

FHWA Resource Center

U.S. Department of Transportation
Federal Highway Administration

Disadvantaged Business Enterprise (DBE) Program

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Training Overview

Disadvantaged Business Enterprise Program:

- **Background**
- **Race-Neutral / Race-Conscious**
- **Good Faith Efforts / Commitments**
- **Terminations / Substitutions**
- **Prompt Payment**



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DBE Program Intent

- DBE Program originally based on Title VI of the Civil Rights Act of 1964.
- USDOT established a regulatory structure in 1980 to remedy past and current discrimination in transportation projects.
- After its inception, Congress enacted statutory provisions addressing the DBE program, which have been amended and reauthorized several times.
- Key objectives of the DBE Program [49 CFR 26.1]:
 - Create a level playing field; and
 - Ensure nondiscrimination.
- The DBE program encompasses over 41 thousand DBE firms with approximately \$6 Billion of awarded contracts.

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Objectives of the DBE Program (49 CFR §26.1)

There are **EIGHT** objectives of the DBE Program:

1. To **ensure nondiscrimination** in the award and administration of DOT-assisted contracts
2. To create a **level playing field** on which DBEs can compete fairly for DOT-assisted contracts;
3. To ensure that the Department's DBE program is **narrowly tailored** in accordance with applicable law;
4. To ensure that only firms that **fully meet this part's eligibility** standards are permitted to participate as DBEs;

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Objectives of the DBE Program (49 CFR §26.1)

5. To help **remove barriers** to the participation of DBEs in DOT-assisted contracts;
6. To **promote the use of DBEs** in all types of Federally-assisted contracts and procurement activities conducted by recipients.
7. To assist the **development of firms** that can compete successfully in the marketplace outside the DBE program;
8. To provide appropriate **flexibility to recipients** of Federal financial assistance in establishing and providing opportunities for DBEs.

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The Applicability of the DBE Program (49 CFR §26.3)

As a general matter, DBE Program applies to recipients of:

- **Federal-aid highway funds**
- Federal transit funds
- Airport funds authorized by 49 U.S.C. 47101

The DBE Program also applies to Transportation Infrastructure Finance and Innovation Act (TIFIA) funding. See Infrastructure Investment and Jobs Act, Division A, Title II, and Section 11101(e)(3).

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DBE OVERALL GOAL METHODOLOGY (49 CFR §26.41 and 26.45)

- State DOTs must set an overall DBE goal every three years
- The overall goal is expressed as a percentage of a recipient's federal-aid funds
- The percentage represents the disparity between the current percentage of minority and women-owned firms' participation on transportation projects and the percentage of participation that would be expected absent the effects of current and past discrimination

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MEASURES TO MEET OVERALL GOALS (49 CFR §26.51)

Race Neutral (RN) Measures:

- Maximum portion through RN participation; and
- Does **NOT** involve setting specific contract goals.

Examples include:

- Reducing or eliminating subcontractor bonding requirements;
- Supportive services programs;
- Unbundling large contracts; and
- Arranging solicitations, times for the presentation of bids, quantities, specifications in ways that facilitate DBEs.

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Measures to Meet Overall Goals (49 CFR §26.51)

Race Conscious Measures –

- **Setting DBE goals on individual contracts, or specific projects.**
- Not required to be set on every contract
 - **Contract goals may only be set on contracts with subcontracting opportunities**
- A contract goal must be **narrowly tailored** based upon each contract. States should not merely use its overall goal as a DBE goal on every contract.
- 49 CFR 26.51(f) defines the circumstances when contract goals may be used or adjusted

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Good Faith Efforts (GFEs) (49 CFR §26.53)

- **All bidders** must make good faith efforts to meet a contract goal. GFE is achieved when:
 - The **bidder commits to subcontracting with DBEs** in a sufficient amount to meet the goal; and/or
 - In the event a prime falls short of the goal with DBE subcontracting commitments, it submits documentation that shows it made a sufficient good faith effort to meet the goal.
- Information must be submitted either:
 - At time of bid (Responsiveness)
 - 5 days after bid opening (Responsibility)
 - **3rd day after bid opening (Missouri)**
- For a design-build procurement, the bidder/offoror may make a contractually binding commitment to meet the goal at the time of bid or with its response to a request for proposals.

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Pre-award – Commitments (49 CFR 26.53)

Bidders must include the following DBE information for contracts with established DBE goals:

- Name and address of DBE;
- Description of the work;
- Dollar amount of participation;
- Written documentation of the bidder's commitment to use the DBE; and
- Written confirmation from DBE that it is participating in the contract in the kind and amount of work described.

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(A) Line No.	(B) Dollar Value of DBE Work** (Unit Price x Quantity of the Item in (A), or Lump Sum)	(C) Dollar value applicable to DBE Goal** (100% = enter 1 60% = enter .6)	(D) Dollar amount applicable to DBE Goal (B x C)	(E) Percent of total contract amount for line item (D / total contract amount)	Add or Remove Lines
					- +
					- +
					- +
DBE Total:				Total %	

**Cannot exceed bid amount for given item of work.
Tracking services credited at 100% if the DBE owns the trucks or is leasing from a DBE firm.
Allowed amount of participation will be in accordance with 49 CFR Part 26.
Brokered services will only receive credit for fees.

Respectfully submitted:

Company Name (Prime Contractor)

Name / Title

Signed (Prime Contractor)

Due 3 working days after bid opening

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Did the Bidder Meet the Goal?

Even if it appears a Bidder met the DBE goal, a good practice is to review the DBE commitments to ensure:

- Committed DBEs have the capacity to perform the work
- Ensure DBE suppliers will meet the definition of "regular dealer" to receive credit for 60% of the cost of supplies
- Trucking estimates are detailed and not just large lump sums
- All committed work is commensurate with the available sub-contractable work and quantities estimated under the prime contract

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Qualifying questions may be asked at time of commitment to gauge the capabilities of a DBE to perform a CUF

Examples of questions asked at time of Commitment:

- Submit a list of DBE owned and leased trucks to be used on project
- Submit truck ownership and registration information (e.g. vehicle ID/DOT#, ownership (registration), operator name and employer, etc.)
- Where is the DBE material supplier getting the materials?
- Does the regular dealer have an established storage facility and inventory?
- Does the DBE own and operate its distribution equipment (**and will use it for this project?**)?

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Pre-award GFE Documentation (49 CFR 26.53)

- If a bidder is unable to meet the contract DBE goal it **MUST** provide the State DOT evidence of GFES
- Must be an **ACTIVE AND AGGRESSIVE** attempt to meet goal (See 49 C.F.R. Pt. 26, Appendix A)
- Document all decisions in detail



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Guidance Concerning Good Faith Efforts (49 CFR Part 26, Appendix A)

- State DOT (recipient) must consider the **quality, quantity, and intensity** of the different kind of efforts the bidder made
- Must evaluate overall effort of the bidder's documented good faith efforts (**holistic**)
- Bidder took all **necessary and reasonable steps** to achieve a DBE goal that by their scope, intensity, and appropriateness to the objective could reasonably be expected to obtain sufficient DBE participation
- Efforts should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to meet the goal

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GFE Actions (49 CFR Part 26, Appendix A)

The following are EXAMPLES of actions a State DOT may consider as part of a contractor's Good Faith Effort to obtain DBE Participation.

- This is NOT a mandatory checklist
- This is NOT an all-inclusive list
- Performing all these examples of actions does NOT automatically ensure a GFE has been made



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GFE Actions (49 CFR Part 26, Appendix A)

- Conducting research to identify small business contractors and suppliers
- Soliciting DBEs through all reasonable and available means
- Examples:
 - Phone calls
 - Emails
 - Advertisements (radio, tv, news/trade papers, website)
 - Pre-bid meetings
 - DBE networking events
- Ensure the solicitation to DBEs is early enough to allow time for a proper response!!

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GFE Actions (49 CFR Part 26, Appendix A)

- Break out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation
 - Consider items that may normally be performed by a Prime Contractor
 - Establish flexible timeframes for performance and delivery
- Provide DBEs with plans, specifications and contract requirements necessary to assist them in their bidding
 - REMEMBER....Provide these as early as possible

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GFE Actions (49 CFR Part 26, Appendix A)

- Negotiate with interested DBEs in good faith
 - Use good business judgment and document the negotiation
 - Evaluate a DBE's price and capabilities **with consideration to the Contract's DBE goal**
 - Documentation of negotiation could include:
 - Names, addresses and telephone numbers of DBEs considered
 - Description of information provided to DBEs
 - Evidence and reasoning why an agreement could not be reached

The fact that there may be additional (reasonable) costs involved to find, negotiate with, and use a DBE is not a sufficient reason on its own for a failure to meet a DBE contract goal

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GFE Actions (49 CFR Part 26, Appendix A)

- Assisting interested DBEs in obtaining:
 - Bonding
 - Credit
 - Insurance
- Utilizing the services of
 - Minority/Women organizations and/or contracting groups
 - Federal/State/Local business assistance offices
 - Entities that assist in the recruitment, development and placement of DBEs



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GFE Actions (49 CFR Part 26, Appendix A)

- Examples that could be considered **insufficient Good Faith Efforts** include:
 - Rejecting DBEs without having a sound reason based on the DBE's capability
 - Rejecting DBEs based on their:
 - Standing in the industry
 - Memberships in organizations or groups
 - Political and Social affiliations
 - Soliciting DBEs that do not perform work in the categories advertised
 - **Rejecting DBEs solely because their quote for work was not the lowest bid received**
 - There is no requirement of the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

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Terminations (49 CFR §26.53)

- State DOT contracts include a termination provision
 - Applicable to DBEs hired in response to a contract goal – committed DBEs
- Written notice to the DBE, copy to State DOT
- DBE has **five** days to respond
- State DOT **must** approve the termination in **writing** (only for good cause) **PRIOR** to the termination
- **Without written consent, the prime contractor will not be paid for work or material**
- Prime may be required to make GFE to replace the terminated DBE with another DBE if necessary to meet the contract goal.

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Terminations (49 CFR §26.53)

Good cause examples:

- DBE fails or refuses to execute a written contract
- DBE fails or refuses to perform the work
- DBE fails to meet reasonable bonding
- DBE becomes bankrupt
- DBE is suspended or debarred
- DBE is not a responsible contractor
- DBE voluntarily withdraws
- DBE is ineligible to receive DBE credit for the type of work required

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Substitutions (49 CFR §26.53)

- When a DBE subcontractor is terminated the prime must 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**
- If the State DOT requests GFE documentation, the contractor must submit documentation within **7 days**, which may be extended for an additional **7 days**.
- The recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

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Prompt Payment (49 CFR 26.29)

- Pay all subcontractors for work that was satisfactorily completed no later than 30 days (**15 in Missouri**) after the prime receives payment
 - The DBE program Plan must contain a prompt payment and release of retainage contract clause
 - Included in every contract and subcontract and applies to all tiers
- Satisfactorily completed - State DOT has accepted and paid for portion of work
- Proactive Enforcement Mechanisms

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