



BASSFORD REMELE

CHALLENGES CONTINUE FOR DBE

Janine M. Loetscher
Bassford Remele, P.A.

Many in the construction industry are aware of ongoing challenges against the U.S. Department of Transportation's ("DOT") Disadvantaged Business Enterprise Program (DBE). By way of background, DBE is a legislatively mandated program aimed at ensuring that federally-assisted contracts for highway, transit, and aviation projects are available to small businesses owned and controlled by socially and economically disadvantaged individuals. While any small business owner may qualify as socially and economically disadvantaged, women and certain racial and ethnic minorities have been subject to a rebuttable presumption of social and economic disadvantage under the program. Upon establishing this program, Congress set a nationwide goal that at least 10% of allocations to State and local entities as part of DOT-assisted aviation, highway, and transit contracting projects be allocated to businesses owned by small and socially disadvantaged individuals.

On October 26, 2023, Mid-America Milling Company, Inc. and Bagshaw Trucking, Inc. filed a lawsuit in the U.S. District Court for the Eastern District of Kentucky against DOT, alleging that despite having a long history of participating in federally financed road construction projects and being qualified, willing, and able to apply for federal highway and surface transportation contracts, they could not compete for these contracts on an equal footing with women and racial and ethnic minorities because of DBE. They alleged that DBE and the federal regulations controlling the program violated the equal protection guarantee of the Fifth Amendment to the U.S. Constitution and the Administrative Procedure Act. The plaintiffs sought a preliminary and permanent injunction enjoining the defendants from applying race and gender-based classifications in DBE, as well as a declaratory judgment that the race and gender-based classifications were unconstitutional. On December 15, 2023, the plaintiffs sought a preliminary injunction prohibiting the defendants from implementing or enforcing DBE's race and gender presumptions and participation goal.

On September 23, 2024, Judge Van Tatenhove granted a preliminary injunction forbidding the mandatory use of DBE's race and gender presumptions in awarding DOT contracts, concluding that the mandatory presumption of disadvantage awarded to minority- or woman-owned contractors violated the Equal Protection Clause. The court limited its preliminary injunction to the case parties themselves. At least two other claimants sought to intervene as plaintiffs ("Proposed Plaintiff Intervenor") and modify the terms of the injunction to also apply to them.

Following the transition to the Trump Administration, and President Trump's executive order purporting to end equity-based decisions in federal contracting, on May 21, 2025, Magistrate Judge Edward B. Atkins allowed a group of minority and women owned contractors and other organizations to intervene as defendants in the case ("Intervenor DBEs").

On May 28, 2025, the plaintiffs and the government submitted a joint motion for a consent order. The proposed text of this order would stipulate that the government's past use of DBE rebuttable presumptions in awarding contracts violated the Equal Protection Clause and end the use of such presumptions. The following day, the Intervenor DBEs filed a notice they intended to oppose the joint motion.

On June 5, 2025, Judge Van Tatenhove issued a multi-faceted order (1) granting a requested 90-day stay of the case to allow parties to consider resolution of the case, (2) extending case deadlines, (3) taking under advisement the Proposed Plaintiff Intervenor's motion for intervention and modification of the injunction during the pendency of the stay, and (4) taking under advisement the plaintiffs' and government's joint motion for a consent order for the pendency of the stay. Importantly, the court indicated that, despite the stay, the Intervenor DBEs could file their opposition to the joint motion.

It is uncertain how the latest ruling by Judge Van Tatenhove will impact the ongoing challenges to the DBE program. All parties face a certain amount of risk. The plaintiffs and the government face the risk of the court denying their joint motion for a consent order. The DBE Intervenor face the risk that the court will grant the motion for the consent order despite their opposition. And the Proposed Plaintiff Intervenor face the risk that the court will deny their motion to intervene and modify the injunction. One might speculate this was done by design, to motivate all parties to reach an agreement.

What is certain is that challenges to the DBE program are not going away, and can only be expected to increase. Contractors performing work that was or may be subject to DBE should consult counsel regarding the status of DBE and their rights and obligations.

About the Author



[Janine Loetscher](#) is a shareholder with Bassford Remele and co-chair of its construction and insurance coverage practice groups. Janine is a litigator with substantial large-scale loss experience, whose practice focuses in construction, insurance coverage, products liability, and personal injury matters. Janine has defended contractors and individuals in construction defect lawsuits, and has represented both insurers and policyholders on numerous coverage issues. She has represented clients in many trials, obtaining defense and favorable verdicts. Janine serves as the Legal Advisor to the Association of Women Contractors. jloetscher@bassford.com, 612.376.1658.

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