

The following questions and answers relate to implementation of Section 26.39 Fostering Small Business Participation

1. What are recipients required to submit to the concerned operating administration (OA) to comply with 49 CFR § 26.39?

- Recipients must submit to the appropriate OA an amendment to their DBE program plan that sets forth in detail the steps to be taken to facilitate competition by small business concerns.
- The concerned OA will provide instructions to recipients on whether the amendment should be submitted for review as a stand-alone document or whether it should be incorporated into the recipient's existing DBE program plans. If the amendment is submitted for review as a stand-alone document, it must be integrated into the body of the recipient's DBE program plan document once approved.
- There is no requirement that the DBE plan amendment be signed by all recipients in the state.
- Recipients must submit the program amendment to the concerned OA by February 28, 2012.

2. By what date must the small business element be implemented?

- The implementation date should be established by the OA when it approves the small business element submitted by the recipient. This date should not be more than nine months after the approval date.
- Recipients are encouraged to include an implementation schedule as part of their submission to ensure the small business element is fully operational within nine months of approval.

3. Must the recipient address each of the strategies presented as examples in the rule as part of its submission?

- No. The list of strategies set out in the rule is designed to give you some ideas on how to accomplish the objectives of the rule. Additional suggestions may be found in the preamble discussion of the rule at 76 Fed. Reg. 5094. This is not an exclusive list, and you are not expected to explain why one strategy was chosen instead of others.
- Recipients may choose one or more of the listed strategies or may develop any alternative strategy that can be effective in creating contracting opportunities for small businesses.
- Recipients (particularly FTA and FAA recipients) also may collaborate with regional partners by pooling resources and/or creating joint programs, but each recipient in the collaborative must make a submission to the appropriate OA.
- In any case, we believe it to be advisable that your submission address unbundling contracts in the context of your procurement program, even if unbundling is not ultimately a strategy you choose.
- A recipient that has an existing race-neutral small business program that has been used to set aside state-funded contracts for competition among small businesses may decide to use that program for federally-assisted contracts to meet this requirement, subject to OA approval. However, the recipient is not required to do so. If an existing small business program is used to comply with the rule, recipients must take steps to separate state and federal contracts to ensure proper reporting to US DOT of DBE participation on federally-assisted contracts only.

4. How should recipients define a small business when developing a small business program to foster small business participation?

- Since the small business element developed by a recipient will be a part of the recipient's approved DBE program plan, recipients should use the definition of small business concerns set out in 49 CFR §26.5.
- This will ensure that all small businesses allowed to participate in the recipient's program (DBEs and non-DBEs alike) are subject to the same size standards and, consequently, compete with similarly-sized businesses.

- A state or local MBE/WBE or other program, in which eligibility requires satisfaction of race/gender or other criteria in addition to business size, may not be used to comply with the rule.

5. Should a personal net worth (PNW) requirement be a part of any small business program used to comply with this requirement?

- A recipient has the option of establishing a PNW threshold as an eligibility criterion for its small business program element. Except in a micro-small business program (where a PNW threshold could be lower), if a recipient chooses to establish such a requirement as part of its program, the PNW threshold should be consistent with the one in 49 CFR Part 26.

6. Could a micro-small business program be an appropriate part of a small business element in a DBE program?

- Yes. A recipient may develop a program for very small businesses (e.g., those with annual gross receipts well below the SBA small business size criteria). As part of such a program, a recipient could also have a lower PNW threshold for owners of the very small businesses.
- Where a recipient creates a micro-small business program, we believe it is a best practice to also provide opportunities to facilitate competition among small businesses that are larger than those eligible to participate in the micro-small business program.

7. Are small business goals required?

- No. The use of small business goals is optional.
- The use of race-neutral small business goals on the same contracts that have DBE contract goals can be difficult to administer. We recommend that recipients not do so unless they have a clear understanding of these complexities and how they expect to manage them.

8. Can supportive services programs be used to meet the requirements of section 26.39?

- The FHWA-funded “supportive service program” is intended to be used only to assist DBEs. Recipients should not include services to non-DBEs as part of that program.
- However, a state- or locally-funded supportive services-type program could be made available to non-DBE firms as a part of the recipient’s small business program element.
- Outreach activities are not sufficient, standing alone, to meet the requirements of section 26.39. Recipients are responsible for taking active, effective steps to increase small business participation.

9. Should a small business program include a verification requirement? If so, may a recipient rely upon or accept the verification process used by another entity?

- Yes to both questions.
- To ensure that a firm is in fact a small business concern and to minimize fraud and abuse, it is advisable for a recipient to take steps to verify eligibility of a firm to participate in the recipient’s program. This means that a program should not allow firms to self-certify/verify as small businesses.
- A recipient may rely on the certification/verification processes used by another entity as long as the process is designed to confirm eligibility consistent with small business criteria consistent with those of Part 26. A certified DBE is presumed eligible to participate in a small business program developed to comply with 49 CFR §26.39, unless it is a micro-small business program.
- While it is not necessary for a recipient to verify the small business status of every firm that might in some way benefit from the recipient’s program, if participation will result in a tangible advantage for a firm (e.g., getting a contract via a small business set-aside program), verification is important to avoid program fraud.

10. Are recipients expected to report on the level of small business participation achieved through their program?

- No. Recipients will be required only to track and report any race-neutral participation by certified DBEs achieved through their small business element or program in the same way they report race-neutral DBE participation obtained through other methods (see by 49 CFR §26.11(a)).

- Nevertheless, recipients may find it useful to collect data on small business participation obtained through their program, in order to answer any future questions that could arise about the results of their programs.

11. How is the small business program element requirement to be applied to sub-recipients?

- The required small business program amendment is part of your overall DBE program. Therefore, it applies to sub-recipients in the same way as your overall DBE program.
- Just as direct recipients are expected to ensure that their sub-recipients comply with goal-setting or certification requirements, so direct recipients are expected to ensure that sub-recipients implement the recipient's approved small business element made a part of the recipient's DBE program plan.
- In any case where a sub-recipient has its own DBE program, separate from that of a direct recipient, the sub-recipient is responsible for creating its own small business program and submitting it to the concerned operating administration for approval.

12. How does this Q&A relate to guidance posted July 15, 2009, titled "What actions should a recipient take before implementing a small business program on federally assisted projects as a race- and gender-neutral means of facilitating DBE participation in meeting the recipient's overall goal?"

- This guidance should be read in concert with the July 2009 Q&A.
- In establishing a race-neutral small business set-aside as a measure under the small business program element required by section 26.39, you should follow the guidance in the July 2009 Q&A.
- It is important to note that implementing a small business element or program is intended to facilitate compliance with the twin obligations in 49 CFR §26.51: (1) to meet the maximum feasible portion of the overall goal by using race-neutral means of obtaining DBE participation and (2) to establish DBE contract goals to meet any portion of the overall goal you are unable to meet using race-neutral means alone.

13. The DBE rule appears to prohibit set-asides. How, then, is it permitted to have small business set-asides as part of the small business program element?

- Section 26.43 generally prohibits the use of set-asides for DBEs. This means that limiting competition on a contract to DBEs – a category based on race- or gender-based

classifications – is forbidden. It is the race-conscious nature of a DBE set-aside that necessitates this prohibition.

- A small business set-aside is different. In this case, competition is limited only on the basis of business size. This is a race-neutral, rather than race-conscious, classification. Consequently, a small business set-aside does not fall under the prohibition applying to DBE set-asides.