Implementation Guidance for the Final Rule

Part 26

Given the Final Rule's changes in major areas of DBE program implementation, the issue of how to address the transition between the former rule and the new rule arises. The preamble to the Final Rule states that it becomes effective on ***May 9, 2024****.*[1]

1. **How should recipients address the Final Rule's requirement for the collection of additional bidders list information prior to the creation of the Department's centralized, searchable database?**

    - Recipients should begin immediately incorporating the new bidders list data for all projects in their own standardized and centralized form. The requirement to collect a bidder's list has been in effect since 1999, and recipients have been required to collect most data points since then. However, the Final Rule imposes the additional step of reporting this information.
    - The bidders list data required under revised 49 CFR § 26.11 must be obtained for the owners of all firms and include the North American Industry Classification System (NAICS) code applicable to each scope of work proposed by the firm in its bid.
    - Bidders list information must be obtained about all DBEs and non-DBEs who bid as prime contractors and subcontractors (including unsuccessful prime contractors and subcontractors) on each of the recipient's federally assisted contracts. Information collected must be submitted with bids or initial responses to negotiated procurements.
    - Recipients need not submit the required data to the relevant OA before the Department's system is operational. Once the Department's system is operational, recipients must enter the data no later than December 1 following the Federal fiscal year in which the relevant contract was awarded. For design-build contracts where subcontracts will be solicited throughout the contract period as defined in the DBE Open-Ended Performance Plan in conformance with § 26.53(e), the data must be entered no later than December 1 following the Federal fiscal year in which the design-build contractor awards the relevant subcontract(s).

2. **What are the obligations of those recipients that do not currently maintain a bidders list?**

    - Recipients must enter this data in the system no later than December 1 following the Federal fiscal year in which the relevant contract was awarded. Design-build contracts involving subcontracts solicited throughout the contract period as defined in a DBE Open-Ended Performance Plan pursuant to § 26.53(e) must be entered no later than December 1 following the Federal fiscal year in which the design-build contractor awards the relevant subcontract(s).

[1] The contents of the document do not have the force and effect of law and are not meant to bind the public in any way, and the document is intended only to provide information to the public regarding existing requirements under the law or agency policies.

3. **How should recipients address the new Uniform Report data and reporting requirements and due date?**

- Recipients should begin immediately capturing and incorporating the additional data fields in their procurements which must include the names of DBEs, NAICS codes performed in a contract, the federally assisted contract number(s), and the dollar value of the contract.
- The Final Rule mandates that recipients must submit the new entries of the Uniform Report of Awards, Commitments, and Payments (Uniform Report) online. However, recipients are not obliged to submit the data to the until OA systems are fully operational and updated to receive the data. Once the systems have been updated, recipients must input the data in accordance with the standard Uniform Report submission date(s).
- The Department intends to post a copy of the Uniform Report form on its website (https://www.Transportation.gov/DBEFORMS), since the form is no longer included as an appendix to the regulatory text in the Final Rule.

4. **How should state department of transportation agencies address the expanded MAP-21 data report requirements?**

- Each November, the Departmental Office of Civil Rights (DOCR) requests that state department of transportation agencies (state DOTs) electronically provide the number, ownership, and location of firms from their statewide unified DBE directories.
- The Final Rule adds additional data points to report, including the names of in-state and out-of-state firms decertified because the socially and economically disadvantaged owners (SEDOs) exceed the Personal Net Worth (PNW) cap.
- State DOTs should begin immediately capturing the six additional data points required by the Final Rule.
- The expanded data points will be requested beginning November 2024.

5. **When must UCPs implement expanded electronic UCP Directories?**

- Each UCP must make the required changes to the existing UCP directory within 180 days after the effective date of the Final Rule. However, UCPs should begin making changes as soon as practicable to ensure that the deadline is met. The statewide directory must be made available to the public electronically, on the Internet, and must allow the public to search and/or filter for the required data fields: (firm name, location, NAICS codes, and website) in addition to the types of work a firm seeks to perform.
- At their discretion, UCPs may ask firms to provide a link to their company websites and include relevant information they would like prime contractors to access.

6. **What is the Purpose of the UCP Directory? How does the DOT gross receipts cap (49 CFR 26.65(b)), which applies only to FTA and FHWA-assisted work, impact how a firm's eligibility must be listed in the database?**

- The main purpose of the directory is to show DBEs and ACDBEs, prime contractors, and the public which firms are certified as a DBE, ACDBE, or both to do the types of work that take place in DOT-assisted contracts.

- UCP directories must clearly indicate those firms which are eligible only for counting on FAA-assisted contracting, since the adjusted DOT gross receipts cap set forth in § 26.65 (b) of Part 26 does not apply to the determination of a firm's eligibility for participation in FAA-assisted contracting. DBE firms working on FAA-assisted projects must meet the SBA size standards appropriate to the type of work based solely on the applicable NAICS code(s) standards.
- Any other additions, deletions, or changes to a firm's eligibility must be included in the directory as soon as they are made.

7. How do recipients implement the new "running tally" monitoring requirement? (49 CFR 26.37)

- The new running tally requirement is an important element of the mandatory compliance monitoring imposed on recipients. The running tally ensures that, throughout the life of the contract, the recipient will know whether the DBE is performing the work to which the prime contractor has committed; whether payments to all subcontractors (DBEs and non-DBEs) are timely; and whether DBEs are performing a commercially useful function.
- For each DBE commitment, a recipient must use a running tally providing for a frequent comparison of payments made to a listed DBE relative to the progress of work. This includes payments for this work to the prime contractor to determine whether the contractor is on track in meeting its DBE commitment and whether any projected shortfall exists which requires that the prime contractor document good faith efforts to meet the contract goal pursuant to § 26.53(g).
- For achieving overall goals, a recipient must use a running tally providing for frequent comparison of cumulative DBE awards/commitments to DOT-assisted prime contract awards. This will enable the recipient to determine whether its current implementation of race-conscious contract goals is projected to be sufficient to meet its annual goal. The running tally will also enable the recipient to make informed decisions concerning goals to be advertised according to the recipient's established contract goal-setting process. While there is no "one-size-fits-all" interval for running tally checks, the Department believes that a recipient must know what is going on with DBE participation on projects at all times.
- All personnel involved in a recipient's DBE program, including DBE Liaison Officers (DBELOs), must facilitate implementation of the running tally requirement.

8. Does the new requirement for a DBE Open-Ended Performance Plan apply to contracts executed prior to publication of the Final Rule or to contracts that will be executed prior to the effective date of the Final Rule?

- No. The DBE Open-Ended Performance Plan (OEPP) requirement applies only to proposals submitted after the effective date of the Final Rule. The requirement does not apply to contracts executed prior to this date.
- The bidder or offeror is required to submit the OEPP with its proposal.
- The OEPP must include an estimated time frame in which actual DBE subcontracts would be executed.

9. Do the new distributor definition limits apply to projects underway before the effective date of the Final Rule?

- No. Prior to the Final Rule, there was no definition of "distributor," and, therefore, there is no existing practice allowing for distributor credit.
- The Final Rule adds "distributor" as a new subset of DBE suppliers. A DBE distributor is an established business that engages in the regular sale or lease of the items specified by the contract. The new distributor definition limits the credit that can be obtained for many drop-shipped goods to 40 percent, so long as the DBE distributor assumes all risk for loss or damage during transportation, evinced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items to the DBE distributor.
- Where a distributor "drop ships" materials without assuming risk or does not operate in accordance with its distributorship agreement, credit is limited to fees or commissions.
- For bids submitted after the effective date of the rule, recipients must examine whether materials or supplies are purchased from a DBE distributor which neither maintains sufficient inventory nor uses its own distribution equipment for the products under examination. In such event, 40 percent of the cost of materials or supplies (including transportation costs) can be counted.

10. What is the purpose of the Department's new pre-award form tool and when will it be available?

- The new tool is designed to help recipients evaluate whether a firm should be awarded 60 percent (regular dealer) or 40 percent credit (distributor) for supplies. For example, the recipient would ask whether on a given contract, the DBE supplier will be using its own distribution equipment; whether it maintains a warehouse or other facility; and whether it engages in the sale of the sort of goods involved in the contract to the public on a regular basis.
- The new tool will also assist recipients in making preliminary determinations for firms proposing to drop-ship items. As part of the pre-award review, the recipient will need to determine whether the proposed supplier demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evinced by the terms of the purchase order or a bill of lading from a third party, indicating Free on Board at the point of origin or similar terms that transfer responsibility of these items to the DBE distributor. If the proposed supplier meets these criteria, it would receive 40 percent credit for the cost of the items.
- Preliminary determinations shall be made based upon the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function will be consistent with the preliminary counting of such participation.
- The tool is posted on DOCR's webpage at https://www.transportation.gov/DBEBP.

11. Do the new preliminary counting requirements for determining whether DBE suppliers submitted as regular dealers or distributors have demonstrated the ability and intent to perform as a regular dealer or distributor apply to ongoing contracts or contracts newly executed prior to the Final Rule's effective date?

- No. This requirement does not impact contracts currently in place or scheduled to be executed prior to the Final Rule's effective date.
- For contracts entered into after the effective date, recipients must examine each DBE listed as a regular dealer or distributor and make a preliminary counting determination to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based upon its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in § 26.55 (e)(2)(iv)(A), (B), (C), and (3) under the contract at issue.

12. How should certifiers evaluate applications under review, and decertifications in progress, as of the Final Rule's effective date?

- Any final decision issued on or after the effective date must apply the new rules.

13. What is the impact of the new PNW cap on final decisions based solely on PNW grounds and issued within six months prior to the effective date?

- If a firm was decertified or its application was denied within six months before the effective date, solely because the owner's PNW was above $1.32 million but not above $2.047 million, the firm may submit a new PNW statement (reporting the owner's PNW as of the effective date) with any applicable waiting period waived. If the UCP determines that the owner's PNW does not exceed $2.047 million, the firm should be certified.

14. Should certifiers ask for new PNW statements for owners whose firms have pending applications?

- No.

15. Should certifiers confer with legal counsel concerning state recording and wiretapping laws?

- Sections 26.83(c)(1)(i) and 23.39(a)(1) require at least an audio recording of any on-site interviews, whether virtual or in person. Since most states have laws concerning the requirements for recording conversations with another party, UCP certifiers are strongly encouraged to consult counsel regarding how to comply with both Final Rule and state law requirements.

16. May DBEs report and document gross receipts, including affiliated gross receipts, on an accrual basis?

- No. DBEs must calculate, report, and document gross receipts on a cash basis.

17. How should certifiers evaluate the presumption of social disadvantage for certain groups in light of ongoing litigation in Federal courts?

- Certifiers should continue to handle applications from members of these groups based upon longstanding practice. The program process remains unchanged. The Department continues to implement the DBE program in accordance with existing statutory and regulatory authority and is not currently changing the way it implements the DBE program in response to ongoing litigation.

18. What is the time period for firms to appeal an adverse decision to DOT, when is that time period effective, and how should certifiers notify appellants?

- The Final Rule reduces the time for firms to file appeals from 90 to 45 days.
- Firms that received adverse decisions before the effective date of the rule have 90 days to file an appeal.
- Certifiers issuing adverse decisions on or after the effective date of the rule should inform firms in their denial or decertification letter that they have 45 days to appeal the decision to the Department.

19. Must recipients amend their UCP agreements and DBE program plans to make them consistent with Final Rule timelines, standards, and procedures?

- Yes. In accordance with §§ 26.21(b) and 26.81(a)(4), significant changes to DBE plans and UCP agreements must be submitted for approval. The Department believes the Final Rule significantly changes the way recipients and UCPs must implement their plans and agreements. Therefore, we expect that recipients and UCPs will amend their plans/agreements, as necessary, to reflect the changes in the Final Rule.

20. What are the immediate tiered program concerns for FTA Tier II Recipients?

- The Final Rule provides that *all* FTA recipients that receive planning, capital, or operating assistance and award FTA-funded contracts must have a DBE program meeting the requirements of Part 26. FTA recipients who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which does not exceed $670,000 in FTA funds in a Federal fiscal year are designated as FTA Tier II recipients. FTA Tier II recipients must maintain a DBE program meeting the following requirements: reporting and recordkeeping; contract assurances; policy statement; fostering small business participation through a small business element; and transit vehicle procurements.
- Since this represents a major change from the former rule requiring detailed content, recipients that do not have programs should begin working on their program plans expeditiously rather than wait for the Final Rule's effective date.
- FTA plans to provide information to Tier II recipients to help them better understand and address the new requirements. Additionally, FTA intends to offer technical assistance to recipients with questions or concerns relating to program implementation.

21. Does the Final Rule affect how FTA recipients and TVMs comply with Part 26 in the context of transit vehicle procurements?

- The Final Rule does not make any substantive changes to the requirements for transit vehicle procurements, nor does it change how transit vehicle manufacturers (TVMs) achieve and maintain eligibility to bid on FTA-assisted transit vehicle procurements.
- The clarifications in the Final Rule are intended to address common issues with FTA-assisted transit vehicle procurements, thus some recipients may find that their current vehicle procurement policies and practices are insufficient to meet the requirements and need to be revised.
- FTA will issue guidance explaining how transit vehicle procurements can meet the requirements of 49 CFR part 26 after the Final Rule's effective date.

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.