

**DEPARTMENT OF TRANSPORTATION
DBE PROGRAM – 49 CFR PART 26
SAMPLE DBE PROGRAM**

The Department of Transportation (DOT) has prepared this sample program to help recipients comply with 49 CFR Part 26, the DOT DBE rule. We originally published Part 26 in the Federal Register on February 2, 1999, and it became effective March 4 (64 F.R. 5096). It made extensive revisions to DOT's DBE program, formally administered under 49 CFR Part 23. The new sample program also incorporates all updates to DOT's DBE program up to the January 28, 2011 Final Rule.

This sample program supersedes guidance issued by the operation administrations under former part 23. It does not address the separate DBE program for airport concessionaires, which continues to be administered in accordance with 49 CFR Part 23.

We are providing this sample DBE program for informational purposes, and recipients are not required to use it or its format. However, recipients may wish to use it as a guide in preparing their program documents. Recipients should customize the sample program to fit their individual circumstances; the final document should incorporate and reflect those processes, procedures, etc., used by the recipient as it implements its DBE program in practice. The three DOT operating administrations with DBE program responsibilities – the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA) – may provide additional guidance for program matters that are specific to their programs. This sample program should, however, lead to greater consistency among recipients' submissions.

At a number of points, the sample program refers to provisions of part 26. Recipients may quote referenced portions of the rule in their program if they wish, but they are not required to do so. The sample program also provides language for some documents that are part of the program (e.g. policy statements, contract clauses). Except where otherwise noted, recipients are not required to use this language, and may use their own language as long as it meets regulatory requirements.

In the sample program, we have put instructions and notes in italics. Recipients would not put this italicized material into their program documents.

You may obtain an electronic version of this document, the DBE regulation themselves and other DOT guidance from DOT's website:

<http://osdbu.dot.gov/DBEProgram/index.cfm>

~~The General Counsel of the Department of Transportation has reviewed this sample program and approved it as consistent with the language and intent of 49 CFR Part 26.~~

SAMPLE DBE PROGRAM

POLICY STATEMENT

Section 26.1, 26.23

Objectives/Policy Statement

The [*Recipient's name*] has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. The [*Recipient*] has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, the [*Recipient*] has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of the [*Recipient*] to ensure that DBEs are defined in part 26, have an equal opportunity to receive and participate in DOT–assisted contracts. It is also our policy:

1. To ensure nondiscrimination in the award and administration of DOT – assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To assist the development of firms that can compete successfully in the market place outside the DBE Program.

[*Name or title of appropriate person or office*] has been delegated as the DBE Liaison Officer. In that capacity, [*Name or title*] is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the [*Name Recipient*] in its financial assistance agreements with the Department of Transportation.

[*Name Recipient*] has disseminated this policy statement to the [*identify the governing board or officials of the recipient*] and all of the components of our organization. We have distributed this statement to DBE and non-DBE business communities that perform work for us on DOT-assisted contracts. [*Specify how this distribution is accomplished*]

[*Signature of Recipients Chief Executive Officer*]

Date

SUBPART A – GENERAL REQUIREMENTS

Section 26.1, 26.23 Objectives

The objectives are found in the policy statement on the first page of this program.

[Note: the policy must be signed and dated by your organization's highest officer, and circulated throughout the organization and to the DBE and non-DBE business communities that work on your DOT-assisted contracts. This process must occur each time your organization hires a new chief/highest officer.]

Section 26.3 Applicability

The [Recipient] is the recipient of federal airport funds authorized by 49 U.S.C. 47101, *et seq.*

The [Recipient] is the recipient of federal –aid highway funds authorized under Titles I and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21, Pub. L. 105-178, 112 Stat. 107.

The [Recipient] is the recipient of federal transit funds authorized by Titles I, III, V, and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, II, and V of the Teas-21, Pub. L. 105-178.

Section 26.5 Definitions

The [Recipient] will adopt the definitions contained in Section 26.5 of Part 26 for this program.

[Note: should you choose to incorporate the definitions from the DBE regulation, you: (1) must ensure that all definitions from the regulations are included and correct; (2) specify that you will add and include any new/amended definitions as they are provided by USDOT; and (3) not include any definitions for terms not included in the definitions found in Section 26.5 of Part 26.]

Section 26.7 Non-discrimination Requirements

The [Recipient] will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, the [Recipient] will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

Section 26.11 Record Keeping Requirements

Uniform Report of DBE Awards or Commitments and Payments: 26.11(a)

[Recipient] will report DBE participation to the relevant operating administration [FAA, FHWA and/or FTA] using the Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B to the DBE regulation.

Bidders List: 26.11(c)

The [Recipient] will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the bidders

list approach to calculating overall goals. The bidder list will include the name, address, DBE non-DBE status, age, and annual gross receipts of firms.

We will collect this information in the following ways:

[Note-Program should indicate the methods the recipient will use to obtain this information. The regulation does not mandate a particular method. Options include, but are not limited to, a contract clause requiring prime bidders to report the names/addresses, and possibly other information, of all firms who quote to them on subcontracts; a recipient-directed survey of a statistically sound sample of firms on a name/address list to get age/size information; a notice in all solicitations, and otherwise widely disseminated, request to firms quoting on subcontracts to report information directly to the recipient, etc.]

Section 26.13 Assurances

[Recipient] has signed the following assurances, applicable to all DOT-assisted contracts and their administration:

Federal Financial Assistance Agreement Assurance: 26.13(a)

[Recipient] shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT assisted contracts. The recipient's DBE Program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the [Recipient] of its failure to carry out its approved program, the Department may impose sanction as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

This language will appear in financial assistance agreements with sub-recipients.

[Note: This language is to be used verbatim, as it is stated in 26.13(a).]

Contract Assurance: 26.13b

We will ensure that the following clause is placed in every DOT-assisted contract and subcontract:

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.

[Note: This language is to be used verbatim, as it is stated in 26.13(b)]

SUBPART B – ADMINISTRATIVE REQUIREMENTS

Section 26.21 DBE Program Updates

Since the [Recipient] has received a grant of [For FAA Recipients: \$250,000 or more for airport planning or development,] [For FTA recipients: \$250,000 or more in FTA planning capital, and or operating assistance in a federal fiscal year,] [For FHWA recipients: authorized by the statute for which this part applies,] we will continue to carry out this program until all funds from DOT financial assistance have been expended. We will provide to DOT updates representing significant changes in the program.

Section 26.25 DBE Liaison Officer (DBELO)

We have designated the following individual as our DBE Liaison Officer:

[Provide the name, address, telephone number, and e-mail address]

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that the [Recipient] complies with all provision of 49 CFR Part 26. The DBELO has direct, independent access to the [indicate chief executive officer of recipient] concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in Attachment ___ to this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The DBELO has a staff of [indicate the number of staff] to assist in the administration of the program. The duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by DOT.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to set overall annual goals.
4. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
5. Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals attainment and identifies ways to improve progress.
6. Analyzes [Name Recipient]'s progress toward attainment and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Advises the CEO\governing body on DBE matters and achievement.
9. Chairs the DBE Advisory Committee.
10. Participates in pre-bid meetings.
11. Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
12. Plans and participates in DBE training seminars.
13. Certifies DBEs according to the criteria set by DOT and acts as liaison to the Uniform Certification Process in [name of State].
14. Provides outreach to DBEs and community organizations to advise them of opportunities.
15. Maintains the [Recipient]'s updated directory on certified DBEs.

[Note: List responsibilities of other personnel responsible for DBE Program implementation].

Section 26.27 DBE Financial Institutions

It is the policy of the [Recipient] to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contract to make use of these institutions. We have made the following efforts to identify and use such institutions: [specify]. We will also re-evaluate the availability of DBE financial institutions [specify timeframe for regular re-evaluation, e.g., every 1 year, 18 months, etc.].

To date we have identified the following such institutions: [List in Attachment ___]

Information on the availability of such institutions can be obtained from the DBE Liaison Officer.

Section 26.29 Prompt Payment Mechanisms

Prompt Payment: 26.29(a)

The [Recipient] will include the following clause in each DOT-assisted prime contract:

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than [specify number] days from the receipt of each payment the prime contract receives from [Recipient]. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the [Recipient]. This clause applies to both DBE and non-DBE subcontracts.

Retainage: 26.29(b)

The prime contractor agrees to return retainage payments to each subcontractor within [specify same number as above] 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 [Recipient]. This clause applies to both DBE and non-DBE subcontracts.

Monitoring and Enforcement: 26.29(d)

The [Recipient] has established [describe in detail the mechanism used] to monitor and enforce that prompt payment and return of retainage is in fact occurring.

[Note – This is sample language, and recipients can use existing prompt payment clause or draft their own, as long as they meet the substantive requirements of 26.29—specifically, the 30 maximum payment period. You may choose a shorter timeframe for prompt payment/retainage, and/or may use the timeframes specified by state and/or local prompt payment laws, provided they do not exceed the 30 days required by the regulation. This portion of the program must also state what sanctions/consequences the recipient attaches to noncompliance with the prompt payment clause and the procedures through which they are enforced. In addition, this portion of the program may also include other prompt payment – related provisions, such as an alternative dispute resolution mechanism that the recipient chooses to use.]

Section 26.31 Directory

The [Recipient] maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as a DBE. We revise the Directory [state interval; must be at least annually.] We make the Directory available as follows: [list address, phone number, website, or other means by which interested persons can obtain access to the Directory]. The Directory [or a link to the directory] may be found in Attachment ___ to this program document.

[Note: All recipients are required to participate in a combined statewide directory when the Uniform Certification Program becomes operational. At that time, this portion of the program will state how interested persons can obtain access to this combined directory.]

Section 26.33 Overconcentration

[Recipient] has not identified that overconcentration exists in the types of work that DBEs perform.

Or

[Recipient] has identified that overconcentration exists in the area of [state area].

We will re-evaluate for overconcentration [specify timeframe for regular re-evaluation, e.g., every 1 year, 18 months, etc.].

[Note: If a recipient has identified overconcentration, then please describe the rationale for having the program element, the specific provisions of the element (e.g., what is the overconcentration that has been identified, how does the program element work, and how interested persons would obtain information about the program element.)]

Section 26.35 Business Development Programs

[Recipient] has a business development program. [Fully describe all elements of the business development program and, to the extent appropriate, any safeguards put in place to prevent the possibility of fraud.] The rationale for the program is [describe rationale for having the program element, the specific provisions of the element (e.g., who is eligible to participate, how does the program element work), and how interested persons would obtain information about the program element].

Or

[Recipient] has not established a business development program. We will re-evaluate the need for such a program every [specify timeframe for regular re-evaluation, e.g., every 1 year, 18 months, etc.].

Section 26.37 Monitoring and Enforcement Mechanisms

The [Recipient] will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26.

1. 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.
2. 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.
3. 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, which must include a written certification that you have reviewed contracting records and monitored work sites on which DBEs are performing], and will occur for each contract/project on which DBEs are participating.
4. We will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.

[Note: the on-site monitoring required by this section may be conducted in conjunction with existing contract performance monitoring practices already in place for other purposes, provided doing so does not negatively impact your ability to properly monitor/ensure DBEs are performing work on their contracts.]

Section 26.39 Small Business Participation

The [Recipient] has incorporated the following non-discriminatory element to its DBE program, in order to facilitate competition on DOT-assisted public works projects by small business concerns (both DBEs and non-DBE small businesses): [describe in detail the small business provision your organization has

developed/chosen in detail, including how it will be implemented as a part of your larger DBE program. Examples of acceptable small business elements include, but are not limited to: removal of unnecessary and unjustified bundling of contract requirements; race-neutral small business set-asides for prime contracts below a certain value; requiring bidders on large contracts to identify and/or provide specific subcontracts appropriate for small business participation; development of acquisition strategies and structuring procurements to facilitate bids by and awards to small business consortia or joint ventures; letting prime contract of a size that small businesses can reasonably compete for and perform; etc. Please note that this is a non-exclusive, non-exhaustive list, and that each organization is encouraged to develop and establish a small element that is unique to and addresses specific needs within its respective market area.]

[Note: your small business provision must be an active part of your DBE program, but should not replace or act as a substitute for other critical elements of your DBE program, including use of contract goals (as appropriate), good faith efforts evaluations, etc.]

SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 26.43 Set-asides or Quotas

The [Recipient] does not use quotas in any way in the administration of this DBE program.

Section 26.45 Overall Goals

In accordance with Section 26.45, the [Recipient] will submit its triennial overall DBE goal to [the relevant DOT operating administration—FAA, FHWA and/or FTA] on August 1 of the year specified by [FAA, FHWA, and/or FTA]. [Note: include assigned year/group of goal setting schedule?].

[Recipient] will also request use of project-specific DBE goals as appropriate, and/or will establish project-specific DBE goals as directed by [FAA, FHWA, and/or FTA].

The process generally used by [Recipient] to establish overall DBE goals is as follows: *[describe in detail the process you use to establish your overall DBE goal. The process used must conform with the options described in Section 26.45 of the DBE regulation, and must be based on the demonstrable evidence of DBE firms ready, able, and willing to participate/perform contracting opportunities derived from your DOT-assisted projects/contracts. As a general matter, goals are most often set based on the Department's "Step 1, Step 2" process established in Section 26.45(c)-(d), whereby you establish a base figure of the relative availability of DBEs to perform work on your DOT-assisted contracts, then adjust your goal as necessary based on additional market information in your area. Please note that disparity studies, while acceptable, must be reasonably current and reflective of your organization's specific market conditions in order to be used as a full replacement for the "Two-Step" goal setting process established by the regulation.]*

Before establishing the overall goal each year, [Recipient] will consult with the [Note-Program should identify the persons or groups with whom this consultation normally occurs, without limiting consultation to these persons or groups] to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the [Recipients] efforts to establish a level playing field for the participation of DBEs. [Note: The consultation should include, but not necessarily be limited to, minority, women's and general contractor groups, community organizations, and other officials or organizations.]

Following this consultation, we will publish a notice of the proposed overall goals, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at your principal office for 30 days following the date of the notice, and informing the public that you and DOT will accept comments on the goals for 45 days from the date of the notice. [Program should state the media

in which this notice was issued: e.g. newspapers, available minority- focus media, trade publications, websites.] Normally, we will issue this notice by June 1 or each year. The notice must include addresses to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed.

Our overall goal submission to DOT will include: the goal (including the breakout of estimated race-neutral and race-conscious participation, as appropriate); a copy of the methodology, worksheets, etc., used to develop the goal; a summary of information and comments received during this public participation process and our responses; and proof of publication of the goal in media outlets listed above.

We will begin using our overall goal on October 1 of the specified year, unless we have received other instructions from DOT. If we establish a goal on a project basis, we will begin using our goal by the time of the first solicitation for a DOT-assisted contract for the project. Our goal will remain effective for the duration of the three-year period established and approved by [FAA, FHWA, and/or FTA].

Section 26.47 Goal Setting and Accountability

If the awards and commitments shown on [Recipient's] Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall applicable to that fiscal year, we will:

1. Analyze in detail the reason for the difference between the overall goal and the actual awards/commitments;
2. Establish specific steps and milestones to correct the problems identified in the analysis; and
3. Submit the plan to [FAA, FHWA and/or FTA] within 90 days of the end of the affected fiscal year.
[Note: submission to DOT operating assistance is only required if you are a state DOT; one of the largest 50 transit authorities as determined by FTA, or an Operational Evolution Partnership Plan airport or other airport designated by FAA. However, please also note that recipients for whom submission/approval is not required must still perform the analysis, establish and implement a corrective action plan, and maintain information/records regarding the analysis and efforts made.]

Section 26.49 Transit Vehicle Manufacturers Goals

[Recipient] will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, [Recipient] may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

[Note: this element applies only to FTA recipients' programs. If an FAA or FHWA recipient uses this approach to purchases of equipment, it would add a similar element to its program.]

Section 26.51 Meeting Overall Goals/Contract Goals

The [Recipient] will meet the maximum feasible portion of its overall goal using race-neutral means of facilitating DBE participation. In order to do so, [Recipient] will: *[describe in detail the race-neutral measures you will take to achieve race-neutral DBE participation. Such efforts may include, but are not limited to, those found in Section 26.51(b) of the DBE regulation. Please note that the specified efforts/race-neutral measures may not be passive; rather, the race-neutral measures taken must be an active component of your organization's DBE program.]*

The [Recipient] will use contract goals to meet any portion of the overall goal [Recipient] does not project being able to meet using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

We will establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. We need not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work.)

We will express our contract goals as a percentage of *[total amount of a DOT-assisted contract]* or *[the Federal share of a DOT-assisted contract]*. *[Note: Recipients can choose either approach; program should mention which choice the recipient made].*

[Note: if the recipient chooses to use other race-conscious measures of achieving DBE participation, those measures should be described in detail here.]

[Note: recipients located within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit are subject to Western States Paving, Inc. v. Washington State Department of Transportation, 407 F.3d 983, and should verify with DOT whether they may use DBE contract goals and/or race-conscious measures when implementing their DBE programs. Absent approval from DOT, Ninth Circuit recipients should be operating entirely race-neutral DBE programs.]

Section 26.53 Good Faith Efforts Procedures

Award of Contracts with a DBE Contract Goal: 26.53(a)

In those instances where a contract-specific DBE goal is included in a procurement/solicitation, *[Recipient]* will not award the contract to a bidder who does not either: (1) meet the contract goal with verified, countable DBE participation; or (2) documents it has made adequate good faith efforts to meet the DBE contract goal, even though it was unable to do so. It is the obligation of the bidder to demonstrate it has made sufficient good faith efforts prior to submission of its bid.

Evaluation of Good Faith Efforts: 26.53(a) & (c)

The following personnel are responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as *[responsive or responsible]* *[Note: Recipients can choose either approach].*

The process used to determine whether good faith efforts have been made by a bidder are as follows: *[describe in detail the process to be used, but without establishing an exact rubric for evaluating good faith efforts. Examples of the information to consider during the process are included in Appendix A to Part 26.]*

We will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before we commit to the performance of the contract by the bidder/offeror.

Information to be Submitted: 26.53(b)

[Recipient] treats bidder/offers' compliance with good faith efforts' requirements as a matter of *[responsiveness]* or *[responsibility]*.

Each solicitation for which a contract goal has been established will require the bidders/offerors to submit the following information:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm participating;
4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractors commitment and
6. If the contract goal is not met, evidence of good faith efforts.

Administrative Reconsideration: 26.53(d)

Within ___ days of being informed by [Recipient] that it is not [responsive or responsible] because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the following reconsideration official: [provide name, address, phone number, e-mail address.] The reconsideration official will not have played any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. We will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

[Note – If there are more detailed reconsideration procedures, the recipient can include them here or in an attachment reference here.]

Good Faith Efforts when a DBE is Terminated/Replaced on a Contract with Contract Goals: 26.53(f)

[Recipient] requires that prime contractors not terminate a DBE subcontractor listed on a bid/contract with a DBE contract goal without [Recipient's] prior written consent. Prior written consent will only be provided where there is "good cause" for termination of the DBE firm, as established by Section 26.53(f)(3) of the DBE regulation. *[Note: you may include the exact language from the regulation, if you so chose. Doing so is not required; at a minimum, however, reference to the appropriate section of the regulation must be included.]*

Before transmitting to [Recipient] its request to terminate, the prime contractor must give notice in writing to the DBE of its intent to do so. A copy of this notice must be provided to [Recipient] prior to consideration of the request to terminate. The DBE will then have five (5) days to respond and advise [Recipient] of why it objects to the proposed termination. *[Note: the five day period may be reduced if the matter is one of public necessity—e.g., safety.]*

In those instances where "good cause" exists to terminate a DBE's contract, [Recipient] will require the prime contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. We will require the prime contractor to notify the DBE Liaison officer immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In this situation, we will require the prime contractor to obtain our prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

[Note: Include the administrative remedies you will use for noncompliance (see 26.53(f)(3)). The following two sentences are examples of such remedies]

If the contractor fails or refuses to comply in the time specified, our contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Bid Specification:

The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply to this contract. It is the policy of the [Name of Recipient] to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this contract will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offerors, including those who qualify as a DBE. A DBE contract goal of ____ percent has been established for this contract. The bidder/offeror shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 1), to meet the contract goal for DBE participation in the performance of this contract.

The bidder/offeror will be required to submit the following information: (1) the names and addresses of DBE firms that will participate in the contract; (2) a description of the work that each DBE firm will perform; (3) the dollar amount of the participation of each DBE firm participating; (4) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet the contract goal; (5) Written confirmation from the DBE that it is participating in the contract as provided in the commitment made under (4); and (5) if the contract goal is not met, evidence of good faith efforts.

[Note: When a contract goal is established pursuant to the recipient's DBE program, the sample bid specification can be used to notify bidders/offerors of the requirements to make good faith efforts. The forms found at Attachment ____ can be used to collect information necessary to determine whether the bidder/offeror has satisfied these requirements. The sample specification is intended for use in both nonconstruction and construction contracts for which a contract goal has been established. Thus, it can be included in invitations for bid for construction, in requests for proposals for architectural/engineering and other professional services, and in other covered solicitation documents. A bid specification is required only when a contract goal is established.]

Section 26.55 Counting DBE Participation

We will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55.

SUBPARTS D & E- CERTIFICATION

Section 26.61 – 26.73 Certification Process

[Recipient] will use the certification standards of Subpart D of Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. We will make our certification decisions based on the facts as a whole.

For information about the certification process or to apply for certification, firms should contact:

[Provide name, address, phone number, and e-mail address of contact person]

Our certification application forms and documentation requirements are found in Attachment ____ to this program.

[Note: if your organization is not a certifying entity, you may remove this section from your DBE program Plan. If remove, ensure that the UCP contact information is included in Section 26.81 below.]

Section 26.81 Unified Certification Programs

[Recipient] is the member of a Unified Certification Program (UCP) administered by [Name]. The UCP will meet all of the requirements of this section. [Recipient] will use and count for DBE credit only those DBE firms certified by the [State UCP.] *[Note: all recipients must include this section, even if not a certifying agency.]*

The following is a description of the UCP: *[describe UCP, if a certifying agency. If not a certifying agency, include contact information to direct interested firms, individuals, etc., to the state UCP for more information.]*

[Note: This is also the place in the program to describe certification reciprocity or coordination mechanisms that exist with other recipients, if they exist (e.g. a regional certification consortium).]

Section 26.83-26.91 Procedures for Certification Decisions

[Recipient] will follow the certification processes of Subpart E of Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. A copy of *[State UCP's]* certification procedures and/or UCP program is included in Attachment ___, and/or is available at: *[include information on where the relevant state UCP plan/certification procedures may be found.]*

For information about the certification process or to apply for certification, firms should contact:
[Provide name, address, phone number, and e-mail address of contact person]

[Note: if your organization is not a certifying entity, you may remove this section from your DBE program Plan. If remove, ensure that the UCP contact information is included in Section 26.81 above.]

Any firm or complainant may appeal a *[state UCP's]* decision in a certification matter to DOT. Such appeals may be sent to:

U.S. Department of Transportation
Office of Civil Rights Certification Appeals Branch
1200 New Jersey Ave. SE
West Building, 7th Floor
Washington, D.C. 20590

We will promptly implement any DOT certification appeal decisions affecting the eligibility of DBEs for our DOT-assisted contracting (e.g., certify a firm if DOT has determined that our denial of its application was erroneous).

[Note: Information regarding certification appeals should be included in every DBE program plan, regardless of whether the specific organization is a certifying agency within the state UCP. In addition, if a recipient has a system for administrative appeals of certification decision, it should mention it here and provide details of the procedure in an Attachment. The program should inform the public that resort to this system is not a remedy a firm need exhaust before making a certification appeal to DOT under 26.89].

SUBPART F – COMPLIANCE AND ENFORCEMENT

Section 26.109 Information, Confidentiality, Cooperation

We will safeguard from disclose to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law. *[Program should summarize applicable state and local law, such as state FOIA laws and how they apply.]*

Notwithstanding any contrary provisions of state or local law, we will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than DOT) without the written consent of the submitter.

Monitoring Payments to DBEs

We will require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be make available for inspection upon

request by any authorized representative of the [Recipient] or DOT. This reporting requirement also extends to any certified DBE subcontractor.

We will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts states in the schedule of DBE participation.

ATTACHMENTS

[List and append; we recommend that a copy of the most current version of Part 26 be attached to the program so that public users to whom we send copies can have it handy; please be sure to update the available version of the regulation each year. Please also note that the list of attachments may include items in addition to those included here, and will likely not include some items included (e.g., goal setting methodology, which will typically be a separate submission.)]

Attachment 1: Organizational Chart

Attachment 2: DBE Directory

Attachment 3: Monitoring and Enforcement Mechanisms/Legal Remedies

Attachment 4: Goal Setting Methodology

Attachment 5: Good Faith Efforts Forms

Attachment 6: Certification Forms

Attachment 7: DBE Regulation, 49 CFR Part 26

Attachment 1

Organizational Chart

Airport Board of Commissioners

Executive Director

Airport Director

Airport Operations Division

Airport Grant Administration

DBE Liaison Officer

Attachment 2

DBE Directory

www.StateUCP.gov/directory

ABC Mechanical Services, Inc
123 Airport Drive
Anywhere, Anystate, 12345
(123) 555-1111

Sheet Metal

ABC Electrical
567 Plug Drive
Circuit City, Anystate, 12345
(123) 555-2222

Electrical

Attachment 3

Monitoring and Enforcement Mechanisms/Legal Remedies

The Airport Authority 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.*]

In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the DBE program, including, but not limited to, the following:

1. Suspension or debarment proceedings pursuant to 49 CFR part 26
2. Enforcement action pursuant to 49 CFR part 31
3. Prosecution pursuant to 18 USC 1001.

[Note: the examples provided above are not intended to be an exclusive or exhaustive list of the monitoring mechanisms and legal remedies used by DOT recipients. DOT expects that measures, mechanisms and/or remedies in addition to what is provided above will be included with your DBE program.]

Attachment 4

Section 26.45: Overall Goal Calculation

Amount of Goal

1. [Recipient]'s overall goal for FY 20__ is the following: ___% of the Federal Financial assistance we will expend in DOT-assisted contracts. *[FTA recipients add: exclusive of FTA funds to be used for the purchase of transit vehicles.]*

or

1. [Recipient]'s overall goal for the following time period 20__-20__ is the following: ___% of the Federal financial assistance we will expend in DOT-assisted contracts. *[FTA recipients add: exclusive of FTA funds to be used for the purchase of transit vehicles.]*

2. \$_____ is the dollar amount of DOT-assisted contracts that [Recipient] expects to award during FFY20__. This means that [Recipient] has set a goal of expending \$_____ with DBEs during this fiscal year/project.

Methodology used to Calculate Overall Goal

Step 1: 26.45(c)

Determine the base figure for the relative availability of DBEs.

The base figure for the relative availability of DBE's was calculated as follows:

$$\text{Base figure} = \frac{\text{Ready, willing, and able DBEs}}{\text{All firms ready, willing and able}}$$

The data source or demonstrable evidence used to derive the numerator was:

The data source or demonstrable evidence used to derive the denominator was:

When we divided the numerator by the denominator we arrived at the base figure for our overall goal and that number was

Step 2: 26.45(d)

After calculating a base figure of the relative availability of DBEs, evidence was examined to determine what adjustment was needed to the base figure in order to arrive at the overall goal.

In order to reflect as accurately as possible the DBE participation we would expect in the absence of discrimination we have adjusted our base figure by ___%.

The data used to determine the adjustment to the base figure was:

The reason we chose to adjust our figure using this data was because:

From this data, we have adjusted our base figure to:

Public Participation

We published our goal information in these publications:

We received comments from these individuals or organizations:

Summaries of these comments are as follows:

Our responses to these comments are:

Section 26.51: Breakout of Estimated Race-Neutral & Race Conscious Participation

[*Recipient*] will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. The [*Recipient*] uses the following race-neutral means to increase DBE participation: [*List the things that you actually do. See Section 26.51(b) for examples*]

We estimate that, in meeting our overall goal of ___%, we will obtain ___% from race-neutral participation and ___% through race-conscious measures.

The following is a summary of the basis of our estimated breakout of race-neutral and race-conscious DBE participation: [*summarize how the estimate was derived: from private sector MBE/WBE participation, DBE participation of DBEs in local procurement programs in which there are no DBE contract goals, extend of your race-neutral business assistance efforts.*]

In order to ensure that our DBE program will be narrowly tailored to overcome the effects of discrimination, if we use contract goals we will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual DBE participation (see 26.51(f)) and we will track and report race-neutral and race-conscious participation separately. For reporting purposes, race-neutral DBE participation includes, but is not necessarily limited to, the following: DBE participation through a prime contract a DBE obtains through customary competitive procurement procedures; DBE participation through a subcontract on a prime contract that does not carry DBE goal; DBE participation on a prime contract exceeding a contract goal; and DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

We will maintain data separately on DBE achievements in those contracts with and without contract goals, respectively.

[Note: the example methodology provided above is not intended to be an example of precisely what should be submitted to any DOT operating administration. As a general matter, DBE goals will be submitted to the relevant operating administration (FAA, FHWA, and/or FTA), independent of the DBE program submissions (as DBE programs are only submitted once, while goals must be submitted every three years). Furthermore, DOT expects that each recipient's actual goal submission be far more thorough than the example above—and should include detailed narratives regarding contracting opportunities available via DOT-assistance, descriptions of the market area considered, etc. If you have questions regarding goal submissions, please contact the appropriate DOT operating administration.]

Attachment 5

Forms 1 & 2 for Demonstration of Good Faith Efforts

[Forms 1 and 2 should be provided as part of the solicitation documents.]

FORM 1: DISADVANTAGED BUSINESS ENTERPRISE (DBE) UTILIZATION

The undersigned bidder/offeror has satisfied the requirements of the bid specification in the following manner (please check the appropriate space):

_____ The bidder/offeror is committed to a minimum of _____ % DBE utilization on this contract.

_____ The bidder/offeror (if unable to meet the DBE goal of _____%) is committed to a minimum of _____% DBE utilization on this contract a submits documentation demonstrating good faith efforts.

Name of bidder/offeror's firm: _____

State Registration No. _____

By _____
(Signature) Title

FORM 2: LETTER OF INTENT

Name of bidder/offeror's firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Name of DBE firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____

Description of work to be performed by DBE firm:

.....
.....
.....
.....

The bidder/offeror is committed to utilizing the above-named DBE firm for the work described above. The estimated dollar value of this work is \$ _____.

Affirmation

The above-named DBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

By _____
(Signature) (Title)

If the bidder/offeror does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.

(Submit this page for each DBE subcontractor.)

[Note: the examples provided above are not intended to be the exact forms used by DOT recipients when evaluating DBE participation on bids and/or making good faith efforts determinations. DOT expects that any forms used will be tailored to each organization's specific processes and needs. Whichever forms are used in practice should be included with your DBE program.]

Attachment 6

Certification Forms

[Include a copy of or link to your state's UCP agreement and, as appropriate, certification forms, certification procedures, etc.]

Attachment 7

Regulations: 49 CFR Part 26

[We recommend that you attach a copy of the regulations to your program so that the public users to whom you send copies can have it handy.]

[You may attach other documents as you see necessary to make your program as complete as possible. The current list of attachments is an example and can be modified at your convenience.]