

Disadvantaged Business Enterprise (DBE)

PROGRAM OVERVIEW



LEARNING OBJECTIVES

At the end of this training and technical assistance session, you will be able to:

- Describe the history and authorities of the DBE program
- Identify the major components of the DBE program requirements in 49 CFR 26
- Define concepts of: DBE Goals; Race neutral/Race conscious; Good Faith Efforts; Counting; Commercially Useful Function (CUF).
- Explain the responsibilities of DOT recipients to monitor DBE program participants

HISTORY

- 1980 First DOT – Wide MBEWBE Regulation
 - Authority Consistent with Title VI
- 1982 Congress Passes and President Reagan Signs First DBE Statute – Surface Transportation Act of 1982 (STAA)
 - Set 10% National Goal
 - Defined Program as Disadvantaged
 - Section 8(d) of SBA

HISTORY

1987 Congress Re-authorizes DBE Program (Surface Transportation Uniform Relocation Assistance Act),

- Adding Women;
- Airports Included:
- Directed Goal to be met as "DBE"
- Reliance on Section 3 of SBA – Size Standard
- Set Minimum Certification Criteria

HISTORY

1991 Congress Re-authorizes DBE Program (Intermodal Surface Transportation Efficiency Act (ISTEA))

1995 Supreme Court Decides Adarand; Clinton Administration Affirmative Action Review

- "Strict Scrutiny Standard" Applies to
- Congressionally Enacted AA Programs
- Compelling Interest (Why?)
- Narrow Tailoring (How?)
- Strict Scrutiny Standard not Impossible

HISTORY

1998 Congress Passes TEA-21 (Transportation Equity Act for the 21st Century),

- Continued the DOT DBE Program
- Unable To Withhold Federal Funds If Court Rules Unconstitutional

2005 – Safe, Accountable, Flexible, Efficient, Transportation Equity Act – Legacy for Users (SAFETEA-LU)

Subpart A – GENERAL

- 26.1 Objectives
 - Non-discrimination
 - Create Level Playing Field
 - Narrowly Tailor Program
 - Only Eligible Firms
 - Remove barriers to DBEs
 - Develop firms to compete outside of program
 - Provide recipient flexibility

Subpart A – GENERAL

- 26.3 Application FTA
 - FAA
 - Includes territories & possessions

- 26.5 - Definitions

26.11 RECORDS & REPORTS

- Single DOT wide reporting form
- Bidders List
 - All firms bidding or participating (primes & subs)
 - Include: name, the age of firm, and annual gross receipts
 - To be used to set annual goals

26.13 - ASSURANCES

- Financial Assistance Agreements with DOT Recipients
- Prime Contractors, Subcontractors, and Subrecipients (cities, counties, etc.)

Subpart B – ADMINISTRATIVE REQUIREMENTS

- 26.21 Who must have a DBE program?
- In one of the categories and *let* DOT assisted contracts
- 26.23 Policy Statement – commitment to DBE program and responsibilities for implementation
- 26.25 Liaison Officer- Independent and direct access to CEO

26.29 - PROMPT PAYMENT MECHANISMS

- **Race Neutral** Contract provision requires primes to pay all contractors, material suppliers, truckers, etc. no later than 30 days
- State must select one of the following options for retainage:
 - Decline to hold retainage and prohibit prime from holding retainage
 - Decline to hold retainage from prime, but allow prime to hold from sub.
 - Hold retainage from prime and provide for incremental acceptance.

26.37 – Recipient's Responsibilities for Monitoring Other Participants

- Ensure compliance by all program participants
- Monitoring and enforcement mechanism to verify commitment is actually performed by DBE
- Running Tally of DBE Attainments (commitments, awards, and payments)

Subpart C – GOALS, COUNTING AND GOOD FAITH EFFORTS

26.45 - Overall Goals

- Two step process for goal setting
 - Step 1. Base Figure – Calculation of relative availability of DBEs and non-DBEs
 - Step 2. Adjusting Base Figure to account for other evidence, i.e., capacity
- Submission must project portions of goal to be achieved through
 - Race neutral means (26.51(a) (c))
 - Race conscious means (contract goals)
- Public participation in establishing overall goal

RACE NEUTRAL

- 26.51 Means to Meet Goals
- Use to maximum feasible extent
- Race-neutral means – Assist All Firms
 - Outreach
 - Technical Assistance
 - Mentor-Protégé & Business Development Program (MP & BDP)
 - Business Management

**23.53 - Good Faith Efforts (GFE)
& Contract Goals**

- Only apply in the presence of contract goals
- Must award to bidder who makes a GFE to meet the contract goal
- Appendix A lists GFEs
- Matter of responsiveness or responsibility
- Recipients required to provide "reconsideration mechanism" for GFE determinations
- Condition of award based on providing information on DBE commitment

**26.55 - COUNTING DBE
PARTICIPATION**

- Credit Provided
 - For work actually performed by certified DBE firm
 - No credit for work subcontracted to non-DBEs
 - Includes cost of materials, supplies & equipment leased even if from non-DBEs
 - No credit if from Prime Contractor or its affiliate

26.55 (c)

COMMERCIALLY USEFUL FUNCTION (CUF)

DBE must be responsible for execution of the contract work by actually **performing, managing, and supervising** the work and obtaining the materials and supplies.

- DBE must perform 30% of total cost of contract work
- No CUF, No Credit!!
- No Payment, No Credit!!

26.55 (c)

COMMERCIALLY USEFUL FUNCTION

- Management/supervision
- Labor
- Equipment
- Materials/Supplies
- Performance

CUF - Materials & Suppliers

- DBE must be responsible for:
 - Negotiating Price
 - Determining quality & quantity
 - Ordering
 - Installing (where appropriate)
- 60% Credit for materials & supplies continued

COUNTING TRUCKING

- DBEs must own & operate at least 1 truck (licensed, insured, operational on the contract)
- Must control (manage & supervise) entire trucking operations
- Leasing permitted with variable crediting and must be approved by the OA

COUNTING TRUCKING

- Credit for 100% transportation services performed with own trucks & drivers & DBE lessees
- May lease trucks from another DBE (firm or owner operator) - credit total value
- Lease trucks from non-DBEs firms/owner operators (count value not to exceed DBE owned trucks on the contract)
- Additional Participation by non-DBE Lessees - Count only fees/commissions (not total value of transportation services)

Subpart D – CERTIFICATION STANDARDS

- Socially and Economically Disadvantage
- Small Business (Small Business Administration (SBA))
- Ownership
- Control (Independent Business)

GROUP MEMBERSHIP

- Requires Signed notarized statement
- If group membership questioned must consider whether the person has held "himself" out to be a member.
- Membership not proven, applicant may prove disadvantage status on individual basis
- Do not impose disproportionate burden of members of a particular group
- Group membership decisions appealable under 26.89

26.65 - BUSINESS SIZE

- Must exist as a small business under SBA standards (13 CFR 121)
- Size standard applied must be for type of work firm seeks to perform in DOT-assisted contracts
- Not exceed average annual gross receipts of \$22.41M (3 yrs)
- Receipts of affiliates must be included

26.67 - SOCIAL & ECONOMIC (S&E) DISADVANTAGE

- Citizens & permanent residents who belong to the following groups (presumption rebuttable):
 - Women
 - Black Americans
 - Hispanic Americans
 - Native Americans
 - Asian-Pacific Americans
 - Subcontinent Asian-Americans
 - Other minorities designated by SBA

26.67 - S&E DISADVANTAGE

- Personal Net Worth (PNW)
 - PNW >\$750,000=Conclusive Rebuttal
 - Each S&E owner submits signed, notarized PNW statement with supporting documentation, i.e. tax returns
 - Ownership interest in applicant firm & equity in primary residence excluded in PNW
 - PNW of Alaska Natives excludes Native Corp
- 8(a) & SDB Firms
 - Certification may be accepted in lieu of own certification

26.69 - OWNERSHIP

- **51% Ownership**
 - S&E persons must own 51% of each class of voting stock of corporation and 51% of aggregate stock
 - DOT to use SBA rules {13 CFR 124.105(c),(e),(f)} as guidance for stock options & dividend distribution

26.69 - OWNERSHIP

- **Contributions of capital or expertise must be real and substantial**
- **Not acceptable**
 - Promise to contribute capital
 - Unsecured note payable to firm or owner not disadvantaged
 - Participation as an employee
- Debt instruments from financial firms O.K.

26.69 - OWNERSHIP

- **Expertise may be used if:**
 - Outstanding quality
 - In specialized field
 - General experience in administration, construction, or professional field insufficient
 - In areas critical in firm's operation
 - Indispensable to firm's success
 - Individual must have significant financial stake in firm also
 - No financial risk, no ownership on basis of expertise
 - Specific to type of work firm performs
 - Documented in firm's records
 - Reflect contribution & value to firm

26.71 - CONTROL

- DBE owners must control firm
- Independence viewed as aspect of control
 - Only independent firms eligible
- Disadvantaged Owner(s) Must:
 - Hold highest officer positions
 - Control board of directors
 - Control all partnership decisions
- Licensing requirement must be consistent with State law

CONTROL - 26.71(g)

The socially and economically disadvantaged owners must have **an overall understanding of, and managerial, and technical competence and experience** directly related to the type of business in which the firm is engaged and the firms operations

Subpart E – CERTIFICATION PROCEDURES

- 26.81-Uniform Certification Program (UCP) "One Stop Shopping"
 - A UCP Agreement between all DOT recipients must use 49 CFR 26 certification requirements
 - "Home State" certification required
 - Common Directory (Electronic)

26.83 - Certification Decision Procedures

- Firms have 30 days to submit affidavits of change to recipient
 - Size
 - Disadvantaged Status
 - Ownership
 - Control
- Decision required within 90 days of complete application
 - No decision deemed denial

26.85 - INITIAL DENIALS

- Denial must cite in writing:
 - Reasons
 - Specific reference to record evidence
- Evidence for denial available to applicant on request
- Correction of minor errors O.K.
- 12 month reapplication waiting period
 - Approval of OA for shorter periods through DBE Program process

26.87 - REMOVAL OF DBE ELIGIBILITY

- May be triggered by:
 - Complaint
 - Any person
 - In writing
 - Specific
 - Complainant's identity protected
 - Recipient
 - Based on changes or other information
 - DOT or OA
 - Must commence proceeding to remove firm

26.87 - REMOVAL OF DBE ELIGIBILITY

- Administrative "Due Process" required
 - Informal Hearing required
- Separation of functions (Judge & Jury)
- Decision maker must be familiar with certification
- Record of hearing
 - Verbatim
 - Transcript required only on appeal

26.87- REMOVAL OF DBE ELIGIBILITY

- Decision to remove:
 - Cannot be based on reinterpretation or changed opinion
 - May be based only on:
 - Changes in firm
 - New evidence or information
 - Info concealed or misrepresented by firm
 - Change in DOT standards
 - Factual error on part of recipient

26.89 - APPEALS TO DOT

- Must be filed within 90 days from decision
 - In writing
 - Extensions by DOT may be granted
 - All involved recipients must provide records to DOT (20 days)
- Target date for DOT action 180 days

26.91 - RECIPIENTS ACTIONS ON DOT APPEAL DECISIONS

- DOT decisions binding on involved recipients only
- Other recipients must review own decisions
- Third party complaints must first be filed with recipients

Subpart F – COMPLIANCE AND ENFORCEMENT

- 26.101 - Compliance & Enforcement
 - Failure to comply
 - Suspension/termination of Federal funds
 - Refusal to approve projects, grants contracts
 - No sanctions where compliance precluded by Federal Court order finding requirement unconstitutional

SUBPART F

- 26.103-Enforcement actions FHWA & FTA
 - General Complaints
 - Any person
 - Within 180 days
 - In writing
 - Confidentiality
 - Compliance Reviews by OA

SUBPART F

- Finding of Noncompliance
 - Reasonable cause notice
 - Conciliation
 - Enforcement Actions
- 26.107-Enforcement Actions, *Firms*
 - Suspension/debarment
 - False representation as DBE
 - False attempt to use ineligible firm
 - Referral to Justice

SUBPART F

- 26.109 - Confidentiality, Intimidation, Retaliation
 - Safeguard confidential business information
 - Identity of complainants confidential
 - Retaliation prohibited

APPENDICES

- Appendix A-Good Faith Efforts
- Appendix B-Forms
- Appendix C-Business Development Program
- Appendix D-Mentor-Protégé Program
- Appendix E-Individual Determination of Social & Economic Disadvantage

SUMMARY

- The DBE regulations have five sections (name the subparts).
- DOT recipients must collect data, submit reports, and monitor the performance of program participants.
- DBEs must perform a CUF to count DBE participation toward the recipients overall goal and the prime contractor's goal.
- The UCP requires:
 - "one stop shopping" by all DOT recipients in the State
 - DOT recipients to use USDOT certification eligibility standards and procedures
- Recipients must implement their DBE program as approved by the OA to ensure that it is administered in a consistent and uniform manner that achieves the program objectives.

THE END - THANK YOU
