

How Will the Trump Administration Affect the Legal Climate for Highway Construction?

by James W. Kutz, Esquire, McNees, Wallace & Nurick LLC



James W. Kutz, Esquire

The focus of this issue of *Highway Builder* magazine is to evaluate what impact the Trump Administration, including the Republican-controlled U.S. Congress,

will have on the highway industry. Inasmuch as improving infrastructure was one of the first items that President-elect Trump mentioned in his acceptance speech, it is understandable that the highway industry is excited about the prospects for its businesses moving forward. While the potential increase in federal funding, including the potential for the creation of a long-term permanent funding solution for the highway industry, will undoubtedly be the primary issue that impacts Pennsylvania highway construction, one also must consider whether the legal climate for highway contractors in Pennsylvania will change during the Trump Administration. While it is always difficult to predict what any president or Congress will do, set forth below are five legal issues to monitor as the new administration takes office.

1. Will the Appointment of One or More Supreme Court Justices Impact the Disadvantaged Business Enterprise System?

With one current Supreme Court vacancy to fill as a result of Justice Scalia passing away in 2016, and with the possibility of other justices retiring in the near future, President

Trump could ultimately appoint at least two, and possibly more, Supreme Court justices. Based solely on age, the three justices who are most likely to retire in the next four to eight years are: Justice Ginsberg who was appointed by President Clinton and turns 84 this year; Justice Kennedy, a moderate judge who cast a key vote in a recent affirmative action decision, who turns 81 this year; and Justice Breyer, also appointed by President Clinton, who turns 79 later this year. If President Trump has the opportunity to appoint more than one justice to the Supreme Court, there may be a significant shift in the constitutional law landscape on many issues.

The most significant issue impacting the highway construction industry that may ultimately be addressed by a revamped court could be the constitutionality of either all or portions of the existing Federal Disadvantaged Business Enterprise (DBE) regulations. The DBE regulations have been in effect in one form or another since the early 1980s, and state departments of transportation must follow the DBE regulations in order to qualify for federal funding on transportation projects. Such programs have often been met with legal challenges based on alleged violations of the Equal Protection Guarantees of the United States Constitution.

In the landmark case of *Adarand Constructors Inc. v. Peña*, the United States Supreme Court ruled in 1995 that classifications relating to the federal DBE program must undergo a “strict scrutiny” analysis. Essentially, under *Adarand*, inasmuch as the Equal Protection

Clause of the United States Constitution prohibits any classification based on race, gender, etc., any government programs that establish special rules for disadvantaged businesses will only be found to be constitutional if the regulations implementing the program survive a “strict scrutiny” analysis.

In the context of the DBE regulations, if a challenge is brought under a “strict scrutiny” analysis, the U.S. Department of Transportation (DOT) would have to demonstrate that its classification based on race, gender, etc. both: (1) furthers a compelling government interest, and (2) is narrowly tailored to advance that interest.

The *Adarand* decision prompted the U.S. DOT to overhaul the DBE regulations in the late 1990s. Since the late 1990s, while there have been other challenges to the DBE regulations in various federal circuits with mixed results, the U.S. Supreme Court itself has not had an opportunity to rule definitively on the constitutionality of the revised DBE regulations, nor have they had the opportunity to consider whether such programs are still constitutional under the Equal Protection Clause. However, the U.S. Supreme Court has had an opportunity to rule on a number of other affirmative action cases, primarily those involving in the higher-education industry.

In 2016, the U.S. Supreme Court issued a decision in *Fisher v. Texas*, which upheld a race-conscious admissions program implemented by the University of Texas at Austin. That case began in 2008, when several

high school seniors who had been denied admission filed suit. The case was ultimately heard by the Supreme Court in 2013 and again in 2016. However, the 2016 decision was by a 4-to-3 vote, and the four justices who voted to uphold the program were Justices Ginsberg, Breyer, Kennedy, and Sotomayor – three of whom are the most likely to retire in the next four to eight years.

Inasmuch as a case or controversy takes many years from the initial filing until the Supreme Court ultimately hears the case, it is unlikely that there will be any immediate significant change in the current DBE landscape as a result of Supreme Court appointments – although, Congress itself could change the existing law. However, it is fair to say that there is a good possibility that a revamped Supreme Court will take a more stringent view on whether such programs pass constitutional muster.

2. What are the Key Environmental Issues that the New Administration May Address that Affect Highway Construction?

One key environmental regulatory issue that will likely be addressed early in the administration is the Clean Water Rule (80 FR 37054). The Clean Water Rule established the extent of the United States' reach under the Clean Water Act, providing, among other things, that tributaries of traditional navigable waters and waters adjacent to those tributaries within a certain distance (including wetlands) are always jurisdictional (i.e., require a permit to disturb, fill, cross, etc.). The scope of the Environmental Protection Agency's (EPA) jurisdiction over waters that are not traditional navigable waters has been the subject of regulation and challenges for many years, and the Clean Water Rule set forth the EPA's latest interpretation of the breadth of its regulatory powers.

The Clean Water Rule was immediately challenged, and a Federal District Court stayed the implementation and enforcement of the rule nationwide, finding the bright-line distance limits may not be supportable. Other litigation has challenged which court

has jurisdiction to determine the validity of the rule. While the various litigation moves forward, the Clean Water Rule remains stayed nationwide. If the stay is lifted, the rule could, for example, regulate areas that otherwise may not be considered wetlands subject to mitigation. Thus, the rule could delay projects and cause increased permitting requirements. The Trump Administration will likely address the Clean Water Rule to potentially limit the extent of the federal government's jurisdiction of remote waters.

3. Will There Be an Increase in the Use of P3s on Pennsylvania Highway Projects Under the Trump Administration?

One of the issues that President Trump stressed during his campaign was the significant need to have private investors in infrastructure improvements. Several years ago, Pennsylvania joined several states in enacting legislation (Act 88) that permitted the use of Public Private Partnerships (P3s) on transportation projects in Pennsylvania.

Act 88 served as the legislative framework for PennDOT to undertake the Rapid Bridge Replacement Project, and also served as the basis to allow Northampton County to recently undertake its own bridge replacement project. There is no current specific statute in Pennsylvania to provide guidelines for P3 infrastructure projects other than transportation projects.

Given the passage of Act 88, and the fact that PennDOT's Rapid Bridge Replacement Program is ongoing, it is difficult to predict

whether the use of P3s will significantly increase in Pennsylvania as a result of anything the Trump Administration may do. Rather, the use of P3s in Pennsylvania will more likely be driven by the desire of PennDOT and local authorities to utilize that delivery method.

However, with an increased emphasis on P3s at the national level, and as more federal funding becomes available for P3s, there may be an increase in non-highway infrastructure P3s. Also, for those P3 projects that are eventually bid in Pennsylvania, there may be more interested bidders for those projects under Trump's administration, as during his campaign, the president promised major tax incentives for those private entities that wish to invest in infrastructure. While the details of such tax incentives are still obviously unknown, participation on the P3 projects that are bid in Pennsylvania could increase significantly if such benefits become available.

JILCO^{INC}

SINCE 1966

SPECIALIZING IN THE APPLICATION OF
**PROTECTIVE & AESTHETIC
CONCRETE COATINGS**

PennDOT PREQUALIFIED
DBE
SUBCONTRACTOR

Call **814.729.7315**
VISIT US ONLINE! **WWW.JILCO-INC.COM**

4. Will PLAs Continue to be Considered for Federally Funded Construction Projects?

The use of Project Labor Agreements (PLAs) on public projects is another issue to monitor during the Trump Administration. In 2009, President Obama issued an Executive Order that “encouraged executive agencies to consider requiring the use of PLAs in connection with large-scale construction projects in order to promote economy and efficiency in federal procurement.” PLAs are a controversial topic and are often challenged by non-union firms and/or trade associations due to their discriminatory impacts on non-union contractors. And while the use of PLAs on infrastructure projects is not widespread, there have been attempts by the federal government and various states to use PLAs on projects that involve federal funding.

Under the landmark Boston Harbor decision issued several decades ago, the U.S. Supreme Court ruled that the National Labor Relations Act did not preempt the field, and thus, the issue of whether PLAs were legal or illegal became primarily a question of whether such agreements were legal as a matter of state bidding laws. However, when the federal government itself acts as the owner, or when state or local projects are funded in part by federal dollars, the actions of a president or Congress can establish rules for such projects, including, for example, whether PLAs are prohibited, encouraged, or discouraged.

The use of PLAs on public projects could be impacted through one or two mechanisms by

the new administration. First, President Trump could simply repeal President Obama’s Executive Order and/or issue an Executive Order of his own that discourages or attempts to prohibit the use of PLAs on federal projects and/or federally funded projects. The repeal of President Obama’s Executive Order and issuance of a new order would be fairly easy to accomplish, and it is not a stretch to imagine a change to the PLA landscape in that respect. Indeed, several trade associations have already publicly urged President Trump to take such steps. The second mechanism, which would involve amending federal law to expressly prohibit PLAs, would be a much more difficult challenge, and it is hard to predict that there will be significant changes to federal labor law with respect to pre-hire agreements in the next four years.

5. Will President Trump Follow Through on His Promise to Reduce the Regulations Which Impact Transportation Projects?

One of President Trump’s major points of emphasis during his campaign was his promise to abolish many regulations that he deemed to be unnecessary. Given the high volume of regulations that impact the highway construction industry, ranging from environmental regulations to Department of Labor regulations, it is hard to know where to start in terms of predicting what the new administration will do in an attempt to streamline the highway-design and construction process.

The American Road & Transportation Builders Association (ARTBA) published a

document in January 2017 that identifies a number of federal regulatory issues affecting the highway construction industry. ARTBA proposed changes to some regulations and the elimination of others. Some of the first steps that could be taken would be to make existing regulations less administratively burdensome, rather than abolishing them completely. For example, ARTBA’s study identifies proposed changes to the Buy American Act, which requires that steel or iron components permanently incorporated into highway projects be manufactured in the U.S. While ARTBA acknowledged the important public policy rationale for the law, it also noted that there should be a “common sense interpretation” of the Buy American Rule, and noted that requiring voluminous Buy American documentation for products that are worth literally pennies can result in delays and administrative costs that far outweigh the value of the component parts in question. The ARTBA study also recommends changes to, among other things, the DBE program, U.S. Department of Labor rules regarding overtime regulations, paid sick leave, as well as a number of other regulations.

Ultimately, if President Trump follows through and has congressional support for his agenda, there will be many new rules that impact highway contractors and engineering consultants on a day-to-day basis.

HB

Bridging the gap between idea + achievement

HDR

Pittsburgh
Philadelphia
Plymouth Meeting
Mechanicsburg
Bethlehem
hdrinc.com



Transportation
Environmental / Infrastructure
Construction Management / Inspection
Utilities
Site Development

RK&K
Responsive People | Creative Solutions
www.rkk.com

Engineers | Construction Managers | Planners | Scientists
with offices in York, Allentown & King of Prussia, PA