

Bloomberg News Interviews NAMC President Wendell Stemley

DBE Program Constitutionality

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Elliott T. Dubev, [Bloomberg](#) News

Nov. 7 — Another federal appeals court found government programs offering a leg up in highway construction work to disadvantaged businesses to be constitutional (Midwest Fence Corp. v. DOT , 2016 BL 369308, 7th Cir., No. 15-1827, 11/4/16)



The federal disadvantaged business enterprise (DBE) program sets a goal for states to spend at least 10 percent of federal highway funds in contracting with DBEs, which are small businesses owned and

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managed by socially and economically disadvantaged individuals, primarily racial minorities and women. The U.S. Court of Appeals for the Seventh Circuit Nov. 4 joined the Eighth, Ninth and Tenth circuits in finding the program is narrowly tailored to serve a compelling government interest in remedying a history of discrimination in highway construction contracting.

Contractor Group Heads Cite Program’s Positive Effects
The minority- and women-owned contractors that make up much of the DBE market have had a “great commitment to hiring more diverse workers,” Beth Doria, the executive

director of the Federation of Women Contractors, which filed an amicus brief in support of the DBE programs, told Bloomberg BNA Nov. 7. “Because they have been disenfranchised, they know what it is to suffer that, and so they have more of a commitment to seeing more diversity within the workforce,” she said. The DBE program helps minority- and women-owned companies to expand their business and goes toward offsetting widespread discriminatory practices in the private contracting market, Doria said.

Wendell Stemley, president of the [National Association of Minority Contractors](#), told Bloomberg BNA on November 7 that company ownership in the DBE market isn’t necessarily race- or gender-based and includes disadvantaged individuals such as veterans and disabled veterans. The program’s purpose is “more about economic inclusion of businesses that are under a threshold capacity,” and this inclusion can help spur job growth, he said. The DBE program is a mechanism for workers who have learned skilled trades to become company owners more easily and confidently, Stemley said. “The program allows them to take that skill and turn it into an emerging business enterprise, which then falls into the DBE guidelines at the city level, state level or federal level,” he said.

Federal, State Programs Survive Strict Scrutiny

The Seventh Circuit’s decision was in response to a lawsuit by a Chicago-based, non-DBE contractor

against the federal program, as well as DBE programs established by the Illinois Department of Transportation and the Illinois State Toll Highway Authority. The company argued that the programs violated its Fourteenth Amendment right to equal protection.

The federal DBE program “provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious ones,” Judge David Hamilton wrote for the Seventh Circuit.

Similar to the federal program, the state programs withstood the strictest standard of federal court review, the Seventh Circuit determined. It affirmed a district court’s grant of summary judgment for the government defendants.

Judges William Bauer and James Peterson joined Hamilton’s opinion.

Dashiell Law Offices, LLC represented Midwest Fence Corp., the contractor challenging the DBE programs.

The U.S. Department of Justice represented the USDOT and the Federal Highway Administration. The Illinois Office of the Attorney General represented the IDOT. Pugh, Jones & Johnson P.C. represented the Illinois State Toll Highway Authority.

Doreen Littlejohn
National Association of Minority Contractors
202-209-1600
email us here

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