



Schwabe

Legal Challenges to DBE Programs

Christopher Slottee
Paige Spratt

Legal Challenges to SBA and Government Contracting Programs

- The DOT's DBE Program is designed to remedy ongoing discrimination and the continuing effects of past discrimination in federally-assisted highway, transit, airport, and highway safety financial assistance transportation contracts.
- The DBE Program requires state and local transportation agencies that receive DOT financial assistance to establish goals for the participation of disadvantaged business enterprises ("DBEs") in their contracting programs, as well as establishing contract-specific DBE subcontracting goals.
- To participate in the DBE Program, a business must be considered "small" under size standards set by the Small Business Administration and the DOT and owned and controlled by socially and economically disadvantaged individuals.
- DOT regulations provide that African Americans, Hispanics, Native Americans, Asian-Pacific and Subcontinent Asian Americans, and women are presumed to be socially and economically disadvantaged. Other individuals can also qualify as socially and economically disadvantaged on a case-by-case basis. To be regarded as economically disadvantaged, an individual must have a personal net worth that does not exceed \$1.32 million.

Legal Challenges to SBA and Government Contracting Programs

Infrastructure Act

- Infrastructure Investment and Jobs Act set-aside of 10% (around \$37 billion) of transportation funding for “small business concerns” owned and controlled by “socially and economically disadvantaged individuals.”
 - Section 11101(e)(3) of the Infrastructure Investment and Jobs Act provides that:

Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under this division (other than section 14004), division C, and section 403 of title 23, United States Code, shall be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals.

Legal Challenges to SBA and Government Contracting Programs

Bruckner and Mid-America

- Two related challenges to DOT's DBE program
- July 2022: *Bruckner et. al. v. Biden et. al.*, Case No. 8:22-cv-1582, Federal District Court, Middle District Of Florida, Tampa Division
 - Dismissed on standing grounds
- October 2023: *Mid-America Milling Company, LLC, et. al. v. U.S. Department of Transportation, et. al.*, Case No. 3:23-cv-72, Federal District Court, Eastern District of Kentucky
 - Current pending decision on Plaintiff's motion for a preliminary injunction

Legal Challenges to SBA and Government Contracting Programs

Mid-America

- The plaintiff in *Mid-America* challenges the DOT's use of a rebuttable presumption when determining if an individual is socially disadvantaged as unconstitutional racial discrimination.
- The plaintiff argues that the DOT's use of a rebuttable presumption distinguishes between individuals on the basis of race and/or sex and that its disparate treatment of different races and sexes does not survive strict scrutiny because :
 - the rebuttable presumption does not address specific and intentional instances of discrimination or unequal treatment by the federal government, as opposed to general societal issues;
 - the rebuttable presumption applies racial categories that are "overbroad," "underinclusive," "imprecise," "arbitrary," and "undefined;" and
 - the DBE Program has been in place for decades and the DOT has not indicated when it will no longer be needed.

Legal Challenges to SBA and Government Contracting Programs

Mid-America

- The DOT argues that:
 - The plaintiffs do not have standing because they have failed to identify any specific contracts they lost due to any preference given to DBEs;
 - the DOT DBE has been held constitutional by every court of appeals that has reviewed the program;
 - the 10% set aside for socially and economically disadvantaged small businesses in the Infrastructure and Investment and Jobs Act is only a goal and not mandatory; and
 - The DOT DBE program survives strict scrutiny because it addresses past discrimination, it is supported by a strong basis in evidence, and it is narrowly tailored.

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Mid-America

- The plaintiffs ask for an order:
 - declaring the race and gender-based classifications in the DBE Program unconstitutional; and
 - enjoining the federal government from applying both the rebuttable presumption of social disadvantage in the DBE Program and the Infrastructure and Investment and Jobs Act's set aside of 10% of surface transportation funding for small business concerns owned and controlled by socially and economically disadvantaged individuals.

- We have also seen the Small Business Administration pivot relatively quickly to individual determinations of social disadvantage after the decision in *Ultima* barred use of the rebuttable presumption of social disadvantage in the 8(a) program. The DOT may take a similar approach.

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- Plaintiffs have successfully challenged two other federal government contracting programs that use a rebuttable presumption when determining social disadvantage
 - *Ultima Services Corporation v. U.S. Department of Agriculture et al.*, Case No. 2:20-CV-00041: Found that the SBA's use of rebuttable presumption of social disadvantage for certain races in the 8(a) program is unconstitutional racial discrimination and enjoined application of that rebuttable presumption.
 - *Jeffery Nuziard, et. al. v. Minority Business Development Agency, et. al.*, Case 4:23-cv-00278-P: Found that the SBA's use of a racial classifications or the plaintiffs' race or ethnicity to determine whether they can access to certain Minority Business Development Agency services and benefits is unconstitutional

Legal Challenges to SBA and Government Contracting Programs

Mid-America

- Potential impact on a ruling in favor of Plaintiffs in *Mid-America* and enjoining use of the rebuttable presumption in the DOT's DBE program is uncertain
 - We have seen the Small Business Administration pivot relatively quickly to **individual determinations of social disadvantage** after the decision in *Ultima* barred use of the rebuttable presumption of social disadvantage in the 8(a) program. The DOT may take a similar approach.
 - The DOT argued in the *Bruckner* case that the 10% set aside for socially and economically disadvantaged small businesses in the Infrastructure and Investment and Jobs Act is only a goal and not mandatory.

Christopher Slottee

Shareholder



I have over 15 years of experience handling complex commercial, corporate, and litigation matters, specifically working with Alaska native corporations, Alaska native corporation settlement trusts, and tribal governments. Previously, I was vice president and general counsel for an Alaska native corporation, which gave me an invaluable understanding of their inner workings and the unique challenges they face. I am well-versed in issues of corporate governance, legal and risk management, government contracting, bid protests, corporate transactions, and mergers and acquisitions.

I provide guidance related to the Small Business Administration's (SBA) small business programs, including SBA's Section 8(a) and HUBZone Business Development Programs, and have advised clients regarding 8(a) and small business joint ventures, regulatory compliance with the Federal Acquisition Regulations, requests for equitable adjustment and claims, and provided strategic advice regarding the utilization of the SBA's small business programs. I also advise Alaska native corporations and tribal entities regarding federal funding opportunities and grant compliance, including CARES Act and American Rescue Plan Act compliance issues.

I have extensive experience providing advice regarding creating, managing, and leveraging the unique characteristics of Alaska native corporation settlement trusts.

[Christopher Slottee](#)

907-339-7130

cslottee@schwabe.com

Paige Spratt

Shareholder



Combining real-world construction experience with legal know-how, I help contractors find practical solutions to complex problems. Before attending law school, I earned a degree in Construction Management and worked as a construction manager for two large commercial contractors and the world's largest aerospace company. As a result, I can understand the business realities clients face daily.

I handle arbitrations and lawsuits for issues ranging from lien foreclosures, construction claims, and public contracting to employment disputes and complex breach of contract claims. I strive to help clients fully understand the litigation process and present creative, practical solutions.

Clients also turn to me for transactional assistance. I focus on achieving client goals and mitigating risk in construction contracts, purchase and sale agreements, services contracts, purchase orders, and other legal documents. I am proactive in ensuring that clients fully understand the contracting process and can take ownership of contract terms.

[Paige Spratt](#)

360-905-1433

pspratt@schwabe.com



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