

Airport Business Diversity Conference

DBE Program Legal Challenges/Updates

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Federal Aviation
Administration



49 CFR Part 26

- *DBE* - 49 CFR Part 26: DOT DBE program for recipient contracting
 - Grant Assurance No. 37
 - 49 USC § 47113
- *ACDBE* - 49 CFR Part 23: FAA DBE program for airport concessions
 - Grant Assurance No. 37
 - 49 USC § 47107(e)



49 CFR Part 26 – Retainage Update

FAA Office of Airports' Advisory Circular 150/5370-10F
Standards for Specifying Construction of Airports

- http://www.faa.gov/documentLibrary/media/Advisory_Circular/150_5370_10F.pdf

Sponsor has three options in determining whether retainage will be withheld on federally-funded AIP project in accordance with 49 CFR 26.29



49 CFR Part 26 – Retainage Update

Option 1: Sponsor may decline to hold retainage from prime

- prohibit prime from holding retainage from subs

Option 2: Sponsor may decline to hold retainage from prime – prime may withhold from sub

- require clause obligating prime to make prompt and full payment of any retainage kept by prime to the sub within 30 days after the sub's work is satisfactorily completed

49 CFR Part 26 – Retainage Update

Option 3: Sponsor may hold retainage from prime contractors – not to exceed 10%

- pay retainage to prime based on prompt incremental acceptance of work
- require clause obligating prime to pay all retainage owed to sub for satisfactory completion of accepted work within 30 days after sponsor's payment to the prime



Program Challenges

Enforcement of DBE requirements imposed by Federal Government

- Accept federal grant funds - airport sponsor must comply with Civil Rights statutes, Executive Orders, and other federal regulations, including
 - 49 USC 47123, 47107(e), and 47113
 - 49 CFR Part 26
- Sponsors must have DBE program if awarding \$250,000 or more in AIP funds
 - 49 CFR 26.21

Program Challenges

14 CFR Part 16 Airport Enforcement Proceeding

- Proposed revisions to Part 16 [77 Fed. Reg. 13027 (March 5, 2012)]
 - Clarifies procedure for filing complaints alleging violations of Part 26 or Part 23
 - Designates decision-making authority for DBE and civil rights matters to Assistant Administrator for Civil Rights and Deputy Assistant Administrator
 - Comment period closed on June 7, 2012
- <http://www.regulations.gov/#!docketDetail;dct=FR%252BP R%252BN%252BO%252BSR;rpp=25;po=0;D=FAA-2012-0176>



Program Challenges

Sponsors

- Compliance Reviews
- Finding of noncompliance in Part 16 proceeding
 - Loss of AIP funds
 - Withhold grant funds
 - Terminate grant eligibility
 - Repay AIP funds

Program Challenges

Primes, DBEs and Non-DBE Subs

- Immediate suspension of work
- Cessation or withholding of project payments
- Investigation by the U.S. DOT OIG
- Prosecution by U.S. DOJ of the prime, DBE firm, and other parties including airport sponsor with knowledge of the fraud and deceit
 - Fines
 - Jail
- Suspension and Debarment of prime, DBE firm, and/or non-DBE
 - Listed on the Federal Government's Excluded Parties List System; not eligible to participate in Federal contracts
 - <http://epls.arnet.gov>
- DBE Monitoring Agreement
- DOT directive to Unified Certification Program (UCP) to initiate proceeding to remove DBE/ACDBE certification



Program Challenges

- Government-wide Suspension and Debarment – 2 CFR Parts 180 and 1200
 - Suspension - temporary ineligibility from Federal contracts, pending completion of an investigation or legal proceeding
 - Debarment - final determination that person/firm is not presently responsible, and debarred from all Federal contracts for up to 3 years
 - Excluded Parties List System (EPLS) - persons/firms listed as excluded or disqualified EPLS at: <https://www.epls.gov>
- DOT Suspension and Debarment Order - standards and procedures for implementing debarment, suspension, and ineligibility procedures
 - http://www.dot.gov/ost/m60/Financial_Assistance_Management_Home/Suspension_Debarment_Order_2010.pdf



Program Challenges

Certification

- Part 26 and Part 23 have some differences, including personal net worth (PNW) - pending rule change
- Control – UCP must reasonably conclude that socially and economically disadvantaged owner actually exercise control over firm's operations, management, and policy

Counting

- Credit awarded only for work performed by DBE firms with their own forces
- ACDBE counted same way

Program Challenges

Identify DBE Fraud

- Fronts - DBE firm does not perform work for participation requirements under prime contract
- Monitor contracts to verify named DBE is performing a commercially useful function and properly compensated
- Sponsors must be diligent and proactive in monitoring contracts to detect fraud
- Look for red flags

Program Challenges

Red Flags for Potential DBE Fraud Schemes

- Minority owner lacking background, expertise, or equipment to perform subcontract work
- Employees shuttling back and forth between prime contractor and minority-owned business payrolls
- Business names on equipment and vehicles covered with paint or magnetic signs
- Orders and payment for necessary supplies made by individuals not employed by minority-owned business
- Prime contractor facilitated purchase of minority-owned business
- Minority-owned business owner never present at job site
- Prime contractor always uses the same minority-owned business



Program Challenges

Report Concerns About Fraud, Waste, Abuse, or Mismanagement to OIG Hotline

- OIG Hotline - available 24 hours a day, 7 days a week
 - online complaint form: <http://www.oig.dot.gov/hotline>
 - telephone: 800-424-9071
 - fax: 540-373-2090
 - e-mail: hotline@oig.dot.gov
 - mail: USDOT Inspector General, P.O. Box 708, Fredericksburg, VA 22404-0708

Program Challenges

Recent DBE Fraud Case

- U.S. alleged DBE fraud against Anthony Allega Cement Contractor, Inc.
 - DOJ alleged Allega falsely claimed DBE performed substantial work on AIP project at Cleveland Hopkins Airport
 - DBE firm merely a pass-through used to obtain appearance of DBE participation
- Allega paid the U.S. \$500,000 to resolve allegations
- Allega entered into administrative agreement with FAA to ensure future compliance with DBE requirements
 - In lieu of suspension and debarment

Program Challenges

Pending DBE Fraud Case

- Prime and DBE indicted for conspiring to obstruct DBE program related to AIP funded residential soundproofing program for homes around Boston Logan Airport
 - Indictment alleges
 - prime claimed DBE supplied windows and doors to meet DBE goal when all parties knew that DBE was merely a pass-through and did not supply materials, incur expenses, or perform any work
 - false documents submitted by prime to Massport with DBE's concurrence
- FAA's Non-Procurement Suspending and Debarring Official suspended prime and DBE during course of criminal proceeding

Questions

