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TRB Webinar: Getting the Facts Straight about the DBE Program

July 13, 2023

12:00 – 1:30 PM



PDH Certification Information

1.5 Professional Development Hours (PDH) – see follow-up email

You must attend the entire webinar.

Questions? Contact Andie Pitchford at TRBwebinar@nas.edu

The Transportation Research Board has met the standards and requirements of the Registered Continuing Education Program. Credit earned on completion of this program will be reported to RCEP at RCEP.net. A certificate of completion will be issued to each participant. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the RCEP.

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Purpose Statement

This webinar will feature experts from federal and state agencies addressing the consistent issues regarding the DBE program.

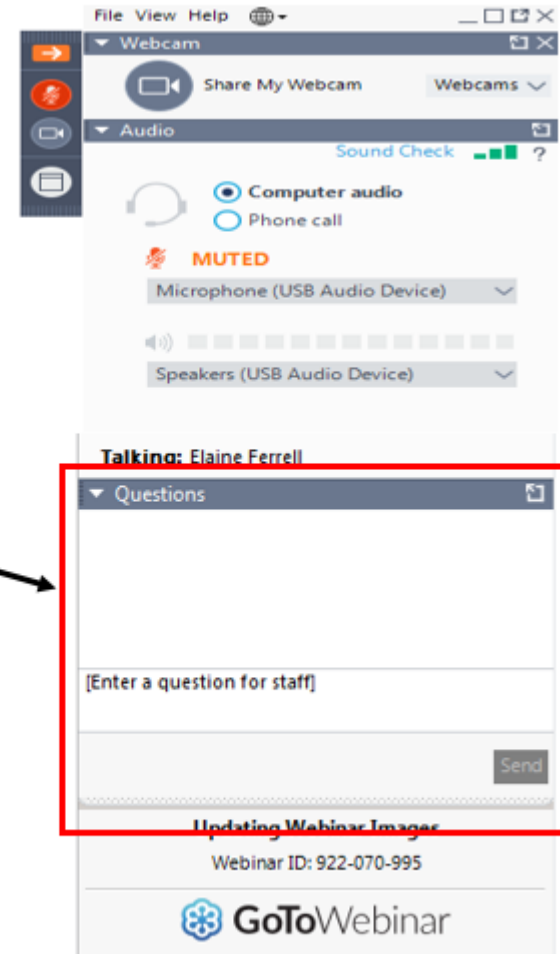
Learning Objectives

At the end of this webinar, you will be able to:

- (1) Understand the correct requirements and expectations of the DBE program
- (2) Utilize best practices to correctly implement the requirements of the DBE program

Questions and Answers

- Please type your questions into your webinar control panel
- We will read your questions out loud, and answer as many as time allows



Today's Presenters



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The Federal DBE Program

Separating Fact from Fiction

Martha Kenley

Christine Thorkildsen



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DBE Overall Goal

Fact or Fiction?

The new overall goal for the DBE program is now 20%



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DBE Overall Goal

Fiction

- The 20% goal is for the participation of small, disadvantaged, firms (not necessarily DBEs) for direct federal procurement only; not federal-aid

See [U.S. Department of Transportation Equity Action Plan | US Department of Transportation](#)

- Does not apply to the DBE program. While there is a national aspirational DBE goal of 10%, each recipient must set an overall goal narrowly tailored to its market area

See 49 CFR §§ 26.41; 26.45(b)



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State and Local Minority or Woman-Owned Business Goals

Fact or Fiction?

A recipient may include State or local MBE/WBE goals on contracts that include DOT funds.



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State and Local Minority or Woman-Owned Business Goals

Fiction

State and Local MBE/WBE goals
cannot be included on a contract
that includes DOT funds

[DBE Guidance on Local or State
MBE-WBE Goals
\(\[transportation.gov\]\(https://www.transportation.gov\)\)](#)



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State and Local Minority or Woman-Owned Business Goals

Fact or Fiction?

A recipient may include State or local MBE/WBE goals on contracts that do not include DOT funds, even if other parts of the project include DOT funds



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State and Local Minority or Woman-Owned Business Goals

Fact

The DBE program only applies to contracts that include USDOT funds. State and local MBE/WBE goals can be included on a contract with no DOT funding, even if other contracts in the project include DOT funding

49 CFR §26.3(d)



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NAICS Codes

Fact or Fiction?

Recipients may credit a DBE's work toward goals even if the DBE is not certified under the NAICS Code associated with the type of work performed, as long as the recipient believes the DBE is capable of doing the work



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NAICS Codes

Fiction

- To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract
(49 CFR §26.53(b)(2)(ii))
- The DBE must seek certification in additional NAICS codes to expand the work it wishes to perform for goal credit



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DBE Negotiated Procurements

Fact or Fiction?

In negotiated procurements, a recipient may give proposers extra points if they exceed the DBE goal



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Negotiated Procurements

Fiction

- Proposers responding to Requests for Proposals that include DBE goals may NOT receive extra points if they exceed the DBE goal
(49 CFR §26.53(a)(2)); and principles of strict scrutiny, narrow tailoring, see, Adarand Constructors, Inc. v Peña, 515 US 200 (1995))
- Proposers **or apparent low bidders** that do not meet the DBE goal but demonstrate adequate good faith efforts should be awarded a contract over the next lowest bidder that meets the goal.



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Monitoring Prompt Payment and Return of Retainage

Fact or Fiction?

Recipients must monitor prompt payment and return of retainage requirements for *all subcontractors*, DBE and non-DBE



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Monitoring Prompt Payment and Return of Retainage

Fact

- Even though the prompt payment and return of retainage requirements are included in the DBE regulations, it is a race-neutral provision, meaning, it applies to all subcontractors
- Recipients must monitor prompt payment and return of retainage for all federal-aid subcontractors (49 CFR §26.29)



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Retainage

Fact or Fiction?

Subrecipients of a primary recipient may apply a different retainage method than the one the recipient applies and includes in its DBE Program Plan



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Retainage

Fiction

- USDOT has consistently interpreted its DBE regulations to require primary recipients to adopt a single DBE Program Plan that must be followed by the primary recipients' subrecipients
- This includes subrecipients adopting the same retainage option chosen by the primary recipient

See 79 Fed. Reg. 59566, 59580 (Oct. 2, 2014); 68 Fed. Reg. 35542, 35549 (June 16, 2003).



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Regular Dealers

Fact or Fiction?

When reviewing bidders' pre-award goal achievement, recipients can assume that when a bidder commits to a DBE supplier, 60% of the cost of materials will count toward the contract goal



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Regular Dealers

Fiction!

- DBE suppliers can receive goal credit of 60% of the cost of materials only if they perform as a regular dealer (either with a warehouse or bulk supplier) as defined in 49 CFR §26.55(e)
- Assumptions on the amount of goal credit achieved pre-award, may not “materialize” during performance



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Meeting the Contract Goal

Fact or Fiction?

After contract award, recipients should wait until the end of the contract to determine if the prime contractor met the goal, and if not, ask the contractor to submit good faith efforts, or reasons why, it did not meet the goal



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Meeting the Contract Goal

Fiction

- Recipients must maintain a running tally of a contractor's progress toward meeting the goal (49 CFR §26.37(c))
- This includes tracking any DBE terminations, substitutions, or change orders that could affect goal attainment and potentially requiring primes to make GFEs to replace



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Alternative Contracting

FACT OR FICTION?

Alternative Contracting is any method of highway construction contracting that deviates from competitive low bid.



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FACT!

Alternative Contracting Methods (ACMs) utilize processes other than the traditional method of Design-Bid-Build (DBB)

- DBB – After design is completed, construction services are obtained by sealed bid awarded to the lowest responsive, responsible bidder
- Project is built in accordance with final design
- ACMs commonly include Design-Build (DB) contracting and construction manager/general contractor (CM/GC) contracting

Approved state legislation for DB summarized in the Design-Build Institute of America State Statute Report

<https://dbia.org/wp-content/uploads/2021/01/2021-DBIA-State-Statute-Report.pdf>



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Major Projects

FACT OR FICTION?

The larger the project, the higher the
DBE goal.



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FICTION!

- Information needed for goal setting:
 - Type of work involved
 - Location of the work
 - Relative availability of DBEs that perform the work types in relevant market area
- A mathematical calculation using data/information narrowly tailored to the unique opportunities of the project and relative availability of DBEs in that market area
- DBE goal setting training



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Design-Build

FACT OR FICTION?

A design build project must have one overall DBE goal for the design and construction of the project.



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FICTION!

- There are three options for structuring the DBE goal on the project:
 - one overall goal for both design and construction
 - two separate goals, with one for design and another for construction
 - an overall goal for both design and construction with separate aspirational goals for design and construction

https://www.fhwa.dot.gov/civilrights/programs/dbe_acm_handbook_20180820.pdf



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Design-Build DBE Commitment Plan

FACT OR FICTION?

Most effective way for a proposer to verify commitment to the DBE goal on a DB project is through a DBE open-ended performance plan (OEPP).

FACT!



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- DB projects are not fully designed at time of proposal and many details of available subcontracting opportunities are not yet known
- Naming DBEs in proposer's DBE commitment plan doesn't align with DB procurement process
- Consequences – prime contractors may submit documented good faith efforts instead of a DBE subcontract, thereby limiting opportunities for small, disadvantaged firms.
- One solution some States have implemented is an open-ended performance plan, a modified DBE commitment plan that, instead of naming DBEs to perform specific work at a specific price, allows the proposer to list anticipated work types for planned DBE participation throughout the life of the project.
- Specifically for design-build contracting, serves as a roadmap detailing how the DBE goal can be achieved.

Every Day Counts – Proven yet underutilized innovations

https://www.fhwa.dot.gov/innovation/everydaycounts/edc_7/rethinking_dbe.cfm



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Design-Build

FACT OR FICTION?

On a design-build project with an open-ended performance plan, the contractor can never submit documentation of good faith efforts to achieve the DBE goal.



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FICTION!

- If as the project progresses and the prime cannot secure DBE subcontracts for the anticipated work as detailed in the OEPP **AND** the project has no remaining subcontracting opportunities available, the prime can submit documented good faith efforts verifying why they could not achieve the goal



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Design-Build

FACT OR FICTION?

A responsive open-ended performance plan includes:

- A description of the type of work or items of work subcontractable to DBEs
- An estimated value of that work
- A time frame of when that work can be subcontracted to DBEs
- A list of signed contracts with DBEs (if secured)
- A total verifying the OEPP equates to the value of the DBE percentage of the project



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FACT!

Type of project: Bridge Replacement

Est. Cost: \$1,000,000

DBE Goal: 10%

Dollar value of DBE opportunity: **\$100,000**

Duration of project: 1 year

ANTICIPATED WORK TO SUBCONTRACT TO DBES	ESTIMATED DOLLAR VALUE	ESTIMATED TIME FRAME
Abutment Excavation	\$30,000	Q2
Concrete	\$20,000	Q3
Design of bridge rail	\$15,000	Q1
Landscaping	\$10,000	Q4
Environmental Oversight	\$15,000	Q1-Q4
Total	\$90,000	

Secured DBE subcontract to add to OEPP:

ABC Hazardous Waste Removal – DBE Firm contacted and verified

Initial Removal of hazardous waste – After award of DB contract, ABC will collect and remove and haul hazardous waste around bridge abutments

NAICS Code: 562112

Value of contract: \$10,000

Total of Proposers Commitment to the DBE goal:

OEPP + Actual Subcontracts = total commitment

\$90,000 + \$10,000 = **\$100,000**



DBE Fact or Fiction: State Perspective

Michael D. Bryant, TxDOT Civil Rights Division Director



HELP #EndTheStreakTX

End the streak of daily deaths on Texas roadways.

TxDOT.gov (Keyword: #EndTheStreakTX)



#EndTheStreakTX Toolkit





Fact or Fiction?

- If a state fails to meet the DBE goal for the year based on its triennial goal methodology, the state is required to submit a shortfall analysis to the respective modal administration.
- A state should be very concerned when required to submit a shortfall analysis because it means there are significant problems with the state's DBE program.



✘ FICTION:

- A shortfall analysis allows the recipient to demonstrate its efforts to meet its annual goal and discuss reasons why the goal was not achieved.
- The analysis provides a roadmap for the future success of the recipient's DBE program.



Fact or Fiction?

- Commercially Useful Function (CUF) reviews are required of all DBEs on all federally-funded projects. If a state review shows that the DBE is not performing a CUF, it is clear that there is fraud in the state's DBE program.



✘ FICTION:

- Not performing a CUF review does not constitute fraud automatically.
- Unless there is evidence of fraud, this more likely impacts whether the work performed by the DBE will count towards the state's overall DBE goal.



Fact or Fiction?

- Termination of a DBE and Substitution of a DBE in lieu of termination are two separate processes and should be treated as such.



✓ **FACT:**

- Termination and substitution are two separate processes.
- Prior to termination, notice must be given to the DBE and the state DOT must approve the termination.
- Substitution requires a good faith effort to utilize another DBE to perform the work scheduled to be performed by the original DBE.



Fact or Fiction?

- A contractor must submit enough DBE commitments to equal or exceed the goal when bidding on a project. Failing to do so will prevent a contractor from being awarded a contract.



✘ FICTION:

- While utilizing DBEs to meet a contract goal is the ideal method, submitting documentation of good faith efforts to meet the goal is a valid method to satisfy requirements.
- A state should not deny a contract award simply because a contractor submits good faith efforts.



Fact or Fiction?

- If a DBE complains that they have been discriminated against, the complaint should be turned over to the agency's Title VI Coordinator immediately.



? IT DEPENDS:

- In many instances, a DBE complaint involves contractual issues, including prompt payment.
- However, if the complaint alleges discrimination based on race, color, or national origin, the Title VI Coordinator should be notified.



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July 23-26, 2023

TRB International Conference on Low
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Aug 8 - 10, 2023

Sustainment Management System (SMS)
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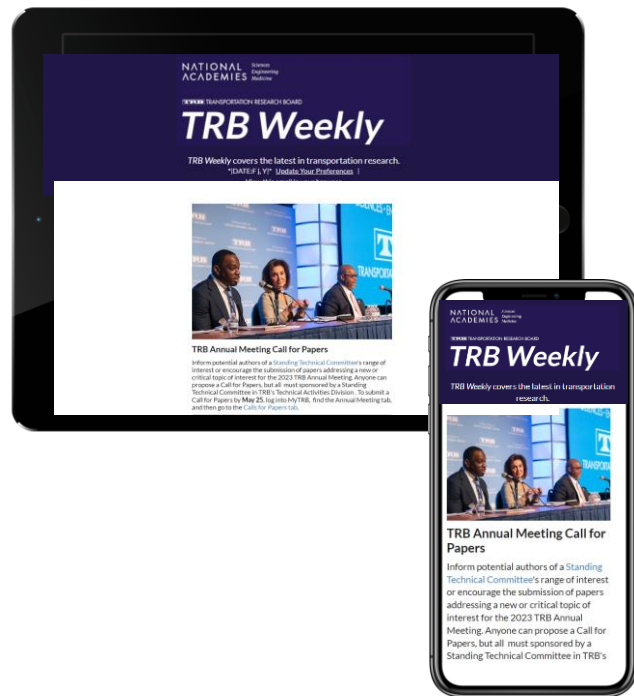


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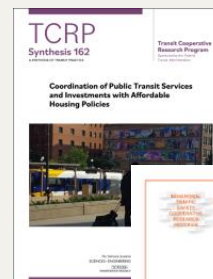
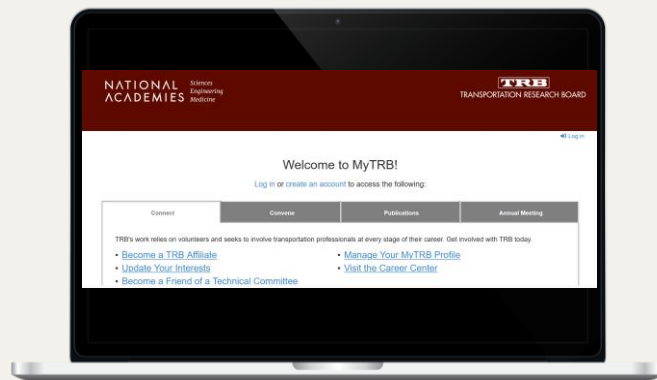
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