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The U.S. DOT Disadvantaged Business Enterprise Program

The Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) program seeks to offer small disadvantaged businesses a fair opportunity to compete for federally funded transportation contracts. Small disadvantaged businesses are small businesses that are owned and controlled by socially and economically disadvantaged individuals, and have been certified as such by the state where they wish to operate as a DBE. The program is implemented through DOT regulations published at Title 49, Parts 23 and 26, of the *Code of Federal Regulations* (C.F.R.).

Program Purpose

The DBE program aims to prevent discrimination against DBEs by providing them equal opportunity to compete for federally funded transportation contracts. Although DOT, like all executive agencies, establishes agency procurement goals for contracting with small disadvantaged businesses (P.L. 100-656), this program is distinct from that effort because it applies to the contracts awarded by state and local governments that receive DOT grant assistance. Funding for transportation projects flows through grant assistance, making the contracts awarded by grant recipients relevant to DOT policy.

Program objectives related to ensuring nondiscrimination include the following:

- removal of barriers to the participation of DBEs in DOT-assisted contracts;
- a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- promotion of the use of DBEs in all types of federally assisted contracts and procurement activities conducted by grant recipients; and
- development of firms that can compete successfully in the marketplace outside the DBE program.

DBE Qualifications

A DBE is defined by criteria from both Small Business Administration (SBA) and DOT regulations. A DBE must be (1) a for-profit small business, and (2) at least 51% owned by socially and economically disadvantaged individuals. A firm must also be organized so that the disadvantaged individuals hold the highest positions in the company or, in the case of corporations, control the board of directors (49 C.F.R. §26.69, 49 C.F.R. §26.69, and 49 C.F.R. §26.71).

To be a small business, a firm must

- meet SBA size standards, defined by the annual gross receipts or employee number caps outlined for each North American Industry Classification System code; and
- have average annual gross receipts over the preceding three fiscal years that do not exceed $26.29 million (although the Federal Aviation Administration (FAA) Reauthorization Act of 2018 removed the gross receipts cap for FAA-assisted work). DOT set the gross receipts cap and adjusts it annually to account for inflation.

To be considered socially and economically disadvantaged, a firm's owners must either demonstrate disadvantage or be presumed as such. DOT presumes social and economic disadvantage for citizens of the United States (or lawfully admitted permanent residents) who are: women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA (49 C.F.R. §26.67). If not presumed disadvantaged by DOT, an owner must demonstrate social and economic disadvantage by meeting conditions explained in Appendix E to 49 C.F.R. Part 26. The DOT definition of "socially and economically" disadvantaged differs from that of the SBA for its programs, found at 13 C.F.R. §124.1001.

In addition to meeting the DOT definition of disadvantaged, each socially and economically disadvantaged owner must not have a personal net worth in excess of $1.32 million. The net worth cap excludes ownership interest in the owner's firm and equity in their primary residence. For highway and transit projects, the cap also excludes taxes and fees that would be incurred to distribute assets held in vested pension plans, IRAs, 401(k) accounts, or other retirement savings or investment programs (49 C.F.R. §26.67(a)(2)).

Program Origin and Guiding Goal

Congress has regularly reauthorized the DBE program for highway and transit projects in surface transportation bills since 1983, most recently in the Infrastructure Investment and Jobs Act (P.L. 117-58). DBE programs for airport projects and airport concessionaires were authorized by the Airport and Airway Safety and Capacity Expansion Act of 1987 (P.L. 100-223). As early as 1969, DOT imposed a requirement on federal-aid highway construction projects to make their best effort to use minority-owned firms, and established a Minority Business Enterprise program through agency regulations in 1980.

Since the first DBE program authorizing legislation in 1983, Congress has maintained a cumulative national goal of at least 10% contracting by DBEs where federal

highway, transit, or airport project assistance is used. State and local transportation agencies that receive DOT grants are required to develop aspirational DBE contracting goals of their own. These goals are based on the share of DBEs ready, willing, and able to perform the contracts a grantee expects to award. Grantees are not required to use the same 10% goal that DOT uses to guide program policy at the national level (49 C.F.R. §26.41).

Program Structure

DBE contracting goals apply to the projects funded by federal grants from the following DOT agencies: the Federal Highway Administration (FHWA), National Highway Traffic Safety Administration (NHTSA), Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

All direct recipients of FHWA financial assistance must implement DBE programs regardless of anticipated contract award size; recipients of aid from other DOT agencies are required to implement DBE programs when they anticipate awarding prime contracts of more than $250,000 per fiscal year with those funds.

Although projects are necessarily funded by nonfederal sources in addition to federal grants, only the federal funds from the FHWA, NHTSA, FTA, and FAA are subject to DBE contracting goals. However, contracts for the purchase of transit vehicles are not subject to DBE goals regardless of federal assistance.

State and Local Program Implementation

Grantees implement DBE programs using their own locally developed DBE contracting goals. The goal setting process focuses on estimating the level of contracting to DBE firms that would take place in the absence of discrimination. Grantees set their goals based on the market conditions and upcoming projects in their location. Regulations specify how to create goals using data on the availability of DBEs relative to contracts to be awarded in a given fiscal year (49 C.F.R. §26.45). Grantees set goals for three-year periods and submit them, along with the "determining methodology," to the FAA, FHWA, or FTA for review and approval. In some cases, DOT permits DBE goal-making for a particular grant or project rather than on a fiscal year basis (49 C.F.R. §26.45(e)(3)).

Grantees cannot be penalized for noncompliance with the program so long as they administer their programs in good faith (49 C.F.R. §26.47). Nevertheless, eligibility for DOT financial assistance depends on DOT approval of grantee DBE programs (49 C.F.R. §26.21(c)). Grantees must also maintain records of data on DBE firm participation in federally funded projects and report it to DOT; specifically, FHWA and FTA grant recipients must submit a report twice per fiscal year, and FAA recipients must submit a report once per fiscal year (49 C.F.R. §26.11).

In order to attain approved DBE contracting goals, grant recipients utilize state directories of certified DBE firms and might provide technical assistance to area DBE firms. Grantees are required to use "race-neutral" and "gender-neutral" means to meet their goals to the extent possible, without using criteria favoring DBEs over non-DBEs (49 C.F.R. §26.5 and 49 C.F.R. §26.51). Examples of neutral means are informational programs on contracting procedures and opportunities, unbundling large contracts to make them more accessible, and offering business support services. Grantees are not permitted to use quotas or set aside contracts for DBEs (49 C.F.R. §26.43).

Certification of DBE Firms

While contracting goals vary by grantee, the requirements for DBE certification do not. DOT regulations lay out the "certification standards" to be used when certifying DBE firms (49 C.F.R. Part 26 Subpart D). Only certified firms are eligible for a contract award as a DBE and states must establish Unified Certification Programs (UCP) that handle state-wide firm certification. UCPs make certification decisions on behalf of all DOT grant recipients in a state, and maintain a state's directory of DBE firms.

A business seeking DBE certification submits an application to the state UCP in order to be eligible for contracts throughout the state. Certification decisions are made through on-site visits to firms and personal interviews, as well as reviews of licenses, stock ownership, equipment, bonding capacity, work completed, financial capacity, and type of work preferred (49 C.F.R. §26.83(c)). DBEs seeking to do business in multiple states generally need to recertify themselves with all applicable UCPs but states can accept certification from other states.

Program Outcome Determinants

Key factors that affect the level of DBE contracting include the type and scale of projects undertaken in any fiscal year and the federal share of funds allocated to projects. In addition, the availability of DBEs able to perform the needed work in a given location, as well as the number of DBEs that ultimately bid on contracts there, affect annual DBE awards and commitments.

Considerations for Congress

Due to the significant amount of funding provided through DOT grants from FHWA, NHTSA, FTA, and FAA, particularly with the passage of the Infrastructure Investment and Jobs Act (P.L. 117-58), Congress may be interested in the DBE program's effectiveness and fraud risks. Congress may also consider program impacts on businesses in the transportation sector, as well as diversity among these businesses. Information provided by grant recipient reporting to DOT agencies may inform Congress's considerations and shed light on this program's significance.

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