

DBE Final Rule – Highlights

Hawaii DOT Civil Rights Symposium

January 28, 2015

Teresa Banks, National Civil Rights Team Manager,
FHWA Resource Center

Overview

DBE Final issued to improve DBE Program in three categories:
(Effective 11/3/14)

1. Revises and creates forms and requires new data collection (uniform certification application forms, PNW, MAP 21 data collection);
2. Strengthens certification-related program provisions;
3. Modifies other program provisions related to goal setting, good faith efforts, TVM, counting for trucking companies. Also, makes minor corrections to the rule.

Who Must Have a DBE Program



All FHWA **primary** recipients (i.e. State DOTs)

- **Subrecipients** (cities/counties other local public agencies (LPA) of FHWA funds must follow the State's DBE Program Plan (including administering their contracts using their State's DBE program provisions) *(New)*

FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$250,000 in FTA funds in a Federal fiscal year

FAA recipients receiving grants for airport planning or development who will award prime contracts the cumulative total value of which exceeds \$250,000 in FAA funds in a Federal fiscal year.

Forms and Data Collection



(Revised) Uniform Certification Application

- Removes unnecessary details [e.g., the phone number and address of applicant's bank, etc.);
- Requires info on the frequency of disadvantaged owner's tasks relating to control;
- Applicant identifies most applicable NAICS code;
- Checklist includes “optional” documents;
- New form available in screen fillable PDF format

Forms and Data Collection



(New) DOT Personal Net Worth (PNW) Form

- **DOT form** - adaptation of the SBA Form 413 tailored to DBE program requirements;
- All disadvantaged owners must submit PNW;
- Spouse of a disadvantaged owner involved in the firm must submit PNW form.

Forms and Data Collection



(Revised) Uniform Report of DBE Awards or Commitments and Payments

- Minority women-owned DBEs
- Actual Payments to DBEs during reporting period
- DOT recipients must use form to report DBE participation for FY 2015

(New) MAP-21 Report (beginning 1/15/2015)

- Annually State DOTs must report % of DBEs by:
 - White women
 - Minority men
 - Minority women

Goal Setting



(Revised) Overall Goal Setting Methodology and Process

- Bidders list must meet requirements of the rule if it is used to establish an overall DBE goal.
 - Identifies firms who bid/quote (both successful and unsuccessful, primes, subs, suppliers, etc.
- Additional data sources must supplement prequalification and similar lists;
- Any adjustments in Step 2 must be supported by evidence;
- Public comment period (optional) reduced from 45 days to 30 days

Transit Vehicle Manufacturers (TVM)



- Clarifies goal setting, reporting, and other requirements that apply to TVMs;
- TVM that is noncompliant will be removed from the FTA's certified TVM list, and will be deemed ineligible to bid;
- A recipient that is noncompliant may be subject to a formal enforcement action or other appropriate sanctions.

COUNTING



Trucking - Total value of hauling services is counted when DBE firms use its own employees, and lease trucks from non-DBE firms.

Materials and Supplies - Clarified counting regular dealer or transaction expediter. Recipients must determine the amount of DBE credit on a contract-by-contract" basis

Good Faith Efforts



Submission of Good Faith Efforts

- **Responsiveness** - Bidders/offerors required to submit DBE information at the time of bid;
- **Responsibility** - DBE information must be submitted no later than 7 days after bid opening;
- The 7 days shall be reduced to 5 days beginning January 1, 2017;
- DBE info must include NAICS code.

Guidance on Good Faith Efforts -



- **Includes examples** of actions taken by contractors recipients may consider when evaluating GFE;
- Contractors can't reject a DBE simply because it is not the low bidder, or if it is unable to find a replacement DBE at the original price;
- Contractors must submit the quotes of DBEs and non-DBEs when DBE quotes rejected based on price;
- Recipients must review the performance of other bidders in meeting the contract goal.

Program Administration



Domestic Partnerships and Civil Unions

- Recognized under state law are included in the definitions of "immediate family members" and "spouse."

(New) Record Retention

- All records documenting a DBE's compliance with the eligibility requirements must be retained
- Complete application package,
- Change notices, all affidavits of no-change,
- On-site review report. (26.11)
- Record retention requirements of OA
- Other records for minimum 3 yrs/OA requirements

Program Administration



(Revised) Contract Assurance

Amended to add contract remedies for failure to comply:

- termination of the contract,
- withholding monthly progress payments,
- assessing sanctions, liquidated damages,
- and disqualifying the contractor from future bidding as non-responsible.

Six new terms added to definitions:

- Assets; Business, Business Concern or Business Enterprise; Contingent Liability; Days; Liabilities; Spouse; Transit Vehicle Mfg.)

Certification Standards



(Revised) Small Business Size

- Increased from \$22.41 million to **\$23.98** million

(Revised) Economic Disadvantage

- Examples of kinds of evidence UCPs can consider such as 3yr average annual gross income \$350k;
- Owner assets exceed \$6m.

Certification Standards



(Revised) Ownership

- Examine if any agreements/practices in place that give a non-disadvantaged individual or firm a priority or superior right to a DBE's profits;
- Origin of assets to acquire ownership;
- Examples of real, substantial, and continuing ownership.

Certification Standards



(Revised) Control

A non-disadvantaged individual who remains involved in a DBE firm after transferring the company to the DBE, is presumed to be in **CONTROL**.

- Assumption is rebuttable – clear & convincing evidence;
- Examples in preamble (i.e.. maintain customer contacts, temporarily assist w/transfer);
- FAA, FHWA, FTA can make a determination that the former owner does not control the firm.

Certification Procedures



(Revised) Prequalification

- UCPs/DOTs cannot require DBE firms to be prequalified as a condition for certification.

(New) Summary Suspension

- DBE certification can be suspended w/o a hearing for 30 days if owner has died or is incarcerated, etc.

(Revised) Grounds for Removal

- A DBE that is debarred/suspended for DBE program violations is automatically removed.

Certification Procedures



- **Revised) Certification Appeals**

- An applicant can reapply for certification at the end of the waiting period. The waiting period is not extended pending a final decision.
- Applicants who appeal must include a specific statement as to **why** the decision was erroneous, **what** significant fact was not considered, or **what provision** was not properly applied.

Conclusion



Purpose of DBE final Rule was to further improve the DBE program:

- Data Collection and Reports
- DBE Program Administration (goals, good faith efforts, etc.
- DBE Certification - Standards and Procedures

QUESTIONS & ANSWERS

THE END!