

DBE and ACDBE Goal Setting



**Federal Aviation
Administration**

Office Of Civil Rights

*ACHIEVING SAFETY
THROUGH DIVERSITY*

Presented by: Nancy Cibic

**6th Annual FAA National Civil Rights
Training Conference for Airports**

August 2015



26.45 Goal Setting and Implementation

Purpose of Overall DBE Goal

Approaches to Calculate Goal

8 Minimum Requirements

Purpose of Overall ACDBE Goal

Accountability Requirements



Purpose of Overall Goal

Establish **Anticipated Amount** of DBE Participation on DOT-Assisted Projects

- FAA Recipients: annual goal reviewed every 3 years
- FTA Recipients: annual goal reviewed every 3 years
- FTA TVMs: annual goal reviewed each year
- FHWA Recipients: annual goal reviewed every 3 years

Purpose of Overall

The percentage represents the percentage of DBE participation that would be **expected absent the effects of current and past discrimination**

Overall Goal and Project Goal

Same Substantive and Procedure
Requirements

Project Goals

- 26.45 (e)(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects.

Project Goals

- 26.45 (e) (3)
- A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.
- A project goal covers the entire length of the project to which it applies.

- The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.



- Must Follow USDOT's "Tips for Goal-Setting in the DBE Program" [Tips for Goal-Setting in DBE Program](#)
- Operating Administrations (OAs) reviewing goals Using Same Guidance

26.45 (f) (4) Overall Goal

- OA reviews Recipient's proposed overall goal and may adjust the goal or require the Recipient to adjust the goal if it believes the goal has not been correctly calculated or the methodology is inadequate
- Recipient may operate under proposed goal prior to OA approval

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5

Approaches to Calculate the DBE

5 Approaches to Calculate the DBE Goal

1

- (1) Use DBE Directories and Census Bureau Data to determine the number of ready, willing, and able DBEs in your market.

2

- *Use a bidders list.* Determine the number of DBEs that have bid or quoted (successful and unsuccessful) on your DOT-assisted prime contracts or subcontracts in the ~~previous year~~ past three years. Determine the number of all businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all businesses to derive a base figure for the relative availability of DBEs in your market. When using this approach, you must establish a mechanism (documented in your goal submission) to directly capture data on DBE and non-DBE prime and sub contractors that submitted bids or quotes on your DOT-assisted contracts.

3

- (3) Use data from a disparity study

4

- (4) Use the goal from another DOT recipient in the same or substantially similar market.

5

- (5) *Alternative methods.* Except as otherwise provided in this paragraph, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market. The exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of subparagraph (2), is not an acceptable alternative means of determining the availability of DBEs.

26.45 (c) (5) Identify Method Selected

The exclusive use of a list of prequalified contractors or plan holders is not an acceptable alternative means of determining the availability of DBEs



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Minimum Requirements Included in each Method

Goal Methodology

8 Minimum Requirements

1. List of FAA-assisted Contracting Opportunities
2. Geographic Market Area
3. Step 1 Base Figure
4. Sources
5. Step 2 Adjustment
6. Race-Neutral/Race-Conscious Breakdown
7. Meaningful Consultation
8. Proof of Publication

1. FAA-Assisted Contracting Opportunities

ALL FAA-Assisted Activities that include Possible Contracting Opportunities

Assign Appropriate NAICS Code for Contracting Opportunities

2. Geographic Market Area

- Determine Relevant Geographic Market Area (GMA): Geographic distribution of contractors and subcontractors and area in which contracting dollars are spent
- Note: relevant Market Area may not be the same State geographic boundaries

2. Geographic Market Area

GMA: 2009 – 2014			
	State Dollars	Total Dollars	Representative State Percentage
Geographic Distribution of Participating Prime Contractors	\$727,048,359	\$779,140,546	93.31%
Geographic Distribution of Participating Subcontractors	\$113,513,436	\$151,557,115	74.91%
Total State Market %	\$840,561,795	\$930,697,661	90.32%

3. Step 1: Base Figure



Ready!



Willing!



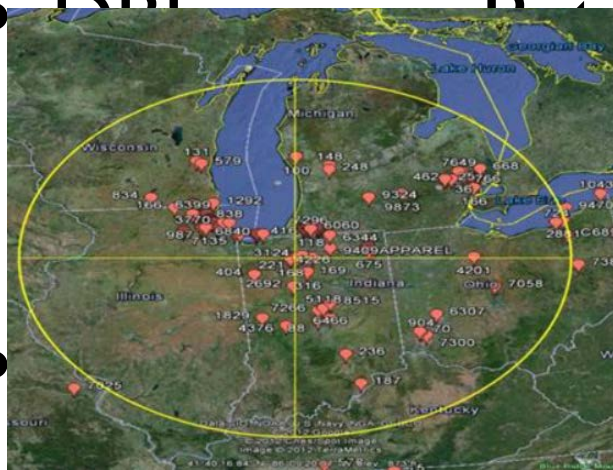
Able!

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Potential DBEs All other
Geographic Market Area

NAICS Codes or Other Work
Category

Willing to Comply

3. Step 1: Base Figure Census & DBE Directory

Determine number of ready, willing, and able
DBEs from DBE Directory

= Base Figure

Use Census Bureau County Business Pattern
(CBP) database to determine number of all
ready, willing, and able businesses available
in your market performing work in same

NAICS codes [US Census Bureau Website](https://www.census.gov)

3. Step 1: Base Figure Bidders List Method

- 49 CFR 26.45(c)(2): Acceptable only if you have a method of collecting data on:
 - ALL businesses, successful OR unsuccessful, that have bid or quoted on prime or subcontracts during the previous three or one year period
 - ALL DBE and non-DBE subcontractors that submitted bids or quotes during time period.

3. Step 1: Base Figure Bidders List Method

10 DBEs bid or quoted
on prime or
subcontracts

_____ = 10.00 % Base Figure

100 Total Firms bid
or quoted on prime
or subcontracts

3. Step 1: Base Figure Disparity Study

A disparity study typically yields best data available

If you have conducted a disparity study in market area and choose another method, explain why

3. Step 1: Base Figure Potential DBEs and ACDBEs

- Supplement certified firms list
 - Minority and women-owned business lists
 - Census data on minority and women-owned businesses in market area
- Adequate Outreach Needed to Encourage Firms to become Certified



3. Step 1: Base Figure Disparity Study

Weighting by Work Type

- Provides a more narrowly-tailored model of availability
- Weights used are proportion of dollars spent within each industry: resulting percentage is more heavily influenced by availability in industries where more dollars are spent
- May use NAICS, internal work codes, etc.

3. Step 1: Base Figure Weighting

- Decide which work types best represent your DOT-assisted contracts (NAICS Codes)
- Tally the dollars spent in each work type category as a percentage of the total contract dollars spent
- Assign work types to each DBE and non-DBE firm

Weighting Example: DOT contracts primarily in Trucking, Engineering/Design, and Construction:

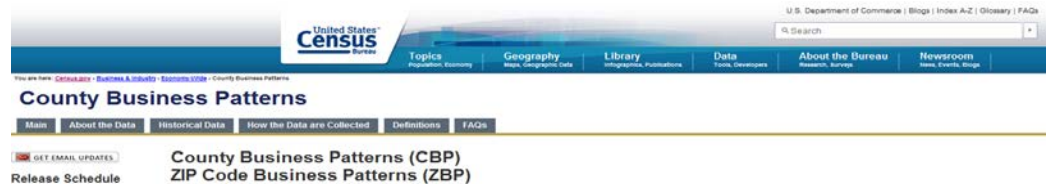
Industry	% of Dollars (weight)	DBEs	Non-DBEs	Weighted %
Trucking	5.00%	1	18	0.28%
Engineering/Design	5.00%	1	17	0.29%
Construction	90.00%	8	65	11.08%
Total	100.00%	10	100	11.65%

4. Identify Sources

DBE Directory



US Census Data



FAA DBE Connect



Supplemental Sources

5. Step 2 Adjustment

Recipient must examine all available evidence and determine what adjustments, if any, are necessary

It is not necessary to make a Step Two adjustment but must include explanation



5. Step 2 Adjustment Median Past DBE Participation (MPP)

Use DBE participation data from past 3 to 5 years to demonstrate capacity (percentages)

If MPP figure is very similar to Step One base figure, should not make any adjustment for past participation

MPP Example

1. Tally total DBE achievement percentage for 5 years.

	Total DBE Achieved (RC+RN)	Total Contract Amt	Total DBE %
2010	\$750.00	\$5,000.00	15.00%
2011	\$480.00	\$4,000.00	12.00%
2012	\$200.00	\$1,000.00	20.00%
2013	\$240.00	\$6,000.00	4.00%
2014	\$360.00	\$6,000.00	6.00%

MPP Example

2. Choose median (not average) percentage:

2013	4.00%
2014	6.00%
2011	12.00%
2010	15.00%
2012	20.00%

3. Average MPP % with Base Figure %:

$$\frac{\text{BF (11.65\%)} + \text{MPP (12.00\%)}}{2} = \text{Adjusted BF } 11.83\%$$

5. Step 2: Adjustment Other Evidence

Information from disparity studies

Lack of access to financing/bonding

Statistical employment data

Other data affecting likely DBE
participation—drastic changes in the economy



6. 26.45 & 26.51 Race-Neutral/Race-Conscious Breakdown

Projection of Race-Neutral and Race-Conscious Participation

Maximum Feasible Portion of Overall Goal using Race Neutral Measures

- ☐ Specify which race neutral measures will be implemented

Must Establish Contract Goals to Meet Remaining Portion of Goal

Race Conscious Race Neutral

- **Race-conscious (RC)** is a conscious action to achieve DBE participation
 - DBE contract goal = RC
- **Race neutral (RN)** is a measure that can be used to assist all small businesses
 - DBE prime contractor participation
 - DBE participation obtained without a DBE contract goal
 - Overachievement of DBE goals

RN Measures

- ***Examples***
- Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitates DBE, and other small businesses, participation
- Providing assistance in overcoming limitations such as inability to obtain bonding or financing
- Providing technical assistance and other services
- Carrying out information and communications programs on contracting procedures and specific contract opportunities
- Implementing a supportive services program for DBE's and other small businesses

RN Measures

- Providing services to help DBE's and other small businesses
- Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low
- Ensuring distribution of DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors
- Assist DBE's and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media

Race-Neutral Projection Example

- Tally total RN DBE achievement percentage for 5 years.

	Race-Neutral DBE Amt	Total Contract Amt	RN DBE %
2010	\$100.00	\$5,000.00	2.00%
2011	\$200.00	\$4,000.00	5.00%
2012	\$30.00	\$1,000.00	3.00%
2013	\$420.00	\$6,000.00	7.00%
2014	\$300.00	\$6,000.00	5.00%

Race-Neutral Projection Example

2. Choose median RN percentage:

2010	2.00%
2012	3.00%
2011	5.00%
2014	5.00%
2013	7.00%

3. Apply to Adjusted Base Figure for final Goal:

$$\begin{array}{rcl} \text{Adj. BF: } 11.65\% & = & 6.65\% \text{ Race-Conscious} \\ & & 5.00\% \text{ Race-Neutral} \end{array}$$

6. Race-Neutral Measures

May Benefit DBEs **and** other Small Businesses

Determine the Small Business Needs within your Geographic Area

Incorporate Race-Neutral Measures that meet the Needs of **your Small Business Community**

6. Race-Conscious Measures

9th Circuit Recipients

Alaska, Arizona, California, Hawaii, Idaho, Montana,
Nevada, Oregon and Washington State

Must Examine All Available Evidence of Discrimination

- ☐ Conduct a disparity/availability study
- ☐ Evaluate the study of a similarly situated recipient
- ☐ Narrowly tailored use of contract goals -- waiver



6. Race-Conscious Measures

9th Circuit Recipients

Alaska, Arizona, California, Hawaii, Idaho, Montana,
Nevada, Oregon and Washington State

- **Include Evidence with Goal Methodology**
- *Western States Paving Co. v. Washington Dept. of Transportation*, 407 F. 3d 983 (9th Cir. 2005)

7. Meaningful Consultation

Small Business Community and Stakeholder Engagement

- ☐ minority organizations, women's groups, **and** general contractor groups
 - ☐ scheduled, direct, **and** interactive exchanges
 - ☐ DBE and non-DBE availability
 - ☐ Effects of discrimination
 - ☐ Efforts to establish level playing field

7. Meaningful Consultation

Must submit evidence of public participation

- ☐ Comments/feedback received
- ☐ Persons/organizations contacted
- ☐ Meetings held



7. Meaningful Consultation

Stakeholder meetings **must occur before** you are required to submit your methodology to the OA

Recipient **may not implement** the proposed goal until it has **complied with this requirement**



8. Proof of Publication

Must Post on Official Internet Webpage

May Post on other Media Outlets

☐ **Must allow 30 day public comment period**



Goal Setting and Implementation

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8 Minimum Requirements

Purpose of Overall ACDBE Goal

Accountability Requirements



Purpose of Overall ACDBE Goal

- Ensure nondiscrimination
- Create level playing field
- Ensure that the ACDBE program is narrowly tailored
- Ensure that only eligible firms participate as ACDBEs
- Remove barriers to the participation of ACDBEs
- Provide appropriate flexibility to airports in establishing and providing opportunities for ACDBEs

5

Approaches to Calculate the ACDBE Goal

Two ACDBE Goals

- Separate goals
- Goal for car rental
- Goal for other than car rental concessions
 - If annual concession revenue exceeds \$200,000 for each category separately



ACDBE – Step 1

Base Figure

Five examples of approaches to use:

- (1) DBE Directories and Census Bureau Data
- (2) Active Participants List
- (3) Disparity Study
- (4) Goal of another recipient
- (5) Alternative methods

Determine Base of ACDBE Goal

Car Rentals

- The base for your goal is the **total gross receipts** of car rental operations at your airport.
- You do not include gross receipts of other concessions in this base.



ACDBE – Car Rental Goal

Except in the case where you use the alternative goal approach of § 23.51(c)(5)(ii),

- *If all or most of the goal is likely to be met through purchases by car rental companies of vehicles or other goods or services from ACDBEs, so you structure the goal entirely in terms of purchases of goods and services.*
- *Calculate your car rental overall goal: \$\$ of such purchases **divided by** estimated \$\$ value of all purchases to be made by car rental companies.]*

Car Rental Goals

- Do not mix/divide goods and services purchases by gross receipts (apples and oranges.)
- Divide gross receipts by gross receipts or goods and services by goods and services.

Car Rental ACDBE Goals

- Recipient's have enforcement provisions in their contracts with the car rental firms.
- Recipient's should point to the current regulations to show the car rental companies what is required.
- Car rental goals may be based on outreach
 - *purchase of goods and services from ACDBE or potential/ACDBE firms.*

ACDBE Car Rental Goal

- The Recipient's compliance with all requirements of this part is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

ACDBE – Base for Other Than Car Rental Goal

- The base for your goal is the **total gross receipts** of concessions at your airport.
- **Does not include:**
 - gross receipts of car rental operations
 - dollar amount of management contract or subcontract with a non-ACDBE and gross receipts of business activities to which a management or subcontract with a non-ACDBE pertains
 - Any portion of a firm's estimated gross receipts that will not be generated from a concession

ACDBE Non-Car Rental Goal

- See slides 16-34 (DBE goals)



ACDBE - Step 2 Adjustment: Things to Consider

- Current capacity of ACDBEs to perform work in your concessions program, as measured by the volume of work ACDBEs have performed in recent years; and
- Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure.




ACDBE Step 2 Adjustment to Base Figure

- If using goal of another recipient:
 - Adjust for differences in your market area and your concessions program

ACDBE Step 2 Adjustment to Base Figure

- Consider evidence from related fields that affect opportunities for ACDBEs to form, grow and compete, including:
 - (i) Statistical disparities in ability of ACDBEs to get financing, bonding and insurance required to participate in your program;
 - (ii) Data on employment, self-employment, education, training and union apprenticeship programs



ACDBE - Step 2 Adjustment to Base Figure, *cont'd.*

- Continuing effects of past discrimination?
 - Must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.



ACDBE – Info to Include with Overall Goal Submittal

- Description of methodology used to establish goal, including base figure and evidence with which it was calculated, as well as:
 - adjustments made to base figure and evidence relied on for adjustments
 - summary listing of relevant available evidence in jurisdiction, and explanation of how you used that evidence to adjust base figure
 - projection of portions of overall goal you expect to meet through R/N and R/C, respectively

ACDBE – Submittal Process

- No requirement to obtain prior FAA concurrence with overall goal (i.e., with the number itself), **BUT**:
 - If FAA's review suggests that overall goal has not been correctly calculated, or that method for calculating goals is inadequate, the FAA may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

ACDBE – Submittal Process

- Need additional time?
 - Request approval of the FAA Administrator for an interim goal and/or goal-setting mechanism. Such a mechanism must:
 - (1) Reflect the relative availability of ACDBEs in your local market area to the maximum extent feasible given the data available to you; and
 - (2) Avoid imposing undue burdens on non-ACDBEs.



ACDBE Advertising Contracts

- How to count ACDBE participation in a transaction involving advertising goods or services
 - Determine in what capacity the ACDBE is performing (e.g., prime concessionaire, joint venture partner, sub-concessionaire, lessee, supplier or contractor) and the manner in which the ACDBE is compensated (e.g., gross receipts earned versus fees or commission for services provided).

ACDBE Advertising Contracts

- If the ACDBE is a prime concessionaire, the ACDBE's participation is counted based on the gross receipts earned by the ACDBE 49 C.F.R. § 23.55(b).
- If the ACDBE is a sub-contractor or sub-concessionaire to a non-ACDBE and the ACDBE's compensation under the agreement is based on gross receipts earned by the ACDBE, **count only the portion of the gross receipts earned by the ACDBE under its sub-agreement.** 49 C.F.R. § 23.55(c).

ACDBE Advertising Contracts

- If the ACDBE's compensation is solely based on fees and commissions, the ACDBE's participation for a bona fide service is counted based on the fees and commissions paid as provided. 49 C.F.R. § 23.55(e).

ACDBE Advertising Contracts

Joint Ventures

- Recipients must first determine that the ACDBE joint venture is functioning in a manner consistent with the ACDBE Joint Venture Guidance

http://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/

- See 49 C.F.R. § 23.3

ACDBE Advertising Contracts

Joint Ventures

- **If the ACDBE firm is participating as a direct owner of the advertising concession through a joint venture arrangement, partnership, sublease, licensee, franchise, or other arrangement in which the ACDBE owns or controls all or some part of the concession and consequently shares in the profits and risks of the concession, the recipient counts the total value of gross receipts the ACDBE earns pursuant to the concession agreement. 49 C.F.R. § 23.55(b) – (d).**

ACDBE Advertising Contracts

- If the **ACDBE** firm is a service contractor to the concessionaire and is compensated based on fees or a commission, the recipient counts the fees or commissions charged by the **ACDBE** that are reasonable and not excessive as compared with fees customarily allowed for similar services.

ACDBE Advertising Contracts

- If the ACDBE provides a bona fide service other than selling advertising, count the entire amount of fees charged by the ACDBE. 49 C.F.R. § 23.55(e).

ACDBE Advertising Contracts

- If the ACDBE is a supplier of goods count the cost of goods supplied by the ACDBE firm. 49 C.F.R. 23.55(g) – ((h)).
- This should not be confused with costs or goods incurred in connection with renovation, repairs, or a construction concession commonly referred to as “build-out” costs.
- 49 C.F.R. 23.55 (k). Do not count costs incurred in connection with the renovation, repair, or construction of a concession facility (..“build-out”).

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8 Minimum Requirements

Purpose of Overall ACDBE Goal

Accountability Requirements

26.47 (c) Accountability Report (Shortfall Requirements)

- 26.47 (c) (1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year
- (2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year

26.47 (c) Accountability Report (Shortfall Requirements)

- FAA OEP/CORE Airport Recipient that does not meet its overall DBE goal **in any given year** must submit written analysis to OA of why the goal was not met and corrective measures to be taken
- U.S. OEP/CORE Airports
http://aspmhelp.faa.gov/index.php/Core_30

26.47 (c) Accountability Report (Shortfall Requirements)

- Each Shortfall Analysis should, at a minimum, include:
- difference between overall goal and DBE and/or ACDBE participation achieved;
- difference between race-neutral projection and race-neutral participation achieved
- difference between race-conscious projection and the race-conscious participation achieved

26.47 (c) Accountability Report (Shortfall Requirements)

- **Specific and credible reasons for the shortfall; and**
- **Corrective measures tied to each specific reason for the shortfall.**

Accountability Report (Shortfall Requirements)

Timeframe: **December 29** of respective year
(90 days after the end of the fiscal year)

OA Approves: In Compliance

OA May Require: **Modifications** to
overall goal methodology

- Changes to RC/RN projections
- Additional RC or RN measures



DBE Shortfall Submission Dates: What If...

Your FY 2014-2016 is 10% Goal

FY 2014: Achieved 15% DBE Participation = No
Shortfall Submission Required

FY 2015: Achieved 8.7% DBE Participation = Shortfall
Submission Required and due on December 29, 2015

FY 2016: Achieved 5.9% DBE Participation = Shortfall
Submission Required and due on December 29, 2016

Drafting a Shortfall Analysis:

❑ Shortfall Percentage



Drafting a Shortfall Analysis:

- ☐ Shortfall Percentage
- ☐ **Race-Conscious/Race-Neutral Breakdown**



Drafting a Shortfall Analysis:

- ☐ Shortfall Percentage
- ☐ Race-Conscious/Race-Neutral Breakdown
- ☐ **Race-Neutral Measures**

**Race Neutral
Measures**



Drafting a Shortfall Analysis:

- ☐ Shortfall Percentage
- ☐ Race-Conscious/Race-Neutral Breakdown
- ☐ Race-Neutral Measures
- ☐ **Projects undertaken during the FY**



Drafting a Shortfall Analysis:

- ☐ Shortfall Percentage
- ☐ Race-Conscious/Race-Neutral Breakdown
- ☐ Race-Neutral Measures
- ☐ Projects undertaken during the FY
- ☐ **DBE participation on these projects**



Drafting a Shortfall Analysis:

- ☐ Shortfall Percentage
- ☐ Race-Conscious/Race-Neutral Breakdown
- ☐ Race-Neutral Measures
- ☐ Projects undertaken during the FY
- ☐ DBE participation on these projects
- ☐ **Reasons for the Shortfall**



Drafting a Corrective Action Plan: Elements

- ❑ **Specific Steps** to Achieve Goal in **Upcoming Fiscal Year**
- ❑ **Milestones** for Implementing these Steps

Goal Shortfall Reasons (Examples)

- A significant percentage of contract dollars are awarded based on good faith efforts (GFE)
- DBEs do not have enough or the correct insurance and/or bonding capacity
- Prime contractors do not give enough time for DBEs to submit quotes prior to when bids are due
- DBEs do not use information that is available to improve their ability to be competitive, i.e. pre-bid meetings, past contract reviews, free access to plans/drawings, debriefings, etc.

Goal Shortfall Corrective Actions and Milestones (Examples)

- Continue outreach efforts by partnering with other agencies and organizations to expand the number and variety of potential DBEs to become certified (**ongoing**)
- Targeted outreach event to construction contractor and trucking organizations to pursue DBE certification (**due by 4/30/16**)
- Instruct DBEs of the criteria/expectations for airport projects and facilitate opportunities for business training and development (**due by 6/15/16**)
- Encourage Primes to allow DBEs sufficient time and resources to provide a quote before the bid due date; (**on-going**)

Goal Shortfall Corrective Actions and Milestones (Examples)

- Continue collaboration with UCP partners and other internal/external resources to identify ways to address DBEs' inability to meet bonding and insurance requirements on solicitations (**ongoing**)
- Educate and encourage DBEs to utilize resources to increase competitiveness in the market place by attending pre-bid meetings, request unsuccessful debrief meetings, review: drawings; plans; and specifications of a project to better respond to Primes requests for quote, etc. (**ongoing**)



Accountability Report (Shortfall Requirements)

Recipient is in non-compliance if **ANY** of the following occur:

- Does not submit analysis and corrective actions to OA timely
- OA disapproves of analysis or corrective actions
- Does not fully implement corrective actions or OA's imposed conditions for acceptance

Federal Aviation Administration-Office of Civil Rights

http://www.faa.gov/about/office_org/headquarters_offices/acr/

Office Of Civil Rights

ACHIEVING SAFETY
THROUGH DIVERSITY



**Federal Aviation
Administration**