

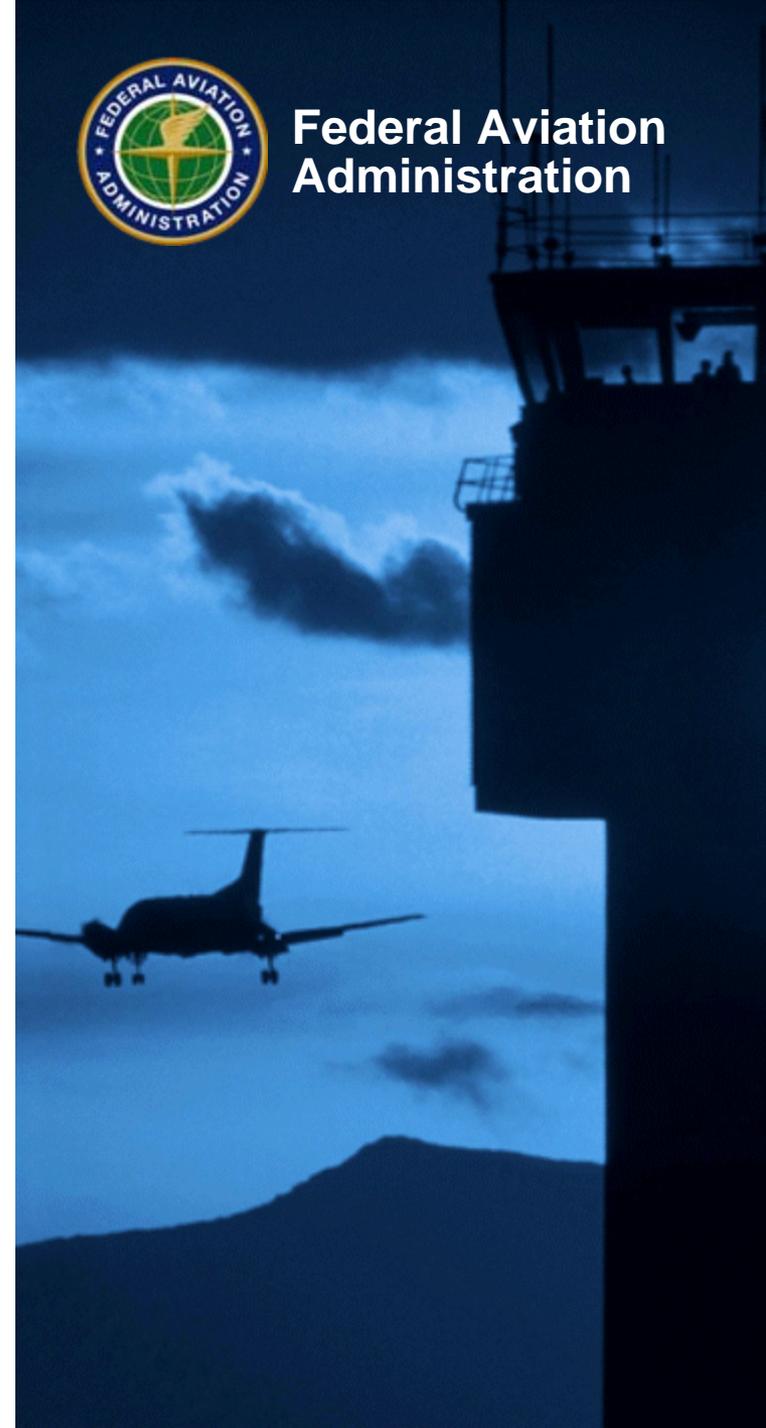


**Federal Aviation
Administration**

49 CFR Parts 26 & 23 DBE Program Overview

**2011 National Airport Civil
Rights Training Conference**

FAA Office of Civil Rights
"We are who we serve"



49 CFR Part 26



Objectives of the DBE Program

- *To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs*
- *To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts*
- *To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law*
- *To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs*



Objectives of the DBE Program

- *To help remove barriers to the participation of DBEs in DOT-assisted contracts*
- *To assist the development of firms that can compete successfully in the marketplace outside the DBE program*
- *To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs*



Who Must Have a DBE Program?

Section 26.21

FAA recipients receiving grants for airport planning or development who will award prime contracts exceeding \$250,000 in FAA funds in a Federal fiscal year.

DBE in General

- Title VI
 - Recipients prohibited from race, color, or national origin discrimination
- Landmark Supreme Court Decision
 - Adarand Constructors v. Peña, 515 U.S. 200, 235, (1995)
 - All racial classifications must pass “strict scrutiny” review
 - Must serve a Compelling governmental interest
 - Must be narrowly tailored to further that interest

Part 26 – Western States Paving

- **Western States Paving v. Washington State DOT, et al., 407 F3d 983 (9th Cir, May 9, 2005)**
- **9th Circuit panel held that DOT's Part 26 contracting regulations were constitutional, but found that the Washington State DOT DBE program was unconstitutional as applied**
- **The court concluded that Washington State DOT's DBE program was not narrowly tailored because the evidence of discrimination supporting its application was inadequate, including that Washington State DOT had not conducted statistical studies to establish the existence of discrimination in the highway contracting industry that were completed or valid**

Part 26 – Western States Paving

- **Guidance applicable only to recipients in the 9th Circuit for Part 26 DBE Programs**
 - Must have evidence to support Race-Conscious Goal or
 - Submit Race-Neutral Program
 - **Gather necessary evidence, may include disparity or availability study and**
 - **Develop action plan for a disparity/availability study**

Regulations

- **49 CFR Part 26:**
 - DOT (i.e. FHWA, FTA, & FAA) DBE program for recipient contracting
- **49 CFR Part 23:**
 - FAA DBE program for airport concessions

Contracting - 49 CFR Part 26

- FAA distributes about \$3.4 billion annually in AIP grants to help finance airport projects
- Also \$1.1 billion in ARRA funds, to which DBE applies
- Approximately 3,300 airports are eligible for AIP grants for airport planning & development
- FAA has a policy of ensuring that socially and economically disadvantaged businesses are able to participate in contracting opportunities created by AIP grants



Personal Net Worth (PNW)

- **\$1.32 million PNW cap, except**
 - Equity in owner's primary residence
 - Assets invested in the business

Certification

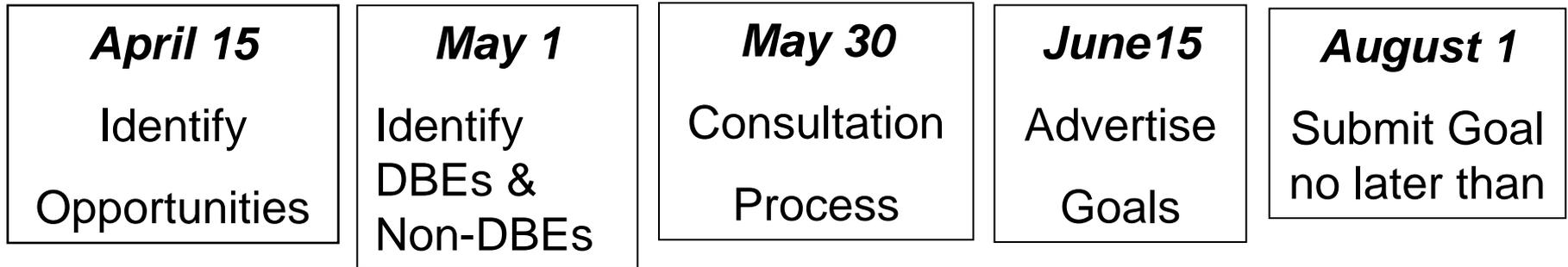
- In addition to meeting DBE requirements, firms must also meet separate SBA small business size standards for their type of business
- Certain groups are rebuttably presumed to be socially and economically disadvantaged. These include Native Americans, Blacks, Hispanics, Asian-Pacific Americans, Subcontinent Asian Americans, & Women
- Each disadvantaged individual seeking certification for his or her firm must submit a notarized certification of disadvantage and a statement of personal net worth

Certification

- Ownership and control requirements provide detailed, specific, clarified standards for determining whether to certify firms
- Each state has a Unified Certification Program (UCP) that certifies DBEs for all DOT recipients in their state



Sample Goal Submittal Timeline



49 CFR Part 23



General Provisions

- ACDBE – A for-profit business that:
 - Is at least 51% owned by a socially and economically disadvantaged individual(s)
 - The management & daily operations of the firm are controlled by the socially and economically disadvantaged individual(s) who own it
- Concessions include businesses, management contracts, goods and services, and advertising
- Anti-fraud reporting – incorporates Part 26 requirements for DBEs, like no change affidavit, requirement to report material changes regarding PNW, size, control etc, and requirements for recipients to have monitoring and compliance mechanisms
- Must include levels of effort and resources devoted to this (i.e. frequency of review of records, on-site reviews, etc.)

Other Provisions

- DBE statute does not preempt state or local law
 - State or local law, policy, or regulation must be administered separately from ACDBE program
 - If conflict exists, the requirements of 49 CFR Part 23 will prevail
- Rule requires a firewall between ACDBE program and local requirements to avoid subjecting Federal program to constitutional challenge

Size Standards

- **\$52.47 million in gross receipts for most ACDBE firms**
 - *Averaged over previous three fiscal years*
 - *\$69.97 million for car rentals*
 - *\$1 billion in assets for banks*
 - *1,500 employees for pay phone companies*
 - *350 employees for automobile dealers*
 - *Expect an inflationary adjustment*

ACDBE Program Provisions

- **Goal submission due dates staggered over three years**
 - Primary Airports must submit revised ACDBE goals on the following schedule:
 - Large/medium Hubs – 10/01/11
 - Small Hubs – 10/01/12
 - Non-Hub Primaries – 10/01/10
 - and every three years on October 1st thereafter

ACDBE Program Provisions

- **Administrative Provisions**
 - Policy Statement
 - Liaison Officer
 - Direct access to chief executive officer
 - May manage both DBE & ACDBE Programs
 - ACDBE Directory
 - Certification of ACDBEs
 - Statement of nondiscrimination in ACDBE Program

ACDBE Program Provisions

- **Non-Discriminatory Participation**
 - Sponsor must list steps to be taken
 - Include race neutral measures
 - Require good faith efforts to meet ACDBE goals
 - No set-asides or quotas
- **Reporting**
 - Sponsors must submit annual ACDBE participation Reports each March 1st

ACDBE Program Provisions

- **Certification**
 - Except for size and PNW standards, the eligibility criteria of Part 23 for ACDBEs are almost identical to those of Part 26 for DBEs
 - Certification of ACDBEs and all other DBEs are handled by the UCP in each state
 - UCPs/Airports had up to three years to review certifications of current ACDBEs to ensure that they met Part 23 criteria
 - Firms required to submit personal net worth statements, certification of disadvantage and affidavit of no change

ACDBE Program Provisions

- **Overall Goal Calculation for Concessions Other Than Car Rentals**
 - Amount of Goal
 - Methodology
 - Consultation
 - Breakout of Race-Neutral and Race-Conscious



ACDBE Program Provisions

- **Overall Goal Calculation for Car Rentals**
 - Amount of Goal
 - Methodology
 - Consultation
 - Breakout of Race-Neutral and Race-Conscious

Airport Monitoring and Enforcement

- **ACDBE programs must include the monitoring and compliance measures the airport will use, including *levels of effort and resources* devoted to this task**
- **Describe the frequency of reviews or records, on-site reviews of concession workplaces, etc., to determine whether ACDBEs are actually performing the work for which credit is being claimed**
- **This type of oversight is crucial to combating ACDBE fraud, and FAA will closely scrutinize this aspect of ACDBE programs**

Airport Monitoring and Enforcement

- **Airport Sponsor subject to compliance reviews by Office of Civil Rights**
 - 14 CFR Part 16 Airport Enforcement Proceeding
 - Withhold grant funds
 - Terminate grant eligibility
 - DOJ referral for DBE/ACDBE Program Fraud
 - Jail
 - Fines
 - Suspension and Debarment
 - Listed on the Federal Government's Excluded Parties List System; not eligible to participate in Federal contracts
 - DOT directive to UCP to initiate proceeding to remove DBE/ACDBE certification

Questions?

