



Federal Aviation Administration

Memorandum

Date: November 20, 2024

To: Shannetta R. Griffin, Associate Administrator for Airports, ARP-1

From: John P. Benishon, Assistant Administrator for Civil Rights, ACR-1

CC: Gene E. Roth, Director, National External Operations, Policy & Compliance, ACR-4

Subject: Process for Implementing Preliminary Injunction

On September 23, 2024, the U.S. District Court for the Eastern District of Kentucky issued a preliminary injunction against the U.S. Department of Transportation ("USDOT") with regard to the Disadvantaged Business Enterprise ("DBE") program. The decision was issued in a lawsuit brought by two non-DBE sub-contractors, both based in Indiana: Mid-America Milling Company ("MAMCO") and Bagshaw Trucking ("Bagshaw") (collectively, the "Plaintiffs"). On October 31, 2024, the Court issued an opinion and order clarifying the scope of the preliminary injunction.

Under the preliminary injunction as clarified by the Court, USDOT is enjoined from mandating 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, to be effective 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.

In their motion to clarify the preliminary injunction, Plaintiffs identified twenty-five States in which they operate or plan to bid on federally funded 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 covers all FAA Regions.

Except for any such projects 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 Airport Sponsor. This includes implementing any contract goals established for projects other than the ones identified by the Plaintiffs.

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 contracts on which they plan to bid. 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 and FAA's Office of Civil Rights (ACR) will review the list and notify the Airport Sponsors and corresponding Airport District Office (ADO) of any contracts on the list that are FAA funded and have DBE goals greater than 0% (the "Identified Contracts").
2. Notwithstanding 49 CFR Part 26, USDOT will not mandate that the Airport Sponsors include DBE contract goals on any of the Identified Contracts. Therefore, the Airport Sponsors should set 0% DBE goals for each of the Identified Contracts.
3. Airport Sponsors, 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, FAA will address such questions on a case-by-case basis. In all cases, Airport Sponsors 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 Airport Sponsor's overall annual DBE goal.
4. Some Airport Sponsors may have approved overall 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 Airport Sponsors already do not set DBE participation goals on individual contracts.
5. Airport Sponsors should continue to collect and provide the bidders lists information in accordance with 49 CFR 26.11(c) for any projects identified under Paragraph 4 of this guidance.
6. To the extent that the reduction of DBE goals on Identified Contracts affects an Airport Sponsor's plans for meeting its overall annual DBE goal, the Airport Sponsor still must exercise good faith efforts to meet its overall annual goal. *See* 49 CFR 26.47(a). An affected Airport Sponsor 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 Airport

Sponsor's overall goal. *See id.* at 26.37(c)(1). Airport Sponsors 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 an Airport Sponsor is required to reduce DBE contract goals to zero on Identified Contracts, the Airport Sponsor 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. Airport Sponsors 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, an Airport Sponsor is unable to achieve its overall annual DBE goal, it must prepare and submit (if applicable) a shortfall analysis to FAA examining the reasons for the difference between the sponsor'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 Airport Sponsor's shortfall.
8. Other than the limitations set forth in this, Airport Sponsors must continue to fully implement the DBE program, including setting DBE contract goals, as necessary, to achieve the sponsor's overall DBE goal on contracts that are not identified by the Plaintiffs.

ACR will provide additional written guidance as necessary. This memorandum and any such additional guidance will be posted on the FAA's webpage at https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program. Please share this guidance with your regional staff and airport sponsors.