

# Is Women Business Enterprise Discrimination a Reality?

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Day-to-day problems faced by women who are attempting to gain or maintain their certification in the disadvantaged business program (DBE) are examined. Examples are offered of individual case histories documenting discrimination against female DBE participants and viable suggestions are made for remedying this discrimination.

Before creation of the disadvantaged business enterprise (DBE) program by Congress in 1982, two good-faith efforts existed for minorities and women in the U.S. Department of Transportation (DOT). However, with the creation of the DBE program, Congress placed the minority component into the DBE program and omitted women. This Congressional action devastated the good-faith women business enterprise (WBE) program. From January 1983 through May 1987, minority participation grew from 5 to 13 percent, whereas female participation remained stagnant. The only hope for women to prove their abilities in this industry would have to come through Congressional action. Congress had pledged assistance to disadvantaged groups and the time had come to demonstrate to Congress that women in the highway construction industry were members of one of the most disadvantaged groups in the nation.

When one looks at the reasons concerning affirmative action for minorities in our society, one cannot overlook the same parallels women have had to face in securing equal opportunity in all areas of social, economic, and political life. History afforded seeing the truth about events and struggles in the development of the nation. The truth is that women have had the same struggle for equality and justice in the nation as minorities. The truth is that white males make more money than minority males, minority males make more money than white females, and white females make more money than minority females. The truth is that minority males won the right to vote before women. The truth is that many private clubs that once excluded minority males in the 1960s are the same private clubs that even today exclude white single females. The truth is, there are more elected minorities in our nation on the local, state, and federal levels than women. This truth is reflected in the fact that there are only 25 females in the U.S. Congress. Women, like minorities, have been shackled by the chains of discrimination and second-class citizenship, fighting for the right to participate.

In 1982, when Congress created the DBE program, women were excluded. This action by Congress would devastate the good-faith administrative WBE program for the next 5 years.

The only chance women had to grow and develop and have the same opportunities in the highway construction industry as minorities was to be included in the DBE program under one goal. The survival of women and their right to participate as viable, responsible contributing citizens lay in that effort. The exclusion of women in 1982 was unfair because women also deserved a helping hand in the construction industry. However, Congress has corrected the wrong and has recognized women as a part of Congress' efforts to affirm its commitment to helping disadvantaged groups.

Following extensive lobbying efforts by the National Women Business Enterprise Association (NWBEA), a nonprofit trade association for women-owned businesses in the highway construction industry, Congress recognized that women were not going to get even a sliver of the transportation pie without its intervention. In 1987, women were added to the DBE program, but were required to share the 10 percent procurement goal for minorities. Since inclusion of women in the DBE program, female participation has increased by 80 percent.

However, concentrated, discriminatory efforts continue in an attempt to remove women from the DBE program. Individuals who implement the DBE program, their leaders, and certified male DBEs have become more aggressive each day in their efforts to place pressure on women in the highway construction industry so that women will want nothing to do with the industry, much less the certification process.

The initial hope felt by females across the nation when first included in the procurement goals was quickly dissipated by the discriminatory interpretations of the federal regulations governing the DBE program. According to the *Federal Register* (1) the Surface Transportation Assistance Act of 1982 maintained the basic structure of the DBE program intact, with the exception of Section 106 (c)(2)(B) that provides that women, like black Americans, Hispanic Americans, and other groups currently designated in the regulations, are presumed to be socially and economically disadvantaged individuals for purposes of the DBE program.

Despite Congress' presumption (drawn following extensive, detailed testimony before Congress enumerating blatant acts of gender-based discrimination), female DBEs are continually called on to prove their social disadvantage or lose their certification. For example, experience is not a requirement to be eligible for the DBE program; however, DOT has an implied regulation that requires WBEs to have technical expertise. Historically, women have been excluded from the highway construction industry except for traditional female roles. Traditional experience as secretary, administrator, etc., does not meet DOT's definition of technical expertise. For women,

technical expertise was impossible until recently. It is interesting that U.S. DOT believes that a secretary would not absorb the knowledge and experience necessary to operate her own company.

In many cases, women start their own company and do not apply for DBE certification for several years. Even these women, who successfully run their own companies for extended periods of time, are denied certification on the basis of lack of experience or expertise. Other areas of discrimination based on subjective interpretations of federal regulations are contributions of capital, stocks, requests for personal income tax returns, family-owned businesses, community property, cosignatures on loans, joint checking accounts, and the hiring of nonminorities and women.

Women's roles in American society have changed dramatically over the past 15 years. These extraordinary changes are evidenced by the skills women have acquired and the socioeconomic status many have attained, independently.

This advancement did not come without pain, nor without government assistance. Passage of educational legislation in 1972, including Title IX (which prohibited sex discrimination in educational institutions receiving federal funds), marked the beginning of the end of economic repression for women.

According to the National Organization for Women (2), between 1972 and 1976, the percentage of women entering male-dominated fields consistently increased. In 1966, 5.9 percent of first-year college women planned careers in male-dominated fields. By 1976, this figure had increased to 19.4 percent, and in 1986, to 25.2 percent. Another historically male-dominated area that has shown dramatic increases in opportunities for women is in sports. For example, the percentage of money spent on women in college sports increased from 1 percent in 1972 to 16 percent in 1982. In 1984, there were about 10,000 college athletic scholarships available for women.

The percentage of women entering professional fields has also drastically increased (2).

Field	1972 (%)	1980 (%)
Law	10	34
Medical	11	26
Engineering	1	25
Veterinary	12	30
MBA Degrees	4	25

Felice Schwartz (3) reported that over the past decade the increase in the number of women graduating from leading universities has been greater than the increase in the total number of graduates and that these women are well represented in the top 10 percent of their class. If businesses want to hire the best students then these businesses have to start hiring women. By not hiring women the businesses will have to dig deeper and settle for the least competent candidates.

Women are making progress, but against all odds. According to the most recent Internal Revenue Service figures (4), from 1977 to 1985 women-owned sole proprietorship nearly doubled, with an increase from 1.9 to 3.7 million. Women already own half of the retail establishments and three-fourths of the service companies in the United States and, given recent trends, by the year 2000 women may own 50 percent of all U.S. businesses. Women are starting businesses at a rate two times faster than men and are clearly the fastest growing segment of the entrepreneurial community.

Because the vast majority of these female entrepreneurs enter professional and typical service businesses, their influence will continue to grow as the country shifts further from a manufacturing-oriented economy to one based on service, high-technology, and information. In addition, women can be found succeeding in virtually every industrial category. According to a 1988 report (4) on the state of small businesses, expansion of women-owned businesses in nontraditional industry has increased faster than for retail trade.

Women-owned businesses are making significant contributions to the economy. Gross receipts for women-owned sole proprietorships was approximately \$100 billion in 1982, according to the U.S. Bureau of Census (4). However, the total economic impact of these businesses far exceeds this level by taking into account the multiplier effect of these dollars as they turn over in the economy. Using a conservative estimate that each dollar will multiply 2.5 times in the local economy, women-owned businesses were already contributing \$250 billion to the national economy 5 years ago. Yet, women procure less than 1.1 percent with the federal government. The time has come for government to extend DBE procurement to all federal agencies.

However, given this level of contribution to the economy, WBEs in the construction industry face a myriad of problems. For example, women have more trouble receiving bonding than any other group in the highway construction industry (4). In addition, lending institutions refuse to lend money to women more often than men (4). When lending institutions do lend money to women, a cosigner is usually required. Ironically, by using a cosigner women jeopardize their certification status in the DBE program. As a result, WBEs tend to start their businesses with substantially less capital than men and usually with no borrowed capital. According to the U.S. Department of Labor, 80 percent of all new WBEs are started from scratch and are not reformed or inherited companies.

In the highway construction industry, the participation of women has been limited in the past because of discrimination; therefore, the only experience women received was in traditional female areas. In addition, WBEs have to contend with the realization that men prefer to do business with men, regardless of color.

For the DBE program, the picture is not any brighter. For example, 60 percent of all WBEs who apply for DBE certification or recertification are refused. Certification and recertification in the DBE program is four times harder for women than for men. This discrimination is reflected in the number of certified WBEs when compared with the number of MBEs. WBEs number about 4,000 whereas MBEs number about 10,000 (5). Apparently, the same standards are not used in certifying WBEs that are used for MBEs.

#### DBE REGULATIONS AND 'JANE CROW' INTERPRETATIONS

In Texas, one WBE experienced subjective interpretation of DBE regulations regarding certification with the city of Fort Worth. Although the WBE had been certified with the city for 6 years, a narrative statement of why the woman-owner was socially and economically disadvantaged was

required. Failure to submit this statement would have resulted in decertification.

How can a WBE that had been certified for many years suddenly and with virtually no change in operation not be eligible for the DBE program? An answer may lie in the personal interpretations of DBE regulations by DOT employees overseeing DBE certification, the majority of whom are male and minority males. In other words, the fate of women-owned transportation industry businesses has been placed in the hands of the one group who perceives themselves to be threatened by WBEs.

NWBEA refers to the discriminatory regulations as interpreted by DOT, as Jane Crow regulations. Following the Civil War, the Southern States passed what was known as the Jim Crow laws. Jim Crow laws were passed to exclude blacks from participating in the American democracy. Political rhetoric claimed that these laws were applied equally, when in reality they placed great hardships on only the black population. Women face the same situation with Jane Crow regulations. Interpretation of these regulations are in themselves discriminatory against women when applied equally to women and males. Like Jim Crow, the reality is the regulations really only apply to women. As mentioned previously, the women who had been certified since 1980 and participated in the highway construction industry for 10 years are now being denied recertification.

Some of the reasons being used to deny female certification include transfers of stock from a male before 1980, or that a woman-owner's father left an inheritance. Such reasons mean a WBE can no longer participate in the DBE program because they have received money from a male.

The handful of women who have managed to maintain their certification are in constant jeopardy of losing that certification. According to the FHWA civil rights director of Region 6, noncertification of women-owned businesses has increased to 60 percent over the last 3 years and newly formed women-owned companies are finding it virtually impossible to obtain certification (personal communication).

## DEFINITION OF DBEs IN FEDERAL REGULATIONS

Federal regulations (49 CFR Parts 23.5 and 23.53a), define a DBE as a small business concern that is controlled by one or more minorities or women. Owned and controlled means at least 51 percent is owned by one or more minorities or women. Stock must be owned by one or more minorities or women and the company's management and daily operations must be controlled by one or more of such individuals.

The regulations go further, saying (a) the owner must be a member of a minority group, or a woman; (b) the business must be independent; (c) there may not be any formal or informal restrictions that limit the customary discretion of the minority or woman owners; (d) all securities that constitute ownership must be real and substantial and must go beyond the corporate record; (e) the minority or woman owner must enjoy the profits and the risk of ownership; (f) the minority or woman owner must possess the power to direct or cause the direction of the management of policies of the firm; (g) the minority or woman owner must possess the power to make

day-to-day, as well as major, decisions on matters of management, policy, and operation; (h) a nonminority owner may not be disproportionately responsible for operation of the firm; and (i) those persons having the ultimate power to hire and fire managers are considered controllers of the business.

In context, these regulations are justifiable and reasonable. However, the interpretations that are being applied to these rules and that have led to the decertification of 60 percent of the WBEs over the past few years can hardly be seen as just.

## FINANCIAL ASPECTS OF WBEs AND DBE REGULATIONS

DBE regulations specify that securities constituting ownership must be held directly by the DBE owner. However, for a woman, this rule means that she cannot inherit money from her father, brother, male cousin, or male friend and put that money into a highway construction company. If a minority male inherits money from his father, he is not penalized because the chances are that his father was minority as well (5).

Furthermore, if a woman worked and contributed funds to a joint checking account or savings account and tries to draw from those funds to establish a business, according to the Jane Crow interpretations the money is not hers but her husband's, and she is therefore disqualified as a DBE. However, if monies are generated from a joint savings or checking account from a minority, no penalty exists because chances are that the minority male is married to a minority female (5).

DOT has consistently held that ownership interests acquired through using funds owned jointly by a female owner and her husband do not meet the real and substantial requirement of the federal regulations, despite the fact that there is no mention in the federal regulations that funds from a joint checking account or savings account are not real and substantial or cannot be used by the female. Such an interpretation is inherently wrong and penalizes a woman for being married and administering her finances, as most married people do, through joint accounts (5).

The assumption that the male contributes more funds than the female to a joint checking or savings account is justifiable. For a woman to contribute equal funds to a joint checking account is virtually impossible when she has historically been discriminated against economically. A woman makes 65 cents to every \$1.00 her male counterpart earns, so meeting this requirement may be impossible.

State transportation departments and DOT have also held that a WBE will not meet federal requirements if her capital contribution came from a bank loan on which her husband cosigned, regardless of who repays the loan, regardless of what collateral is used, and even if the banking institution required the signature.

Federal regulations must be interpreted using common sense with regard to current business practices. Today, it is still difficult, if not impossible, for a married woman to receive a loan from a bank without her husband's signature.

In U.S. society, lending institutions have not recognized that women are separate entities. And not until just recently, with the passage of a bill from Congress, was the practice made illegal for banks to require women to have cosignatures on commercial loans. However, in the case of the minority

male, a joint checking account, savings account, or joint signature on a loan (unless from a nonminority spouse) would not result in the decertification of a minority company.

The only purpose that could possibly be served by this interpretation is to preclude women from participating in the program.

Perhaps the most tragic Jane Crow interpretation comes from an example of women who have been in the highway construction business for 8 to 10 years and have sole financial and managerial responsibilities of their company, including certification under these same regulations, and are now being decertified because states are demanding proof that her business was established with independent funds.

The following notification of decertification for a WBE company is further evidence that the federal standards are not being properly applied. "While the evidence of the record reveals that Mrs. X is currently exceptionally knowledgeable of the business, it is of the utmost importance that we look at the original shareholders and number of board stock initially issued by the board members" (5). This case involves a company that was formed nearly 27 years ago. This company is controlled and run totally by the female owner, who now owns 100 percent of the stock. However, there was a transfer of stock more than 10 years ago, before the DBE program existed. This WBE company had been certified since 1980 and recertified under the present regulations consecutively for 10 years. To deny recertification on the basis of an occurrence before the inclusion of women in the DBE program is a travesty of justice. This situation would seldom apply to male minorities because the transfer of stock would be from father to son, from father to daughter, from son to daughter, etc.

Another example of Jane Crow interpretations is the requirement that those applying for certification and recertification in the DBE program must present their personal income tax returns. There is absolutely no reason to request personal income tax returns, other than to suggest that the female owner would be hiding something because she is married to a nonminority male. However, to require minority males to present a personal income tax return would not apply because the chances are that his personal income tax return is a joint return with a minority female.

#### **DOT INTERPRETATION OF CONTROL AND MANAGEMENT OF WBEs**

DBE regulations require that the owner possess the power to direct or cause the direction for the day-by-day operations, as well as the major decisions on matters of management, policy, and operations. DOT's Office of Civil Rights has consistently upheld decisions to decertify WBEs on the basis of the fact that a nonminority party has experience and expertise in the construction industry.

DOT officials have twisted the regulations requiring real and substantial company control of a WBE firm to mean that the female owner should possess technical expertise. When Great Distributing Company, Inc., appealed its decertification in 1988, DOT upheld the state's decision, offering the following explanation. "The record in this case reveals that the technical expertise of Mr. Johnson is far superior to that

of the female owner. This is not to say that the contributions of Mrs. Johnson are not important to the success of this business. The Regulation, however, requires more than an important contribution" (5).

In another instance, DOT takes their erroneous presumptions a step further: "The Department is aware that, theoretically, the female owner could replace her two sons on the Board, in the event of disagreement, through her majority position; however, this seems unlikely in view of the family relationship and her sons' superior technical expertise" (5). Further, in a letter to another WBE, "The Department recognizes that as a majority owner, the female owner could, at least theoretically, remove Mr. Hall from the Board. However, it appears unlikely considering the husband's extensive involvement in the firm" (5).

DOT's Office of Civil Rights has consistently held that small family-run businesses (a business owned by a Caucasian female who employs her husband, sons, or daughters) do not qualify for the DBE program. DOT alleges that this indicates the female owner does not control her company. However, this requirement is not contained in the federal regulation, but has been assumed by DOT. DOT's July 1989 response to the W. R. Mollohan, Inc., appeal to their decertification was, "The Regulation does not provide for the inclusion of family-run businesses where the background and technical expertise of the husband is clearly superior to that of the female owner and when the husband is also responsible for the critical activities of the business" (5). DOT also denied recertification for H & H Landscape Company in May of 1988, saying, "H & H is in reality a family run business with mother and son sharing management and control but with the son possessing the critical skills necessary to control day-to-day operational decisions. This type of business is not eligible to participate in the departments DBE, WBE program" (5).

Another discriminatory and devastating interpretation of DBE regulations is the assumption that a woman's involvement in her company is limited to administrative or clerical roles because she may not be in the field 5 days per week. No president of any corporation in the nation does all company jobs. If the woman-owner has a male working for her as a field manager, supervisor, or estimator, then she is going to be considered as not controlling her business.

It is inconceivable that DOT's Office of Civil Rights would take the position that any owner of a business must handle every aspect of that business. This view would represent an unsound business practice. Logic dictates that when a woman owner hires someone to perform a supervisory role, she will hire the most qualified person, with the most experience in each particular area. In the construction industry, this person will generally be a male who has more years of experience in construction than the female owner. This action does not mean the female owner is not in compliance with federal regulations. A more reasonable interpretation would be that the female owner must have an understanding and knowledge of her business, to the extent that she can evaluate the information supplied to her and from that information independently make decisions regarding day-by-day operations.

If DOT's interpretation is carried to an extreme, half the small businesses in the country would have to close if their owners were no longer permitted to hire individuals whose expertise outweighed their own. Apparently, WBEs are the



only businesses in our society harassed for exercising good managerial skills and hiring an expert crew.

### EXPERIENCE AND EXPERTISE OF WBE OWNERS

One of the main reasons WBEs are either decertified or not certified is the presumption that a particular female business owner does not possess enough expertise. This practice is merely a ploy to keep women from participating in the highway construction industry. The question must be asked, "How can a woman acquire the technical experience and expertise if she has been barred from participating in the industry in the first place?" Congress included women as socially and economically disadvantaged, for the purpose of this program, because they are convinced of the discrimination women face in this male-dominated industry. Construction is a male-dominated profession no matter what the race, creed, or color. Males have always had the opportunity to participate in this industry. Women, on the other hand, have been forced to participate in traditional roles and have encountered road blocks trying to break out of these roles.

The issue of experience and expertise is not addressed in DBE regulations. However, interpretation of the regulations by DOT's Office of Civil Rights suggests that minority or women owners must have the experience and expertise necessary to possess the power to direct or cause the direction of management and policy of the firm and to make day-by-day as well as major decisions.

DOT has constantly asserted that women do not have the experience and technical expertise necessary to run a construction-related business (5). Of the 153 appeals before DOT in 1989, 107 were women who were all told that they did not have the experience and expertise to conduct day-by-day business (5).

If this type of erroneous interpretations of the regulations is permitted to continue, women will be excluded from participating in the DBE program. One of the main reasons women were included was to allow 52 percent of this country's population access to nontraditional occupations. Common sense dictates that, with some exceptions, women do not have the 10, 15, or 40 years' experience in the construction industry. Women have been precluded from participating in the industry, in nontraditional roles, because of discrimination.

The critical point is that the regulations do not require WBE owners to have more experience than their employees. The federal regulations do not place any sanctions on hiring an employee with superior expertise. A female owner does not have to possess expertise superior to those she hires to be eligible to participate in the DBE program.

However, rarely does the experience and expertise issue apply to minority males. Generally, minority males hire minority males. Therefore, no matter who is controlling the business, a minority male is in the forefront. Because the highway construction industry has always been a white, male-dominated industry, minorities who have had an opportunity to participate in the DBE program have had the tendency to be in labor-related areas rather than management.

In this regard, the U.S. Department of Labor is investigating discrimination of women in the highway construction industry. In many cases, women are discriminated against and

are not accepted to participate in union-related training for iron workers, carpenters, electrical workers, etc.

With the creation of the DBE program, many minority individuals instantly had the opportunity to run and control their own business. Women, on the other hand, who had been in the highway construction industry in whatever capacity saw an opportunity also to create their own companies. However, the only available pool of construction supervisors for WBEs is the white male. Therefore, to require that a woman have another female supervisor is ludicrous given past discrimination. However, if she hires white males to participate in her company and to help her manage and supervise, then she is considered not to be controlling her business. This is a slap in the face to women.

Women were added to this program because it was difficult for women to enter nontraditional roles, such as owning a construction company. Because women were not permitted to have nontraditional construction jobs does not mean that a woman cannot possess the requisite knowledge and power to own and control a construction company within the meaning of the federal regulations. However, a woman who is to be in the position of hiring a family member, regardless of their experience, is precluded from participating in this program by subjective interpretations of DOT's Office of Civil Rights.

In the two cases cited previously, both women were able to prove clearly that they owned their own business, capitalized with independently owned funds, with sole ownership of all stock, and had been in the industry 8 to 10 years.

Minorities are not faced with this problem, because generally, the relatives they employ are also minorities. Apparently, decertification based on employing relatives only applies to white women.

### APPEALING DOT CERTIFICATION DECISIONS

DBE regulations specifically allow for a series of appeals for companies that do not agree with an initial decision of a state not to certify. However, the appeal process on the state level is conducted by the same division that refused the certification in the first place. For companies believing in our system of justice, there is a final appeal to DOT's Office of Civil Rights. But, the Office of Civil Rights is nothing more than a rubber stamp for the states. A fair appeal system does not exist on the federal level for American citizens to trust. For example, for all of 1987 and one-half of 1988, appeals requested from DOT amounted to a total of 339—170 white females, 67 minority males, 1 white male, and 1 black female. Of the 339, only 5 were reversals of state decisions. All of the white females' appeals had almost the same reasons for denial. The 67 minority denials had a mixture of reasons. Twenty-six minority males were native Indian and Hispanic who were denied certification because of a lack of recognition in their community. The 41 black males were denied certification because they were overly dependent on nonminority contracting firms. However, few minorities lost their appeals on the basis of technical expertise, or control and management of their businesses, or how they obtained their capital, or if their capital and expertise was not real and substantial, as were most denied appeals for WBEs. Apparently a double standard exists with DOT's Office of Civil Rights.

WBEs appear to be the only segment of American society not afforded the opportunity to have an unbiased, third-party review of the circumstances surrounding their expulsion and determine whether justice has been served. Granted, DBE regulations do not mandate such procedure, but they do strongly urge due process.

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