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Rethinking Federal DBE Requirements – More to Come?

IN OCTOBER 2025, the United States Department of Transportation (“USDOT”) issued an Interim Final Rule (“IFR” or the “Rule”), amending 40 CFR Part 26, which governs USDOT’s Disadvantaged Business Enterprise (“DBE”) program.¹ That Rule became effective immediately and has a significant impact on DBEs in New York State who are certified through USDOT.

Under the IFR, the objective of the DBE program was amended to “ensure that the DBE program operates in a nondiscriminatory manner and without regard to race or sex, while maximizing efficiency of service.” Thus, while various amendments were made to the DBE program, the removal of the race- and gender-based presumptions of disadvantage previously employed for certification purposes is most significant. Now, DBE certification based solely, or in part, on race or gender is no longer permitted.

The IFR is partially the result of various legal challenges and Federal Executive Orders regarding the DBE and similar programs that aim to provide “small businesses owned and controlled by socially and economically disadvantaged individuals a fair opportunity to compete for federally funded transportation contracts.”² Most notably, in *Mid-America Milling Co. v. U.S. Department of Transportation*, brought in the Eastern District of Kentucky, the DBE program was challenged on equal protection grounds. In that case, plaintiffs challenged the race- and gender-based presumptions of disadvantage used to certify DBEs under the program, alleging that the USDOT failed to meet its constitutional burdens in employing such classifications, thereby denying the plaintiffs equal protection.

After finding such presumptions to be likely unconstitutional, the court issued an order prohibiting the USDOT from “mandating the use of race- and gender-based rebuttable presumptions for [DOT] contracts impacted by DBE goals upon which the Plaintiffs bid.” In other words, that injunction only applied to states in which the Plaintiffs operated or bid on contracts affected by DBE goals. Thereafter, however, in late May 2025, the parties, through a joint motion, sought entry of a Consent Order whereby the USDOT stipulated and agreed that “the DBE program’s use of race- and sex-based presumptions of social and economic disadvantage. . . violate[d] the equal protection component of the Due Process Clause of the Fifth Amendment of the U.S. Constitution” and that USDOT would no longer employ such presumptions. Although

the court had not yet ruled on the joint motion when the IFR was issued, the case appears to have had a compelling impact on the DBE and other programs.

It should also be noted that various Executive Orders regarding diversity and accessibility policies, programs, and practices were also issued by President Trump prior to the issuance of the IFR. Briefly, Executive Order 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing, which ordered the Director of the Office of Management and Budget, assisted by the Attorney General and the Director of Personnel Management, to “coordinate the termination of all discriminatory programs, including illegal DEI and ‘diversity, equity, inclusion, and accessibility’ (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear,” was issued in January 2025.

The Order further mandated the review and revision of all Federal employment practices, union contracts, and training policies/programs. Following, Executive Order 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, which directed all executive agencies to “terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements” and “to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities,” was issued. Lastly, Executive Order 14219, Ensuring Lawful Governance and Implementing the President’s “Department of Government Efficiency” Deregulatory Initiative, was issued, whereby agencies were directed to identify and repeal any unconstitutional regulations. All of these directives would tend to signal that the USDOT DBE program will not be last place where Federal practices and requirements will substantially change.

The issuance of USDOT’s IFR marks a period of significant change for any company in a USDOT-derived DBE and similar programs throughout the United States, including in New York State. As the IFR became effective in October 2025, any existing USDOT DBE temporarily lost its status. To regain USDOT DBE status, the IFR requires any previously certified DBE to undergo a new, more complex evaluation and either be recertified under the new certification standards or permanently decertified where those standards are not met.



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Notably, a New York business seeking recertification must prove by a preponderance of the evidence that it satisfies all of the requirements of the IFR. As such, recertification now requires an individual evaluation, supported by an individualized narrative and other financial documents that illustrate personal disadvantage. Essentially, businesses must now demonstrate social and economic disadvantage based on individual experiences and circumstances, rather than relying on the program's long-embedded race- and gender-based presumptions. A sufficient narrative must specify "instances of economic hardship, systemic barriers, and denied opportunities that impeded the owner's progress or success in education, employment, or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons."

All told, New York businesses may now experience a more timely application process and increased costs to prepare the requisite individualized narrative. As the IFR requires each Unified Certification Program, including the New York State Department of Transportation ("NYSDOT"), to complete the reevaluation process as quickly as practicable, the NYSDOT has begun streamlining the process by contacting previously certified DBEs. In response, New York businesses seeking recertification shall provide the requisite documentation supporting their DBE eligibility. Of note: New York's programs that do not rely upon or receive funding from USDOT are not currently effected, so an entity that qualifies as a USDOT DBE may not be eligible to be a New York State DBE. This will create additional confusion and process for a company seeking designation.

Furthermore, New York businesses should remain attentive to changes to other Federal programs in light of the IFR. For example, in *Revier Technologies, Inc., et al. v. U.S. Small Business Administration, et al.*, filed in the Eastern District of Louisiana, the plaintiffs seek to invalidate a Small Business Administration regulation that establishes a rebuttable presumption of social disadvantage for members of certain racial and ethnic groups regarding two programs: the State Small Business Credit Initiative and the Intelligence and Cybersecurity Diversity Fellowship. Importantly, the plaintiffs contend that the presumption embedded in those

programs violates constitutional principles of equal protection. While a response has yet to be filed, this recent action signifies that the IFR on the USDOT DBE program may only be the beginning of a change that can have major impacts on New York businesses that have relied upon federal funding or other authorizations based upon programs benefitting a particular race or gender. ○

FOOTNOTES:

1. It should be noted that the IFR also made changes to the Airport Concession Disadvantaged Business Enterprise Program.
2. For more information, see <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>.

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