

The Fresno Council of Governments Disadvantaged Business Enterprise (DBE) Program

Definitions of Terms – The terms used in this program have the meanings defined in 49 CFR 26.5

Objectives (26.1) The Fresno Council of Governments (FCOG) hereby establishes a program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. It is the policy of FCOG;

To ensure non discrimination in the award and administration of DOT assisted contracts;
To create a level playing field on which DBEs can compete fairly for DOT assisted contracts;
To ensure that the FCOG DBE program is narrowly tailored in accordance with applicable law;
To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
To remove barriers to participation of DBEs in DOT assisted contracts;
To assist the development of firms that can compete successfully in the marketplace outside the DBE program;

Nondiscrimination (26.7) The FCOG will never exclude any person from participation in, deny any person benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin. In administering its DBE program, the FCOG will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishments of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin. The FCOG Executive Director will sign assurance, applicable to all DOT assisted contracts and their administration as part of the grant document, contract, or program supplement agreement for each project.

Record Keeping (26.11) FCOG will create and maintain a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on its DOT-assisted contracts. The bidders list will include the name, address, DBE status, and annual gross receipts of firms.

Prime contractors are required to maintain records and document payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative on FCOG, Caltrans, FHWA, or DOT. This reporting requirement also extends to any certified DBE subcontractor.

Payments to DBE subcontractors will be reviewed by the FCOG to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

FCOG will report final utilization of DBE participation to DLAE using Exhibit 17-F of the Caltrans LAPM.

FCOG will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, or local laws.

Assurances (26.13) Each financial assistance agreement FCOG signs with DOT shall include the following assurance.

The FCOG shall not discriminate on the basis of race, color, national origin, or sex in the award of and performance of any DOT assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The FCOG shall take all necessary and reasonable steps under

49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT assisted contracts. The FCOG's DBE Program, as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the FCOG of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

The following assurance will be included in each DOT funded contract signed with a contractor (and each subcontract the prime contractor signs with a subcontractor).

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract and such other remedy as the recipient deems appropriate.

DBE Program Updates (26.21) The FCOG will continue to carry out this program until the FCOG has established a new goal setting methodology or until significant changes to this DBE Program are adopted. FCOG will provide to Caltrans a proposed overall goal and goal setting methodology and other program updates by June 1 of every year.

Policy Statement (26.23) This policy statement shall be circulated throughout the FCOG organization and upon request, to the DBE and non-DBE communities that perform services to FCOG on DOT-assisted contracts.

Liaison Officer (26.25) The FCOG Finance Director is designated as liaison officer. The Finance Director has direct, independent access to the FCOG Executive Director concerning DBE program matters. An organization chart displaying the Finance Directors position in the organization is found in Exhibit 1 to this program.

Financial Institutions (26.27) To the extent that FCOG uses financial institutions, FCOG will investigate services offered by institutions owned or controlled by socially and economically disadvantaged individuals and make reasonable efforts to use these institutions. To the extent that FCOG prime contractors use local financial institutions, FCOG will encourage prime contractors to use such local DBE owned or controlled institutions.

Prompt Payment (26.29) The agency shall hold retainage from the prime contractor and shall make prompt and regular incremental acceptances of portions, as determined by the agency of the contract work and pay retainage to the prime contractor base on these acceptances. The prime contractor or subcontractor shall return all monies withheld in retention from a subcontractor within 30 days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the agency. Federal regulation (49 CFR 26.29) requires that any delay or postponement of payment over 30 days may take place only for good cause and with the agency's prior written approval. Any violation of this provision shall subject the violating prime contractor or subcontractor to penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or non payment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

DBE Directory (26.31) FCOG subscribes to the Disadvantaged Business Enterprise Quarterly Directory published by Caltrans Civil Rights Department and downloads the Calcert Extract file from Caltrans Civil Rights Departments website to have access to the information in database form. Information from the DBE Directory is available to interested persons, contractors, and the public upon request. Additional DBE information can be found at Caltrans Business Enterprise Program website at <http://www.dot.ca.gov/hq/bep>.

Over concentration (26.33) FCOG has not identified any types of work in DOT assisted contracts that have an over concentration of DBE participation. If in the future FCOG identifies the need to address over concentration, measures for addressing over concentration will be submitted to the DLAE for approval.

Business Development Programs (26.35) FCOG does not have a business development or mentor-protégé program. If the FCOG identifies the need for such a program in the future, the rationale for adopting such a program and a comprehensive description of it will be submitted to the DLAE for approval.

Program Monitoring (26.37) Request for Proposal on all DOT-assisted projects issued by FCOG will include FCOG requirements for DBE participation. Contracts awarded having an agreed amount of DBE participation will include language that DBE percentages will be maintained as set forth in the contract and that the Contractor shall not assign, subcontract, or change subcontractors without express written permission from FCOG.

Procurements wherein a DBE Contract Goal is stipulated will contain provisions requiring the contractor to report payments to DBE subcontractors. The contractor shall maintain records showing the name and address of each subcontractor, the date of payment, and total dollar figure paid to each subcontractor. DBE prime contractors shall also show the date of work performed by their own forces along with the corresponding dollar value of the work claimed toward DBE goals. If the contractor's report contains discrepancies from the agreed to usage of DBE subcontractors, type of work DBE subcontractors expected to perform, or amount of payment DBE subcontractors receive, FCOG will notify the contractor of the apparent discrepancy and potential loss of payment. Based on the contractor's response, FCOG will take appropriate action. If the contractor fails to adequately explain why there is discrepancy, payment for the disputed work will be withheld and a letter sent to the contractor referencing the applicable violation and the required withholding of payment.

When a DBE substitution is requested, FCOG will require a letter from the contractor explaining why substitution is needed. FCOG will review the letter to be sure names and addresses are shown, dollar values are included, and reason for the request is explained. If the contractor is not meeting the contract goal with this substitution, the contractor must provide good faith effort to the FCOG for local agency consideration.

26.39 Fostering Small Business Participation

A requirement of good faith effort implementation of the DBE Program, includes the active implementation of a DBE Program to foster small business participation. Contracting requirements shall be structured to facilitate competition by small businesses, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation as prime contractors or subcontractors.

In meeting a portion of Fresno COG's overall goal projected to meet through race-neutral measures, a reasonable number of prime contracts are to be of a size that small businesses, including DBEs, can reasonably perform.

The DBE Program is open to all small businesses, including DBEs, regardless of their location, and there are no limits on the number of contracts that can be awarded to firms participating in the DBE Program. Every effort will be made to avoid creating barriers.

Assistance shall be provided to small business, including DBEs, in overcoming barriers to DBE Program participation in all methods of procurement. Businesses requiring management and technical assistance can be identified through unsolicited requests for assistance.

Fresno COG staff and DBE Program contact shall offer the following assistance to DBEs and other small businesses:

Information on its organization and contractual needs;

Instructions for preparation of bid specifications, procurement policy procedures, and general bid requirements;

Information on specific reasons for unsuccessful bids through debriefing sessions;

Projected procurement opportunities;

Instruction of job performance requirements;

Referrals to firms who offer advice and assistance through mentor-protégé programs;

National Aspirational Goal (26.41) The Secretary has determined that nationwide, not less than 10 percent of DOT authorized funds are to be expended with DBE's. This 10 percent goal is a national aspirational goal that DOT uses as a tool in evaluating and monitoring DBE opportunities. The national goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or to take any special administrative steps if their goals are above or below 10 percent.

Quotas, and Set Asides (26.43) FCOG will not use quotas or set asides on DOT assisted contracts under any circumstances.

Goal Setting (26.45) FCOG shall establish an overall goal on DBE participation. The overall goal is not a quota, rather it is a guideline on the level of DBE participation FCOG would expect in the absence of discrimination. The overall goal shall provide for participation by all certified DBEs and is not subdivided into group specific goals. The overall goal is based on the relative availability of DBEs in FCOGs contracting market.

The overall goal will be calculated in two steps. A "base figure" to determine the relative availability of DBEs in our contracting market will be calculated. In step 2, the base figure is evaluated to determine the current capacity of DBEs to perform work.

An initial base figure is developed by consulting the Census Bureau's County Business Pattern (CBP) database to determine the number of ready, willing, and able business' available in the geographic area. The Calcert Extract DBF file, available from Caltrans Civil Rights website, is downloaded and browsed to determine the amount of certified DBE's soliciting work in the corresponding geographic area. The DBE's is divided by the number of all firms to determine the base figure.

The base figure is then evaluated and adjusted to determine the current capacity of DBEs to perform work. To do this FCOG will maintain a bidders list to determine the number of DBEs that have bid or quoted on DOT assisted contracts. The evaluation of the base figure may take into consideration, including but not limiting to, the volume of work DBEs have performed in recent years. The adjusted figure becomes the overall goal.

The overall goal is then stated as a percentage of all DOT funds budgeted for expenditure on contracting pursuant to the FCOG Overall Work Program.

FCOG will adopt the overall goal at a noticed public hearing to allow for consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-discrimination opportunities for DBEs, and FCOG's efforts to establish a level playing field for the participation of DBE's.

FCOG will publish a public notice in general circulation media announcing the adopted overall goal, describing how it was selected, inviting inspection during normal business hours at FCOG's office for 30 days following the date of notice, informing the public that FCOG will accept comments on the goals for 45 days from the date of the notice and providing addresses to which comments may be sent.

Meeting the Overall Goal (26.51) FCOG consistently exceeded its prior DBE goal established under 49 CFR part 23 without using Race-conscious measures. The FCOG fully anticipates that it will consistently meet and exceed its goal under 49 CFR part 26 using Race-neutral measures exclusively. Race-neutral measures include;

Awarding a contract that has no DBE goal to a contractor with DBE subcontractors.
Arranging solicitations and firm selection in ways that facilitate DBE participation.
Negotiating bonding and insurance requirements in ways that facilitate DBE participation.
Disseminating the DBE directory to prime bidders upon request.

Good Faith Efforts Procedures (26.53) In the situation whereby apparently, the overall goal will not be met, FCOG may choose to narrowly tailor the program to overcome the effects of discrimination by using race conscious measures. This includes the establishment of contract goals and the use of Good Faith efforts to the point that the overall goal will be met. If during the course of a year in which FCOG is using contract goals, FCOG determines that the overall goal will be met or exceeded, the use of contract goals will be reduced or eliminated to the extent necessary to ensure that the use of race-conscious measures does not result in exceeding the overall goal. Good Faith efforts on the part of FCOG include recording;

Advertisement for DBE participation in newspapers, trade papers, and minority focus papers.
The dates when notices were mailed soliciting bids for projects and the names and DBE status of the consultants on the mailing list.
The items of work made available, including breaking down contracts into economically feasible units to facilitate DBE participation.
A summary of negotiations, bidder selection, the name of the firm selected and a listing of firms and DBE status who submitted bids but were not accepted.
Any additional data to support demonstration of good faith effort.

Upon solicitations of DOT-assisted contracts with contract goals, FCOG will not deny award to contractors on the basis of DBE goals, who demonstrate that they have used good faith efforts to meet the goal. Good faith efforts on the part of contractors include;

Documenting that they can meet the required goal.
Documenting that they made good faith efforts to meet the goal, even though they did not succeed in obtaining enough DBE participation to do so.

Contractors selected on the basis of a DBE goal must provide the following information with the initial proposal or before entering into a contractual agreement with FCOG:

1. The names and addresses of the DBE firms.
2. A description of the work each DBE will provide.
3. The dollar amount of participation by each DBE.
4. Proof of DBE certification.
5. Written confirmation that the DBE will participate.

6. If the contract goal is not met, evidence of good faith efforts must be provided.

If FCOG determines that the apparent successful bidder has failed to meet the DBE requirement of the solicitation or to document good faith efforts, FCOG will notify the bidder that they have 10 days to request administrative reconsideration. As part of this reconsideration the bidder will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The determination of the reconsideration will be made by the FCOG Executive Director or Deputy Director. The bidder will be offered the opportunity to meet with the reconsideration official to discuss the issue. A written notification will be sent to the bidder explaining the basis for the reconsideration finding. The result of the reconsideration is not appealable to Caltrans, FHWA, FTA, or DOT.

Counting DBE Participation (26.55) FCOG will count DBE participation toward overall and contract goals as provided in contract specifications for the prime contractor, subcontractor, joint venture partner with prime or subcontractor, or vendor of material or supplies (see 26.37).

Certification (26.83) FCOG ensures that only DBE firms currently certified per 29 CFR Part 26 will participate as DBE in our program. Such certification must be issued by Caltrans, FHWA, FTA, DOT, MPO, City, County, or State in accordance with 29 CFR Part 26.

The intent of this procedure is to implement the federal requirements of 49 CFR 26 as required by the Department of Transportation. Federal legislation is subject to revision and interpretation by congress and various regulatory agencies. If a conflict of wording or intent exist between this procedure and the federal regulations, the most recent amended federal statutes take precedence.