

# District Court Ruling on DOT Disadvantaged Business Enterprise Program

October 4, 2024

Awarding a preliminary injunction, a federal district court ruled in *Mid-America Milling Company v. United States Department of Transportation* that the U.S. Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) program may no longer operate under existing program regulations in the states of Indiana and Kentucky. The U.S. District Court for the Eastern District of Kentucky concluded in a September 23, 2024, opinion that DOT's "rebuttable presumptions" of disadvantage based on race and gender pursuant to the program likely violated contractors' rights to [equal protection](#) under the Constitution. The challenged requirements gave some women- and minority-owned businesses competitive advantages for certain DOT-funded contracts. Under the applicable strict scrutiny standard, a race-based preference must be narrowly tailored to meet a compelling government interest.

In *Mid-America*, the court did not find specific instances of intentional discrimination, as needed to establish a compelling interest. General assertions of discrimination, or statistical disparities, the court said, were not enough. Furthermore, the court held that the DBE program would not be [narrowly tailored](#) to remedy discrimination because it arbitrarily included and excluded certain racial groups, and because the decades-old preference lacked a termination date or other logical end point. Similarly, the court concluded that the government did not meet the intermediate scrutiny standard, applicable to sex-based preferences. This standard requires the preference to be substantially related to an important government interest (such as remedying discrimination). Disparity studies showed women-owned businesses had less access to credit, the court acknowledged, but it did not show intentional discrimination.

Based on the ruling, DOT must change certain DBE program requirements in Indiana and Kentucky (where the plaintiffs in the case operate), at least until the case is fully resolved, or it may seek a stay of the injunction. DOT has yet to respond to the ruling.

DBE program objectives include the promotion of the use of DBEs in federally-assisted transportation projects and the development of firms that can compete successfully in the marketplace. DBEs are defined as small businesses that are at least 51% owned by "socially and economically disadvantaged individuals" and that meet other corporate control and revenue criteria. The eligibility criteria are found in Small Business Administration (SBA) and DOT regulations (at [13 C.F.R. §124.1001](#) and [49 C.F.R. Part 26](#) and [49 C.F.R. Part 23](#)).

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To be considered socially and economically disadvantaged, a firm's owners must either demonstrate disadvantage or qualify for a presumption. DOT presumes social and economic disadvantage for U.S. citizens and permanent residents who are: women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA (49 C.F.R. §26.67). In *Mid-America*, plaintiffs challenged the race- and gender-based disadvantage presumptions. If not presumed disadvantaged by DOT, business owners must demonstrate social and economic disadvantage by meeting conditions explained at 49 C.F.R. §26.67(d).

Congress has regularly reauthorized the DBE program in surface transportation bills since 1983, most recently in the Infrastructure Investment and Jobs Act (P.L. 117-58). DBE programs for airport projects and airport concessionaires were authorized by the Airport and Airway Safety and Capacity Expansion Act of 1987 (P.L. 100-223). For more information, see [CRS In Focus IF12055](#), *The U.S. DOT Disadvantaged Business Enterprise Program*.

State and local governments implement the DBE program. Local government grantees of the Federal Highway Administration, National Highway Traffic Safety Administration, Federal Transit Administration, and the Federal Aviation Administration submit DBE contracting goals to DOT funding agencies for review, although they cannot be penalized for noncompliance with DBE requirements so long as they administer their programs in good faith (49 C.F.R. §26.47). While statute specifies a nationwide goal for DBE contracts of 10% of applicable funds, grantees develop aspirational DBE contracting goals of their own (49 C.F.R. §26.41), relevant to their contracting markets. Goals are based on the share of DBEs available to perform contracts, and may rely on a contract "bidders list" or a "disparity study" (49 C.F.R. §26.45(c)).

State and local grantee agencies typically maintain directories of certified DBE firms and might provide technical assistance to DBE firms in order to help them attain their DBE goals. Existing program regulations require grantee agencies to try to meet their goals using "race-neutral" and "gender-neutral" means, without favoring DBEs over non-DBEs (49 C.F.R. §26.51(a) and 49 C.F.R. §26.51(b)). In addition, regulations prohibit the set-aside of contracts for DBEs on DOT-assisted contracts except "when no other method could be reasonably expected to redress egregious instances of discrimination" (49 C.F.R. §26.43). Absent a stay of the district court ruling, Indiana and Kentucky grantees may not currently presume that firms owned by racial minorities or women qualify as disadvantaged for DBE benefits.

SBA's 8(a) Business Development Program faced a similar court challenge in 2023 and now may not use race-based presumptions of social disadvantage when admitting small business owners to that program. That program offers contracting preferences as well as mentorship, training, and counseling to socially and economically disadvantaged business owners. The DOT definition of "socially and economically" disadvantaged differs from that of the 8(a) Business Development Program. For example, women are presumed to be disadvantaged by the DBE program but not by the 8(a) program. Certain economic thresholds also differ between the two programs. For more information on the 8(a) program, see [CRS Report R48190](#), *SBA's 8(a) Business Development Program: Structure and Current Issues*. Regarding definitions of "disadvantage" for different programs, see [CRS Insight IN12266](#), *Small Disadvantaged Businesses, Disadvantaged Business Enterprises, and Minority Business Enterprises: Definitions and Differences in Terms Used by Government Programs*. A variety of race-based federal programs have faced legal challenges. For more information on those cases, see [CRS Legal Sidebar LSB11226](#), *Equal Protection and Race- or Sex-Conscious Government Action: Case Developments*.

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