

DBE Contract Administration

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Learning Objectives

1. DBE Program History & Basics
2. Pre-Award and Good Faith Efforts
3. Commercially Useful Function
4. Prompt Payment & Payment Tracking

DBE Program History

DBE Program is predicated on Title VI of the Civil Rights Act of 1964:

“No **person** in the United States shall, on the ground of **race, color, or national origin**, be **excluded** from participation in, be **denied the benefits** of, or be **subjected to discrimination** under any **program or activity** receiving **Federal financial assistance.**”

DBE Program History

- October 13, 1971, President Nixon approved Executive Order 11625 "Prescribing Additional Arrangements for Developing and Coordinating a **National Program For Minority Business Enterprise**"
- March 31, 1980, Department issued MBE/WBE regulations: all federal recipients adopt an MBE/WBE program, created **set-aside goals for MBE/WBEs**
- July 2, 1980, [Fullilove v. Klutznick](#), 448 U.S. 448 (1980): U.S. Congress could constitutionally use its spending power to **remedy past and current discrimination (with quotas and/or set-asides)**
- 1982, Congress set 10% national DBE/WBE participation goal

DBE Program History

June 12, 1995, Adarand Constructors v. Pena, 515 U.S. 200, 235: affirmative action requires “**strict scrutiny.**” Racial classifications must be **narrowly tailored** to further **compelling governmental interests.**

Narrow Tailoring means:

- No quotas or set-asides. Good Faith Efforts.
- Must consider race-neutral measures. (but “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. . . .” Grutter v. Bollinger, 539 U.S. 306 (2003))
- Goals justified with disparate impact evidence in market area

DBE Program History

Western States Paving Co. Inc. v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005): held that, as applied, state DOT's DBE Goal was not narrowly tailored.

- Narrow tailoring means state must establish **sufficient evidence of disparate impact** for **market area** to justify Race-Conscious Program. Disparity must be **statistically significant**.
- Sufficient evidence means statistical data (regression analysis, etc.); State cannot rely on headcount methods from 49 CFR §26.45(c).
- NDOT conducted Study in 2007 and found significant disparities. NDOT stayed RN, so FHWA directed NDOT to adopt RC Goal in 2010. NDOT's 2013 Study likewise showed significant disparities.

DBE Program Basics

DBE Program Objectives:

1. Ensure **nondiscrimination**
2. Create a level playing field on which DBEs can **compete fairly**
3. Ensure that the Department's DBE program is **narrowly tailored**
4. Ensure that only firms that fully meet this part's **eligibility standards** are permitted to participate as DBEs
5. **Remove barriers** to the participation of DBEs in DOT-assisted contracts
6. Assist the **development** of firms that can compete successfully in the marketplace outside the DBE program
7. Provide **flexibility to recipients** in establishing and providing opportunities for DBEs

DBE Program Basics

What is a DBE? ([49 CFR §26.5](#))

A Disadvantaged Business Enterprise (DBE) is a for-profit small business concern that is:

- At least **51% owned** by one or more individuals who are both **socially and economically disadvantaged**; and
- Whose management and daily business operations are **controlled** by one or more of the socially and economically disadvantaged owners.

DBE Program Basics

What is Social Disadvantage?

- Owner(s) Citizen or lawfully admitted permanent resident and a member of a presumed socially and economically disadvantaged group:
 - Black Americans
 - Hispanic Americans
 - Native Americans
 - Asian-Pacific Americans
 - Subcontinent Asian Americans
 - Women
 - Others may qualify but have burden of demonstrating social and economic disadvantage

DBE Program Basics

What is Economic Disadvantage?

- Owner's personal net worth cannot exceed \$1.32 million, excluding the value of their primary residence and assets of the firm applying for DBE certification.
- Firm's average annual gross receipts may not exceed Small Business Administration size standards, and in any case may not exceed a \$22.41 million average over the previous three fiscal years.

DBE Program Basics

What are the recipient's responsibilities?

- Ensure due process in award procedures (Good Faith Efforts, etc.)
- Monitor commitments to ensure DBEs get work for which they were committed
- Review DBEs to ensure they perform a Commercially Useful Function
- Track and ensure prompt payment and full commitment payment

DBE Program Basics

How do recipients meet the Overall Goal? [49 CFR](#)

[§26.51\(e\)](#).

- Set individual contract goals to meet portion of overall goal that can't be met through RN means
- Set goals only on DOT-assisted contracts with subcontracting opportunities
- Not required to set goal on every DOT-assisted contract or at same percentage level as the overall goal
- Factors: types of work, the location, availability of DBEs, etc.

Pre-Award & Good Faith Efforts

Recipient must only award to bidder that ([49 CFR §26.53\(a\)](#)):

- 1. Documents** that it obtained enough DBE participation to meet the goal; or
- 2. Documents** that it made **adequate** good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder failed to meet the goal

Pre-Award & Good Faith Efforts

What are Good Faith Efforts?

- ***Good faith efforts*** means efforts to achieve a DBE goal or other requirement of this part which, by their **scope**, **intensity**, and **appropriateness** to the objective, can reasonably **be expected to fulfill** the program requirement. [49 CFR §26.5.](#)
- Must consider the **quality**, **quantity**, and **intensity** of the bidder's efforts. Efforts should be those that one could **reasonably expect** a bidder to take if the bidder were **actively and aggressively trying to obtain DBE** participation sufficient to meet the DBE contract goal. Mere **pro forma efforts are not good faith efforts** to meet the DBE contract requirements. [49 CFR, Appendix A to Part 26.](#)

Pre-Award & Good Faith Efforts

What are Good Faith Efforts?

- No formula – reasonableness and common sense
- See recommended factors in Appendix A. For example:
 - Extent and targeting of solicitations
 - Sufficient time to respond
 - Negotiations
 - Breaking out work
 - Investigations into DBE capacity/capabilities

Pre-Award & Good Faith Efforts

Notes on Price (49 CFR, Appendix A to Part 26, IV(D)(2)):

- Bidder using **good business judgment** would consider number of factors in negotiating with subcontractors, and would take a firm's **price** and **capabilities** as well as **contract goals** into consideration
- But, the fact that there may be some **additional costs** involved in finding and using DBEs **is not in itself sufficient** reason for a bidder's failure to meet the contract DBE goal, as long as such costs are **reasonable**.

Pre-Award & Good Faith Efforts

Notes on Price (49 CFR, Appendix A to Part 26, IV(D)(2)):

- No magic formula: e.g. “the DBE was 30% higher” might amount to relatively small dollar amount
- New DBE rule coming: recipient must review all competing quotes
- Consider **competing quotes, negotiations, and other bidders**

Pre-Award & Good Faith Efforts

GFE Award Review Process ([49 CFR §26.53](#))

1. Bidders must submit with their bid:

- The names and addresses of DBE firms that will participate in the contract;
- A description of the work that each DBE will perform;
- The dollar amount of the participation of each DBE firm participating;
- Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
- Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
- **If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part);**

Pre-Award & Good Faith Efforts

GFE Award Review Process (49 CFR §26.53)

- LPAs must adopt DBE Program Plan of the recipient for all DBE review procedures. Therefore, Nevada LPAs must follow NDOT's Plan
- Current rule: GFE docs may be submitted with bid or shortly after. 49 CFR §26.53(b)(3). NDOT's Plan states GFE docs must accompany bid, so that is what LPAs follow

Pre-Award & Good Faith Efforts

GFE Award Review Process (49 CFR §26.53)

2. Review DBE materials for completeness and accuracy.

49 CFR §26.53(c)

- Must ensure DBEs are certified to perform work to which they are committed
- Must ensure that all listed items make sense for DBEs to perform
- In some cases, may “look behind” certification to question DBE capabilities

3. If Goal met, contract may be awarded. If not met, then GFE Review. 49 CFR, Appendix A to Part 26.

Pre-Award & Good Faith Efforts

GFE Award Review Process (49 CFR §26.53)

- No set timeframe for GFE review process, but remember bid prices expire
- If GFE docs provided with bid, do not allow post-bid documentation for review

4. Send written notice to bidder of decision with details about basis for decision.

- If GFEs acceptable, then may award.
- If GFEs not acceptable, then send notice to bidder with option for administrative appeal. Give reasonable timeframe for response. If bidder does not appeal, then may proceed to GFE review of second-lowest bidder.

Pre-Award & Good Faith Efforts

GFE Award Review Process ([49 CFR §26.53](#))

5. If bidder exercises right to administrative appeal (49 CFR §26.53(d):

- Bidder must have opportunity to **provide written documentation** or argument concerning the issue of whether it met the goal or made adequate GFEs
- Reconsideration must be made by official **who did not take part in the original determination**. Should be knowledgeable about DBE Program
- Bidder must have opportunity to meet in person with reconsideration official
- Must send the bidder **written decision** on reconsideration, explaining basis for finding.
- **Result of reconsideration process not administratively appealable to the Department of Transportation**

Pre-Award & Good Faith Efforts

GFE Award Review Process ([49 CFR §26.53](#))

6. Other Considerations:

Pre- and Post-Award DBE terminations (49 CFR §26.53(f)):

You must require that a prime contractor **not terminate a DBE** subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) **without your prior written consent**. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

You may provide such **written consent** only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the DBE firm.

Pre-Award & Good Faith Efforts

GFE Award Review Process ([49 CFR §26.53](#))

6. Other Considerations:

Pre- and Post-Award DBE terminations (49 CFR §26.53(f)):

- Before transmitting to you its request to terminate and/or substitute a DBE subcontractor, the **prime contractor must give notice in writing** to the DBE subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and **the reason for the request**.
- **Prime must give DBE five days to respond** to prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than five days.

Pre-Award & Good Faith Efforts

GFE Award Review Process ([49 CFR §26.53](#))

6. Other Considerations:

Replacement for any reason (49 CFR §26.53(g)):

- When DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you **must require Prime to make good faith efforts to find another DBE** subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.

Commercially Useful Function

Generally ([49 CFR §26.55](#))

- DBE participation only counts toward DBE goals if the DBE is performing a commercially useful function (CUF).
 - Responsible for execution of the work and carrying out its responsibilities by **actually performing, managing, and supervising** the work involved
 - DBE responsible for **negotiating price, determining quality and quantity, ordering** the material, and **installing** (where applicable)
 - May use standard industry practice
 - DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.
 - **Lack of a CUF means DBE fraud**

Commercially Useful Function

Process ([49 CFR §26.55](#))

- Presumption: If DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract you must presume that it is not performing a commercially useful function.
- Recipient/Subrecipient must **review** and **document** CUF for **every DBE**, even if DBE isn't used toward the goal
- Ideal time to review is **when DBE first begins work**, but may follow up at any time.
- Follow recipient's DBE Program **Plan** and **forms**

Commercially Useful Function

Counting ([49 CFR §26.55](#))

- **Subcontractor:** Count 100%
- **Regular Dealer** (storefront/warehouse supplier: Count 60%
- **Broker:** Count only commission
- **Trucking:**
 - Count value of all DBE trucking
 - Count value of non-DBE trucking to match number of DBE trucks
 - This is the 1-to-1 rule

Prompt Payment & Payment Tracking

Prompt Payment (49 CFR §26.29)

- Must require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than **30 days from receipt of each payment** you make to the prime contractor
- Must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed
- Sub's work is satisfactorily completed when all tasks called for in the subcontract have been accomplished and documented as required by the recipient.

Questions?