

SUBJECT: Disadvantaged Business Enterprise Program Coordination and Oversight

1. BACKGROUND: The U.S. Department of Transportation (“Department” or “DOT”) distributes substantial funds each year to finance projects initiated by State and local governments, and public transit and airport agencies. The Disadvantaged Business Enterprise (DBE) program is an affirmative action program designed to remedy ongoing discrimination and the continuing effects of past discrimination in federally-assisted transportation contracting markets nationwide. As such, the U.S. Supreme Court has held that the DBE program is subject to the highest standard (strict scrutiny) of judicial review; the program must be narrowly tailored to serve a compelling governmental interest. Several Federal Circuit Courts of Appeal have determined that the authorizing statute and the DBE program rules further the compelling interest found by Congress in eradicating discrimination and satisfy the narrow tailoring requirement. Thus, the primary remedial goal and objective of the DBE program is to level the playing field by providing small businesses owned and controlled by socially and economically disadvantaged individuals a fair opportunity to compete for federally-funded contracts let by State and local transportation agencies, local transit authorities, and airports. These DOT recipients are required to comply with the DBE Program regulations at 49 C.F.R. Parts 23 and/or 26 as a condition of receiving Federal financial assistance.

2. GENERAL PRINCIPLES AND PURPOSE: The Department is committed to realizing the goals and objectives of the program set forth at 49 C.F.R. §26.1 and 49 C.F.R. §23.1, maintaining a narrowly-tailored program that meets constitutional requirements, and ensuring the integrity of the DBE program overall. All offices within the Office of the Secretary (OST) and Operating Administrations (OA) involved in program operation and oversight share important responsibilities in ensuring nondiscrimination in the award and administration of DOT’s federally assisted contracts. These responsibilities require systematic coordination to ensure: (1) the DBE program is administered properly, (2) all regulatory provisions are appropriately implemented by DOT recipients, and (3) information about the program and its operation is communicated by the Department in a consistent, unified way to all parties and stakeholders.

This Order clarifies the leadership roles and responsibilities of the various offices and OAs within the Department responsible for supporting and overseeing the implementation of the DBE program. These offices include elements from the Office of the Secretary—the Departmental Office of Civil Rights (DOCR), the Office of the General Counsel (OGC), and the Office of Small Disadvantaged Business Utilization (OSDBU)—as well as from the three OAs distributing financial assistance to DOT recipients—the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA). This Order further establishes a framework for coordination, overall policy development, and program oversight among these offices.

3. ROLES AND RESPONSIBILITIES

- a. The **Secretary** is the head of the Department and, with the Deputy Secretary, is accountable for the Department's oversight of the DBE program. The Secretary and Deputy Secretary retain ultimate decision making responsibility for all aspects of the DBE program. All components of the Department in OST and the OAs responsible for some aspect of the DBE program must carry out their responsibilities as required by law and consistent with Departmental policy and guidance.
- b. The **Departmental Office of Civil Rights (DOCR)** within OST serves as principal advisor to the Secretary and Deputy Secretary on civil rights statutes and regulations applicable to the Department. The DOCR is responsible for ensuring Departmental compliance with external civil rights programs, including reviewing and evaluating the OAs' enforcement of civil rights laws and regulations. The DOCR will act as the lead office in OST for the DBE program. In this capacity, the DOCR will coordinate the Department's oversight of the DBE program. This includes overseeing and providing guidance to the OAs and responding to policy questions on behalf of the Secretary. The OAs will continue to be the first points of contact regarding, and be primarily responsible for overseeing and enforcing, the day-to-day administration of the program by recipients.

Under the DBE program regulations, DOCR decides DBE certification appeals filed pursuant to 49 C.F.R. §26.89. The DBE appeal decisions serve as a body of guidance (49 C.F.R. §26.9) that is readily accessible to internal and external stakeholders. The DOCR maintains the Department's DBE Certification Ineligibility Determination Online Database.

This Order sets forth additional programmatic responsibilities for DOCR:

- (1) The DOCR's duty with regard to the DBE program is broadly defined as providing guidance to the OAs regarding their oversight and compliance responsibilities; collecting, compiling, and analyzing DBE utilization data submitted by the OAs; and providing technical support to the OAs and recipients and their staff. Consistent with the responsibilities delineated in this Order, DOCR will refer matters of inquiry it receives to the appropriate OST office or OA for appropriate action.
- (2) The DOCR shall communicate the Secretary's DBE oversight expectations and establish an oversight mechanism to ensure that the OAs carry out their oversight, compliance, and enforcement responsibilities for the DBE program, including how well they gauge recipient post-contract award monitoring. Performance measures will be developed to evaluate and assess DOT's DBE program. This system will capture specific details and metrics concerning OA compliance reviews and technical assistance. The Department regards establishing these measures as an integral first step for OAs as they seek to ensure the program is meeting its stated goals.

(3) The DOCR will oversee the development of a “train-the-trainer” program for OA staff so that they may deliver consistent training and guidance to their recipients on all aspects of the DBE program.

(4) The DOCR will track, compile, centralize, and analyze data collected by the Department on the utilization of DBEs and ACDBEs in federally-assisted contracts let by DOT recipients as well as airport concession opportunities. The DOCR also will perform trend analyses of DBE utilization data that the OAs collect from their recipients. The DOCR will perform research and provide informative analysis of various programmatic objectives. The DOCR will set performance measures for the OAs to gauge their overall effectiveness in overseeing implementation of the DBE program recognizing the objectives set out in the DBE rules. These include, but are not limited to assessing (1) how well recipients reach their DBE participation goals; (2) whether OAs effectively provide oversight and technical assistance; and (3) program success at leveling the playing field for DBE firms to participate in DOT-assisted programs.

(5) The DOCR will maintain the Department’s DBE program website and ensure that official guidance issued by the General Counsel, and other information posted, is up-to-date and organized in a user-friendly manner.

c. The **General Counsel (OGC)** is the chief legal officer of the Department, legal and policy advisor to the Secretary, and final authority within the Department on questions of law. See 49 C.F.R. §1.26. The critical responsibility of OGC with respect to the DBE program is to develop and issue Departmental regulations implementing the program and ensure that those regulations satisfy constitutional standards. Written interpretations of, or written guidance concerning, the regulations are valid and express the official position and views of the Department or the OAs only if issued by the Secretary or if reviewed and approved by the General Counsel. In addition, OGC provides oversight of litigation over, compliance with, and administrative enforcement of the DBE program; processes, in collaboration with the OAs, applications for exemption or waiver to be acted on by the Secretary under 49 C.F.R. §26.15; reviews reciprocity agreements between Unified Certification Program recipients in two or more states under 49 C.F.R. §26.81; and supervises, coordinates, and reviews the legal work of the Chief Counsel Offices in FHWA, FTA, and FAA related to DBE program matters, among other things.

d. The **Office of Small and Disadvantaged Business Utilization (OSDBU)** within OST ensures that the Department’s small and disadvantaged business policies and programs are developed in a fair, efficient, and effective manner. The OSDBU operates a Financial Assistance Division, which operates on behalf of the Department with negotiating small business goals with the Small Business Administration (SBA). This Division also administers and updates the Department’s Annual Procurement Forecast, which provides updates on DOT’s direct contracting opportunities. Also, OSDBU operates a Financial Assistance Division, which administers the Short Term Lending Program (STLP) and Bonding Education Program (BEP). These programs provide eligible small and

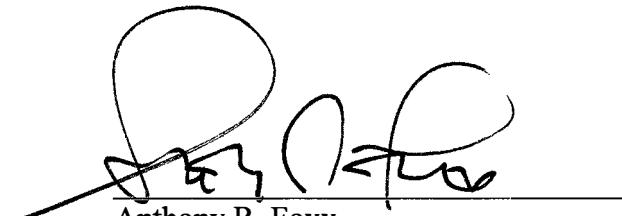
disadvantaged businesses with access to the financial capital and capacity they need to compete in the transportation industry. The OSDBU enters into partnerships with non-profit organizations such as chambers of commerce, trade associations, educational institutions, and business-centered community-based organizations to operate Small Business Transportation Resource Centers (SBTRCs) located throughout the Nation. The SBTRCs work closely with State and local transportation agencies located in their jurisdictions. They also assist firms that are interested in doing business with DOT directly or with state or local agencies receiving DOT funding. The SBTRCs provide technical assistance to DBEs (e.g., business counseling, business analyses and market research, and general management assistance). The OSDBU shall coordinate stakeholder meetings and small business conferences throughout the country to identify resources available to assist DBEs in competing for contracting and concession opportunities on major projects in a given area.

e. The **Operating Administrations**: Recipients of Federal financial assistance from FAA, FHWA, and FTA are required, as a condition of receipt of those funds, to administer a DBE program that complies with 49 C.F.R. Parts 23 and 26. The OAs are primarily responsible for overseeing the day-to-day administration of the program by recipients, providing training and technical assistance, maintaining current and up-to-date DBE websites on OA Web pages, and taking appropriate action to ensure program compliance. The OAs are the first point of contact for questions regarding day-to-day program administration by recipients. Some of the specific activities performed by the OAs include, but are not limited to, the following:

- (1) Review DBE program plans and significant changes to such plans (49 C.F.R. §26.21);
- (2) Collect data from recipients (49 C.F.R. §26.11);
- (3) Process applications for exemptions or waivers to be submitted to the OGC for Secretarial action (49 C.F.R. §26.15) pursuant to procedures established by OGC;
- (4) Review strategies to combat overconcentration identified by recipients (49 C.F.R. §26.33);
- (5) Review overall and project goal setting methodology submitted by recipients (49 C.F.R. §26.45 and §26.49);
- (6) Approve race-neutral and race-conscious projections (49 C.F.R. §26.51);
- (7) Review contract goals set by recipients as needed (49 C.F.R. §26.51);
- (8) Review Accountability Reports (49 C.F.R. §26.47);
- (9) Approve Business Development and Mentor Protégé plans (49 C.F.R. §26.35);
- (10) Review Small Business Elements (49 C.F.R. §26.39);
- (11) Monitor compliance with DBE program requirements (49 C.F.R. §26.103);
- (12) Investigate complaints of noncompliance with DBE program requirements (49 C.F.R. §26.103); and

- (13) Initiate appropriate compliance procedures or enforcement action (49 C.F.R. §26.103).
- f. This Order establishes the **DBE Oversight and Compliance Council** (Council). The Council will be chaired by the Deputy Secretary and the DOCR Director will serve as the vice chair. Members of the Council will include the heads of FHWA, FAA, FTA, as well as the heads of the OGC, the OSDBU, the OST Office of the Assistant Secretary for Governmental Affairs, and the OST Office of the Under Secretary of Transportation for Policy. The Council will facilitate Departmental collaboration, communication, and accountability among the DOT components responsible for DBE program oversight and assist in the formulation of Departmental policy regarding DBE program management and operation. The Council will meet no less than quarterly and provide a forum for the discussion of DBE policy and other matters that may be elevated to the Secretary or Deputy Secretary. The Council may invite other DOT components to participate as appropriate.
- g. The Office of the General Counsel established a **DBE Working Group** approximately 15 years ago and has generated all rule changes and official DOT guidance. The OGC will continue to lead this group, which comprises representatives from the OST offices and OAs (both the civil rights and legal offices) responsible for DBE program oversight, compliance, and enforcement. The task of the DBE Working Group is to coordinate the development, by components of the Department, of formal and informal guidance and interpretations, to ensure consistent and clear Departmental communications regarding the application and interpretation of DBE program requirements. The group meets regularly (at least monthly) to ensure greater consistency and uniformity, as appropriate, in Departmental oversight and in DOT recipient administration of DBE program requirements.

EFFECTIVE DATE: This Order takes effect on February 5, 2014.



Anthony R. Foxx
Secretary of Transportation