition of a requirement for scour minimization as part of a site's erosion and sediment controls;
- Clarification as to where natural buffers are required;
- Clarification as to when soil compaction and topsoil preservation is not required;
- Clarification that the period of time within which soil stabilization must be completed will be determined by the permitting authority; and
- Clarification as to when minimization of exposure to precipitation and stormwater is not required.

If you would like additional information regarding the changes to the 2009 Rule or general stormwater permitting requirements for construction sites, please feel free to contact Marjan Foruzani at (206) 829-2703 or any other member of Short Cressman's Environmental and Land Use Practice Group or Construction Practice Group.

1 "Infeasible" is now defined as "not technologically possible, or not economically practicable and achievable in light of best industry practices." 79 Fed. Reg. 12661 at 12667 (March 6, 2014).

Court of Appeals Ruling on Employment Recruiter Case Applies to Construction Contracting: *Lokan Associates, Inc. v. American Beef Processing, LLC*

by Athan Tramountanas – Short Cressman & Burgess PLLC – Seattle, WA

Last November, Division One published a ruling in *Lokan Associates, Inc. v. American Beef Processing, LLC*, 177 Wn. App. 490, 377 P.3d 1285 (2013), which has potential applicability to construction law. The case involves a contract dispute between an employment recruiter and a client, but the decision has interesting language that applies to change orders and pay-when-paid clauses.

In the case, Opti Staffing Group ("Opti") entered into a contract with American Beef Processing ("ABP") for employment referral services. ABP was a start-up company developing technology for controlling the amount of fat in beef products. ABP was seeking approximately $5,000,000 in federal funding from the USDA. It was in a precarious financial state and needed the funding to pay for, among other things, additional personnel.

Under the parties' contract, Opti was to identify and refer potential employees to ABP. ABP was to pay Opti if it actually hired the referral. Opti identified two potential employees that ABP subsequently hired. Meanwhile, ABP was struggling to get the necessary federal funding, It could not pay Opti. After hiring the first employee referred by Opti, the parties entered into a contract addendum. The addendum provided that ABP would pay Opti for the referral once it obtained the funding: "[Opti] will extend our initially agreed upon payment terms to be payable upon [ABP's] receipt of [federal] funds. Services have been rendered and payment is due at the time funding is received regardless of candidate's start date…"

The federal funding never came, and ABP never paid Opti. Opti sued, and its claims were dismissed at the trial court on summary judgment. On appeal, Division One considered (1) whether the addendum was supported by consideration; and (2) whether the addendum created a condition precedent for ABP to make payment to Opti.

Was the addendum supported by adequate consideration?

ABP argued in part that its reaffirmation of its promise to pay Opti for the referrals was adequate consideration for the addendum. The court easily dispatched with this argument, noting, "It is axiomatic that a modification to an existing contract must be supported by consideration independent from that which was given in order to form the original contract." The court stressed that independent consideration is required for a contract amendment, and independent consideration does not exist when one party is to perform some other additional obligation while the other party is simply to perform that which it promised in the original contract. While this holding is not in the context of a construction dispute, its rationale applies to change orders to a construction contract if they modify the obligations of the parties. Change orders must be supported by additional consideration.

Did the addendum create a condition precedent for payment of Opti's services?

In analyzing whether, "to be payable upon [ABP's] receipt of [federal] funds," created a condition precedent, the court noted the issue "depends on the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in light of all the surrounding circumstances." The court listed some contractual phrases previously identified by the Washington Supreme Court as illuminating whether the parties intended to create a condition precedent: "on condition," "provided that," "so that," "when," "while," "after," or "as soon as." The court focused on the addendum's use of "upon," and noted that this word was not on the Supreme Court's "list."

The court stated that where doubt exists about the parties' intent to create a condition precedent, the language is to be interpreted as a promise instead of a condition. The court held the language was not a condition precedent and that it stopped short of saying that payment is excused if ABP never received the funding. Instead, the language merely created a promise that ABP would make payment "within a reasonable time" if it failed to obtain the funding.

While this case is not in the context of a construction contract, the decision would apply to a general contractor's attempt to create pay-when / if-paid clause in its subcontracts. If the parties intend the subcontractor is only to be paid if the general receives payment from an owner, the contract should contain express language to that effect, making payment from the owner a condition precedent to the general's obligation to pay the subcontractor.

Your Input Is Needed!

The Construction Law Section Newsletter works best when Section members actively participate. We welcome your articles, case notes, comments, and suggestions concerning new developments in public procurement and private construction law. Please direct inquiries and submit materials for publication to:

Athan Tramountanas or **Russell King**
Short Cressman & Burgess PLLC
999 Third Avenue, Suite 3000
Seattle, WA 98104
rking@scblaw.com
athant@scblaw.com

WSDOT to Exclude Non-Minority Women-Owned Business from DBE Participation Goals

by Ellie Perka – Ahlers & Cressman PLLC – Seattle, WA

In late December 2013, the Washington State Department of Transportation ("WSDOT") indicated its plan to make a striking and drastic change to the Disadvantaged Business Enterprise ("DBE") Program in Washington. It is seeking to exclude non-minority women-owned businesses from Washington's DBE program goals for federally funded contracts.

As it is required to do under the governing federal rules, in January and February 2014, WSDOT sought public comment on the change. And in early March 2014, WSDOT submitted its proposal to the U.S. Department of Transportation's Federal Highway Administration ("FHWA") for federal approval. FHWA has not yet issued its decision. If approved by FHWA, this significant change will go into effect in Washington for the rest of federal fiscal year (FFY) 2014 and remain in place for FFYs 2015 through 2017.

WSDOT's proposal will be a *de facto* exclusion of women-owned businesses from the DBE program. It is an extreme and unsupported measure that will have long-lasting detrimental impacts on our state, joblessness, and the economy. Most importantly, however, by moving to exclude women-owned businesses from the DBE program goals, WSDOT is *itself* discriminating against women. Further, if challenged in a court of law, WSDOT's actions may not withstand constitutional scrutiny.

In the current economic climate, our state agencies should be taking measures to *increase* women-owned business participation and opportunities in the marketplace—not to decrease them, as WSDOT is doing. Its significant change to the DBE program—that will likely be implemented next fall 2014—is largely occurring under the radar, without major attention in the industry or mainstream media. Perhaps for this reason, as of yet, there is no unified effort to oppose WSDOT.

General Background on the DBE Program

The DBE program was created by Congress with the goal of increasing women- and minority-owned business participation in federally funded transportation contracting.[1] Under the program, small businesses that are owned and controlled by "socially and economically disadvantaged" individuals can become DBE certified; once certified, those businesses qualify for a percentage of certain work funded by U.S. Department of Transportation ("USDOT") transportation funds.[2] Women and a number of racial and ethnic minorities are presumed to be socially and economically disadvantaged under the DBE regulations.[3]

The DBE program does not guarantee contracts to any business; rather, it aims to ensure that DBEs are provided an equal opportunity to complete for USDOT-assisted contracts.[4]

Despite numerous challenges, the courts have consistently upheld the validity and constitutionality of the DBE program.[5] For example, in the *Western States* case, the Ninth Circuit applied the "strict scrutiny" test to evaluate the constitutionality of the DBE program. It concluded that the evidence before Congress demonstrated a nationwide compelling interest in remedying the effects of past and present discrimination that limit the opportunities for DBEs to compete on a level playing field in transportation contracting.[6] For this reason, the Ninth Circuit held that the DBE program was constitutional.[7]

Although it ruled that the DBE program *itself* was constitutional, the Ninth Circuit concurrently ruled that Washington's *implementation* of the DBE program (by WSDOT) was flawed and unconstitutional. The court found that the statistical analysis WSDOT had used to administer the DBE program was wholly inadequate. The court held that—while the federal DBE program withheld constitutional scrutiny—WSDOT's implementation of it was unconstitutional.[8]

Goal-Setting and WSDOT's Proposed Changes to Washington's DBE Program

Since the Court's decision in *Western States* it has been abundantly clear that—to withstand constitutional scrutiny—each state must tailor its implementation of the DBE program to the specific discrimination found to exist in that state. Every three years, therefore, each state must revisit its overall goal for DBE participation and ensure that it reflects the level of DBE participation that would be expected in that state, absent the effects of discrimination.[9]

Each state must follow a specific process in evaluating its DBE goal—often called "goal-setting." The required goal setting process is specifically articulated in the DBE program rules. It involves three steps: first, the state must determine the "availability" of DBEs in its jurisdiction—this "availability" measure is critical.[10]

Second, each state may adjust the "availability" to account for numerous real-world factors: the capacity of DBEs to perform work on USDOT-related contracts; discriminatory barriers in accessing bonding, financing, and insurance; and "demonstrable evidence" of other "continuing effects of past discrimination."[11]

Third, the state must compare its "availability" to the actual use of those businesses within the state (often termed "utilization") and, using this comparison, establish an overall goal aimed to address any significant disparities that are found to exist between "availability" and "utilization."[12]

After engaging in this goal-setting process for Fiscal Year 2014, WSDOT has proposed two significant changes to the DBE program in Washington:

> **First**, WSDOT plans to reduce Washington's overall DBE participation goal from 15.17 percent to 11.6 percent.

continued on next page

WSDOT to Exclude Non-Minority Women-Owned Business from DBE Participation Goals from previous page

Second, and most alarmingly, WSDOT is seeking a "waiver" for women-owned business participation in federally funded contracting. Under the waiver, WSDOT will exclude women-owned businesses from participation in the DBE program goals for federally funded contracts. In other words, general contractors in Washington that hire women-owned DBEs to perform work on federally funded jobs will not be able to count those contract dollars toward meeting their DBE percentage goal.

WSDOT Hired BBC Research & Consulting to Assist in its "Goal-Setting"

WSDOT's proposed changes are based upon a statistical study done by BBC Research & Consulting of Denver, Colorado. WSDOT hired BBC to analyze "whether there were any disparities" between the "availability" and "utilization" of minority- and women-owned businesses (MBE/WBEs) on its transportation contracts.

Through its statistical study, BBC concluded that women-owned firms do not face "substantial disparities," or discrimination, in the federally funded transportation contracting market in Washington.

To reach this sweeping conclusion, BBC interviewed just a small handful of Washington businesses. Many businesses were not included in BBC's analysis. In fact, during WSDOT's January 9, 2014 public meeting on the changes to Washington's DBE program, most, if not all, of the women-owned businesses in attendance stated they had never been contacted by BBC. This is striking and very concerning.

BCC attempted to carry out a "custom census" of all businesses within certain relevant work specialization codes (NACIS codes). Unfortunately, however, BBC only interviewed a small portion of those relevant businesses.

BBC's process was as follows:

(1) using Dun & Bradstreet (D&B) listings, BBC identified 14,528 business listings in certain, relevant NACIS codes;

(2) BBC reported that only 10,560 of the 14,528 had valid working phone numbers. BBC apparently attempted to contact each of the 10,560 but, for reasons not identified, was able to only successfully contact 4,784 (or 32 percent);

(3) Of the 4,784 contacted by BBC, only 3,335 (or 22%) agreed to complete BBC's "availability telephone survey;"

(4) Based on the results of the telephone survey, BBC decided which businesses could be considered "ready, willing, and able" for WSDOT work for purposes of WSDOT's goal setting process.

(5) BBC determined that only 988 (or 6.8 percent) were potentially "available" and based its analysis only upon these 988 potentially "available" firms.

In summary, therefore, BBC's analysis and findings were based on just 6.8 percent of the 14,528 businesses identified by D&B listings. Based on this small sample, BBC posited that women-owned DBEs have not "actually suffered discrimination" in federally funded transportation contracting and should therefore be excluded from participation in DBE program goals for federally funded transportation contracts.

BBC Ignored a Large Percentage of Businesses in its "Availability" Analysis for Washington

BBC provides no statistical basis for ignoring the large proportion of firms—93.2 percent—that were not interviewed or included in their study. This is very concerning since BBC excluded some firms for not being able to provide detailed information on their contracting history in their telephone interviews.

Since businesses owned by women are often smaller and have fewer resources, they are less likely to have the staff and/or time to answer BBC's questions and hence would be more inclined to be excluded from BBC's survey results. This effect will bias downward BBC's "availability" analysis of women-owned businesses and significantly skew BBC's analysis upon which WSDOT relies.

In statistics, this downward bias effect is often called "self-selection bias." Self-selection bias arises in any situation in which individuals select themselves into—or out of—a group, causing a biased statistical result. It is commonly used to describe situations where the characteristics of the people which cause them to select themselves in—or out of—the group create abnormal or undesirable conditions in the group.

BBC' findings were that the "availability" of women-owned businesses *decreased* by more than 60 percent between 2010 and 2011. BBC itself noted that, in one year, its figures were driven by inclusion of a large contract awarded to a single (minority-owned, but not certified) firm. The large fluctuations in BBC's "availability" index from year to year suggest that BBC's analysis and methodology are unreliable.

BBC's "Custom Census" Approach Has Not Been Approved by the Courts

When challenged with the insufficiencies of BBC's "custom census" approach, WSDOT and BBC have both argued that BBC's "custom census" methodology has been specifically approved by the courts, citing the Ninth Circuit's opinion in *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp.*[13]

Contrary to their arguments otherwise, the Ninth Circuit in *Associated Gen. Contractors* did not so rule. In that case, the Associated General Contractors of America ("AGC") challenged the California Department of Transportation's ("Caltrans'") implementation of the DBE program, arguing that the program was unconstitutional.

WSDOT to Exclude Non-Minority Women-Owned Business from DBE Participation Goals *from previous page*

AGC did not challenge the methodology or approach used by Caltrans in its goal-setting process—instead, AGC argued that the DBE program, as applied in California, unconstitutionally provided race- and gender-based preferences on certain transportation contracts. The Ninth Circuit never once addressed, and certainly did not sanction, BBC's "custom census" approach to calculating "availability" in *Associated Gen. Contractors of Am.*

The Potential Impact of WSDOT's Proposal

The impact of WSDOT's proposal to exclude women-owned businesses from Washington's federal contracting goals will be significant. This is an important issue that will impact not just those businesses that are excluded, but also general contractors and the construction industry as a whole.

WSDOT published its intent to seek the exclusion of women-owned businesses from federally funded contracting in late 2013. It sought public comment and testimony—as it is required to do under the Federal Regulations—through February 3, 2014.

As the next step toward implementing its proposal, in early March 2014, WSDOT submitted its proposal to the U.S. Department of Transportation's Federal Highway Administration ("FHWA") for approval. FHWA has up to six months to review the BBC study, WSDOT's proposal, and the public comment WSDOT received in reaction.

A decision either approving or rejecting WSDOT's proposal is anticipated from FHWA in October 2014. Until then, the DBE program in Washington remains unchanged and women-owned businesses remain eligible for inclusion in the DBE program goals for federally funded contracts.

If WSDOT's proposed "waiver" is accepted next fall 2014, women-owned DBEs will still be eligible for DBE certification and may participate in the "race- and gender-neutral program measures" of the DBE program—*for example*, one-on-one mentoring, technical assistance, and WSDOT's small business program. They will, however, be excluded from DBE program goals for federally-funded contracts.

Moving Forward

In recognition of the importance of women-owned business participation in our state, Governor Jay Inslee and Seattle Mayor Ed Murray have both recently issued written orders in support of WBEs.

On December 31, 2013, Governor Inslee signed a Proclamation acknowledging the "vital role" that women-owned businesses have in Washington's economy and daily lives. He agreed that "women-owned businesses are often underutilized in government contracting and procurement" and deemed January 20 – 24 as "Minority and Women-owned Business Week."[14]

On April 8, 2014, Seattle Mayor Ed Murray issued Executive Order 2014-03, affirming the Mayor's commitment to promoting race and gender equity in contracting. He acknowledged that "it is a priority for the City to affirmatively expand its efforts to include WMBE participation in City contracts and ensure that WMBEs are afforded fair and equitable opportunity to complete for City contracts and do not face unfair barriers when seeking and performing on City contracts."[15]

Governor Inslee's Proclamation and the Mayor's Order are in striking contrast to WSDOT's plan and conclusion that women-owned DBEs have not "actually suffered discrimination" in federally funded transportation contracting. The messages are not consistent.

The simple fact is that WSDOT's analysis is incorrect and BBC's statistics are skewed: women-owned businesses *do* presently suffer discrimination in federally-funded transportation contracting and their inclusion in the DBE program goal is vital.

In order to withstand constitutional scrutiny—WSDOT (and all states) must implement the DBE program based upon solid and reliable data that accurately reflects true marketplace conditions. WSDOT's current proposal would not meet this test in a court. In 2005, the Ninth Circuit court struck down WSDOT's implementation of the DBE program as unconstitutional because WSDOT's statistical data and analysis was inadequate.[16] A court could similarly strike down this current proposal.

If challenged, the Ninth Circuit Court has the authority to once again strike down WSDOT's changes to Washington's DBE program. To make this change happen, however, businesses impacted by WSDOT's changes must first lodge a challenge in court. As of yet, no group has come forward to take this action.

WSDOT's plan is an extreme measure that will have long-lasting detrimental impacts on our state, joblessness, and the economy. In the current economic climate, as recognized by Governor Inslee and Mayor Murray, our state should be taking measures to increase women-owned business participation and opportunities in the marketplace, not reducing them.

1 *Western States Paving Co., Inc. v. Washington State Dep't of Transp.*, 407 F.3d 983, 988 n.3 (9th Cir. 2005).

2 *Id.*

3 49 C.F.R. 26.67(a).

4 49 C.F.R. 26.1(b).

5 *See e.g., Western States*, 407 F.3d at 988.

6 *Id.* at 990-93.

7 *Id.*

8 *Id.* at 1002.

9 49 C.F.R. 26.45(b).

10 49 C.F.R. 26.45(c).

11 49 C.F.R. 26.45(d).

12 49 C.F.R. 26.45(e).

13 713 F.3d 1187 (9th Cir. 2013).

14 *See* http://getcertifiednw.com/wp-content/uploads/2013/08/Governors-Proclamation-Minority-and-Women-owned-Business-Week.pdf.

15 *See* http://murray.seattle.gov/wp-content/uploads/2014/04/WMBE-Executive-Order.pdf.

16 *See Western States*, 407 F.3d at 988.

Washington State Bar Association
Construction Law Section
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

2013-2014
Construction Law Section Membership Form
October 1, 2013 – September 30, 2014

❒ Please enroll me as an active member of the Construction Law Section.
My $25 annual dues are enclosed.

Name _____

Firm Name _____

Address _____

City/State/Zip _____

Telephone _____

E-mail Address _____

Please send this form to:

Construction Law Section
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

office use only

Date _____ Check # _____ Total $_____