

## **Transcript for Implementing a Successful DBE Program:**

### **2014 DBE Rule Synopsis Training**

#### **Slide 1**

Hi, today the Federal Transit Administration will summarize the changes made to the DBE regulations and provide a few practical steps to implementing a successful DBE program. My name is Britney Berry and together with Janelle Hinton and Jennifer Riess we will highlight FTA's expectations regarding your DBE program implementation.

#### **Slide 2**

In October 2014, the U. S. Department of Transportation published modifications to the DBE requirements. These changes largely reflect existing DOT and FTA-specific policies and guidance. It is important that FTA recipients and transit vehicle manufacturers (also referred to as TVMs), understand how the new requirements complement the "not so new" requirements.

#### **Slide 3**

During today's session, all new regulatory requirements or modifications are marked with a yellow star in the left hand corner.

Janelle, will you begin by telling us a little bit about the foundation of today's training—namely the program plan and the goal methodology?

#### **Slide 4**

The DBE program plan consists of two distinct yet complementary elements: the DBE program plan and the goal methodology.

#### **Slide 5**

The goal represents the anticipated amount of DBE participation a recipient or TVM expects to achieve within the triennial period and/or fiscal year.

#### **Slide 6**

The program plan is the blue print that guides the day-to-day operations of the DBE program.

#### **Slide 7**

It provides a substantive outline of how each recipient and TVM will implement the DBE requirements

#### **Slide 8**

Compliance with both the program plan and goal methodology is determined using a good faith effort standard.

## **Slide 9**

While recipients and TVMs are accustomed to assessing a prime contractor's good faith effort, you all should be aware that FTA assesses your good faith efforts as far as overall program implementation is concerned.

## **Slide 10**

Timely submitting DBE related information such as goals, program plans, uniform reports, shortfall analyses, responding to DBE complaints and properly reviewing and evaluating bid submissions are all monitored to determine recipients' and TVMs' good faith.

## **Slide 11**

This goal standard applies to all DBE program participants— including all FTA Recipients, TVMs, DBEs, and non-DBE contractors.

## **Slide 12**

Recipients are reminded that the DBE goal is an annual goal that covers a triennial period.

## **Slide 13**

Although you submit one goal every three years, you must achieve that DBE goal each year of the triennial period.

## **Slide 14**

TVMs, on the other hand, simply submit an annual goal each fiscal year to FTA.

## **Slide 15**

Recipients and TVMs submit one program plan that is updated to reflect significant changes such as a new CEO, DBELO, and prompt payment periods.

## **Slide 16**

Jen here. I'm going to take some time to walk through the goal setting process.

There is an inherent flexibility that allows recipients and TVMs to explore different methods to calculate the DBE goal. The regulations provide a list of 5 different approaches. The 2014 DBE regulations provide clear guidance on how each method should be used.

## **Slide 17**

The USDOT Departmental Office of Civil Rights, did a great job outlining the 5 different approaches and highlighting the changes in the 2014 DBE Rule

## **Slide 18**

The changes are primarily seen in the requirements for the bidders list approach in 49 CFR 26.45(c)(2); and the alternative method approach in 49 CFR 26.45(c)(5).

### **Slide 19**

When using the bidder's list approach, you must consider all bidders from the past three years and describe the method used to capture this data.

### **Slide 20**

When using an alternative method, you must ensure that it includes demonstrable evidence of local market conditions. Also, if you decide to use a bidders list or prequalification list exclusively, it must meet the regulatory requirements discussed in 49 CFR 26.45(c)(2)

### **Slide 21**

Regardless of which approach you use, the goal methodology should include the following 8 minimum elements.

### **Slide 22**

First, you must provide a list of FTA-assisted contracts identified by the appropriate NAICs Code

### **Slide 23**

Then identify the geographic market area.

### **Slide 24**

Next, determine the Step 1 Base figure—that is, the relative availability of DBEs and non-DBE firms within your geographic market area.

### **Slide 25**

You must then list the sources used to locate DBE and non-DBE firms and any other sources used to calculate your goal

### **Slide 26**

Should your goal be adjusted upwards or downwards? This element must also be discussed as part of your goal submission.

### **Slide 27**

Then determine the percentage of your goal that will be achieved using race-conscious and race neutral measures; and identify the race neutral measures you will implement as part of your DBE goal implementation.

### **Slide 28**

Public participation is next on the list and is one of most important elements of your goal methodology. You must actively engage the public and submit evidence of this engagement as part of your DBE goal methodology.

## **Slide 29**

Last but not least is proof of publication. Publication is an extension of your public participation and the regulations simply require that you publish a notice announcing your goal on your official internet webpage.

Britney, how do recipients and TVMs satisfy these 8 minimum requirements?

## **Slide 30**

Well, let's begin with Item #1— the list of contracting opportunities.

## **Slide 31**

When addressing this requirement, you must consider all FTA-assisted contracting opportunities or activities. Do not limit the contracting because you believe DBEs are unable to perform on larger or more complex tasks.

## **Slide 32**

For recipients, these contracting opportunities include direct FTA-assisted contracting opportunities as well as any contracting your sub-recipients may undertake during the triennial period.

## **Slide 33**

You must also be sure to assign the most specific NAICS Codes to the contracting opportunities and avoid using broad general Codes to describe them.

## **Slide 34**

Next, let's look at Item # 2 -- the 2nd minimum requirement—the geographic market area.

## **Slide 35**

The geographic market area may be a single state, several states, or even an entire region.

## **Slide 36**

Where you award or have awarded a substantial majority of your FTA-assisted contracts.

## **Slide 37**

The key is clearly explaining how you determined the boundaries of your geographic market area and including this explanation within your goal methodology. This illustration shows how you can use a generic map to highlight the physical location of your contractors to help determine exactly what your geographic market area should be.

Be mindful, however, that simply using a map to identify the geographic market area without further explanation will not satisfy this requirement.

### **Slide 38**

Jen and Janelle, would you all mind discussing the Step 1 Base Figure and what the regulations mean by the “relative availability” of firms within the geographic market area?

To begin, recipients and TVMs must determine the number of DBE and non-DBE firms that are available to perform on your contracts. This basic comparison is called the Step 1 Base Figure and it's the 3rd requirement on our list.

### **Slide 39**

For goal setting purposes, the Step1 Base figure helps determine the relative availability of all firms. The relative availability reflects the ready, willing, and able DBE and non-DBE firms within your geographic market area.

### **Slide 40**

The Step 1 calculation includes all certified DBEs and non-DBEs that you consider ready, willing, and able to perform on FTA-assisted contracts. You may also include potential DBEs (such as Minority and Women Business Enterprises or MWBEs) within your calculations.

As a reminder, your goal methodology should identify the sources used to locate potential DBEs and what efforts you've taken to assist in their ultimate DBE certification.

### **Slide 41**

Ready, willing, and able firms (that is DBEs, potential DBEs, and all other firms) should be located within your geographic market area

### **Slide 42**

Identified by NAICS Codes or other work classifications

### **Slide 43**

And should be willing to comply with the DBE requirements.

### **Slide 44**

Recipients and TVMs should also consider expanding their NAICS Code search to determine whether DBEs and other firms listed in related NAICS categories are also ready, willing, and able to perform on their contracts.

### **Slide 45**

For example, most NAICS codes have a section that cross references your initial search with like categories. Here, I searched building construction NAICS Code 236210,

### **Slide 46**

And the site automatically cross referenced my research with other potentially relevant codes.

#### **Slide 47**

Remember, the ready, willing and able standard applies to DBEs, potential DBEs, and all other firms.

#### **Slide 48**

Also bear in mind that while you **may** include potential DBEs in the goal calculation

#### **Slide 49**

You **may not** include potential DBEs when counting DBE participation for reporting purposes or DBE participation submitted in response to contract goals

#### **Slide 50**

The 4th requirement concerns the sources used during the goal setting process

#### **Slide 51**

Recipients and TVMs typically use DBE Directories from Unified Certification Programs (or UCPs)

#### **Slide 52(JH)**

US Census Data to identify DBEs and non-DBE firms in accordance with 49 CFR 26.45(c)(1).

#### **Slide 53**

However, there are additional resources such as the FAA's DBE Connect and

#### **Slide 54**

Other supplemental sources that may help locate DBEs and non-DBEs firms who are ready, willing, and able to participate on your FTA-assisted contracts in accordance with 49 CFR 26.45(c)(5).

#### **Slide 55**

Combining sources may help ensure the goal reflects an apples to apples comparison of all firms. For example, if recipients or TVMs perform a vetting process to determine which DBEs listed in the UCP are indeed ready, willing, and able to perform on their contracts, the recipient or TVM should perform a similar vetting process for the non-DBEs captured by the US Census Data.

Using a bidder's list or prequalification list helps discern the actual number of DBE and non-DBE firms who have bid or quoted, successfully or unsuccessfully, on prime or subcontracts within a specific time frame.

## **Slide 56**

Janelle, this is a natural transition to the Step 2 adjustment requirement which is Item # 5 on our list.

## **Slide 57**

The Step 2 adjustment helps ensure a narrow and precise goal percentage. That said, there is no requirement that goal be adjusted upwards or downwards.

## **Slide 58**

TVMs and recipients must, however, examine all available evidence and examine whether an adjustment is warranted. The regulations now make clear that no adjustment shall be made if there is no evidence to support the adjustment.

## **Slide 59**

Now on to Requirement #6 -- the race-neutral/race-conscious breakdown.

## **Slide 60**

The breakdown captures the amount of race-neutral and race-conscious participation that you a recipient or TVM expects to achieve within the fiscal year.

## **Slide 61**

Recipients and TVMs should use race-neutral measures as much as possible and their goal methodology must clearly identify which race neutral measures will be used during or throughout the fiscal year.

## **Slide 62**

Race-conscious measures should be used to meet the remaining portion of the goal. We will address the specific requirements for our 9th Circuit recipients momentarily

But, before we get ahead of ourselves...

Let's take a few moments to discuss race-neutral and race-conscious measures generally. Recipients and TVMs must understand these basics before determining the race-neutral/race-conscious breakdown.

## **Slide 63**

I'll begin with race-neutral measures. Race neutral measures are activities or initiatives that benefit all small businesses regardless of DBE status.

See 49 CFR 26.51(b) for a non-exhaustive list of race neutral measures but don't feel obligated or confined to the activities mentioned in the regulations

#### **Slide 64**

TVMs and recipients should determine the specific needs of the small business community within their geographic market area. Next, determine the most appropriate race-neutral measures for firms in that area.

#### **Slide 65**

For example, the needs of the small business community in NY State may differ from the lowa small business community so the race-neutral measures listed in these recipients' goal methodologies may be different.

#### **Slide 66**

After properly identifying and implementing appropriate race-neutral measures, your actual race neutral participation can take several forms.

First, all DBE prime contractor participation is considered race-neutral—regardless of whether there was a DBE goal on the contract.

#### **Slide 67**

Second, DBE participation on contracts where there is no contract goal included is all race neutral

#### **Slide 68**

Third, DBE participation that exceeds the stated contract goal is also considered race-neutral.

#### **Slide 69**

Now here's the kicker, the new DBE rule now removes, as an example of race-neutral participation, the use of a strict low bid system to award subcontracts in contracts that have DBE goals.

This simply means that if a contract includes a DBE goal and the prime contractor does not consider a firm's DBE status when awarding the subcontract, this award is still considered race-conscious.

#### **Slide 70**

Now the opposite of race-neutral measures are race conscious measures. Race-conscious measures are the value added to a recipient's or TVM's DBE goal methodology. They represent the mechanisms used to meet the portion of your goal you were unable to meet using purely race-neutral means; these measures benefit DBEs only.

And contract goals are the most common form.

The 2014 DBE regulations slightly modify the requirements for contract goals and good faith efforts.



### **Slide 71**

The Preamble text of the 2014 DBE Rule outlines the roles and responsibilities of the DBE, the bidder, and the recipient or TVM when contract goals are present.

When a DBE submits a bid or quote to a general contractor as a subcontractor,

### **Slide 72**

it is the responsibility of the DBE to ensure the bid or quote shows the appropriate NAICS code in which the DBE is certified

### **Slide 73**

The DBE's NAICS Code should correspond with the scope of work on the particular contract

### **Slide 74**

The bidder has some responsibility too. The bidder ensures that the firms listed in response are certified DBEs.

The bidder then submits a few things to the recipient such as: the name of the DBE firm that will participate on the contract,

### **Slide 75**

a description of the work that each DBE will perform,

### **Slide 76**

the dollar amount associated with the DBEs' participation,

### **Slide 77**

a written commitment to use the DBE subcontractor,

### **Slide 78**

and a written confirmation from the DBE that it will actually participate on the FTA-assisted contract as a DBE subcontractor.

### **Slide 79**

But this isn't the only option

### **Slide 80**

Prime contractors or bidders may submit sufficient good faith efforts as described in Appendix A in response to a contract goal

### **Slide 81**

This simply means that the bidder must show that it took all necessary and reasonable steps to achieve the DBE goal.

Recipients judge a bidder's effort or efforts by the scope, intensity, and appropriateness put forth to obtain sufficient DBE participation.

### **Slide 82**

Remember, the circumstances surrounding each procurement may vary, so good faith effort determinations must fit each individual situation as closely as possible.

Stated a bit differently, what constitutes a showing of adequate good faith efforts in a particular procurement is a fact-specific judgment that recipients and TVMs must make.

### **Slide 83**

The 2014 DBE Rule now also requires that recipients and TVMs require the prime contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for the work on the contract

### **Slide 84**

This new requirement allows the recipient or TVM to determine whether the DBE's prices were substantially higher than its non-DBE competitors;

### **Slide 85**

It also allows the recipient or TVM to contact the DBEs and confirm the prime's good faith efforts.

### **Slide 86**

Remember, pro forma mailings to DBEs requesting bids alone are not sufficient to satisfy good faith efforts requirements

### **Slide 87**

After the DBE and bidder have fulfilled their responsibilities, the recipient or TVM must thoroughly review the information submitted.

### **Slide 88**

Ultimately, the recipient is responsible for ensuring the DBE is certified to do the kind of work covered by the contract BEFORE DBE participation can be counted.

It should be noted, however, that that bidder cannot document good faith efforts under 49 CFR 26.53 on the basis of a sincere but mistaken belief that a DBE was certified to do the work proposed for the contract.

Janelle, do the 2014 DBE regulations impact contract goals in any other ways?

## **Slide 89**

Yes, there is a notable change regarding the timeframe with which bidders must respond to contract goals.

As previously mentioned, a prime contractor must submit evidence of DBE participation information or sufficient good faith efforts when responding to contract goals. The 2014 DBE Rule expounded on the flexibility and discretion recipients can assert when collecting this information.

## **Slide 90**

The Rule differentiates between the responsibility and responsiveness approaches. FTA recipients and TVMs must choose either responsibility or responsiveness when collecting and accessing good faith efforts and other DBE information submitted in response to a contract goal.

## **Slide 91**

If responsiveness, the DBE schedule of participation and all other information required by 49 C.F.R. 26.53(b)); (pause) or, the good faith efforts documentation, must be submitted at the time of bid.

## **Slide 92**

If responsibility, this information must be submitted within 7 days after bid opening. This 7 day period will decrease to 5 days by January 2017.

## **Slide 93**

Remember responsiveness and responsibility are used during sealed bids and are not required during all negotiated procurements—such as design-build contracts.

## **Slide 94**

When it comes to race-conscious participation, we'd like to remind all 9th Circuit recipients that you are not strictly prohibited from using race-conscious measures.

## **Slide 95**

Again...9th circuit recipients are not prohibited from using race-conscious measures.

Recipients located in the 9th Circuit must have demonstrable evidence of discrimination before instituting race conscious measures. This requirement is not a complete bar to contract goals for 9th Circuit recipients.

## **Slide 96**

As a 9th Circuit recipient, you may implement race-conscious measures (such as contract goals) if you will not meet your overall goal using race-neutral measures and you have evidence of discrimination or its effects in the transportation industry marketplace.

## **Slide 97**

The disparity study and/or other evidence must address whether discrimination exists within your geographic market area and relevant industry or work category.

## **Slide 98**

If the 9th Cir recipient is not in the process of conducting its own disparity study, it should assess the applicability of other relevant and appropriate disparity studies and include this assessment as part of its DBE goal methodology.

## **Slide 99**

In either instance, all studies and other evidence must be submitted to FTA as part of your goal methodology

## **Slide 100**

I'd like to switch gears just a bit and wrap up the 8 minimum requirements of the goal methodology with Item #7, Meaningful Consultation, and Item #8 Proof of Publication. Item 7 and 8 together constitute public participation.

and FTA is more closely examining public participation in all of the DBE goal methodologies. We are doing this to ensure stakeholders and interest groups are properly consulted during your goal setting process.

So we'll continue with Meaningful Consultation for now.

## **Slide 101**

FTA expects that consultation is an ongoing process that does not begin and end with goal setting. Maintaining relationships with interested parties and conducting meaningful public participation is evidence of a recipient's and TVM's good faith efforts. The changes to the DBE Rule strengthen this expectation.

Recipients and TVMs must actively engage the small business community—including but not limited to minority organizations, women's groups, and general contractor groups, through

## **Slide 102**

Scheduled, direct, and interactive exchanges. This interaction is used to gather information concerning

## **Slide 103**

the availability of DBEs and non-DBEs

## **Slide 104**

the effects of discrimination on opportunities for DBEs, and

### **Slide 105**

Whether your efforts to establish a level playing field are meeting the needs of the small business community within your geographic market area.

### **Slide 106**

FTA recipients and TVMs should contact regional Minority Business Development Associations, local Chambers of Commerce, and other available resources when conducting public participation to facilitate free flowing communication among all DBE stakeholders.

### **Slide 107**

The goal methodology must clearly and thoroughly describe your efforts to engage the public. The methodology must also include evidence that you have satisfied this requirement.

### **Slide 108**

Last, but not least, #8 Proof of Publication

### **Slide 109**

The 2014 DBE rule requires that goals are published on the recipients' and TVMs' webpage and makes all other publication sources optional

### **Slide 110**

If you publish your goal in other media outlets, the new Rule has reduced the mandatory comment period from 45 days to 30 days.

Remember though, if you publish your overall goal for comment, you still must engage in the required consultation with stakeholders; all of which must be completed well before the deadline for submitting your overall goal documentation to the operating administration

### **Slide 111**

Let's turn our attention to the DBE Program Plan and explore how the new and old requirements function together. We will begin with the DBE Program Objectives

### **Slide 112**

Then we'll take a look at contract clauses

### **Slide 113**

Next, we'll discuss Terminating DBE Contracts

### **Slide 114**

Prompt Payment

**Slide 115**

Monitoring and Enforcement of all DBE program participants

**Slide 116**

Counting and Reporting DBE participation

**Slide 117**

And, we'll end with Vehicle Purchases

**Slide 118**

First we look at changes made to the DBE Program Objectives

**Slide 119**

The DBE Program Objectives should guide recipients and TVMs, as you establish and implement your DBE Program plans and goals. Each regulatory provision is directly linked to one of these objectives.

**Slide 120**

The 2014 DBE rule added this additional objective to make clear that the DBE program is not limited to construction contracts but covers all federally funded contracts let by DOT-recipients—such as professional services, supplies, etc.

**Slide 121**

Let's now discuss Contract Clauses

**Slide 122**

Contract clauses bind DBE program participants (that is recipients, TVMs, DBE contractors and non-DBE contractors) to the DBE regulatory requirements. These clauses are designed to prevent discrimination in the award and completion of all federally-funded contracts.

**(Slide 123**

This means each contract and subcontract should include the proper DBE clauses and assurances. You should ensure that these clauses flow down from prime contracts to all lower level subcontracts as a DBE compliance measure.

**Slide 124**

The 2014 DBE Rule adds suggested breach of contract remedies in the event DBE program participants do not comply with these requirements.

These remedies include withholding monthly progress payments, assessing sanctions, liquidated damages, and/or disqualifying the contractor from future bidding as non-responsible.

### **Slide 125**

Recipients and TVMs must also include prompt payment clauses in prime contracts and DBE subcontracts.

### **Slide 126**

You should be aware that the 2014 rule now expressly states that failure to carry out applicable requirements of 49 CFR Part 26 is a material breach of contract which may result in termination of the prime contract.

### **Slide 127**

Janelle, based on the 2014 rule, is terminating a DBE subcontract a breach of the prime contract subject to the remedies listed in 49 CFR 26.13?

### **Slide 128**

It depends. When using contract goals, the prime contractor may not terminate DBE subcontracts for convenience. Reducing a DBE subcontract, at any point during contract performance, after the schedule of DBE participation or good faith efforts have been submitted, in order to self-perform the work or to allow another subcontractor to perform the work requires the written consent of the FTA recipient.

### **Slide 129**

Pursuant to the 2014 rule, unless written consent is provided prior to terminating the DBE subcontract, (pause) the prime is not entitled to payment for the portion of the contract originally designated to the DBE.

### **Slide 130**

After receiving the requisite written consent from a recipient or TVM, the prime contractor must, within a reasonable time,

### **Slide 131**

locate a replacement DBE or provide additional good faith efforts displaying its effort to locate a replacement DBE firm.

### **Slide 132**

The DBE regulations now permit prime contractors to request an extension if unable to meet this requirement within 7 days.

And yes, breach of contract remedies should be employed for improperly terminating DBE subcontracts.

### **Slide 133**

Now Jen, did the new DBE rule modify the prompt payment provisions?

No, the DBE prompt payment provision did not change. However, most FTA DBE complaints involve prompt payment disputes

### **Slide 134**

Ensuring prompt payment is a two-fold responsibility. First, the DBE must satisfactorily perform under the contract according to acceptable industry standards. This is an objective determination.

### **Slide 135**

Second, the prime contractor must pay the DBE for services rendered

### **Slide 136**

And payment must take place within 30 days

### **Slide 137**

after the prime receives payment from the recipient or TVM.

### **Slide 138**

When investigating DBE complaints and during compliance reviews, FTA reviews not only contracts and forms, but the procedures and policies that govern a recipient's or TVM's DBE program. One such policy is the prompt payment verification process. Recipients should have a process that ensures DBEs receive timely payment and that DBEs are in fact providing the services they have been contracted to perform.

### **Slide 139**

Remember prompt payment provisions must be included in each prime and subcontract agreement. Failure to comply with this provision

### **Slide 140**

is considered a material breach of contract.

### **Slide 141**

Let's now examine how the 2014 DBE rule impacts monitoring and enforcement mechanisms.

### **Slide 142**

We should first note that monitoring and enforcement are critical components of any DBE Program and must be applied to both DBE and non-DBE contractors alike. These mechanisms are used to identify and prevent DBE fraud, ensure DBE contracts are compliant with the



regulatory requirements, and prevent intimidation, retaliatory actions or other discriminatory acts.

In doing so recipients and TVMs should review DBE subcontracts and perform periodic on-site visits as part of your monitoring efforts; and incorporate breach of contract remedies as enforcement mechanisms.

#### **Slide 143**

To assist in the process, the 2014 rule now expressly states that all DBE subcontracts must be submitted to the recipient or TVM upon request.

#### **Slide 144**

Recipients and TVMs should use this as an opportunity to ensure DBE subcontracts are consistent with the DBE work scope, as submitted in response to the contract goal,

#### **Slide 145**

and also ensure that all DBE clauses have been included in the subcontracts.

#### **Slide 146**

This is required and will definitely assist in monitoring DBE compliance. (pause)

#### **Slide 147**

If a recipient's field personnel do not know which DBEs should be on the job and are unaware of the work the DBE should be performing, it will be unable to confirm that the DBE is actually performing the work committed by the prime.

#### **Slide 148**

Now turning to enforcement mechanisms

As a general matter, the DBE regulations require that each prime contract include a clause stating the contractor will use the DBEs listed in its response to the contract goal during the FTA-assisted project.

#### **Slide 149**

The 2014 DBE rule adds that, unless otherwise stated, the contractor shall not be entitled to payment for work or materials unless it is performed or supplied by the listed DBEs.

#### **Slide 150**

Remember, breach of contract remedies are available to redress or prevent any type of DBE non-compliance.

### **Slide 151**

Jen, I'd like to now discuss the counting and reporting requirements outlined in the 2014 Rule. The counting requirements are more-or-less a clarification but the reporting requirements have changed.

### **Slide 152**

It is common knowledge that recipients and TVMs must only count the amount of work performed

### **Slide 153**

with the DBE's own forces.

### **Slide 154**

That's true Janelle but counting DBE trucking firms is a little unique. Recipients and TVMs are reminded that trucks leased by a DBE from a DBE should not be treated any differently than leasing other equipment.

### **Slide 155**

That is to say, the DBE that leases trucks from another DBE receives credit for the total value of the transportation services—including the services from the leased trucks or equipment.

### **Slide 156**

If the DBE leases from a non-DBE truck leasing company but uses its own employees or drivers, the DBE can too count total value of the hauling services.

### **Slide 157**

The 2014 rule also makes clear the importance of distinguishing regular dealers, manufacturers, and brokers when counting DBE participation.

Regular dealers own, operate, or maintain facilities where certain materials and supplies are bought, kept in stock and regularly sold to the public in the usual course of business.

Be mindful that regular dealer is a term of art unique to the DBE regulations; the recipients and TVMs

### **Slide 158**

must make the determination on a case-by-case basis when counting DBE participation

### **Slide 159**

After properly counting DBE participation, the 2014 DBE rule now requires that recipients and TVMs submit this information on a new Uniform Report.

Recipients and TVMs must begin using this new form to submit the June 1, 2015 Semi-annual report. The new form is currently available in TEAM for FTA recipients and TVMs will continue submitting paper forms until otherwise notified.

**Slide 160**

The new form removes cells 8E and 8F.

**Slide 161**

When a DBE wins a prime contract that included a contract goal, the contract and the DBE participation

**Slide 162**

are considered race-neutral

**Slide 163**

and should be reported in cells 8G and 8H.

**Slide 164**

Recipients and TVMs must now also report the ethnicity and gender of DBE contractors in Columns A, B, D, and E. Remember you must only count those firms who are certified DBEs.

**Slide 165**

You will report the dollar amount of all DBE contracts awarded to female-owned DBE firms in columns 11A-16A

**(Remain on slide for 5 seconds)**

**Slide 166**

You will report the dollar amount of all DBE contracts awarded to male-owned DBE firms in columns 11B-16B

**(Remain on slide for 3 seconds)**

**Slide 167**

The total dollar amount awarded to male- and female-owned DBE firms by ethnicity is reported in 11C-16C.

**Slide 168**

Take a moment now to check the submission for accuracy. The dollar amounts reported in 10C and 17C reflect the total dollar amount of FTA-assisted contracts awarded to DBE firms.

**Slide 169**

The information included in 10C—that is the total dollar amount of DBE contracts—

**Slide 170**

Should match the amount reported in 17C.

**Slide 171**

You will now report the total number of contracts awarded to female-owned DBE firms in cells 11D-16D

**Slide 172**

The total number of contracts awarded to male-owned DBE firms will be reported in cells 11E-16E

**Slide 173**

The total number of contracts awarded to male- and female-owned DBE firms by ethnicity is reported in 11F-16F.

**Slide 174**

Let's take another moment to check the submission for accuracy. The dollar amounts reported in 10D and 17F reflect the total number of FTA-assisted contracts awarded to DBE firms.

**Slide 175**

The information included in 10D—that is the total number of DBE contracts awarded—

**Slide 176**

Should match the figure reported in cell 17F.

**Slide 177**

When completing Section C—Ongoing Payments—please bear in mind that ongoing contracts have not been completed.

**Slide 178**

This means that all orders under a contract have not been received or paid for

**Slide 179**

It also means that all services under the contract have not been completed or paid for

### **Slide 180**

If all payments have been made under the contract then it should not be reported in this section. If all payments have been made and all services and supplies delivered, the contract is complete and is not on-going.

### **Slide 181**

Cell 18A should include the total number of contracts that are on-going or active and have not been completed.

Remember the qualifications Jen just outlined.

All orders and services under the contract have not been completed or paid in full.

### **Slide 182**

Remember also that this number includes all DBE and non-DBE prime and subcontracts

### **Slide 183**

As an example, the 15 on-going projects displayed here could very easily be contracts that were awarded and started in FY14 but are not complete. Or, these could be projects that you've started this fiscal year that still have not been completed.

### **Slide 184**

Next, Cell 18B reflects the total dollar amount paid to DBE and non-DBE firms that are currently performing on FTA-assisted projects.

### **Slide 185**

This simply means that Cell 18B includes the total amount paid on the contracts you've identified in Cell 18A. Here, continuing the example, that amount is \$250,000.

So far, you have conveyed to FTA that during this reporting period, you have started but not yet completed 15 contracts and that you've used FTA-funds totaling \$250,000 towards these contracts.

### **Slide 186**

Cell 18C will begin to dissect the information you've previously reported a bit further. This cell reflects the total number of FTA-assisted contracts that are on-going—that is, not yet completed—and

### **Slide 187**

DBEs are currently working on these contracts.

Don't get confused here. Cell 18C is not the number of DBE contractors only the number of contracts that have DBE participation.

**Slide 188**

Be mindful that the figure reflected in 18C will always be less than or equal to the figure in 18A.

The figures in 18C and 18A will only be the same if all of your on-going contracts are DBE contracts.

**Slide 189**

In the example, we see that 7 of the 15 ongoing contracts include DBE contractors. This figure represents both DBE prime and subcontractors.

**Slide 190**

Cell 18D reflects the total payments made to DBEs on the ongoing contracts.

**Slide 191**

Here, of the 7 contracts that have DBE participation, you have paid DBEs \$75,000.

**Slide 192**

Cell 18E reflect totals the number of DBE contractors currently receiving payment for work performed during this reporting period—though the contract is not completed

**Slide 193**

Another quick note, Remember that Cell 18E will always be less than or equal to Cell 18C.

Here, we see that 3 DBE contractors on 7 contracts that include DBE participation have received \$75,000 during this reporting period.

**Slide 194**

Let's do brief recap and comparison of what we covered. Cell 18C reflects ongoing DBE contracts.

**Slide 195**

Once more, 18C reflects DBE Contracts—that is—contracts that have DBE prime or subcontract participation

**Slide 196**

Cell 18E reflects DBE firms (both prime and DBE subcontractors) currently performing on contracts

**Slide 197**

A side by side comparison shows 18C reflecting contracts and 18E reflecting firms

### **Slide 198**

Cell 18F is the percentage of DBEs. This is a simple mathematics equation, 18D divided by 18B will give you 18F.

### **Slide 199**

In our example, the total payments to DBEs was \$75,000 divided the total dollars paid to DBEs and non-DBEs at \$250,000 which gives use 30% of on-going payments as the percentage of FTA-funds paid to DBEs in this reporting period.

Britney, it seems that everything that we've covered applies to both recipients and TVMs; but I understand the new DBE regulation clarified several concerns with the TVM provision of 49 CFR 26.49.

### **Slide 200**

That's correct Jen. The last topic we'll discuss today is Vehicle Purchasing.

### **Slide 201**

The DBE regulations did not necessarily change the pre-existing TVM requirements. The rule merely codifies pre-existing FTA standards and policies related to vehicle purchases. The rule includes a definition of TVMs in 49 CFR 26.5,

### **Slide 202**

It clearly outlines the TVM requirements for both TVMs and FTA recipients

### **Slide 203**

It also identifies the consequences for TVMs and FTA recipients that fail to comply with the TVM provisions.

### **Slide 204**

And the only real change to the rule is the inclusion of ferries as a type of transit vehicle subject to the TVM provisions.

### **Slide 205**

Like other TVMs, shipyards and other entities that may manufacture ferries can submit a DBE goal and program plan to FTA approval or the FTA recipient may establish a project specific goal for the ferry purchase.

Again, like all other project goals recipients must seek prior FTA approval before establishing the project goal.

### **Slide 206**

And remember, all project goals include the same 8 minimum requirements as the overall goals discussed in a few previous slides

**Slide 207**

Recipients are now also required to submit to FTA,

**Slide 208**

That is the FTA Civil Rights headquarters and the Regional Civil Rights Officer

**Slide 209**

within 30 days of award,

**Slide 210**

the name of the successful TVM bidder and

**Slide 211**

the total value of the vehicle procurement.

**Slide 212**

So after going through each of these topics, what are the take-aways?

**Slide 213**

All DBE program participants are held to the gold standard of good faith effort. Remember, FTA assesses your good faith efforts as far as overall program implementation is concerned.

**Slide 214**

Consider the changes to the approaches used to calculate the DBE goal. When using the bidder's list approach, you must consider all bidders from the past three years and describe the method used to capture this data.

**Slide 215**

If using alternative methods, however, be sure to research local market conditions prior to establishing your overall goal. Feel free to use more than one method when necessary.

**Slide 216**

Be mindful of the 8 minimum requirements you must use when establishing a project goal. These requirements are applicable no matter which method you use. The 8 minimum requirements should also be covered when establishing project goals.

**Slide 217**

Requirement 1: consider all FTA-assisted contracting opportunities. For recipients, these also include any contracting opportunities your sub-recipients undertake. And remember to assign NAICS Codes to all contracting opportunities. Be as specific as possible.



### **Slide 218**

Requirement 2: identify the specific geographic market area where you award a substantial majority of your FTA-assisted contracts.

### **Slide 219**

In your goal methodology, include an explanation of how you arrived at the boundaries for your specific market area.

### **Slide 220**

Requirement 3: Calculate your base figure. Determine the relative availability of all DBEs and non-DBEs within your geographic market area. Your relative availability determination should be based on those firms you have found to be ready, willing and able.

### **Slide 221**

Requirement 4: Identify all of the sources you used to locate the DBEs and non-DBEs in your geographic market area. Several commonly used sources are listed here but feel free to supplement with others when necessary.

### **Slide 222**

Requirement 5: consider whether you need to make an adjustment to your base figure. We want to ensure that all goals are narrowly tailored. While an adjustment is not necessarily required...

### **Slide 223**

An explanation is. Be sure to explain whether you adjusted your goal and describe the justification for your decision.

### **Slide 224**

Requirement 6: identify the race-neutral and race-conscious percentages of your overall goal. This breakdown projects the amount of race-neutral and race-conscious participation you expect to achieve each fiscal year.

### **Slide 225**

Remember, the DBE regulations require that you use race-neutral measures to meet the maximum portion feasible of your overall goal.

### **Slide 226**

In determining what race-neutral measures you should use in your overall program, be creative.

### **Slide 227**

These race-neutral measures should address the concerns of your specific small business community. There is no "one size fits all" solution.

### **Slide 228**

Be mindful, however, that ANY DBE participation in response to a contract goal is race-conscious participation.

### **Slide 229**

The only exception to this rule is when the bidder exceeds the DBE contract goal. This additional participation is race-neutral.

### **Slide 230**

Each entity must remember its responsibilities when it comes to contracts goals. The DBE must insure that it has identified its appropriate NAICS code to the prime contractor.

### **Slide 231**

The prime contractor must submit specific information to the recipient or TVM regarding its DBE commitments. This includes written confirmation that the DBE will perform work as a subcontractor.

### **Slide 232**

Remember, if the prime contractor needs to submit good faith efforts documentation because it did not meet the contract goal, it should include all DBE and non-DBE quotes when a non-DBE subcontractor was selected over a DBE.

### **Slide 233**

Don't forget the gold standard.

When implementing DBE contract goals, you should either choose responsiveness or responsibility

### **Slide 234**

—not both.

### **Slide 235**

Be sure to have a process in place that outlines the how you will assess GFE submissions.

### **Slide 236**

Requirement 7 & 8: Use the public participation process to build relationships with the DBE stakeholders who may have information regarding additional resources and databases that can be used during the goal setting process.

You must actively engage the public and submit

**Slide 237**

evidence of your efforts as part of your DBE goal methodology.

The 2014 DBE rule requires that

**Slide 238**

goals are published on the recipients' and TVMs' webpage and makes all other publication sources optional.

**Slide 239**

If you publish your goal in other media outlets, the new Rule has reduced the mandatory comment period from 45 days to 30 days.

**Slide 240**

Now for the take-aways of the Program Plan

Remember, the DBE program is not limited to construction contracts but covers all federally funded contracts let by DOT-recipients.

**Slide 241**

Contract clauses are binding commitments to the DBE regulatory requirements. FTA holds recipients responsible for ensuring contract clauses are included in all DBE contracts.

**Slide 242**

Reviewing these contracts is a necessary monitoring mechanism.

**Slide 243**

30 days or less constitutes prompt payment. FTA reviews prompt payment

**Slide 244**

verification processes during complaint investigations as well as other evaluations.

**Slide 245**

The 2014 rule now expressly states that all DBE subcontracts must be submitted to the recipient or TVM upon request.

**Slide 246**

Recipients and TVMs should consider a progressive disciplinary policy for prime contractors who have not complied with the DBE requirements in one or more instances.

**Slide 247**

When counting DBE participation, recipients and TVMs must only count the work performed by the DBEs' own forces.

**Slide 248**

Recipients should have a procedure for tracking DBE participation to ensure accurate and timely DBE reporting.

**Slide 249**

Concerning vehicle purchases. Recipients must either: 1) require TVM certification prior to accepting TVMs' bids; or 2) obtain FTA approval to establish project specific goals.

Recipients then must report to FTA the successful TVM bidder within 30 days of awarding the vehicle contract.

**Slide 250**

Finally, while FTA expects recipients and TVMs to competently implement the DBE requirements with your own staff and resources, we are here and willing to assist you before non-compliance becomes a factor.

**Slide 251**

Here is a list of additional resources that should and could be used during the goal setting process and further DBE Program plan implementation.

**Slide 252**

Listed here are all FTA contacts. Thank you in advance for implementing a successful DBE program!