

○ **CAN SUBRECIPIENTS HAVE THEIR OWN DBE PROGRAMS AND OVERALL GOALS? IF SO, WHO REVIEWS THEM? (Posted - 6/18/08)**

\* In another Question and Answer, "Must a primary recipient's DBE program and goals apply to contracts let by subrecipients?" the Department describes how subrecipients could administer contract goals on their contracts under the umbrella of their primary recipient's DBE program and overall goals.

\* That Q&A notes that subrecipients are not required to have their own, independent DBE programs and overall goals. However, a subrecipient may -- only if permitted by the DOT operating administration providing its financial assistance and subject to the approval of the concerned primary recipient -- have its own, independent DBE program and overall goal. Generally, this is an option that would make sense only for larger subrecipients who are receiving considerable amounts of DOT financial assistance.

\* Following coordination with the primary recipient, the subrecipient would submit its DBE program and overall goals to the appropriate DOT operating administration for review and approval, in the same way that primary recipients submit their program and goals for DOT review and approval. A written agreement between the primary recipient and subrecipient is desirable.

\* Subrecipients that have their own DBE programs must participate in their state's unified certification program (UCP).

\* The amount of DOT financial assistance provided to a subrecipient with its own DBE program via the primary recipient is deleted from the base from which the primary recipient calculates its goals, and the subrecipient's DBE participation is not counted toward the primary recipient's DBE participation.

\* If a subrecipient has its own independent DBE program and overall goals, the subrecipient would submit DBE participation reports to both the primary recipient and the DOT operating administration involved, the frequency and content of which would be determined through the subrecipient's consultation with the primary recipient and DOT operating administration.



- **Section 26.37(b), 26.55(g)**

- **SHOULD RECIPIENTS KEEP TRACK OF DBE "COMMITMENTS," "ACHIEVEMENTS," OR BOTH? (Posted - 2/17/00)**

Both. Section 26.37(b) requires recipients to have a mechanism to verify that the work committed to DBEs at contract award is actually performed by the DBEs. Obviously, recipients need to track both commitments and actual achievements in order to perform this task.

Final information on actual achievements will often not be available in the same year in which contracts are let. Recipients will often have to rely on commitments information in order to administer their programs (e.g., make needed adjustments with respect to the use of race-neutral and race-conscious measures).

On the other hand, keeping track of actual achievements is crucial to evaluating the operation of recipients' programs. As 26.55(g) provides, actual achievements are not counted toward goals until DBEs receive payment for their work. If the actual achievements of particular contractors, or a recipient's program in general, falls short of commitments, this is an indication that corrective action should be taken to improve program performance.



- **Section 26.45(g)**

- **WHAT STEPS ARE RECIPIENTS EXPECTED TO TAKE TO SATISFY THE CONSULTATION COMPONENT OF THE PUBLIC PARTICIPATION REQUIRED FOR GOAL SETTING?**  
(Posted - 6/18/08)

- The goal setting process used by recipients to establish their annual overall goal submitted to the operating administrations for approval must include "consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations" which could be expected to have information concerning the availability of DBEs and non-DBEs. This consultation process is also intended to gather information concerning the effects of discrimination on opportunities for DBEs, if present, and establishing a level playing field for the participation of DBEs.
- By definition, the process of consultation involves a scheduled face-to-face conference or meeting of some kind with individuals or groups of interested persons for the purpose of developing and/or assessing a proposed goal and methodology and seeking information or advice before a decision is made. Publication of the proposed goal to the general public is not synonymous with, or a substitute for, consultation with interested or affected groups.
- Recipients should identify groups within their contracting market that are likely to have information relevant to the goal setting process or that have a stake in the outcome of the process. Those groups should be contacted and invited to participate in a face-to-face exchange (which may occur at a public meeting) aimed at obtaining the kind of information set out in the regulation regarding establishing the overall DBE goal. Efforts should be made to engage in a dialogue with as many interested stakeholders as possible. An advisory committee may be one method of consultation (but not the exclusive method, since this could lead to a recipient talking only to the same people all the time). A description of the consultation process and its purpose should be provided to all invitees.
- Consultation is expected to occur before the proposed goal is established and prior to publication of the proposed overall goal for inspection and comment by the general public.
- The consultation process must be documented in the recipient's annual goal submission.



- 26.45, 26.47, 26.51, 26.53

○ **HOW SHOULD RECIPIENTS ADMINISTER THEIR DBE PROGRAMS IN THE CONTEXT OF POTENTIALLY LARGE INCREASES IN FUNDING THAT MAY BECOME AVAILABLE AS THE RESULT OF THE PROPOSED ECONOMIC RECOVERY PACKAGE? (Posted - 1/26/09)**

\* The Department anticipates that the DBE program and regulations will apply to Federally-assisted contracts receiving funds from the proposed recovery package. All of a recipient's funds – whether derived from SAFETEA-LU or the recovery package – should be viewed as part of a single, combined funding base to which DBE goals apply.

\* Given the flexibility built into the DBE regulations, recipients can successfully administer their DBE programs under these rules in the context of funding increases provided by the recovery legislation. Particularly because a major purpose of the proposed legislation is to increase opportunities for businesses and workers in a challenging economic climate, the Department expects recipients to do so.

\* The Department is aware of concerns expressed by recipients that there may not be sufficient availability of certified DBEs to meet existing overall goals, as applied to recipients' expanded programs.

\* To help address such concerns, recipients should begin, as soon as possible, outreach to affected persons. This outreach should include dialogue with representatives of the contracting industry and the DBE community to begin to understand recipient-specific issues. This outreach will allow recipients and DOT operating administrations to be better prepared to react to Congressional direction in new legislation.

\* Recipients should make use of race-neutral measures, such as small business programs, owner-provided insurance, technical and financial assistance, and unbundling of contracts to increase the ability and capacity of DBEs and other small businesses to perform contracts receiving recovery package funding. The Department of Transportation's Office of Small and Disadvantaged Business Utilization also operates a short-term lending program, which can help to increase DBE capacity.

\* Recipients should take steps to mobilize underutilized DBE capacity:

- Recipients should reach out to firms that may potentially be eligible for DBE certification, but are not yet part of the program, urging them to apply.
- Recipients should expedite the processing of applications for certification.
- In many cases, there are substantial numbers of certified firms that are seldom used on contracts. This can be an additional source of DBE capacity. Recipients should make vigorous efforts to work with such firms and prime contractors to take advantage of this resource.
- Recipients and prime contractors should be as inclusive as possible in utilizing all available DBE firms, not ruling certified firms out based on preconceptions about their competence to do a particular job.

\* Recipients should use existing regulatory tools to address concerns about capacity:

- Recipients can take the projected availability of DBEs for any particular contract into consideration in determining the contract goal for that contract. This is consistent with the existing regulation (see 49 CFR 26.51(e)(2)).
- If a bidder on a prime contract cannot find sufficient certified DBE participation to meet a contract goal (e.g., because all DBE capacity for the types of work involved is absorbed by other projects), the bidder can meet DBE requirements by documenting its good faith efforts to find DBE participation. This is also consistent with the existing regulation (see 49 CFR 26.53(a)(2)).
- The Department believes that modifications to overall goals will be needed rarely, if at all, to deal with administration of recovery package funds. It is important to remember that recipients are not penalized for failing to "hit the number" with respect to overall goals, as long as they are operating their programs in good faith (see 49 CFR 26.47). However, if a recipient believes it necessary to adjust an overall goal, it could propose such an adjustment to the relevant DOT operating administration. The requirements of 49 CFR 26.45 would apply to such an adjustment.

\* Recipients should communicate regularly with DOT agencies concerning operating their DBE programs in context of recovery package funding. If a recipient believes that it has problems or issues that are not addressed by the DOT regulations or program guidance, the recipient should contact the relevant operating administration to discuss the matter.





