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**Departmental Office of Civil Rights (DOCR)**
**Federal Aviation Administration (FAA)**
**Federal Highway Administration (FHWA)**
**Federal Transit Administration (FTA)**

# DBE Contract Goal Setting

# Background

**What is the DBE Program?**

- A USDOT program that requires recipients of federal FHWA, FTA, and FAA transportation funds to create and administer a DBE program.

- Congress enacted the first DBE statute in 1983 and reauthorized the program several times in both surface and aviation programs (most recently in the 2021 Infrastructure, Investment, and Jobs Act).

# Background (cont.)

- USDOT issues DBE regulations found in 49 CFR Part 26 and revises them periodically to improve program administration by recipients, which are comprised of state DOTs, transit agencies, and airport sponsors.
- Key objectives of the DBE Program:
  - Ensure nondiscrimination; and
  - Create a level playing field on which small, disadvantaged-owned businesses can compete fairly on Federally-assisted transportation projects

# BIL: Increased Funding Opportunities

- The Bipartisan Infrastructure Law (BIL) includes an increase in funding, including discretionary grant opportunities
- DBE Program requirements will apply to many grants
- Some direct recipients may be non-traditional recipients unfamiliar with DBE program requirement

# Overall DBE Goal

- Recipients must set an overall DBE goal every three years and submit that goal to the relevant Operating Administration per the OAs' established schedule.

- The percentage represents the **difference** between the **current percentage** of minority and women-owned firms' participation on transportation projects and the percentage of participation that would be **expected absent the effects of current and past discrimination.**

# DBE Contract Goals

- The USDOT funding recipient must establish contract goals to meet any portion of its overall goal it is not able to meet through race-neutral means.
- DBE contract goals should only be set on contracts with subcontracting opportunities
- DBE goals do not need to be included on every contract
- The recipient should have a data-driven process in place for setting DBE contract goals with delineated factors such as: type of work involved, location of the work, and the availability of DBEs that perform the work types.

# Information Necessary to Set Contract Goals

- All **individual work scopes (*or types of work*)** of the project, ***including prime work scope(s)***.
- **Industry codes** for each work scope (e.g., NAICS).
- Approximate **dollar value of each work scope** & its weight relevant to overall cost (% or $).
- **Geographic market** for project work & firms.
- **List of certified DBE firms** from your UCP with industry codes relevant to project work scopes, in the geographic market.
- **Universe of all firms that may bid on this contract** with industry codes relevant to work scope, in the geographic market.

# Best Practices in Goal Setting Basics: 2 Steps

Setting a contract goal involves two components:

1. A mathematical calculation using certified DBEs and all contractors with relevant work codes in geographic market area

2. Assessment of market pressures and past performance and adjustment of the calculated goal, ***if appropriate***.

Source: 49 CFR 26.45

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# Best Practice: Step 1: Basic Division

$$\text{Relative Availability} = \frac{\text{Certified DBEs for contract work types in relevant market area}}{\text{All firms (DBE and non−DBE) that perform relevant work types in relevant market area}}$$

**Source: 49 CFR 26.45(c)**

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# Best Practice: Weighting by Work Type

$$\text{Work Type Availability} = \frac{\text{Ready,willing,and able Certified firms in work type}}{\text{All firms in work type ready,willing, and able (DBE and non-DBE)}}$$

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# Best Practice Example

For each work category, identify certified firms and divide this number by the total number of all firms in the identified work category.

$$\frac{\textbf{14 certified truckers}}{\textbf{35 total truckers}} = 0.40$$

Multiply the result by 100 and write the number as the *availability percent.*

$$\textbf{0.40} \times \textbf{100} = \textbf{40\%} = \textbf{Trucking company availability}$$

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# Goal Setting Worksheet: Work Scope & Availability Calculations

| | Work Category/Scope | 6 Digit NAICS | # Certified Firms | | # Total Firms | | Work Scope Availability | | Work Scope Amount | | Certified Work Scope Amount |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Trucking | 484110 | 14 | ÷ | 35 | = | | % x | $ | | $ |
| 2 | | | | ÷ | | = | | % x | $ | | $ |
| 3 | | | | ÷ | | = | | % x | $ | | $ |
| 4 | | | | ÷ | | = | | % x | $ | | $ |

Add up all Certified Work Scope Amounts and enter total dollar amount.

**Sum of Certified Work Scope Amounts:** $

÷

**Total Project Amount:** $

Divide Sum of Certified Work Scope Amounts by Total Project Amount

**Project Goal:** %

# Goal Setting Worksheet: Work Scope & Availability Calculations

| | Work Category/Scope | 6 Digit NAICS | # Certified Firms | | # Total Firms | | Work Scope Availability | | Work Scope Amount | | Certified Work Scope Amount |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Trucking | 484110 | 14 | ÷ | 35 | = | 40 | % x $ | | ▷ $ | |
| 2 | Aggregate Base | 212320 | 7 | ÷ | 70 | = | 10 | % x $ | | ▷ $ | |
| 3 | Asphalt Paving Supply | 212399 | 3 | ÷ | 20 | = | 15 | % x $ | | ▷ $ | |
| 4 | | | | ÷ | | = | | % x $ | | ▷ $ | |

Add up all Certified Work Scope Amounts and enter total dollar amount.

Sum of Certified Work Scope Amounts: $

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Total Project Amount: $

Divide Sum of Certified Work Scope Amounts by Total Project Amount

**Project Goal:** %

# Goal Setting Worksheet: Work Scope & Availability Calculations

| | Work Category/Scope | 6 Digit NAICS | # Certified Firms | | # Total Firms | | Work Scope Availability | | Work Scope Amount | | Certified Work Scope Amount |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Trucking | 484101 | 14 | ÷ | 35 | = | 40 | % x $ | 149,500 | ▷ $ | 59,800 |
| 2 | Aggregate Base | 212320 | 7 | ÷ | 70 | = | 10 | % x $ | 178,900 | ▷ $ | 17,890 |
| 3 | Asphalt Paving Supply | 212399 | 3 | ÷ | 20 | = | 15 | % x $ | 445,000 | ▷ $ | 66,750 |
| 4 | | | | ÷ | | = | | % x $ | | ▷ $ | |

Add up all Certified Work Scope Amounts and enter total dollar amount.

Sum of Certified Work Scope Amounts: $

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Total Project Amount: $

Divide Sum of Certified Work Scope Amounts by Total Project Amount

**Project Goal:** %

# Goal Setting Worksheet: Work Scope & Availability Calculations

| | Work Category/Scope | 6 Digit NAICS | # Certified Firms | | # Total Firms | | Work Scope Availability | | Work Scope Amount | | Certified Work Scope Amount |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Trucking | 484110 | 14 | ÷ | 35 | = | 40 | % x $ | 149,500 | ▷ $ | 59,800 |
| 2 | Aggregate Base | 212320 | 7 | ÷ | 70 | = | 10 | % x $ | 178,900 | ▷ $ | 17,890 |
| 3 | Asphalt Paving Supply | 212399 | 3 | ÷ | 20 | = | 15 | % x $ | 445,000 | ▷ $ | 66,750 |
| 4 | | | | ÷ | | = | | % x $ | | ▷ $ | |

Add up all Certified Work Scope Amounts and enter total dollar amount.

Sum of Certified Work Scope Amounts: $ 144,440

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Total Project Amount: $

Divide Sum of Certified Work Scope Amounts by Total Project Amount

**Project Goal:** %

# Goal Setting Worksheet: Work Scope & Availability Calculations

| | Work Category/Scope | 6 Digit NAICS | # Certified Firms | | # Total Firms | | Work Scope Availability | | Work Scope Amount | | Certified Work Scope Amount |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Trucking | 484110 | 14 | ÷ | 35 | = | 40 | % x $ | 149,500 | ) $ | 59,800 |
| 2 | Aggregate Base | 212320 | 7 | ÷ | 70 | = | 10 | % x $ | 178,900 | ) $ | 17,890 |
| 3 | Asphalt Paving Supply | 212399 | 3 | ÷ | 20 | = | 15 | % x $ | 445,000 | ) $ | 66,750 |
| 4 | | | | ÷ | | = | | % x $ | | ) $ | |

Add up all Certified Work Scope Amounts and enter total dollar amount.

Sum of Certified Work Scope Amounts: $ 144,440

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Total Project Amount: $ 773,400

Divide Sum of Certified Work Scope Amounts by Total Project Amount

**Project Goal:** 19 %

# Step 2: Additional Considerations

- Adjustments are not mandatory or appropriate in every instance
- Possible considerations:
  - Current projects and impact on availability of certified and non-certified firms?
  - Past Performance
    - Have projects in the recent past (up to five years) of similar scope and market area met, substantially exceeded, or substantially missed the goal?
    - Other measures of demonstrated capacity
- Do not adjust if evidence doesn't support the decision to adjust.

Source: 49 CFR 26.45(d)

# Step Two Example: Adjustment Past Participation

- If you calculate the adjustment as a median of past participation on similar contracts in similar areas

$$\text{Contract Goal} = \frac{\text{Step 1 Goal} + \text{Median of Past Participation}}{2}$$

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# Contract Goal vs. Overall Goal

- Each recipient sets an overall DBE participation goal
- To reach the goal, recipients, in part, include DBE subcontracting goals in their Federally-assisted contracts for prime contractor bidders to use good faith efforts to meet.
- Goals can also be met when DBEs are the successful bidders on a prime contract
- There is no punitive action taken when a recipient falls short of meeting its overall goal (unless the program is not administered in good faith).
- Project goals are set in the same manner as contract goals.

Source: 49 CFR 26.45, 26.47, 26.51

# Race-Neutral

- You must meet the maximum feasible portion of your overall goal with race-neutral DBE participation.
- Race-neutral DBE participation includes
  - any time a DBE wins a prime contract through customary competitive procurement procedures
  - actions in the recipient's small business element that result in DBE participation
  - when a DBE subcontractor is used on a prime contract that does not include a DBE contract goal

# When Contract Goal Setting Goes Wrong

- Unsupported caps or “modifiers” on goal setting
- Goal-setting charts that do not consider “narrow-tailoring” principles
- Modifiers or adjustments made to all contracts in adjusting base figure.
- Subjective considerations for adjustments not supported by data
- Using the Overall Goal on every contract

# When Contract Goal Setting Goes Wrong (Cont.)

- Political interference with goal setting process
- Input from one, but not all, stakeholder groups, if public outreach is sought
- Changing goal after advertisement unless clear mathematical error
- Add after contract has been awarded
- Or requesting to change
- Deviate from process
- See the same goal over and over

# Good Practices for Encouraging DBE Participation

- For large projects, early outreach to DBE community on upcoming project and work types sought
- For large projects fostering open communication with the community and stakeholder groups
- Explain goal methodology used-be transparent—post on website; community outreach
- Goals set too low:  Deny opportunities for DBEs
- Goal set too high:  Potential for fraud

# Final Thoughts

- Operating Administrations should review and approve a DBE goal on large or high-profile projects
- ***<u>Rule of Thumb</u>: Arbitrarily adjusting the goal in either direction, for reasons that are not supported by data is prohibited***

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# Questions

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