

**Speaking with One Voice
DOT Civil Rights Symposium
Sept. 27, 2012**

**Martha Kenley
National DBE Program Manager
Federal Highway Administration
Office of Civil Rights
202-366-8110
martha.kenley@dot.gov**

SPEAKING WITH ONE VOICE

New DBE NPRM

- **Sent to Federal Register August 22nd**
- **Published September 6, 2012**
- **Comment period ends**

November 5, 2012.

Docket number-OST-2012-0147

[Http://www.regulations.gov](http://www.regulations.gov)

SPEAKING WITH ONE VOICE

- Revised application form (removes old SBA-DOT MOU language)
- Revised PNW form (more information)
- Revised semi-annual DBE Uniform Report :
 - Includes on-going payments
 - Track minority and non-minority women
 - Clearer instructions

SPEAKING WITH ONE VOICE

- Increases Gross Receipts Cap from \$22.41 to \$23.98M –inflationary adjustment

SPEAKING WITH ONE VOICE

- Formalizes FHWA policy that its sub-recipients may not have their own DBE program plan and annual goal
- Must operate under the Recipient's (State DOT), DBE program and annual goal

SPEAKING WITH ONE VOICE

- Emphasize DBE program is for all types of DBEs—not just those in heavy construction

SPEAKING WITH ONE VOICE

- DBE Goal Methodology
 - State DOT's goal setting practice should reflect "Tips on DBE Goal Setting" guidance
 - Allows use of bidders' list to determine relative availability of DBEs, but only if well documented and supported
 - Proposes to disallow use of pre-qualified contractors list to establish availability.

SPEAKING WITH ONE VOICE

- DBE Goal Methodology
 - Proposes to eliminate the public comment period and allow publication on website only.
 - Proposes to require stronger consultation efforts before setting goal.

SPEAKING WITH ONE VOICE

- Certification--Ownership
 - More detail from applicant regarding source of initial investment
 - Contribution of capital—real and substantial
 - Right to majority of profits
 - Marital assets used

SPEAKING WITH ONE VOICE

- Certification- Ownership
 - Presumption of disadvantage may be rebutted if even though PNW statement below \$1.3M if owner:
 - shows an ability to amass substantial wealth
 - Shows unlimited growth potential
 - Has not had to overcome impediments

SPEAKING WITH ONE VOICE

- Certification—Ownership
 - PNW must count
 - Transfers to immediate family members for less than fair market value within two years of application
 - Unless applicant can show valid reason, e.g., education or medical expenses.

SPEAKING WITH ONE VOICE

- Certification—Ownership
 - Loans from non-financial institutions—applicant must provide documents to show:
 - Arm's-length transactions
 - Full recourse loan
 - Terms and conditions

SPEAKING WITH ONE VOICE

- Certification—Control
 - Non-disadvantaged owners allowed, but
 - Relationship must be looked at with greater scrutiny

SPEAKING WITH ONE VOICE

- Certification
 - May not require prequalification or obtaining a State business license as condition of certification

SPEAKING WITH ONE VOICE

- Decertifications
 - Proposes to eliminate language that a recipient cannot remove a DBE's certification based on reinterpretation or changed opinion
 - May initiate decertification proceedings if recipient finds initial certification was clearly erroneous, i.e. bad mistake

SPEAKING WITH ONE VOICE

- Decertifications (cont)
 - If DBE has demonstrated a pattern of “bad behavior,” e.g. does not perform a CUF
 - Asks for comment on whether suspension or debarment should be reason for decertification

SPEAKING WITH ONE VOICE

- Allows State DOT to suspend a DBE's certification
 - If firm is sold or ownership transferred
 - If owner becomes incarcerated
- Allows State time to acquire information or initiate decertification procedures

SPEAKING WITH ONE VOICE

- Good Faith Efforts
 - Remove responsive vs. responsibility language.
 - Bidders commit to all DBE info at time of bid (except in negotiated procurements)
 - If goal not met, require copies of from DBE and non-DBE when non-DBE was chosen over DBE due to price as part of GFE

SPEAKING WITH ONE VOICE

- Good Faith Efforts (cont)
 - When goal is not met, proposes options for when GFE documents have to be submitted:
 - At time of original bid
 - One day after winning the bid
 - A promise by a prime contractor bidder to include DBEs after the award is not evidence of GFE

SPEAKING WITH ONE VOICE

- Good Faith Efforts (cont)
 - Proposes to strengthen requirements of recipients when evaluating good faith efforts of contractor failing to meet goal
 - Review other bids to determine if higher bids met the goal

SPEAKING WITH ONE VOICE

- Good Faith Efforts, cont.
 - Review and compare bids of DBE and non-DBE when non-DBE was chosen due to price
 - No objective checklists

SPEAKING WITH ONE VOICE

- Performance
 - Work committed by prime to specific DBE must be performed by that DBE (unless the recipient approves)--or prime cannot be paid for that work

SPEAKING WITH ONE VOICE

- Replacing a Committed DBE
 - Specifies types of GFE prime must make
 - Written statement of efforts
 - Time and date contacted
 - Information provided
 - Explanation of why agreement not reached
 - Do not need to replace with DBE in same work type—look for other areas

SPEAKING WITH ONE VOICE

- Proposes new contract clause that failure to comply with using committed DBEs or using GFE to replace a DBE with recipient approval is a material breach of the contract, resulting in various sanctions, including
 - Withholding payment
 - Prime in default—terminate contract
 - Liquidated damages

SPEAKING WITH ONE VOICE

- Proposes to allow DBEs to lease trucks from non-DBE leasing firm without any loss of credit.
- Counting must be done on a case-by-case basis—regardless of certification
- Asks for comment regarding “regular dealer” concept. Is a DBE regular dealer just a “middleman”?



THE END - THANK YOU