

TRANSIT VEHICLE MANUFACTURERS JANUARY 2012 TRAINING



HISTORY OF DBE PROGRAM

- The Disadvantaged Business Enterprise program is one dedicated to helping small businesses owned and controlled by socially and economically disadvantaged individuals, including minorities and women , in participating in contracting opportunities created by DOT financial assistance programs.
- This program originally began in 1980 as a minority business enterprise (**MBE**) program and was later expanded to include women owned firms (**WBEs**) in 1987.
- In 1999, the Supreme Court's decision in *Adarand v. Peña* held that affirmative action programs must be "narrowly tailored to serve a compelling governmental interest," in addressing discrimination. Thus, the DBE program seeks to create a level playing field on which DBE can compete fairly for USDOT-assisted contracts

DBE PROGRAM OBJECTIVES

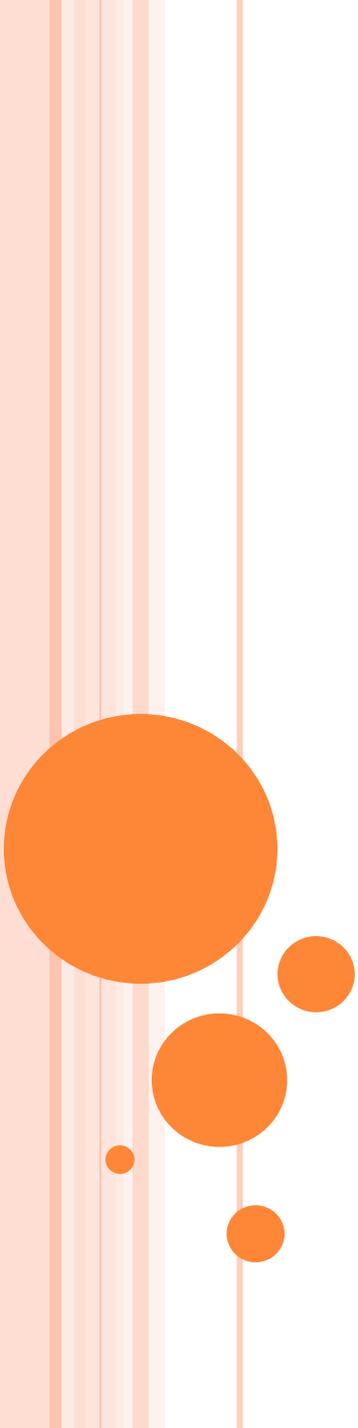
- Non-discrimination
- Create Level Playing Field
- Narrowly Tailor Program
- Only Firms Meeting Eligibility Standards Can Participate
- Remove barriers to DBEs
- Develop DBE firms to compete outside of program
- Provide recipient flexibility

DBE PROGRAM PROHIBITIONS

- DBE Program explicitly prohibits the use of quotas and set-asides.
- Statutory ten percent goal is a nationwide aspirational goal. (TEA-21, P.L. 105-178, Section 1101(b), 49 CFR 26.41)

DBE PROGRAM PLAN REQUIREMENTS

- Today:
 - We will cover briefly all 12 elements
 - We will spend most of our time on determining and meeting DBE goals
 - We will provide examples of common errors
 - We will review your program and goal with you and point out specific concerns for you to address
 - Questions are welcome at anytime!
 - What is said here stays here, so be honest and open



GOAL SETTING REQUIREMENTS

49 CFR § 26.45

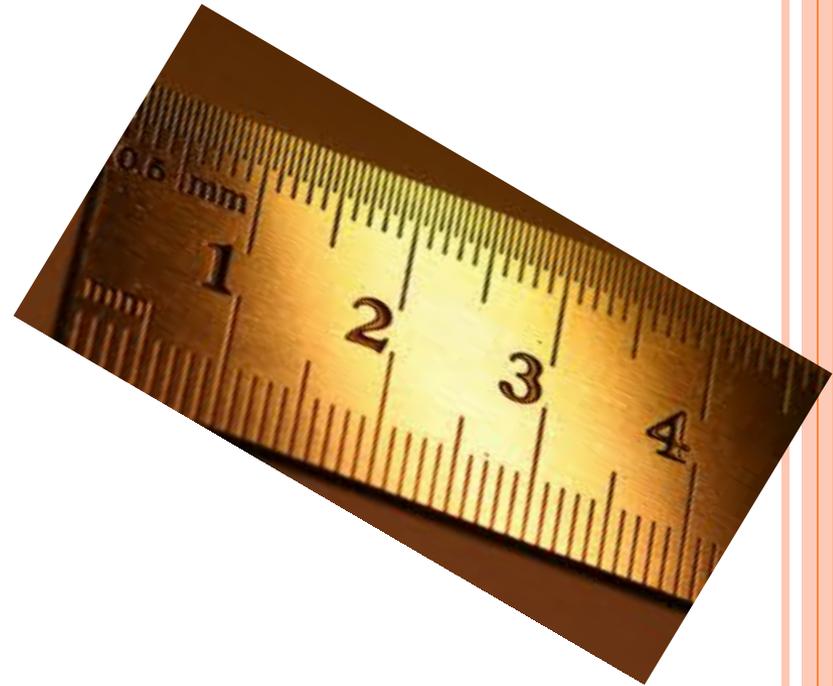
WHAT IS A MUST WITH DBE GOALS?

- Method > Number
- “Two Step Process”
 - Step # 1: The Base Figure
 - Based on “Availability”
 - Ready, willing & able
 - Step # 2: The Adjustment
 - Based on “Examination of Evidence”



THE RULE OF GOAL SETTING

- What are the contracting opportunities available?
- If available to non-DBEs then to DBEs
 - Even if no participation is expected
 - “self fulfilling prophecy”

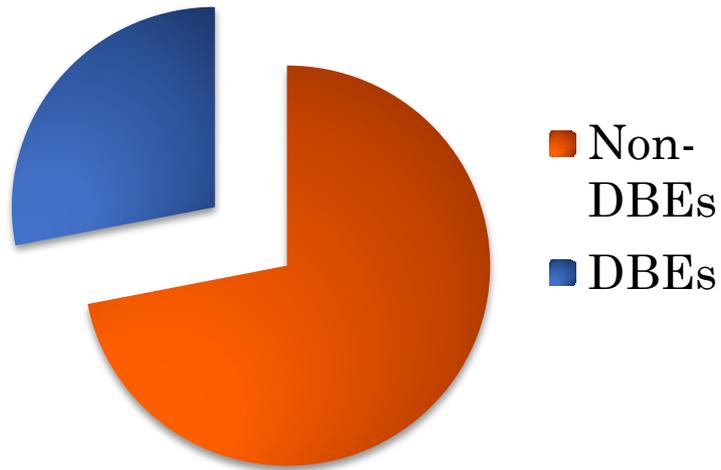


MUST INCLUDE!

- Description of the methodology
 - Base figure, evidence and adjustments
 - *Explanation of why evidence not used*
 - Projection of race-neutral and race-conscious
- Public participation!
 - Consultation
 - Publication

CALCULATING YOUR GOAL

STEP 1: PART C—DETERMINE YOUR BASE FIGURE



DBEs ÷ All Firms =
Relative Availability

EXAMPLES FROM REGULATION

- DBE Directories & Census Bureau Data
 - Use NAICS codes to determine DBEs in market
 - Divide by total businesses in market
- Bidder's List
 - Number of DBEs that bid or quoted on prime and sub contracts in the previous year
 - Divide by number of other firms

EXAMPLE

- *“These components and many other expensive components make up the majority of the dollars spent for...manufacturing...thus these are not part of the annual goal calculations.”*

THINK ABOUT IT

- Complex components are made from “simpler” parts



- Explore opportunities from sub contracts

CALCULATING YOUR GOAL

STEP 1: PART A –PROCUREMENT STAFF

(CONTINUED)



EVIDENCE

- “you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed”
 - *49 CFR §26.45(d)*

WHAT EVIDENCE?

- Capacity of DBEs to perform work
- Disparity Studies
- *Adjust for local market*
- *Evidence from related fields*
 - *Financing/bonding*
 - *Employment, education, training...*

EXAMPLE

Greenville as well as the City of Denver's Certified Directory of DBE's and determined that the data is focused on the road construction and city services sectors. While these are valid indicators of the availability of DBEs, there could possibly be a higher percentage of DBEs that may be available to participate on the manufacture of transit vehicles.

- Promising!
 - But no follow through.

possible the DBE participation we would expect, in the absence of discrimination, an approach to create a goal against all business use to all recognized DBE's in the related NAICS codes found would be used.

The Status Quo?

WHAT CAN WE DO?

Supplement the Data...

your goal setting process truly reflects the actual availability of ready, willing, and able DBEs in your local market area. Toward this end, if you are using your DBE Directory and census data in goal setting and you are concerned that your DBE Directory does not accurately reflect the number of potential DBEs in your area, you should seriously consider supplementing the number of firms in your DBE Directory for the purposes of goal-setting. This is especially important because the census data represent

However...

should be included in your list of ready, willing, and able DBEs. Of course, you must be careful not to double count firms by including them on your list more than once. You also must remember that you are checking these other sources for the purpose of goal setting only. In order to actually be included in your DBE Directory, an otherwise eligible firm must take the additional steps of going through the certification process.

To count the DBE...they must be certified.

Source: *Tips for Goal-Setting in the DBE Program*
(<http://osdbu.dot.gov/DBEProgram/tips.cfm>)

RC/RN SPLIT

- *You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see 26.51(c)).*

RACE NEUTRAL

- measure or program is one that is, or can be, used to assist all small businesses.
 - *race-neutral* includes gender-neutrality.
- Providing technical assistance
- Long-term development opportunities
- Contract structuring & delivery

RACE CONSCIOUS

- measure or program focused specifically on assisting only DBEs, *including women-owned DBEs*
- You must establish **contract goals** to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

RACE NEUTRAL & RACE CONSCIOUS

Race neutral measures are activities or programs that benefit and assist all small business equally, including DBEs. Such activities include purchase of materials, contracted labor, and manufacturing supplies.

The race neutral DBE program is made up of two ethnic groups: Hispanic Americans (includes Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese) culture or origin, regardless of race. Additionally, sub continental Asian Americans (including India, Pakistan, Bangladesh, Bhutan, and the Maldives Islands, Nepal or Sri Lanka).

Race-conscious measures are those measures and programs what focus on specifically assisting DBEs only. These four groups will be referred to as Underutilized Disadvantaged Business Enterprise or UDBEs.

Race Consious UDBE program includes: Black Americans (or African Americans), Native Americans, Asian-Pacific Americans, Women).

WHAT ARE TVM'S DOING?

- You must meet the maximum *feasible* portion of your overall goal by using race-neutral means
- Vast majority of submissions were race neutral only.
- One was race conscious only.

PUBLIC PARTICIPATION AND OUTREACH

- 49 CFR 26.45(g) **requires** public participation in the development of your DBE goal.
- Public participation **must** include:
 - **Consultation** with minority, women and general contractor groups with knowledge of availability of DBEs
 - **Publication** of a notice announcing your proposed goal.
 - Must be published in general circulation media and minority-focused and trade-focused publications

PUBLIC PARTICIPATION AND OUTREACH CONT.



Due to the project oriented creation of our initial DBE program as a TVM manufacturer [REDACTED] made only a direct contact with all possible qualified DBE contractors as determined by the CUCP database for District 4 as required by the §DBSC 7.1.3.D of R FQ/P No. 01ZK-110, Design-Build Supplementary Conditions.

Note: Any future contract bids involving DOT assisted funds will include a similar reference to specific portions of such RFP contractual requirements which specify a geographic area of participation of DBEs.

PUBLIC PARTICIPATION AND OUTREACH CONT.

Public Notices

Would your company or agency like to post a Public Notice on www.dbegoodfaith.com? Download and complete our [Public Notice Order Form](#) and fax it back to DBE Goodfaith Inc. For government agencies, the Public Notice is free!

If you have any questions about DBE Goodfaith's Public Notices, contact us at (877) 802-3394 or info@dbegoodfaith.com.

PUBLIC PARTICIPATION AND OUTREACH CONT.

- Why the two previous slides are problematic:
 - No indication that minority, women, and general contractor groups were consulted
 - DBEGoodFaith.com is NOT a publication of general circulation
 - Applied state law standard as opposed to DOT DBE regulations at 49 CFR Part 26

PUBLIC PARTICIPATION AND OUTREACH CONT.

- What we suggest:
 - APTA's "Passenger Transport" magazine is a good trade magazine, but don't rely on it solely
 - Contact national minority/women advocacy groups for local contacts and publications
 - Contact chambers of commerce
 - Look at FTA's non-exhaustive list
 - UCPs
 - Transit agencies – Contact the Civil Rights Office; most will have a good idea about the availability of DBE's in the area.

PUBLIC PARTICIPATION AND OUTREACH CONT.

Per the Census Bureau's CBP data (copies of findings included with this mailing):

1,854 ready, willing, and able businesses exist within our market locations listed under the following

NAICS codes: 336 Transportation Equipment Manufacturing (1124)
3361 Motor Vehicle Manufacturing (32)
3362 Motor Vehicle Body & Trailer Manufacturing (85)
3363 Motor Vehicle Parts Manufacturing (613)

Per DBE Online Directory listings researched:

0 Ready, willing and able DBE's are listed in any NAICS codes pertaining to our 'specialized' vendor market.

PUBLIC PARTICIPATION AND OUTREACH CONT.

- Why we are concerned about the previous slide:
 - Contracting opportunities not broken out
 - Not clear where information came from other than Census Bureau
 - Not clear where TVM looked for DBEs other than Census Bureau
 - Use of “specialized vendor market” is cryptic

PUBLIC PARTICIPATION AND OUTREACH CONT.

- What we suggest:
 - When you publish your goal, send letters with a copy of goal to minority, women, and general contractor groups
 - ASK for feedback on your methodology
 - When finalizing your methodology reference the feedback you received and how you used it
 - Getting feedback during step 1 process lessens the likelihood of having to adjust your goal in step 2.

FACILITATING RELATIONSHIPS WITH COMMUNITY/MINORITY ADVOCACY ORGANIZATIONS

- TVMs should consider partnering with state, regional, and/or national minority and small business advocacy groups to identify small businesses and DBEs in specific work categories.
- A non-exhaustive list will be posted on the FTA's website by January 27, 2011.
 - The excuse that “there are no small businesses or DBEs that do this work” is not acceptable when TVMs haven't tried to find those small businesses and DBEs

OUTREACH! OUTREACH! OUTREACH!

- Hold outreach sessions inviting DBEs and non-DBE primes and small businesses to discuss your company's contracting opportunities
- Reach out to transit agencies that you work with and see what resources they utilize to identify small businesses and DBEs.
 - *Especially in areas where transit agencies have developed effective partnerships with local organizations*



BREAK TIME...



WHAT'S IN YOUR DBE PROGRAM?

- DOT's DBE program has 12 elements:
 - Program Plan
 - Policy Statement
 - DBE Liaison Officer
 - Financial Institutions
 - DBE Directory
 - Overconcentration
 - Business Development Programs
 - Determining and Meeting Goals
 - Required Contract Provisions
 - Certification Standards
 - Certification Procedures
 - Record Keeping and Enforcement

DBE PROGRAM PLAN REQUIREMENTS

- Program Plan:
 - Details your implementation of your DBE program according to federal guidelines
 - When significant changes occur, update your DBE Program and submit for FTA approval
- Policy Statement:
 - Affirms your participation in the DBE program, identifies the objectives of your DBE program, identifies your DBELO, the manner which your company will disseminate this statement internally and externally, and must be signed and dated by your current Chief Executive Officer

DBE PROGRAM PLAN REQUIREMENTS

- DBE Liaison Officer:
 - Undertakes the responsibilities associated with DBE program implementation and has a direct reporting relationship with the CEO
 - DBELO must have adequate staff and authority to administer the program
- Financial Institutions:
 - You must conduct thorough search for DBE financial institutions and make this information available to contractors
 - Availability should be re-evaluated periodically (i.e. 1-2 years)

DBE PROGRAM PLAN REQUIREMENTS

- DBE Directory:
 - Issued by each certifying agency and may help TVMs locate ready, willing, and able certified DBEs in specific work categories
- Overconcentration Analysis:
 - Information detailing whether there is (not) an overconcentration of DBEs in a particular work category and how you will address over-concentration

DBE PROGRAM PLAN REQUIREMENTS

- Business Development Programs:
 - Can be a Mentor/Mentee Program
 - Can also foster small business growth and development
- Determining/Meeting Goals:
 - Calculating the percentage of federal funds that will be directed toward DBE contractors and subcontractors
- Required Contract Provisions:
 - Contracts and subcontracts language must be include all federal regulatory DBE provisions when federal funds are involved

DBE PROGRAM PLAN REQUIREMENTS

- Certification Standards/Procedures:
 - Ensure that all DBEs listed on any State UCP are certified
- Record Keeping and Monitoring:
 - Must report DBE participation and provide FTA a copy of the bidders' list upon request
 - Must ensure that certified DBEs are performing the work contracted to them and that they are being paid for their satisfactory performance

DBE PROGRAM PLAN REQUIREMENTS

- Monitoring and Enforcement Mechanisms
 - Must implement appropriate mechanisms to ensure regulatory compliance by all participants in the program (i.e. contractors and subcontractors)

ANYTHING NEW?

- NEW! 49 CFR 26.39 requires your DBE program to include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation.

DBE PROGRAM PLAN

FOSTERING SMALL BUSINESS PARTICIPATION

- You must submit to FTA an amendment to their DBE program plan that sets forth in detail the steps to be taken to facilitate competition by small business concerns.
- FTA requires that you the amendment as part of your DBE program.
- You must submit the program amendment to FTA by February 28, 2012.

DBE PROGRAM PLAN

FOSTERING SMALL BUSINESS PARTICIPATION

- What can a small business program include?
 - Establishing race-neutral set-asides for prime contracts under \$1M
 - For large contracts requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses can reasonably perform
 - On contracts with no contract goals, have the prime provide subcontracting opportunities of a size that small businesses can perform
 - Identify alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures by small businesses to compete for and perform prime contracts
 - Unbundling contracts whenever possible!

DBE PROGRAM PLAN

FOSTERING SMALL BUSINESS PARTICIPATION

- Business Development Programs can also be part of your small business program.
- Not required, but a good one can help develop small businesses and DBEs
- Implementing your small business program in good faith is a requirement of implementing your DBE program (i.e. No lip service!)

DBE PROGRAM PLAN

- 49 CFR 26.21 requires a DBE program meeting the requirements of 49 CFR Part 26. Regular updates are not necessary as long as the programs meets the requirements of 49 CFR 26.
 - DBE regulations were revised in February 2011—**Everyone** has to update their DBE program!

DBE PROGRAM PLAN

- What we suggest:
 - Don't leave template language in your plan
 - If a required element doesn't apply to you as a TVM simply state that it doesn't apply (e.g. certification procedures)
 - You are required to implement your DBE program in “good faith”
 - If you have a race-neutral program, your program plan must demonstrate how you are going to pursue a race-neutral program
 - Race-conscious measures are available to TVMs **not** in the 9th Circuit

REQUIRED CONTRACT PROVISIONS

NONDISCRIMINATION CLAUSE

- 49 CFR 26.13 requires each contract signed with a contractor (and each subcontractor) must include a non-discrimination clause.
- Use the language in the rule verbatim!!!
- Must be in prime contracts and must ensure it is in subcontracts.

REQUIRED CONTRACT PROVISIONS

NONDISCRIMINATION CLAUSE

The contractor, sub-recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

REQUIRED CONTRACT PROVISIONS

PROMPT PAYMENT

- 49 CFR 26.29 requires prime contractors to pay subcontractors for satisfactory performance on their contracts **no later than 30 days** from receipt of each payment made.
- Must also address prompt return of retainage payments from the prime to the sub within 30 days.

REQUIRED CONTRACT PROVISIONS

PROMPT PAYMENT

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 30-60 days from the receipt of each payment the prime contract receives from [REDACTED]. The prime contractor agrees further to return retainage payments to each subcontractor within 30-45 days after the subcontractors work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the [REDACTED]. This clause applies to both DBE and non-DBE subcontracts.

REQUIRED CONTRACT PROVISIONS

PROMPT PAYMENT

- What is Required:
 - **30 days** or less
 - Sub contractors must have similar protections
 - How do you ensure compliance?
 - Develop an oversight mechanism (spot check) to make sure there are no deviations
 - Monitoring timeliness of payments

REQUIRED CONTRACT PROVISIONS

LEGAL REMEDIES

- 49 CFR 26.37 requires implementation of appropriate mechanisms to ensure compliance by all participants applying legal and contract remedies under Federal, state, and local law.
- If there is a conflict of laws, Federal requirements trump state and local requirements!

DBE PROGRAM PLAN

EXAMPLE OF TEMPLATE LANGUAGE LEFT IN PROGRAM

has available several remedies to enforce the DBE requirements contained in its contracts, including, but not limited to, the following:

1. Breach of contract action, pursuant to the terms of the contract;
2. Breach of contract action, pursuant to [State Code Section X];
3. [List the other laws, statutes, regulations, etc. that are available to enforce the DBE requirements.]



MONITORING AND ENFORCEMENT MECHANISMS

- We are looking for a strong and effective set of monitoring and compliance provisions in each TVM's DBE program.
- One of the main purposes of these provisions is to make sure that DBEs actually perform work committed to them at contract award.
- **Prime contractors** whose performance fell short of original commitments would be **subject to the compliance mechanisms of the TVMs**

MONITORING AND ENFORCEMENT

COMMON MISTAKE:

- Most TVMs use boilerplate language from the sample DBE program without specifically describing its enforcement mechanisms:
 - “The [*TVM*] will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26
 - We will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109.”

MONITORING AND ENFORCEMENT

COMMON MISTAKE:

- “We will consider similar action under our own legal authorities, including responsibility determinations in future contracts. Attachment ___ lists the regulation, provisions, and contract remedies available to us in the events of non-compliance with the DBE regulation by a participant in our procurement activities.”

OR

- “We will also provide a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by the DBEs. This will be accomplished by [*describe the mechanism*].”

MONITORING AND ENFORCEMENT

COMMON MISTAKE:

- TVMs often fail to:
 - lists what legal actions are available in cases of non-compliance by an independent contractor.
 - describe monitoring and enforcement mechanisms used to verify that work committed to DBEs at contract award is actually performed by the DBEs.

HOW TO REMEDY MONITORING AND ENFORCEMENT DEFICIENCIES

- Consult with your company's General Counsel to locate applicable punitive laws, statutes, or regulations available in instances of noncompliance
- If no General Counsel, contact TVMs in your locality or state to determine what legally punitive enforcement mechanisms that company includes within its DBE program.
- Last resort: Conduct a web-search of applicable punitive laws, statutes, or regulations available in instances of noncompliance

HOW TO REMEDY MONITORING AND ENFORCEMENT DEFICIENCIES

- Conduct onsite monitoring to ensure that DBEs are actually doing the work they were contracted to perform
- Request that prime contractors, with DBE subcontractors, send your company verification that the DBE was paid upon satisfactory completion of the work

THE END...

OPEN Q & A TIME

