

Guidance on State or Local MWBE Program Contract Goals
(Posted - 4/25/2018)

Does the Department restrict recipients from including participation goals from State or local programs such as minority business enterprises and women business enterprises (MWBE) on federally-funded contracts?

- Yes. The Department does not allow recipients to establish Minority and Women-owned Business Enterprise (MWBE) participation goals on federally-funded contracts. The only participation goals allowed on a federal-aid contract are goals applied through the federal Disadvantaged Business Enterprise (DBE) program under the Department's DBE regulations at 49 CFR Part 26.
- The restriction barring recipients from setting State or local MWBE participation goals on federal-aid contracts applies to all federal-aid contracts, regardless of whether a contract carries a DBE contract goal.
- Furthermore, a recipient may not apply its MWBE program only to the recipient's financial share of a federally-funded contract. To the extent a recipient lets a transportation contract in which both recipient and federal funds participate, the contract is a federally-funded project to which federal requirements apply. To the extent a recipient lets a separate contract using only recipient funds, the federal DBE program does not apply. *See* 49 CFR § 26.3(d) ("If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.").

On what authority does the Department base its policy of restricting the use of State or local MWBE participation goals on federally-funded contracts?

- The Department's policy of not allowing recipients to set State or local MWBE participation goals on federal-aid contracts flows from three sources: (1) the competitive contracting requirement for the federal-aid highway program under Title 23 of the U.S. Code (U.S.C) and 2 C.F.R. § 200.319 for all operating administrations; (2) U.S. Supreme Court and U.S. Courts of Appeals precedent requiring narrow tailoring of the federal DBE program under constitutional strict scrutiny review; (3) the principle of federal preemption.

Is the Department's policy of restricting the use of State or local MWBE participation goals on federally-funded contracts supported by federal competitive contracting requirements?

- Yes. The federal-aid highway program provides that, unless otherwise approved by the Secretary of Transportation, construction of Federal-aid projects shall be performed by contracts awarded by competitive bidding. *See* 23 U.S.C. § 112(b)(1). The only exceptions to this requirement for open competition are those exceptions expressly

provided for in Section 112 and in other federal statutes, like the statute and implementing regulations authorizing the federal DBE program. FHWA's regulations also prohibit the consideration of geographic preferences in contracting. *See* 23 CFR § 635.112(d).

- Similarly, the procurement standards set out at 2 CFR § 200.319(b) provide that recipients are prohibited from using statutorily or administratively imposed State, local, or tribal geographic preferences, except where applicable federal statutes expressly mandate or encourage geographic preference.

Is the Department's policy of restricting the use of State or local MWBE participation goals on federally-funded contracts supported by decisions of the U.S. Courts of Appeals and the U.S. Supreme Court?

- Yes. The U.S. Supreme Court determined in *Adarand v. Peña* that the federal DBE program must serve a compelling government interest and must be narrowly tailored to advance that interest, including by ensuring nondiscrimination in the award of USDOT-assisted contracts and creating a level playing field on which DBEs can compete fairly for federally assisted contracts. *See Adarand v. Peña*, 515 U.S. 200 (1995); 49 CFR § 26.1.
- In response to *Adarand*, The Department revised its DBE regulations in 1999. Since that time, the federal DBE program has been upheld as constitutional in several U.S. Circuit Courts of Appeals decisions, which the Supreme Court has declined to review.¹ The federal courts' conclusion that the Department's DBE program satisfies the narrow tailoring requirement of strict scrutiny supports the Department's position to limit participation goals on Federal-aid contracts to those specific goals applied through the federal DBE program. Including State or local MWBE participation goals alongside goals established under the federal DBE regulations or in Federal-aid contracts that do not contain federal DBE contract goals would complicate the Department's ability to ensure that the federal DBE program would continue to satisfy the narrow tailoring requirement necessary for federal courts to uphold its constitutionality.

Is the Department's policy of restricting the use of participation goals by State or local MWBE programs on federally-funded contracts supported by the doctrine of federal preemption?

- Yes. Under the doctrine of federal preemption, State and local regulatory requirements that conflict with a federal program or that enter a field that Congress intended to be occupied by a federal regulatory scheme are displaced by federal law. To the extent that State and local MWBE programs on federally-funded contracts conflict with the federal

¹ *See, e.g., Western States Paving Co., Inc. v. Washington Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005) (denying facial challenge to constitutionality of the federal DBE statute and regulations but upholding as-applied constitutional challenge), *cert. denied sub. nom., City of Vancouver v. Western States Paving Co., Inc.*, 546 U.S. 1170 (2006); *Northern Contracting, Inc. v. Illinois*, 473 F.3d 775 (7th Cir. 2007); *Sherbrooke Turf Inc. v. Minnesota Dep't of Transp.*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

DBE program and encroach on the field of providing contractual preferences to DBE firms on Federal-aid contracts, they are superseded by the federal DBE program. As a result, on federally-funded projects, a State or local MWBE program must yield to the requirements of the federal DBE program.

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.

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