



U.S. Department
of Transportation

**Federal Highway
Administration**

Memorandum

Subject: **ACTION:**
Preliminary Injunction
Affecting Disadvantaged
Business Program

Date: November 18, 2024

From: Irene Rico
Associate Administrator
Office of Civil Rights

In Reply Refer To:
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To: Directors of Field Services
Division Administrators
Deputy Division Administrators

I am writing to provide general guidance on how the Federal Highway Administration (“FHWA”) is responding to the lawsuit in Kentucky challenging the U.S. Department of Transportation’s (“USDOT”) Disadvantaged Business Enterprise (DBE) Program. FHWA, after consultation with the USDOT Acting General Counsel and the U.S. Department of Justice (“DOJ”), is issuing this guidance to comply with the court’s preliminary injunction. The preliminary injunction prohibits USDOT from applying DBE contract goals on contracts for which Plaintiffs have identified an interest in bidding. This general guidance is in addition to and consistent with specific, State-by-State guidance for specific lettings that FHWA has already provided to the States in which Plaintiffs have already identified contracts on which they intend to bid and that FHWA will continue to provide as Plaintiffs identify additional contracts.

Background

As you know, the USDOT is a defendant in a lawsuit filed last year in the U.S. District Court for the Eastern District of Kentucky challenging the constitutionality of USDOT’s DBE program. Plaintiffs Mid-America Milling Company (“MAMCO”) and Bagshaw Trucking (“Bagshaw”), Indiana-based non-DBE subcontractors who work on highway projects, allege that the statutes authorizing the program, as well as USDOT’s implementing regulations, unlawfully discriminate on the basis of race and gender and therefore violate the equal protection component of the Fifth Amendment’s Due Process Clause.

On September 23, 2024, the Court issued a preliminary injunction prohibiting USDOT from mandating the use of the DBE program’s race- and gender-based rebuttable presumptions of disadvantage on USDOT-funded contracts on which Plaintiffs bid for

work as subcontractors. USDOT construed this decision as limiting the reach of the injunction to contracts in Indiana and Kentucky. However, on October 31, the Court issued an opinion and order clarifying the preliminary injunction as reaching contracts with DBE goals “in any state in which Plaintiffs operate or bid on such contracts.” In practice, this means that federally-assisted contracts on which Plaintiffs intend to submit a quote in any state must have DBE goals set at zero percent. Except for any such contracts that are identified by the Plaintiffs, the DBE Program will continue to operate pursuant to the applicable DBE regulations at 49 CFR part 26 and approved DBE programs for each State. This includes implementing any contract goals established for contracts other than the ones identified by the Plaintiffs.

In Plaintiffs October 10, 2024, motion to clarify the preliminary injunction, Plaintiffs identified twenty-five States in which they operate or plan to bid on federally funded State contracts with DBE goals: **Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia** (collectively, the “States”). Plaintiffs may identify contracts in other States subject to their capacity to undertake such work. Therefore, this memo is addressed to all Division Administrators for awareness. As of the date of this memo, Plaintiffs have identified contracts in Illinois, Indiana, Kentucky, Michigan, Ohio, Oklahoma, Tennessee, Virginia, and West Virginia.

Process for Implementing Preliminary Injunction

DOJ has negotiated the following process with Plaintiffs for implementing the preliminary injunction.

1. Plaintiffs will identify in writing the federally funded contracts, including locally-administered projects under which the State has subgranted to a local agency, in each State on which they plan to bid for each scheduled letting. Plaintiffs will submit a list of contracts to DOJ no later than five business days after the contracts are advertised, and DOJ will share the list with USDOT. No later than five business days after Plaintiffs submit such a list (and likely sooner), USDOT will review the list and notify the States of any contracts on the list that are federally funded and have DBE goals greater than 0% (the “Identified Contracts”).
2. Notwithstanding 49 CFR Part 26, USDOT will not mandate that the States include DBE contract goals on any of the Identified Contracts. Therefore, the States should set 0% DBE goals for each of the Identified Contracts. In addition, FHWA will not concur in the award of any Identified Contract that has a DBE goal higher than 0% (including contracts for which the FHWA’s concurrence responsibility has been assumed by the States under the FHWA/State Stewardship and Oversight Agreement).
3. The States, in turn, should issue an amendment or revision setting a 0% DBE goal for each Identified Contract prior to the letting. This process applies to traditional Design-Bid-Build contracts, as well as contracts under alternative contracting methods, such as Design-Build and Construction Manager/General Contractor contracts. To the extent that

implementation questions arise on application of this process to alternative contracting methods, FHWA and the States involved will address such questions on a case-by-case basis. In all cases, the States should take appropriate action to notify the contractor community of each such revision or amendment. Like other contracts with no DBE goals or contracts with DBE goals set at 0%, DBE participation achieved on an Identified Contract where the DBE contract goal was reduced to 0% still counts as race-neutral participation toward the State's overall annual DBE goal.

4. Some States may have approved overall statewide goals to be satisfied solely by race- and gender-neutral means. In such cases, no action will be necessary to comply with the preliminary injunction as such States already do not set DBE participation goals on individual contracts.
5. States should provide to FHWA the bidders lists information in accordance with 49 CFR 26.11(c) for any projects identified under Paragraph 1 of this guidance.
6. To the extent that the reduction of DBE goals on Identified Contracts affects a State's plans for meeting its overall annual DBE goal, the State still must exercise good faith efforts to meet its overall annual goal. *See* 49 CFR 26.47(a). An affected State must continue to implement a running tally of its cumulative DBE awards/commitments to determine whether its current implementation of contract goals is projected to be sufficient to meet the State's overall goal. *See id.* at 26.37(c)(1). States must set contract goals to meet any portion of their overall goal that they do not project being able to meet using race-neutral means. *See id.* at 26.51(d). This means that if a State is required to reduce DBE contract goals to zero on Identified Contracts, the State must use good faith efforts to identify other contracts on which DBE contract goals may be established to make up for the loss of expected DBE participation on the Identified Contracts. States may only set DBE contract goals on projects with subcontracting possibilities, and contract goals must be set using a data-driven process, considering such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract.
7. If, despite the exercise of good faith efforts, a State is unable to achieve its overall annual DBE goal, it must submit a shortfall analysis to FHWA examining the reasons for the difference between the State's overall goal and the level of its DBE awards and commitments for that year. *See id.* at 26.47(a), (c). The impact of compliance with the preliminary injunction may be identified as a reason for the State's shortfall.
8. Other than the limitations set forth in this and previous guidance, the States must continue to fully implement the DOT DBE program, including setting DBE contract goals, as necessary, to achieve the State's overall DBE goal on contracts that are not identified in this memorandum.

USDOT will provide additional written guidance as necessary. This memorandum and any such additional guidance will be posted on the FHWA's webpage at <https://highways.dot.gov/civil-rights/programs/disadvantaged-business-enterprise-dbe-program>. This guidance supersedes all previous guidance received by the States to the extent that those memoranda could be construed as applying to contract lettings other than those specifically identified therein.

Please share this guidance with your State departments of transportation.

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