

DEI Is Dead. Long Live Economic Development

Merit-based opportunities are the talking point for eliminating decades of construction industry programs designed to allow minorities and women entry into an industry primarily limited to caucasian male owners. Known as Affirmative Action (“AA”), or diversity, equity, and inclusion (“DEI”) programs, these initiatives were designed to assist minority and women-owned businesses in the construction industry. Now, these programs are considered discriminatory and illegal on the federal construction level.

As far back as 9/24/65, President Lynden B. Johnson issued Executive Order No. 11246 stating in relevant part that:

Section 202. [A]ll Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

- (1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin. The contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, color or national origin.

Almost sixty years later, on 1/21/25, President Donald J. Trump signed an Executive Order that revoked President Johnson’s Executive Order entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”. President Trump’s Affirmative Action requirements for federal contractors. Executive Order 14173 states, in pertinent part:

Section 1. [T]oday, roughly 60 years after the passage of the Civil Rights Act of 1964, critical and influential institutions of American society, including the Federal Government, major corporations, financial institutions, the medical industry, large commercial airlines, law enforcement agencies, and institutions of higher education have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called “diversity, equity, and inclusion” (DEI)... that can violate the civil-rights laws of this Nation.

Section 2. It is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work. I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements.

The premise of the anti-DEI movement is that unqualified people of color or women obtained their construction contracts although inadequate, or at least less qualified than their caucasian

male counterparts. That premise of course has not been tested or authenticated. Regardless, federal contractors must now:

- A) Certify that they do not operate DEI programs in violation of federal anti-discrimination laws;
- B) Ignore race, sex, sexual preference, religion or national origin in their contracting practices;
- C) Review any programs that include the requirement for diversity, equity and/or inclusion, and determine if the programs need to be modified or eliminated.

What should a contractor do? First, review any programs that include the words diversity, equity and inclusion to determine if the programs need to be modified or eliminated. Second, follow the constantly changing requirements being promulgated by the federal and local government agencies and determine which one applies to your construction company. Third, do not throw the baby out with the bath water. AA and DEI have been very good for the construction industry and may be continued with modifications.

What impact President Trump's Executive Order, removing affirmative action on the federal level, will have on local construction projects is yet unclear. The State of Illinois and numerous local municipalities such as the City of Chicago and Cook County, have aspirational goals for women and minorities to participate in construction projects. Based on two combined cases out of Kentucky, however, the Illinois Department of Transportation (IDOT) removed DBE goals from certain specified projects. These projects were ones the Kentucky plaintiffs claimed they were interested in bidding on.

IDOT's removal of its AA programs on certain projects does not necessarily mean all Illinois State and Local Municipalities will also remove their AA programs. The first question to address is what the President's authority is to remove DEI programs by Executive Order. Congress initially created DBE goals for the construction industry so, arguably, it would be necessary for Congress to take action to eliminate DBE programs on federal construction projects. Also, even though the President's Executive Order directs federal agencies to "relentlessly combat private sector discrimination," many private construction companies are maintaining their DEI hiring practices.

For example, Derek Cunz, who recently appointed CEO of Mortenson, stated to Construction Drive that:

When we think about DEI, our "why" is not changing. We're very focused on belonging and inclusion on our projects." ("New Year, New CEO at Mortenson," *Construction Drive*, January 2025).

As for the Federal Small Business Administration (“SBA”), support for its DEI programs has weathered challenges to its 8(a) program which sets goals for women and what are termed traditionally underrepresented groups of contractors. The same is true for the US Department of Transportation’s (USDOT) DBE program. These programs have been modified, not terminated. Both programs now require proof of disadvantages, rather than automatic participation in the DBE program. This is not to say that the SBA’s and USDOT’s DBE programs are not at risk. Time will tell.

Further, many state and local governmental agencies involved with construction projects are restructuring their DBE programs to be race and sex neutral. Instead of DBE or AA goals, some agencies are renaming their programs based on goals due to economic disparity, economic insecurity, socio-economic development, equal opportunity, or merit-based programs, just to name a few. Stay tuned for further updates.