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The U.S. Department of Justice and Department of Transportation Move To Terminate Key Requirements Of The Disadvantaged Business Enterprise (DBE) Program

Overview

A recent proposed settlement in federal court case, if approved, would lead to substantial changes to the DBE program's requirements for reserving a portion of federal highway construction funds to be paid to small businesses owned and controlled by traditionally socially and economically disadvantaged individuals.

The proposed settlement is in an October 2023 lawsuit filed by two construction industry companies in the U.S. District Court for the Eastern District of Kentucky against the U.S. Department of Transportation, the Secretary of Transportation, the Division Administrator of the Kentucky Division of the Federal Highway Administration, and the Administrator of the Federal Highway Administration. Represented by pro bono counsel, plaintiffs Mid-America Milling Company, Inc. and Bagshaw Trucking, Inc. alleged that although they each were highly qualified for participation in road construction projects financed by the federal government, as non-DBE contractors they were faced with a significant disadvantage to being able to compete for these contracts on a level footing with competing firms owned by women and/or racial and ethnic minorities because of the provisions imposed by the DBE program. Plaintiffs further contended that the DBE program and the federal regulations governing it violated their right to equal protection under the Fifth Amendment to the U.S. Constitution. The suit sought a declaratory judgment that the DBE program's race and gender-based classifications were unconstitutional and to enjoin the defendants from applying the DBE program's race and gender-based classifications.

On September 23, 2024, United States District Judge Gregory Tatenhove[1] entered a preliminary injunction against the "use of race- and gender-based rebuttable presumptions for United States Department of Transportation contracts impacted by DBE goals upon which the Plaintiffs bid."

On May 28, 2025, the plaintiffs and the government defendants submitted a joint motion for a consent order that stipulated that the government's past use of the DBE program's requirements for awarding transit, highway, and aviation contracts violated the Fifth Amendment's Equal Protection Clause. Unlike the September 23, 2024, injunction, which appears limited just to projects "upon which Plaintiffs bid," the judgment to be entered pursuant to the consent order provides:

> 11. Based on the stipulation set forth in Paragraph 9 above and its independent analysis, the Court hereby holds and declares that the use of DBE contract goals in a jurisdiction, where any DBE in that jurisdiction was determined to be eligible based on a race- or sex-based presumption, violates the equal protection component of the Due Process Clause of the Fifth Amendment.
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> 12. Accordingly, the Court hereby holds and declares that Defendants may not approve any federal, state or local DOT-funded projects with DBE contract goals where any DBE in that jurisdiction was determined to be eligible based on a race- or sex-based presumption. The Court's declarations are binding on the parties, including all Defendants, in a conclusive final judgment.

The District Court has not yet entered judgment pursuant to the stipulation. State and local government agencies, as well as companies who would be affected by the proposed judgment, are seeking to intervene in the case and to file amicus briefs. The case is set for trial in January 2026.

If the District Court were to approve the consent order, the motion for which is still pending, the court's judgment effectively terminates the key provisions of the DBE program, including its reliance on a rebuttable presumption that women and select racial groups are presumed to be disadvantaged**.** Elimination of this presumption would trigger a significant transformation of the federal DBE programs.

In light of the recent developments, all DBE program participants will need to evaluate their current practices, identify areas of legal and operational vulnerability, and take steps to develop compliance strategies that are consistent with the revised DBE requirements.

Background

The DBE program, enacted by the federal government in 1983 and reauthorized in 2021, establishes a national goal that ten percent of federal highway construction funds be paid to small businesses owned and controlled by "socially and economically disadvantaged individuals," as

that term is defined in § 8(d) of the Small Business Act (15 U.S.C. § 637). Under the law any person of any gender or race may qualify as socially and economically disadvantaged, but there is a rebuttable presumption that individuals who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Women, and any additional groups whose members are designated as socially and economically disadvantaged by the SBA are socially and economically disadvantaged.

The determination for DBE eligibility is made on a case-by-case basis. However, at minimum to be eligible for consideration under the DBE program, a qualifying business must be a for-profit small business enterprise where at least 51% of the business is owned and controlled by socially and economically disadvantaged individuals.

Under federal law, all recipients of federal funds, including transportation agencies and departments of individual states, are required to have a DBE program in place and must set DBE participation goals. At the state and local agency level, the federal implementing regulations at 49 C.F.R Part 26 require that prime contractors bidding projects receiving funds from the U.S. Department of Transportation, either directly or through state agencies such as Caltrans, either meet the DBE goal for the project or engage in specific steps demonstrating "good faith efforts" to do so. Failure to meet a project's DBE goal, and to have engaged in sufficient good faith efforts, are common grounds for challenges to the apparent low bidder on federally funded projects.

Until the recent change in presidential administrations, the U.S. DOT and the Department of Justice defended the DBE program in court proceedings. It should be noted that there have been a number of prior cases litigating the legality of the DBE program's regulations, and those cases typically found that the regulations were constitutional. For example, in *Associated Gen. Contractors v. Dept. of Transportation*, 713 F. 3d 1187 (9th Cir. 2013), the Ninth Circuit ruled in favor of Caltrans and upheld the legality of the regulations implementing the DBE program.

However, some recent cases have challenged the constitutionality of similar programs, including a ruling from the U.S. District Court of the Northern District of Texas which sided with white business owners who contended that Texas' Minority Business Development Agency ("MBDA") discriminated against them on the basis of race and held that the MBDA's eligibility criteria violated plaintiffs' Fifth Amendment equal protection guarantees because they systemically presumed that racial minorities are inherently disadvantaged.

Implications for the Construction Industry

If the proposed consent order in *Mid America Milling Co. v. USDOT* is approved by the court and not overturned by the Court of Appeals or the Supreme Court, there are significant implications for public agencies, prime contractors, and certified DBEs. The DBE program will come to an end, resulting in what is effectively a nationwide ban on the use of race and gender-based criteria in establishing DBE contract goals. This would include any participation goals or bid incentives that rely on the previously accepted presumption that women and certain racial or ethnic groups are socially and economically disadvantaged. Such a ruling would effectively nullify the current structure of the DBE program as implemented under 49 C.F.R. Part 26, and any program relying on these presumptions would risk being found noncompliant or unconstitutional.

This is very significant change. For example, the DOT regulations at 49 CFR Part 26 are the very reason Caltrans and other agencies receiving DOT funding directly or indirectly have DBE goal requirements. Approval of the consent order, if it is not stayed or reversed, would leave agencies with no legal basis to set DBE goals tied to race or gender classifications and force an immediate reevaluation of how such goals are set and enforced.

The California Supreme Court has ruled that DBE programs violate the law, including Proposition 209, except where federal statutes or regulations preempt state law. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000).

1. Impact on Federal, State and Local Agencies

Entry of the consent order would create considerable uncertainty for federal, state, and local agencies receiving DOT funding. The consent order if approved would likely be challenged on a variety of grounds.

First, on June 27, 2025, in *Trump v. CASA, Inc*., 222 L. Ed. 2d 930, 145 S. Ct. 2540 (2025), the United States Supreme Court limited the ability of lower-court judges to issue "universal injunctions" to block the enforcement of policies nationwide. The Court ruled in a 6–3 decision that universal injunctions exceed the judiciary power unless necessary to provide the formal plaintiff with "complete relief". Writing for the majority, Justice Barrett emphasized that "complete relief" for a plaintiff was distinct from "universal relief" impacting all similar situations nationwide. We expect many agencies and groups will take the position that the consent order in *Mid America Milling Co.* only should apply to the specific parties in that case.

Second, federal agencies typically must follow an extensive notice and comment procedure under the Administrative Procedure Act (APA) even when rescinding a regulation. These procedures take a substantial amount of time to implement, and it is not clear that the President or Department of Justice have authority to circumvent the APA's requirements. The recission of existing regulations can also be challenged in court.

Absent definitive court rulings either upholding the existing regulations or rescinding and/or striking them down, federal, state, and local agencies are faced with the difficult task of complying with existing regulations that the current presidential administration claims are illegal. Complicating that task is the fact that there may be conflicting rulings in different courts and in different parts of the country, although it is possible that the Supreme Court might intervene to stay some or all of the rulings pending final review of a case concerning the lawfulness of DBE regulations. The Supreme Court may be more receptive to the Department of Justice's position in *Mid America Milling Co*. than it might have been in past. However, it may take years for challenges to DBE regulations to be finally resolved, whether by the Supreme Court or through regulatory action.

Each agency subject to 49 CFR. Part 26 will need to determine what action it must take. Assuming that there is a national ban on enforcing DBE rules and requirements, federal, state, and local agencies would need to quickly revise their DBE programs to comply with a race-neutral framework. This would likely require significant modifications to internal policies, administrative

procedures, and procurement documentation.

Goal-setting methodologies would need to shift from current disparity analyses that rely on racial and gender classifications to alternative frameworks based solely on race and gender-neutral factors, most likely focusing on small business status and economic disadvantage alone. For example, when the California Supreme Court ruled against the use of DBE goals in the absence of a federal mandate, San Francisco and many other local agencies adopted Local Business Enterprise programs, which themselves must be carefully drafted to avoid constitutional issues, such as violation of the Equal Protection and Commerce Clause requirements.

Such a shift may also prompt agencies to reevaluate their outreach, monitoring, and enforcement mechanisms, which often include race-conscious components. Agencies that continue operating under current Part 26 structures without modification could face legal exposure or risk having future funding withheld, even if there are court rulings at the time that find that the applicable regulations are lawful and in effect.

2. Impact on Industry Contractors

Contractors and their subcontractors participating in federally funded projects also will be caught up in the uncertainty that the consent order in *Mid America Milling Co. v. USDOT* would create if it were entered. In the absence of definitive court rulings or administrative action rescinding Part 26, agencies may adopt different strategies. Some may continue to require compliance with DBE program requirements. Others may indicate that compliance is not required, which then places further burdens on contractors as the legality of the contracts that they enter into could be challenged if they fail to comply with Part 26 regulations that are not definitely stayed or rescinded.

Assuming that the DBE program is ended, whether through court rulings or administrative action, contractors and subcontractors would need to adapt. For example, many prime contractors currently develop bid strategies around meeting DBE goals that are structured in part on the availability of certified minority and women-owned firms. If those classifications are invalidated for goal-setting purposes, prime contractors will be expected to meet participation goals without regard for the race or gender of their subcontractors. This may lead to significant uncertainty and disruption in bid planning, compliance reporting, and subcontractor selection.

Furthermore, prime contractors may face challenges with projects already under contract, particularly if those contracts incorporated DBE participation goals that would no longer be permissible under the new legal framework. Contractors should begin preparing for project-by-project risk assessments and explore alternative small business inclusion strategies that are legally defensible.

3. Impact on Currently Certified DBE Businesses

Minority and women-owned businesses that are currently certified as DBEs based on presumed disadvantaged status may experience adverse impacts in both certification and contracting opportunities. Although economic disadvantage criteria would likely remain a valid basis for certification under a revised program, many businesses that have relied on race or gender-

based presumptions may need to requalify or seek recertification under new standards. These firms may also face reduced visibility in competitive solicitations if agencies and prime contractors are no longer permitted to consider their demographic status in award decisions. As a result, diverse business communities that have historically benefitted from the DBE program may see diminished contracting opportunities unless proactive race-neutral support mechanisms, such as bonding assistance, capacity-building programs, and targeted small business outreach, are implemented.

4. No Impact on DVBE or Local Business Programs

The proposed consent order in *Mid America Milling Co. v. USDOT* would not affect other goal or preference programs, such as those intended to benefit veterans or local small businesses. For example, California Military and Veterans Code Section 999 establishes the Disabled Veteran Business Enterprise (DVBE) Program, which requires California state departments and agencies to meet a 3% DVBE participation goal. Contractors and subcontractors should therefore continue to comply with such requirements when bidding and performing construction work.