

program on an individual basis. All DBE firms must be certified by the Unified Certification Program to be counted in this report.

### Section C: Payments on Ongoing Contracts

Line 18(A-E). Submit information on contracts that are currently in progress. All dollar amounts are to reflect only the Federal share of such contracts and should be rounded to the nearest dollar.

18(A). Provide the total number of prime contracts where work was performed during the reporting period.

18(B). Provide the total dollars paid to prime contractors for work performed on contracts during the reporting period. Payments by recipients for all work performed on the contract are made to the prime contractor, who in turn is obligated to promptly pay its DBE and non-DBE subcontractors. See 49 C.F.R. §26.29.

18(C). Provide the total number of prime and subcontracts that are currently being performed by DBE firms for which payments have been made. The number of contracts reported in item

18(C) may be larger, smaller, or the same as the number in item 18(A).

For example, assume that only one prime contract is underway during the reporting period:

If the prime contractor is a non-DBE with 3 DBE subcontractors, the number reported in item 18(C), will be higher than item 18(A).

If a non-DBE prime contract reported in item 18(A) has no DBE subcontractors, the number reported in item 18(C) will be less than item 18(A).

If the prime contract involves a DBE prime contractor with no DBE subcontractors, the number in item 18(A) and item 18(C) would be the same, with appropriate notation that item 18(C) includes a DBE prime contract.

18(D). Provide the total dollar amount paid to DBE firms currently performing work during this reporting period. If the prime contractor is a DBE, report only the total dollars paid to the DBE prime contractor who in turn is obligated to promptly pay its DBE subcontractors.

18(E). Provide the total number of DBE firms that received payment during this reporting period. For example, while 3 contracts may be active during this period, one DBE may be providing supplies or services on all three contracts. This field should only list the number of DBEs performing work.

18(F). Of all payments made during this period, calculate the percentage going to DBEs. Divide the total dollar value to DBEs in item 18(D) by the total dollars of all payments in item 18(B). Round the percentage to the nearest tenth.

### Section D: Actual Payments on Contracts Completed This Reporting Period

This section should provide information only on contracts that are closed during this period. All dollar amounts are to reflect the entire Federal share of such contracts and should be rounded to the nearest dollar.

19(A). Provide the total number of contracts completed during this reporting period that used race-conscious measures. Race-conscious contracts are those with contract goals or another race conscious measure.

19(B). Provide the total dollar value of prime contracts completed this reporting period that had race-conscious measures.

19(C). From the total dollar value of prime contracts completed this period in 19(B), provide the total dollar amount of dollars awarded or committed to DBE firms in order to meet the contract goals. This applies only to race-conscious contracts.

19(D). Provide the actual total DBE participation in dollars on the race-conscious contracts completed this reporting period.

19(E). Of all the contracts completed this reporting period using race-conscious measures, calculate the percentage of DBE participation. Divide the total dollar amount to DBEs in item 19(D) by the total dollar value provided in 19(B) to derive this percentage. Round to the nearest tenth.

20(A)-20(E). Items 21(A)-21(E) are derived in the same manner as items 19(A)-19(E), except these figures should be based on contracts completed using race-neutral measures.

20(C). This field is closed.

21(A)-21(D). Calculate the totals for each column by adding the race-conscious and neutral figures provided in each row above.

21(C). This field is closed.

21(E). Calculate the overall percentage of dollars to DBEs on completed contracts. Divide the Total DBE participation dollar value in 21(D) by the Total Dollar Value of Contracts Completed in 21(B) to derive this percentage. Round to the nearest tenth.

8(A).

9(A).

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**DBE6. For each of the past three completed Federal fiscal years, if the recipient's DBE achievements (based on contract awards) were below the overall goal for the applicable year, did the recipient complete the required shortfall analysis and corrective action plan?**

#### **BASIC REQUIREMENT**

Each recipient that does not achieve its overall DBE goal at the end of any Federal fiscal year must conduct a shortfall analysis, and develop and implement a corrective action plan.

#### **APPLICABILITY**

All recipients with an overall goal

#### **DETAILED EXPLANATION FOR REVIEWER**

If the awards and commitments shown on a recipient's Uniform Report of Awards or Commitments and Payments at the end of any Federal fiscal year are less than the overall goal applicable to that three-year period, the recipient must do the following:

- Analyze in detail the reasons for the difference between the overall goal and the DBE awards and commitments in that fiscal year.
- Establish specific steps and milestones to correct the problems identified in the analysis to enable the recipient to meet the goal for the new fiscal year.

FTA considers goals to the first decimal place in making the determination of shortfall. For example, if the goal is 12 percent, and attainment is 11.8 percent, a shortfall exists. If the recipient did not have any FTA-funded awards in a given Federal fiscal year and experienced a shortfall, an analysis and corrective action plan is still required. Only the Top 50 transit agencies, as determined by the FTA, must submit, within 90 days of the end of the Federal fiscal year (December 29), the analysis and corrective actions described above for review. All other recipients must retain the analysis and corrective actions in their records for three years and make it available to FTA upon request for review.

If the shortfall analysis submitted by a recipient is not sufficient, FTA may issue a letter with corrective action plan or a reasonable cause notification. If the latter, the recipient can enter into a conciliation agreement.

## **INDICATORS OF COMPLIANCE**

- a. *Was the recipient required to conduct a shortfall analysis and develop a corrective action plan?*
- b. *If the recipient is considered to be a Top 50 Recipient by FTA, did it submit shortfall analyses and corrective action plans to FTA on time?*
- c. *If the recipient is not considered to be a Top 50 Recipient by FTA, but was required to conduct a shortfall analysis and develop a corrective action plan, do the analysis and plan contain the required elements?*

## **INSTRUCTIONS FOR REVIEWER**

Using DBE reports found in TrAMS, complete Exhibit 10.1 at the end of this section. To compare the annual DBE achievement of a recipient to its overall applicable goal, review the combined results of the annual (Tier II report due December 1) or both semi-annual reports for each Federal fiscal year (the Tier I report due June 1 and the report due Dec 1). The overall goal as stated at the top of the report reflects the recipient's current goal as noted by FTA. If the goal has changed in the last three years, it may be necessary to verify the previous goal which can be found in the DBE Goal module in TrAMS. The annual percentage awarded to DBEs is calculated by dividing the total dollars awarded to DBEs (by adding cell 10C for both reports) by the total prime contract dollars awarded (by adding cell 8A for both reports).

Verify that, if the awards and commitments at the end of any fiscal year were less than the overall goal applicable to that three-year period, a shortfall analysis and corrective action plan was developed.

If there was no shortfall identified, move to the next question.

For recipients needing to conduct a shortfall analysis and develop a corrective action plan, review the Listing of Top 50 Recipients on the DBE section of FTA's website to determine if the recipient is designated as one of the Top 50 Recipients for purposes of the DBE regulation. If on the Top 50 list, review the recipient's documents in TrAMS to ascertain if the shortfall analysis was uploaded and the date of upload. FTA reviews these submissions.

If the recipient is not on the Top 50 list, and had a shortfall, request and review the recipient's most recent shortfall analysis and corrective action plan. Determine if the shortfall analysis analyzed in detail the reasons for the difference between the overall goal and the DBE awards and commitments in that Federal fiscal year and included:

- Details that explain the level of DBE participation for FTA-assisted projects/contracts during the fiscal year.
- The percentage of the goal met through race-neutral and race-conscious measures
- A list of all race-neutral measures used during the Federal fiscal year, an explanation of whether the mechanisms were effective, and a list of specific reasons for the shortfall.

Review the corrective action plans to verify if they included:

- A description of all corrective actions and how those proposed corrective actions will increase DBE participation in the current year.
- A timeline for implementation.

#### **POTENTIAL DEFICIENCY DETERMINATIONS**

The recipient is deficient if its DBE achievements were less than its overall goal and it did not conduct a shortfall analysis and develop a corrective action plan.

DEFICIENCY CODE DBE6-1: DBE goal achievement analysis and corrective action plan not completed

SUGGESTED CORRECTIVE ACTION: The recipient must submit the required analyses for the missing year(s), along with a written process to ensure future shortfall analyses are completed.

The recipient is deficient if it is one of the 50 largest transit authorities as determined by the FTA and is required to submit its shortfall analysis and corrective action plan to FTA by December 29 after the end of the applicable Federal fiscal year(s), but did not or did not submit it on time.

DEFICIENCY CODE DBE6-2: DBE goal achievement analysis and corrective action plan not submitted timely

SUGGESTED CORRECTIVE ACTION: The recipient must submit the required analyses for the missing year(s), along with a written process to ensure future shortfall analyses are completed on time.

The recipient is deficient if it did not include all required elements in its shortfall analysis or corrective action plan.

DEFICIENCY CODE DBE6-3: DBE goal achievement analysis and corrective action plan do not include all required elements

SUGGESTED CORRECTIVE ACTION: The recipient must submit a revised analysis and/or corrective action plan.

#### **GOVERNING DIRECTIVE**

49 CFR 26.47(c)

If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith: (1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year; (2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year.

49 CFR 26.47(c)(3)(i)

If you are a state highway agency; one of the 50 largest transit authorities as determined by the FTA; or an Operational Evolution Partnership Plan airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

49 CFR 26.47(c)(3)(ii)

As a transit authority or airport not meeting the criteria of paragraph (c)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to FTA or FAA on request for their review.

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**DBE7. If the recipient exceeded its overall goal using contract goals in Federal fiscal years 2022 and 2023 did it make appropriate procurement adjustments?**

**BASIC REQUIREMENT**

Recipients that continuously exceed their goal using race-conscious measures must make adjustments in their use of contract goals.

**APPLICABILITY**

All recipients with an overall goal

**DETAILED EXPLANATION FOR REVIEWER**

In order to ensure that its DBE program continues to be narrowly tailored to overcome the effects of discrimination, a recipient must adjust the use of contract goals during the Federal fiscal year to ensure it does not exceed the overall goal. If it obtains DBE participation that exceeds its overall goal in two consecutive years through the use of contract goals (i.e. not through the use of race-neutral means alone), the recipient must reduce the use of contract goals proportionately in the following year.

**INDICATOR OF COMPLIANCE**

- a. *If the recipient uses race-conscious contract goals and it is exceeding its overall goal, is it making adjustments to new solicitations to reduce the race-conscious portion of its overall DBE goal attainment?*

**INSTRUCTIONS FOR REVIEWER**

Review DBE reports in TrAMS and Exhibit 10.1 at the end of this section to determine if the recipient is exceeding its overall goal at the end of the last two completed Federal fiscal years. To compare the annual DBE attainment of a recipient to its overall applicable goal, review of the annual (Tier II report due December 1) or both annual semi-annual reports for each Federal fiscal year (the Tier I report due June 1 and the report due Dec 1). The overall goal is stated at the top of the report (if the recipient indicates that the goal on the report is not correct, verify with the RCRO that the recipient has not submitted an updated goal that is not reflected in the report). The annual percentage awarded to DBEs is calculated by dividing the total dollars awarded to DBEs (by adding cell 10C for both reports) by the total prime contract dollars awarded (by adding cell 8A for both reports). To determine the portion of the attainment achieved through race-conscious measures, divide the total amount awarded to DBEs race-consciously (by adding cell 10E for both reports) by the total prime contract dollars awarded (by adding cell 8A for both reports).

If the recipient is exceeding its overall goal and it is using race-conscious contract goals, during onsite interviews and documentation, verify if the recipient can demonstrate how it is adjusting its procurement processes to reduce its use of DBE goals in solicitations (i.e. contract goals).

#### **POTENTIAL DEFICIENCY DETERMINATION**

The recipient is deficient if it has obtained DBE participation that exceeds its overall goal for the past two consecutive years through the use of contract goals but has not taken action to reduce its use of contract goals.

**DEFICIENCY CODE DBE7-1:** No proportionate reduction of race-conscious goals

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit a revised goal that includes a proportional adjustment to the race-conscious goals for FY2024 and the remainder of the current triennial goal cycle.

#### **GOVERNING DIRECTIVE**

49 CFR 26.51(f)

To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows: (4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

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#### **DBE8. Has the recipient implemented steps to meet the maximum feasible portion of its overall goal race-neutrally?**

##### **BASIC REQUIREMENT**

Recipients are to meet the maximum feasible portion of their overall goal by using race-neutral means of facilitating DBE participation.

##### **APPLICABILITY**

All recipients

##### **DETAILED EXPLANATION FOR REVIEWER**

Recipients are to meet the maximum feasible portion of their overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime

contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE goal.

Race-neutral means include, but are not limited to, the following:

- Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses.
- Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing).
- Providing technical assistance and other support services.
- Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors).
- Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses.
- Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency.
- Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low.
- Ensuring distribution of the UCP directory to the widest feasible universe of potential prime contractors.
- Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

Recipients include information on their race-neutral measures in the DBE program plan. Additionally, in their overall goal submission, recipients must include the projection of the portions of the overall goal they expect to meet through race-neutral means and the basis for that projection. If a recipient projects meeting part of their goal through race-neutral means and the remainder through contract goals, they must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively.

Recipient DBE programs must include an element for fostering small business participation. This element must include provisions to structure contracting requirements to facilitate competition by small business (not based on race or sex). Recipients must take all reasonable steps to eliminate obstacles to small business participation, including unnecessary and unjustified bundling of contracts that may preclude small business participation in procurements as prime contractors or subcontractors.

As part of this program element, recipients may include, but are not limited to, the following strategies:

- Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g. \$1 million).
- In multi-year design-build contracts or other large contracts (e.g., for “megaprojects”), requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
- On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.
- Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.
- To meet the race-neutral portion of the overall agency goal, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

## INDICATORS OF COMPLIANCE

- a. *Has the recipient implemented the race-neutral measures noted in its DBE program? If the recipient included race-neutral measures in its overall goal methodology and/or any shortfall analyses/corrective action plans, is it implementing these measures?*
- b. *Has the recipient implemented the element in its DBE program for fostering small business participation?*

## INSTRUCTIONS FOR REVIEWER

Determine the portion of overall goal attainment that the recipient achieved race-neutrally in the past two completed Federal fiscal years. To determine this, using Exhibit 10.1, divide the total amount awarded to DBEs race-neutrally (add cell 10G from the two years in question) by the total prime contract dollars awarded (add cell 8A from the two years in question). If the information from the recipient's semi-annual reports indicates that it has attained all of its overall goal race-neutrally and there are no deficiencies in Question DBE-5 of this review relating to reporting accuracy, move to the section below on fostering small business participation.

Review the recipient's currently approved DBE program submission in TrAMS or locally maintained DBE program for race-neutral measures that were to be implemented. Review the recipient's currently-approved three-year goal methodology in TrAMS, for the portion of its goal that it projected meeting race-neutrally and for notation of any race-neutral measures that were to be implemented. If the recipient was required to perform a shortfall analysis and corrective action plan in the past two completed fiscal years, review those documents to determine if the recipient identified race-neutral measures to implement. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, or is awarded a subcontract on a prime contract that does not carry a DBE goal.

During onsite interviews and review of documentation, determine if measures described by the recipient have been implemented.

**Fostering small business participation:** Review the recipient's currently approved DBE program in TrAMS, or locally maintained DBE program for the small business element that was to be implemented.

During onsite interviews and review of documentation, determine if the recipient's small business element measures described in the DBE program have been implemented.

## POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it is not meeting the portion of its overall goal that it projected race-neutrally and cannot provide documentation of implementing race-neutral measures described in its DBE program, goal submission, or shortfall analysis/corrective action plan.

DEFICIENCY CODE DBE8-1: Inadequate implementation of race-neutral measures

SUGGESTED CORRECTIVE ACTION: The recipient must submit an implementation plan, which includes coordination with the recipient's procurement office, for applying race-neutral measures and evidence that these measures have been implemented.

The recipient is deficient if it is not implementing its small business element.

DEFICIENCY CODE DBE8-2: Small business element not implemented

SUGGESTED CORRECTIVE ACTION: The recipient must submit evidence of implementing its small business participation strategies, which includes coordination with the recipient's procurement office.

## GOVERNING DIRECTIVE

### 49 CFR 26.51(a)

You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

### 49 CFR 26.39(c)

You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your DBE program.

### 49 CFR 26.47(c)(4)

FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

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**DBE9. When including a DBE goal in a solicitation, is the recipient ensuring that the contract is only awarded to a bidder that meets the goal or makes good faith efforts to meet the goal?**

## BASIC REQUIREMENT

Recipients must ensure that contracts with DBE goals are only awarded to bidders that meet the goal or demonstrate adequate good faith efforts to meet DBE contract goals.

## APPLICABILITY

All recipients

## DETAILED EXPLANATION FOR REVIEWER

The recipient has discretion to determine if a DBE goal is appropriate for any contract with subcontracting opportunities. The bidder must present information on DBEs proposed to meet the goal as part of bid responsiveness (provided at the time of bid) or no later than five days after bid opening as a matter of responsibility.

Note: In 49 CFR part 26, days is defined as calendar days. In computing any period of time, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday.

Prior to awarding a contract to a firm that did not meet a specific DBE contract goal, the recipient must determine whether the efforts the firm made to obtain DBE participation were “good faith efforts” to meet the goal. Examples of efforts the recipient may consider include whether the contractor attended any pre-bid meetings held by the recipient to inform DBEs of contracting opportunities, or whether the contractor provided written notice to a reasonable number of DBEs with potential interest in the contract, and with sufficient time to allow participation. A more extensive list of examples is provided in Appendix A to 49 CFR part 26.

It is important to note that DBEs are certified to perform certain types of work. To receive credit for good faith efforts and to count towards goal attainment, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract.

## INDICATORS OF COMPLIANCE

- a. *For solicitations with DBE contract goals, is the recipient requiring information on DBE participation from bidders/proposers within the correct timeframe? If the recipient does not use DBE contract goals (i.e. it is operating a race-neutral program), skip to Question DBE-10.*
- b. *For solicitations with DBE contract goals, did the recipient document its determination of “good faith efforts” prior to awarding a contract where the bidder did not meet the goal?*

## INSTRUCTIONS FOR REVIEWER

Review the DBE program and procurement policies and procedures to determine if the recipient notes that information provided in response to a DBE goal is a condition of responsiveness or responsibility. Review the recipient's list of procurements to identify procurements that included a DBE contract goal. Document if the submission of DBE information by bidders/proposers is stated as a matter of responsiveness or responsibility in a sample of these procurements. If it is a matter of responsibility, verify if the correct number of days was required by the recipient for receipt of the information. When onsite, review a sample of procurements which included DBE goals to verify that the recipient received information from the bidder(s) as required in the solicitation.

Request and review the list of contracts awarded where the prime did not achieve the contract goal and was therefore required to show good faith efforts (only look at those contracts awarded since the last Comprehensive Review). Determine if the recipient documented that the awardee made good faith efforts towards meeting that goal prior to award by reviewing the information required in 26.53(b)(2). For a procurement where the awarded DBE amount is less than the goal stated in the solicitation, examine

the recipient's documented good faith efforts review. Part of determining good faith efforts is verifying that DBEs are certified for the type of work they are being named for prior to award. For a procurement with a DBE goal, verify that the DBEs included in the award were certified for the work for which they were named by reviewing the DBEs' descriptions in the state's UCP directory and comparing the work they are certified to perform with the work they are named as performing in the contract.

## POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it is not requiring and collecting information from bidders/proposers on proposed DBEs within the timeframes described in the regulations.

**DEFICIENCY CODE DBE9-1:** Inadequate timeframe for DBE responsibility determination

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit revised procurement procedures to limit the amount of time that the bidder is allowed to demonstrate DBE responsibility to five days.

The recipient is deficient if it is not documenting its good faith efforts review or does not verify that DBEs are certified to perform the type of work they are being named for prior to awarding a contract that contained a DBE goal.

**DEFICIENCY CODE DBE9-2:** Inadequate good faith efforts determination

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit a method for determining "good faith efforts" in compliance with the regulation and/or evidence that it has included documentation in applicable procurement files.

## GOVERNING DIRECTIVE

### 49 CFR 26.53(b)(3)(i)

At your discretion, the bidder/offofferor must present the information required by paragraph (b)(2) of this section (A) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or (B) No later than 7 days after bid opening as a matter of responsibility.

### 49 CFR 26.53

- (a) When you have established a DBE contract goal, you must award the contract only to a bidder/offofferor who makes good faith efforts to meet it. You must determine that a bidder/offofferor has made good faith efforts if the bidder/offofferor does either of the following things: (1) Documents that it has obtained enough DBE participation to meet the goal; or (2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offofferor does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offofferor failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offofferor's good faith efforts.
- (b) (2)(ii) To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
- (c) You must make sure all information is complete and accurate and adequately documents the bidder/offofferor's good faith efforts before committing yourself to the performance of the contract by the bidder/offofferor.

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**DBE10. Question removed from the FY23 Contractor Manual.**

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**DBE11. Did the recipient properly report all FTA-funded transit vehicle awards?****BASIC REQUIREMENT**

Recipients must notify FTA's Office of Civil Rights of any FTA-funded transit vehicle procurement.

**APPLICABILITY**

FTA recipients who receive the funds specified in 49 CFR 26.3(a)(2)

**DETAILED EXPLANATION FOR REVIEWER**

For transit vehicle awards made November 3, 2014 and after, FTA recipients are required to submit, within 30 days of becoming contractually required to procure a transit vehicle, the name of the successful bidder for transit vehicles the Federal share of the contractual commitment at that time. This notification should be submitted by using the online Transit Vehicle Award Reporting Form located on FTA's Civil Rights DBE Webpage. The online reporting form was initiated in June 2016.

If the recipient issues a contract for transit vehicles that includes a base order and subsequent options, the recipient is to submit the information for the base number of vehicles and subsequently for each order of vehicle options awarded. The recipient should be submitting this information for itself and for subrecipients that are procuring transit vehicles with funds that it passes through to them. The recipient is responsible for having a mechanism in place for maintaining a copy of all awards reported to FTA. The recipient is not to report awards for vehicles not manufactured by eligible transit vehicle manufacturers, even if those vehicles are used by the recipient for transit purposes (these awards are captured in the semi-annual reports). FTA's List of Eligible Transit Vehicle Manufacturers is located at <https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/eligible-transit-vehicle-manufacturers>.

Transit vehicle manufacturer means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale "off the lot" are not considered transit vehicle manufacturers.

**INDICATOR OF COMPLIANCE**

- a. *For FTA-funded transit vehicle purchases or award(s) of options, did the recipient make appropriate, timely notification of the award to FTA's Office of Civil Rights?*

**INSTRUCTIONS FOR REVIEWER**

During the review of the procurement area, document any FTA-funded transit vehicle awards. Review the listing of vehicle award notifications from FTA's RCRO to verify if applicable notifications were made. FTA maintains information on these submissions on its internal systems, which can be shared with reviewers. Onsite, ask the recipient for documentation of submission, if not available from FTA's Office of Civil Rights. Verify notifications were submitted a maximum of 30 days after the award. If it appears that

the recipient made an award to an entity other than an eligible TVM, verify with the FTA RCRO that the entity was in fact ineligible at the time of the award.

## POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if it did not notify FTA within 30 days of making a transit vehicle award that occurred on November 3, 2014 or after. The recipient is deficient if it reported an award to an entity that is not listed on FTA's List of Eligible Transit Vehicle Manufacturers or is otherwise ineligible to bid on FTA-assisted transit vehicle procurements.

DEFICIENCY CODE DBE11-1: Unreported transit vehicle purchases

SUGGESTED CORRECTIVE ACTION: The recipient must submit an implemented process to ensure that future awards of FTA funded transit vehicle purchases are reported timely to the FTA Office of Civil Rights. Additionally, the recipient must report any unreported awards to transit vehicle manufacturers to the FTA Office of Civil Rights and must revise any Semiannual Uniform Reports as necessary.

## GOVERNING DIRECTIVE

49 CFR 26.49(a)(4)

Within 30 days of becoming contractually required to procure a transit vehicle, an FTA recipient must report to FTA: (i) The name of the TVM that was the successful bidder; and (ii) The Federal share of the contractual commitment at that time.

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## **DBE12. Does the recipient monitor the performance of contractors and enforce contractual requirements consistent with its approved DBE Program?**

### BASIC REQUIREMENT

Recipients must implement appropriate mechanisms to ensure compliance with the DBE regulation by all program participants.

### APPLICABILITY

All recipients

### DETAILED EXPLANATION FOR REVIEWER

Investigations by the Office of Inspector General have raised concerns about the administration of DBE programs. Recipients must have a process to monitor contractors for compliance with applicable DBE requirements. Recipients must implement appropriate mechanisms to ensure compliance with the DBE program by all program participants (i.e., applying legal and contract remedies available under Federal, state, and local laws). These mechanisms must be set forth in the recipient's DBE program.

For all contracts that have subcontractors, recipients must have mechanisms in place to monitor compliance with prompt payment to subcontractors and inclusion of required clauses in subcontracts. They must also be able to verify the commercially useful function of DBEs on all projects so that accurate reporting can be accomplished, including reporting for race-neutral achievements.

For contracts with a DBE goal, a recipient must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs. Monitoring is

important for both race-conscious and race-neutral contracts to ensure accurate counting for required semi-annual reports.

Prior to awarding a contract with a DBE goal to a contractor, the recipient is required to collect from the awardee:

- The names and addresses of DBE firms that will participate in the contract
- A description of the work that each DBE will perform
- The dollar amount of the participation of each DBE firm participating
- Written documentation of the bidder/offeror's commitment to use the DBE subcontractor whose participation it submits to meet a contract goal
- Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment

This information forms the DBE commitment (not goal) of the awarded contract. The recipient should document efforts to monitor that primes are maintaining their commitments to use the DBEs noted in contract award documents for the types and dollar amounts of work detailed.

- Additionally, recipients are required to: Include a written certification that it has reviewed contracting records and monitored work sites to ensure DBEs are performing the work committed to them and that DBEs are performing a commercially useful function by retaining control of the work performed. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of contract performance for other purposes (e.g., close-out reviews for a contract).
- Require that a prime contractor not terminate or substitute a DBE subcontractor listed on a contract with a DBE goal without good cause and prior written consent from the recipient.

Details on what constitutes good cause are contained in 49 CFR 26.53(f). A recipient's written consent can only be given after the contractor notifies the DBE (with a copy of the notice to the recipient) in writing of its intent to request substitution or termination and allows the DBE five days to respond. Recipients must also require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. If the recipient requests documentation under this provision, the contractor shall submit the documentation within 7 days, which may be extended for an additional 7 days if necessary at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.".

## INDICATORS OF COMPLIANCE

- a. *For contracts where DBE attainment is claimed (race-neutrally or race-consciously), does the recipient monitor contractors and in accordance with its DBE program to ensure that DBE obligations are fulfilled and apply appropriate remedies when necessary?*
- b. *For contracts where DBE attainment is claimed (race-neutrally or race-consciously), does the recipient monitor projects to ensure that DBEs are actually performing the work committed to at the time of contract award and that they are performing a commercially useful function?*
- c. *For contracts where DBE attainment is claimed (race-neutrally or race-consciously), does the recipient complete a written certification of monitoring activities?*

- d. *For all FTA-funded, non-TVM contracts, does the recipient implement the prompt payment and return of retainage monitoring and enforcement mechanisms described in its approved DBE program?*
- e. *For contracts with a DBE commitment, does the recipient implement correct procedures for providing written consent to contractors requesting termination or substitution of a DBE after contract award?*

#### **INSTRUCTIONS FOR REVIEWER**

Review the Tier I recipient's approved DBE program in TrAMS for described methods of monitoring and enforcing DBE commitments, and of applying remedies. On site, conduct interviews, and request and review evidence of the recipient actively monitoring projects with DBE goals as described in its DBE program. If necessitated, verify that the recipient implemented remedies stated in its DBE program on contracts.

Verify that prior to awarding a contract with a DBE goal to a contractor, the recipient collects from the awardee:

- The names and addresses of DBE firms that will participate in the contract
- A description of the work that each DBE will perform
- The dollar amount of the participation for each DBE firm participating
- Written documentation of the bidder/offeror's commitment to use the DBE subcontractor whose participation was submitted to meet a contract goal
- Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment

Verify if the recipient documented efforts to monitor that primes are maintaining their commitments to use the DBEs noted in contract award documents for the dollar amount and types of work detailed.

Review the recipient's DBE program to identify the methods that the recipient states it will use to monitor that DBEs are actually performing the stated work on contracts. During the site visit, interview the recipient and review documentation to verify monitoring activities/reports for selected procurements. Monitoring is important for both race-conscious and race-neutral contracts to ensure accurate counting for required semi-annual reports.

Review the recipient's DBE program for any monitoring certification template that may be noted. During the site visit, review contract files or DBE files to verify that the recipient is completing written certifications for recent contracts with DBE participation.

Review the recipient's approved DBE program in TrAMS for methods of prompt payment monitoring and enforcement. During the review of the procurement section, note what prompt payment and return of retainage clauses are included in FTA-funded procurements. On site, request and review evidence of the recipient actively monitoring implementation of prompt payment and return of retainage from prime contractors to subcontractors for progress and retainage payments, as well as appropriate enforcement actions when applicable. On-site, request and review any correspondence from subcontractors relating to issues of prompt payment or return of retainage.