

# **Encouraging Participation by Minority and Women-Owned Businesses in Transportation Contracting:**

## ***Recommended Practices for State Departments of Transportation***

### **Final Report**

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**Joint Transportation Committee**

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The Washington State Legislature directed the Joint Transportation Committee (JTC) to identify best practices for minority and women-owned business contracting related to the transportation sector:

*“The joint transportation committee must study the issues surrounding minority and women-owned business contracting related to the transportation sector. The study should identify any best practices adopted in other states that encourage participation by minority and women-owned businesses. The joint transportation committee, with direction from the executive committee, may form a legislative task force at the conclusion of the study to help to inform the legislature of any best practices identified from other states that encourage minority and women-owned businesses’ participation in the transportation sector.”* (Legislature, 2016)

This report explores government contracting in the transportation sector related to the federal Disadvantaged Business Enterprise (DBE) program, a mandated program for all states that accept federal transportation monies. It lists state practices the DBE program administrators have found effective along with those the Federal Highway Administration (FHWA) has identified as recommended practices for complying with the federal DBE program. These practices address several broad categories: Business Development; Outreach; Public Reporting; and State DOT Program Management. This report does not independently evaluate these practices.

As the Legislature’s directive was to identify best practices adopted in other states, this report does not evaluate the DBE program in Washington State.



## Table of Contents

<b>INTRODUCTION</b> .....	1
<b>EXECUTIVE SUMMARY</b> .....	2
<b>OVERVIEW OF THE FEDERAL HIGHWAY DBE PROGRAM</b> .....	3
<b>DBE program objectives</b> .....	3
<b>DBE program requirements</b> .....	4
<b>DBE certification requirements</b> .....	4
<b>Setting state DBE participation goals</b> .....	5
<b>Assistance provided to small and DBE businesses</b> .....	6
<b>Recent federal DBE program audits</b> .....	7
<b>Context for the Washington State DBE Program</b> .....	8
<b>Framework for DBE program success</b> .....	10
<b>Recommended Practices by DBE Program Category</b> .....	12
<b>FEDERAL ASSISTANCE PROGRAMS FOR SMALL BUSINESSES IN GOVERNMENT CONTRACTING</b> .....	16
<b>Navigating government contracting</b> .....	16
<b>Federal small business assistance programs</b> .....	16
<b>Effective federal assistance program practices</b> .....	16
<b>STATE MINORITY BUSINESS ENTERPRISE PROGRAMS</b> .....	18
<b>DEFINITIONS</b> .....	19
<b>ACKNOWLEDGEMENTS</b> .....	20
<b>REFERENCES</b> .....	21



## **INTRODUCTION**

The Washington State Legislature directed the Joint Transportation Committee (JTC) to identify best practices for minority and women-owned business contracting related to the transportation sector: *“The study should identify any best practices adopted in other states that encourage participation by minority and women-owned businesses.”* (Legislature, 2016)

This report explores government contracting in the transportation sector related to the federal Disadvantaged Business Enterprise (DBE) program, a mandated program for all states that accept federal transportation monies. It lists state practices the DBE program administrators have found effective along with those the Federal Highway Administration (FHWA) has identified as recommended practices for complying with the federal DBE program. These practices address several broad categories: Business Development; Outreach; Public Reporting; and State DOT Program Management. This report does not independently evaluate these practices.

As the Legislature’s directive was to identify best practices adopted in other states, this report does not evaluate the DBE program in Washington State.

This report also includes information on general government agency best practices related to encouraging participation by small businesses in government contracting. By definition, in order to be eligible for DBE certification, a minority or woman-owned business must meet the small business definition set by the US Small Business Administration (SBA).

While the federal DBE program only addresses projects funded with federal funds, some states also have complementary programs for projects paid for with state funds, which offer assistance to small businesses and set minority and women-owned business state participation goals. Those programs are briefly described in the report. However, because these state programs do not have identified best practices, they are not explored in depth.

### **Report methodology**

The information contained in this report was obtained through staff interviews, staff participation in the AASHTO Subcommittee on Civil Rights biennial conference, and a review of online and print resources from various sources, including:

- USDOT’s Office of Civil Rights
- FHWA’s offices in Washington State and Washington, DC
- AASHTO’s Subcommittee on Civil Rights, American Association of State Highway Transportation Officials
- USDOT’s Northwest Small Business Transportation Resource Center (SBTRC), Office of Small and Disadvantaged Business Utilization (OSDBU)
- Procurement and Technical Assistance Center (PTAC) of Washington State, a federal Department of Defense small business program
- National Conference of State Legislatures (NCSL)

Details on information sources used in this report can be found in the References section at the end of this report.

## EXECUTIVE SUMMARY

Since 1983, the federal government has required states<sup>1</sup> receiving federal transportation funds to ensure a portion of those funds are spent by Disadvantaged Business Enterprise (DBE) firms.

Each state is required to have an approved DBE plan, with specified goals for DBE participation. FHWA provides up to a total of \$10 million annually in funding to be dispersed among all state DOTs for training, technical assistance and services to DBE firms. The funding is tied to the program's aim to support the DBE businesses' development so that they may reach the point of sustainability and compete for work outside the DBE program. State DOTs must annually submit proposed DBE Supportive Services Statements of Work (SOWs) to FHWA for review and approval. The State's program must include a Business Development Program element.

Each state has its own program to certify businesses as DBE, following guidelines established by USDOT. A DBE certified firm must be: independently owned by person(s) who are deemed socially and economically disadvantaged, with daily operations controlled by the eligible owner(s); have less than \$23.98 million in gross receipts over the previous three years; and a personal net worth of less than \$1.32 million.

Neither the USDOT nor FHWA have established best practices for states to follow in implementing federal DBE requirements. A 2013 audit by the USDOT Inspector General recommended that USDOT establish best practices for states to follow, and other recommendations to improve federal administration of the program. In response to this recommendation, FHWA is currently in the process of identifying "promising practices" that are used successfully in at least one state to meet or exceed the goals of the DBE program.

The American Association of State Highway Transportation Officials (AASHTO) Subcommittee on Civil Rights (Subcommittee) works to "research and evaluate the effectiveness of external civil rights programs including (the) Disadvantaged Business Enterprise" program in its member states. The Subcommittee is comprised of state DOT executives, DBE program administrators and USDOT liaisons. While the Subcommittee does not have a comprehensive list of best practices for each aspect of the DBE program, its biennial conference highlights essential and best practices for several program elements. Staff attended the conference in June 2016 to gather information on current practices used successfully around the country.

For purposes of clarity, the practices identified by FHWA and AASHTO's Subcommittee are grouped together by topic category and will collectively be called "recommended practices" within this report. Source information for individual practices can be found in the References section.

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<sup>1</sup> The term "state" throughout this report will typically refer to all 50 states as well as the District of Columbia and Puerto Rico.

## OVERVIEW OF THE FEDERAL HIGHWAY DBE PROGRAM

### History of the DBE Requirements in Federal Surface Transportation Acts

The first Disadvantaged Business Enterprise requirement related to federal (USDOT) transportation spending was established in 1983. It set a goal that no less than 10% of USDOT highway, aviation and transit funding be expended with DBEs. (US Congress, 1983)

In 1987, the DBE funding provision was re-authorized and amended to also create the first DBE program. (US Congress, 1987)

The DBE Program aims to increase the number of DBEs participating in USDOT-funded projects by providing support to all small businesses. However, achieving the 10% national DBE goal has not been possible without additional DBE-focused support. Therefore, another element of the DBE Program is DBE Support Services, which provide enhanced and targeted support to encourage DBE participation in USDOT funded projects. (US Congress, 2015)

Since 1987, each federal surface transportation act has included the re-authorization of the DBE spending requirement and DBE program. These DBE requirements were most recently re-authorized on December 4, 2015, in the Fixing America's Surface Transportation (FAST) Act.

All fifty states as well as the District of Columbia and Puerto Rico accept federal transportation funding for highway projects and are subject to the DBE program requirements.

**The DBE requirement for federal transportation spending was established in 1983, and set a goal that no less than 10% of USDOT highway, aviation, and transit funding be expended with DBEs. This 10% goal remains in place today.**

### **DBE program objectives**

The DBE program establishes requirements for highway, transit and airport agencies that accept federal funding.

Federal regulations state eight objectives of the federal DBE program (49 CFR 26):

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;*
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;*
- (c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;*
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;*
- (e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;*
- (f) To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.*
- (g) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and*

*(h) To provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs. (United States Congress)*

### **DBE program requirements**

USDOT's DBE program sets the following requirements for state and local transportation agencies accepting monies from FHWA, Federal Aviation Administration (FAA) or Federal Transit Administration (FTA):

- Each USDOT recipient (including state DOTs) must have an approved DBE Plan, submitted to and approved by the recipient's primary USDOT operating administration<sup>2</sup> (FHWA, FAA or FTA)
- The approved DBE Plan obligates the State DOT or local transportation agency to administer a DBE Program that complies with USDOT regulations under 49 Code of Federal Regulations (CFR) Part 26
- Key elements of the DBE Program include the following:
  - Designation of DBE Liaison Officer;
  - Signed Policy Statement;
  - DBE goals and good faith efforts;
  - Administering DBE Support Services (including the Business Development) program;
  - Contract administration procedures;
  - Reporting;
  - Program monitoring;
  - Certification;
  - Compliance; and
  - Enforcement

**The 10% federal DBE spending requirement applies to the federal Department of Transportation on a national level – and not to individual states. As such, it is not tied to the states' goal-setting decisions.**

The USDOT DBE Program aims to support utilizing DBE firms in at least 10% of federal transportation spending. However, guidance from USDOT in 2013 clarified that the 10% goal is an aspirational goal that applies to the Department of Transportation on a national level, not to individual states. Therefore, the 10% federal goal is not tied to individual states' goal-setting decisions.

### **DBE certification requirements**

A **DBE certified firm** is one that is independently owned (51% or more) by a socially or economically disadvantaged individual and where daily operations are controlled by socially and economically disadvantaged people; has less than \$23.98 million in gross receipts over the previous three fiscal years combined; and a personal net worth of less than \$1.32 million (excluding the value of the DBE business and DBE owner's primary residence as part of the net worth calculation).

Any individual in the following groups is presumed to be socially and economically disadvantaged:

- Black Americans;
- Hispanic Americans;

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<sup>2</sup> The DBE plan and goal is approved by one of three USDOT administrations; FHWA for highway funds; FTA for transit funds; and FAA for airport funds

- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian-Pacific Americans;
- Women; and
- Other minorities found to be disadvantaged by the US Small Business Administration

Additionally, others may also be eligible for DBE certification if they establish their social and economic disadvantage. One example is people with disabilities who have disproportionately low incomes and high rates of unemployment. The determination for people with disabilities is made on a case-by-case basis.

USDOT does not certify firms as DBEs. Instead, each state has its own certification program, and is responsible for determining whether applicants meet all applicable requirements. The burden of proving a business qualifies falls upon the DBE applicant.

Certification determinations are made based upon interviews, site-visits, financial reviews, resumes of past work and verified physical ownership of equipment needed for the lines of work for which the business is certified.

**Setting state DBE participation goals**

State DOTs must set an overall DBE participation goal for federal highway funds, utilizing available data in two steps:

**Step 1:** Establish an expected rate of DBE participation. This is accomplished by dividing the number of DBE firms by the total number of firms “ready, willing and able” to perform that work. For example, if the upcoming year’s projects are paving projects, the State DOT reviews the database of available DBE contractors and all contractors (including both DBEs and non-DBEs) available to perform paving projects. If there are 20 DBE contractors and 155 total contractors the rate of DBE participation that could be expected would be 12.9%:

$$\frac{20 \text{ DBE Paving Contractors}}{155 \text{ Total Paving Contractors (including DBE and nonDBE Contractors)}} = 12.9\%$$

So in this example, the State’s preliminary goal is to have 12.9% of firms involved in paving projects be DBEs.

**Step 2:** Adjust the preliminary goal using available data. The goal can then be adjusted based on several factors, such as continuing effects of past discrimination; barriers to DBE participation; known impending de-certifications or certifications of DBEs; information from a recent disparity study; etc.

In the nine states within the US Ninth Circuit Court’s jurisdiction, conducting a disparity study is mandatory. In hearing *Western States Paving v. Washington State DOT (2005)*, the US Ninth Circuit Court decided that states must demonstrate evidence of discrimination in the state’s transportation contracting industry to implement race and gender conscious measures that are part of the DBE program. FHWA issued guidance in response to this decision requiring all nine states (WA, OR, CA, ID, MT, AK, HI, AZ and NV) complete a disparity study.

The State DOT then submits its overall goal and methodology to FHWA (for highway funds), along with a plan for how the State DOT anticipates meeting this goal. The goal can be achieved through services provided to all small businesses and services provided specifically for DBE eligible businesses (“**race neutral**” means) and specific project goals for DBE certified firms’ participation (“**race conscious**” means).

Federal regulations require the State DOT to “*meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation*”. This means the State DOT must offer assistance to small businesses, to help meet this DBE goal. If the State finds that goals for DBE participation cannot be met with these race neutral measures alone, then the State must set race conscious goals on individual projects. (USDOT, 2014)

States can have exclusively race neutral programs or programs that are a combination of race neutral and race conscious means. A combination program is the most common. The type of program is determined by the State DOT every three years when developing its overall DBE goal methodology, in consultation with the state FHWA office.

The federal program mandates that states show good faith in executing the program, and doing so typically means implementing a variety of race neutral and race conscious outreach and support services that are well documented and put the state DOT on track to meeting its DBE goal. Specifically related to project contractors, “**good faith effort**” is a term used on projects where a race conscious goal has been set, and mandates the state DOT require the bidding contractors to show good faith effort by either 1) documenting commitments for participation by DBE firms to meet the goal set for the project; or, 2) if not meeting the goal, showing that the bidder took all necessary and reasonable steps to achieve a DBE goal through thorough documentation (including demonstrated outreach to DBEs for the subcontract work, any and all bids by DBEs for work on the contract and a written justification for why a DBE firm was not chosen, etc).

### **Assistance provided to small and DBE businesses**

In order to meet DBE goals and show good faith efforts toward achieving those goals, State DOTs offer various types of assistance to small businesses. Some of this assistance is provided to all small businesses and some assistance is provided specifically to DBEs through the federally funded DBE Support Services program.

49 CFR 26.51 identifies various race-neutral means that states can utilize to reach the DBE goals:

*(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses;*

*(2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);*

*(3) Providing technical assistance and other services;*

*(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);*

*(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;*

*(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;*

*(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;*

*(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and*

*(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.*

Federally funded services specifically for DBEs can include training, technical assistance and other support (and can also be provided to firms seeking DBE certification). The aim is to support the DBEs in becoming businesses that flourish. The \$10 million in federal funds appropriated annually for DBE Support Services is distributed by formula to the states. To be eligible for funds each year, states must demonstrate results in aiding DBEs with these monies.

The DBE Business Development Program is a required sub-program of the DBE Support Services Program, and was first mandated in 2014. The purpose of the DBE Business Development Program is to develop DBEs so that they can move into non-traditional areas of work and compete in the marketplace outside of the DBE program. Services provided through the Business Development Program are initiated once a contract between the state DOT and business entity is established, with desired outcomes written into the contract. The state DOT will provide targeted support to the business to help reach this goal, such as aiding with business plan development, providing training to strengthen fiscal and managerial skills, and one-on-one coaching. (Warren Whitlock, 2013)

**The DBE Business Develop Program aims to develop DBEs so they can compete in the marketplace outside of the DBE program.**

### **Recent federal DBE program audits**

A [2013 Office of the Inspector General Audit](#) recommended USDOT clearly define best practices for the DBE program. The internal audit also prompted a national review of the FHWA's application of [DBE Program Administration and Oversight](#). The review identified that FHWA guidance and technical support is not consistent across the country and extensive [training and outreach is currently underway](#) with the aim of correcting the inconsistencies and shortcomings.

The 2013 Inspector General’s (IG) audit was focused on the USDOT/FHWA administration of the national DBE program. In the course of that audit, the IG determined that no state has a legally compliant DBE plan, because at least one element in each state’s plan does not meet the current DBE requirements. However, every state does have a DBE plan that has been approved by FHWA, meaning at the time it was approved it was either in line with the law at the time or it was thought to be. DBE plans around the country are currently being updated to ensure the plans are in line with current law.

The audit concluded that it is incumbent upon USDOT/FHWA to identify both methods for basic compliance as well as best practices for states to meet the requirements of the federal DBE program.

**FHWA has determined that “best practices” cannot be defined for all states, since each operates their own DBE program under different circumstances, demographics, and affirmative action laws.**

(U.S. Department of Transportation, April 23, 2013)  
(Program Management Improvement Team, FHWA, December 7, 2015)

The FHWA is proceeding with identifying “**promising practices**” as it conducts its own DBE program performance reviews for states. It has determined that “best practices” are not possible to define for all states, since all states operate their DBE program under different circumstances;

differing demographics, affirmative-action laws, etc. These “promising practices” are included in the recommended practices noted in the following pages.

### **Context for the Washington State DBE Program**

The Washington State Department of Transportation (WSDOT) is the Washington agency responsible for compliance with the federal DBE requirements for federal highway funds. To the extent WSDOT receives FTA and FAA funds, it is held accountable to those federal administering agencies as well. In addition, local transit and aviation agencies within Washington state are accountable for meeting federal DBE requirements when utilizing federal transportation funds.

The Office of Minority and Women’s Business Enterprises (OMWBE) is the official federal DBE certifying agency in Washington State. This includes providing the application and processing all the paperwork required for DBE certification, according to guidelines set by USDOT. OMWBE is responsible for certifying all DBE firms that do business in Washington state, which includes businesses from 40 states.

OMWBE is required by state law (see [RCW 39.19](#)) to set “achievable” goals for state spending with M/WBE (Minority & Women’s Business Enterprises) on state contracts. To reach these goals, each state agency must institute a plan with specific measures it will utilize to “increase participation of certified minority and women-owned businesses”. Prime contractors must report usage rates of MBE and Veteran’s firms to state agencies.

**As a result of 1998’s Initiative 200, generally the RCW prohibits the enforcement of M/WBE utilization goals in state funded contracts (i.e., contracts funded without federal funds).**

Since 1998, Initiative Measure 200 (I-200) has generally prohibited “preferential treatment to any individual or group” in public contracting in Washington State (see [RCW 49.60.400](#)). I-200 changed state law to prohibit state and local agencies from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting. As a result of I-200, WSDOT cannot require contractors to meet the OMWBE goal, unless the contracts are funded by federal dollars. Therefore, while the WSDOT goal for M/WBE utilization Fiscal Year 2015 was 16% the voluntary participation rate

by prime contractors was just 6.55%. If federal funds are not present, the OMWBE goal for WSDOT is unenforceable. As such, federal requirements which apply only to federal funds are the only compulsory goals for DBE participation in public contracting in Washington.

When I-200 was first analyzed in the 1998 voter's pamphlet, there was uncertainty about the effect of the measure, stating "the measure does not define the term 'preferential treatment', and does not specify how continued implementation or enforcement of existing laws would be affected if this measure were approved..." and "the effect of the proposed measure would thus depend on how its provisions are interpreted and applied". (State, 1998)

As part of Governor Inslee's Business Diversity Initiative, the implementation of I-200 is being reviewed. At the request of Chris Liu, Director, Washington State Department of Enterprise Services (DES), who is leading Governor Inslee's Business Diversity Subcabinet, the Attorney General's (AG) office is currently preparing a legal opinion paper regarding how elements of I-200 must be interpreted and applied<sup>3</sup>. The request is asking whether the implementation of race- or sex-conscious measures – such as M/WBE utilization being a factor in contract award decisions - could be allowed to address significant documented disparities. A state-wide disparity study to document statewide M/WBE utilization is currently underway and being led by DES.

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<sup>3</sup> Docket No. 16-02-01 - The AG Opinion will answer the following questions:

- Does I-200 prohibit the State from implementing race- or sex-conscious measures to address significant disparities in the public contracting sector that are documented in disparity study if it is first determined that race- and sex-neutral measures will be insufficient to address those disparities.
- Does the answer to the first question depend on whether the contracts at issue are being awarded by a state agency that receives federal funds and is therefore subject to Title VI of the federal Civil Rights Act?

## RECOMMENDED DBE PROGRAM PRACTICES

While neither the USDOT nor FHWA define best practices for states to follow when implementing their DBE programs, FHWA recently has identified a handful of “promising practices” following FHWA DBE program performance reviews. Promising practices are those that are current, creative and transformative implementation strategies for DBE Program requirements; and that have been utilized successfully by at least one state. A list is currently being compiled by the FHWA Resource Center and is anticipated to be published in early 2017.

Prior to “promising practices”, FHWA developed a list of “Good, Best and Innovative Practices” in the mid-2000s. Some of those practices are still used successfully by states today. Those that could be confirmed as currently utilized are included in the body of this report.

Additionally, the American Association of State Highway Transportation Officials (AASHTO) has charged its Subcommittee on Civil Rights (Subcommittee) to “research and evaluate the effectiveness of external civil rights programs including (the) Disadvantaged Business Enterprise” program in its member states (which includes all 50 states as well as the District of Columbia and Puerto Rico). While the Subcommittee does not have a comprehensive list of best practices for each program requirement, its biennial conference highlights essential and best practices for many aspects of the program. Input from the Subcommittee was also incorporated in this report.

For purposes of this report, all the above mentioned practices will be referred to collectively as recommended DBE program practices. Additional information on sources for individual practices can be found in the References section.

### **Framework for DBE program success**

The AASHTO Subcommittee leadership shared that the first step in creating a successful DBE program is to provide a solid framework. Only within this framework can a state DBE program successfully implement the recommended practices. Grindly Johnson, the Virginia Deputy Secretary of Transportation and Drema Smith, the West Virginia DOT Division Director for Equal Employment Opportunity, are presently serving as the Chair and Vice-Chair of the Subcommittee and had have shared details on the importance of three framework elements:

1. Leadership and Culture
2. DBE Program Administration
3. Internal & External Engagement

They are explored in further detail below.

#### **1. Leadership and Culture**

States with successful programs have a mandate from the top and a culture of high standards requiring that a diversity of firms be used on public contracts. Actions that create this culture include:

- The Governor, DOT Secretary and other elected officials publicly speaking to the importance of utilizing DBE firms on state contracts
- Leadership supporting the Civil Rights Division in holding the prime contractor firms accountable for utilizing DBE firms on public contracts

**Implementing all the recommended practices within a state DBE program will not be effective if the state does not have the framework to support a successful program.**

- Setting utilization goals. In some states, utilization goals for a state’s MBE (Minority Business Enterprise) program exceed those of the federal program. Sometimes utilization goals are set regardless of fund source. This establishes consistent expectations for the contractor community across all projects. It helps set into practice the use of DBE firms on all projects, making the state’s achievement more attainable and consistent
- Providing sufficient personnel to proactively administer the DBE program

Examples of these elements in action:

- In Virginia, the governor regularly speaks to the Commonwealth’s largest contractors about his high expectations for small business utilization on projects. The Commonwealth of Virginia’s goal for small business utilization on procurement and projects – including DBEs – is 42% of spending, regardless of funding source<sup>4</sup>.
- In Florida, the goal for DBE utilization is 9.91% of spending for all projects, regardless of funding source.

## **2. DBE Program Administration**

A DBE program can either be administered through a Civil Rights Division or DBE program responsibilities can be dispersed throughout the agency among many divisions. The programs run by Civil Rights Divisions have all DBE elements and requirements managed by DBE program staff within the State DOT. Dispersed programs have elements spread throughout the agency, such as in human resources, contracts, budget, project engineering, etc.

A Civil Rights Division run program produces the most consistent and integrated application of the DBE program in a state DOT. It allows for adequate training for staff tasked with implementing the DBE program. This structure leads to fewer compliance issues and complications for the DOT, prime contractor and DBE firm.

## **3. Internal & External Engagement**

Effective DBE programs establish both an Internal Executive Committee and External Advisory Committee.

The Internal Executive Committee should be led by the DOT Secretary or Assistant Secretary and members of the committee should include the DOT leaders responsible for delivering on elements of the DBE program. Regular meetings and check-ins with this group helps the DOT meet DBE program requirements in a consistent manner and achieve its established DBE goals.

The External Advisory Committee serves to support stakeholders in engaging with each other. Stakeholders for this committee include the DBE firms and community representatives, leading prime contractors, DOT executives and staff throughout the DOT (including the DBE program, budget, contract and project engineer staff).

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<sup>4</sup> Note: The DBE component of this goal is set by the methodology outlined by USDOT; an overview of that process is provided on pages 5-6 of this report. The Virginia Small, Women and Minority (SWaM) is a state program that requires 42% of discretionary spending go to a SWaM firm. All DBEs are SWaM but all SWaM firms are not DBEs. The 42% goal represents a 12% DBE and a 30% SWaM.

Regular meetings and information exchange sessions can aid in cutting confusion and frustration with a program that people often find cumbersome to navigate. This established and integrated form of communication also allows a more streamlined delivery of new and clarifying information, when a new federal transportation act is enacted or rules are updated. Additionally, these external stakeholder meetings can help lead to collaborations – formal or informal Mentor/Protégé type arrangements - to aid in implementing the intent of the DBE program, which is to grow the number of diverse firms successfully operating in the marketplace.

### **Recommended Practices by DBE Program Category**

Following is a list of practices that either FHWA or AASHTO's Subcommittee on Civil Rights recommend state DOTs adopt when implementing their DBE programs. These recommended practices help states implement effective DBE programs, and to meet or exceed the goals of the federal DBE program. Where known, the state(s) that implement these practices are identified.

### **Bonding & other Small Business Financial Considerations**

1. Create smaller projects (\$1.5 - \$2 million) to make it more feasible for small businesses to bid, bond and complete for projects (*Iowa*)

### **Business Development & Training**

2. Be upfront and clear about the benefits the DBE firm can receive from participating in the DBE Support Services program
3. Provide a bid matching program which includes a real-time list of all the work available for DBEs by type of work (using specialty codes) and support from staff to complete bids
4. Create a step-by-step process for the DBE firm to develop a business plan and website
5. Utilize specialized staff for the DBE Support Services program; staff that have both practical construction knowledge and program administration knowledge are key
6. Create partnerships with colleges and universities to provide the Business Development Program - services managed by the college/university can include needs assessments, SWOT (Strengths, Weaknesses, Opportunities and Threats) analyses, business development plan implementation and other workshops; and hiring consultants to provide support services (attorneys, CPA, etc.) (*Connecticut*)
7. Set achievable goals for the DBE firm to reach in developing their business and track progress toward those goals, hold both the DBE firm and Support Services staff accountable for the DBE firm's success

### **Internal State DOT Actions & Activities**

Eight states' DBE plans are considered model plans for other states: Arizona, Colorado, Delaware, Florida, New Mexico, Oklahoma, Texas and Wisconsin

8. Develop standardized forms and a detailed checklist (Standard Operating Procedures) for each element of the program categories, so that staff throughout the DOT are working on DBE implementation and reporting in a uniform manner
9. Present a DBE report in the monthly DOT Executive meetings
10. Provide regular instruction and refresher training on the requirements of DBE certification to all staff engaged in the certification program

11. Coordinate with neighboring states on implementation approaches for DBE certification
12. Utilize the geographic market area – which can cross state lines - when identifying the ready-willing-and-able firms for the base calculation in goal setting
13. Engage the stakeholder community early and often on goal setting methodology. Consulting stakeholders at the start provides a more transparent and ultimately productive process for all participants

## **Marketing**

14. Dedicate a full-time DOT staff person to develop and implement a marketing plan to market the DBE Program to prime contractors and consultants (*Florida*)
15. Work with the Transportation Builders Association (or similar) to present awards to prime contractors with high DBE participation and successful DBEs (*Florida*)

## **Mega-Project Strategies:** Develop specific strategies for engaging DBEs on Mega Projects. (*Wisconsin*)

16. Increase media engagement to spread the word about mega projects. This includes minority radio and television shows; legislative visits; minority convention participation; neighborhood sub-consultants; translation of all public information pieces; and living up to the motto: “We will meet with anyone, anywhere, anytime”
17. Form Project Committees -- an array of advisory committees of stakeholders including businesses, labor and tribes
18. Increase use of community based networks -- public outreach consultants doing grassroots, community-based outreach and labor development
19. Unbundle contracts. The design and/or project team should break projects into the smallest possible pieces with separate project IDs in order to create stand-alone projects; for larger projects, create mandatory subcontract requirements
20. Employ a labor development model, which includes outreach, training, job placement and case management/retention in order to create a diverse workforce pool in the construction industry
21. Conduct inclusive DBE goal setting, utilizing industry stakeholders to recommend DBE goals that balance community expectations with project needs
22. Send post-award letter from the Secretary of Transportation to the prime contractors reminding them of the DOT commitment to fulfilling community expectations and the DBE goal
23. Conduct DBE firm pre-assessment -- a voluntary opportunity for DBE firms to have assistance with identifying potential problem areas and receiving customized training in advance of the contracting opportunity
24. Encourage formalized partnering relationships, including an informal mentoring networking program; mentor/protégé agreements; and joint venture agreements

## **Mentor/Protégé Program** (*Ohio and Missouri*)

The **mentor/protégé program** pairs a well-established (prime contracting) firm with a DBE (subcontractor) firm that has the potential to grow. It is ideal if the firms are not in the same line of work.

25. Design the program to enhance the business capabilities of the DBE firm; this is not an apprenticeship program

26. Conduct a needs assessment for both firms before establishing the relationship. A successful match occurs when both entities can benefit from the partnership.
27. Establish a contract between the two firms clearly outlining each firm's responsibilities
28. Ensure the program is backed by contractors' associations and staffed by a support services consultant
29. Support services consultants provide expertise in business management, financial administration, insurance and bond readiness, website development, business development and marketing. These duties should not fall entirely to the mentor
30. Compensation can be provided to the mentor for direct and indirect costs for services provided by the mentor for the protégé training and assistance
31. Leverage technology to increase efficiency and success
32. Regularly set and reassess goals, and set milestones for success. Hold both firms accountable for meeting their goals and milestones
33. Utilize former DBE firms when possible as the mentoring firm, those firms are uniquely qualified to appreciate the perspective and needs of both a prime and DBE firm
34. Divide DBE firms into tiers, based on their "Capability Maturity Model" determined by utilizing publicly available research based tools, and utilize tools that help a firm grow to the next level; setting unattainable one-size-fits-all goals for firms will create frustration for all involved
35. Engage a university or college to partner with the DOT in administering the program. Research staff at colleges and universities are familiar with the "Capability Maturity Model"

### **Monitoring and Enforcement**

36. Engage a multi-disciplinary team to review and modify where necessary the **Commercially Useful Function** (CUF) form and verification process to meet all DBE regulatory requirements
37. Conduct a monthly rolling review of bulk suppliers' facilities, and thoroughly train and establish internal agency controls to ensure field staff are completing the verifications as required
38. Develop strong protocols for on-site inspections of the equipment utilized and work performed by DBEs
39. Conduct all compliance reviews in person and document reviews in written reports. A checklist can be used to complement the written reports.
40. Use a check-list to be consistent and thorough. The list should include all the required elements and 'red flags' that could indicate practices that are not in line with requirements
41. Engage and train all DOT staff that touch the project on which the DBE firm is operating, the monitoring and enforcement activities related to CUF
42. Establish state DOT policies for how and when monitoring and enforcement activities will take place

### **Outreach (Florida)**

43. Develop a high-quality, visually engaging quarterly newsletter for the DBE community containing useful tips, informational articles, program updates, and training and bid opportunities
44. Dedicate a part-time DOT position to recruit new businesses into the DBE program and contacting businesses that let their DBE certification expire
45. Include requirements in contracts with DBE Support Service Providers to help prime contractors identify ready, willing and able DBEs to participate on contracts and recruit new businesses into the DBE Program

46. Send DBE Participation letters to all prime contractors, signed by the state transportation Secretary; assign participation level with a letter grade (A-F); for those receiving an A+ or A, a thank you letter; for those receiving a B or C, a neutral letter; for those with a D or F grade, the letter states, "Your Company will be contacted by the Department's DBE Program Specialist to discuss your current strategies and determine if there are additional efforts we can suggest to increase your DBE utilization"
47. Ensure DOT staff attend and present at contractor meetings emphasizing the importance of using DBEs and small businesses as subcontractors and sub-consultants on DOT projects

### **Prompt Payment**

48. Utilize technology to implement a transparent and accessible prompt payment verification system
  - For example, require the prime contractor and all subcontractors to enter payment data/receipt of payment information into an electronic database which is publically accessible. Provide instruction on this requirement through a pamphlet distributed to all prime and sub-contractors. This allows the state DOT to easily communicate and monitor a contractor's compliance with federal prompt pay requirements for all federal transportation contracts. (*Michigan*)

### **Public Reporting**

49. Utilize agency webpages to post various reports and databases/data tables related to DBE, including:
  - DBE achievement by work category and region – separately for federally funded and state funded projects, and all project combined; and
  - DBE achievements by contractor and consultant, including the number of contracts awarded, total dollars awarded and percent of DBE participation (*Florida*)
50. Attend and present these DBE reports at the annual state construction conference, quarterly committee meetings that include members of the Institute of Consulting Engineers (or similar) and internal DOT meetings (*Florida*)

## **FEDERAL ASSISTANCE PROGRAMS FOR SMALL BUSINESSES IN GOVERNMENT CONTRACTING**

All DBE certified firms also fit the US Small Business Association definition for a small business. The federal government has established several programs to assist small businesses in successfully competing for government contracts.

### **Navigating government contracting**

Dozens of different specialized business certifications exist in government contracting. Some of the obstacles small businesses encounter in seeking to obtain government contracts include ensuring the business has the right certification(s), identifying available contracts and making connections with the prime contractors. Two federal assistance programs available to help small businesses compete in the transportation contracting realm are described in detail below.

### **Federal small business assistance programs**

Two federal government funded programs that assist Washington state small businesses with navigating government contracting are the Washington State Procurement and Technical Assistance Center (PTAC) and Northwest Small Business Transportation Resource Center (SBTRC).

The Washington State Procurement and Technical Assistance Center (PTAC) is funded, in part, by the US Department of Defense (DOD). The program was first authorized in 1985 as a pilot project and continues to be part of the DOD budget. Its aim is to “maximize the number of capable U.S. companies participating in the government marketplace”. The Washington State PTAC provides no-cost services to aid small businesses in obtaining local, state and federal government contracts. Specifically, PTAC advises businesses on bid reviews, marketing, contract performance, small business designations, and more. PTAC hosts procurement training classes and seminars and helps businesses register with the correct databases in order to compete for government contracts. With the help of PTAC, Washington state companies won more than \$592 million in government contracts in 2015.

The USDOT Northwest Small Business Transportation Resource Center (SBTRC) is funded by USDOT’s Office of Small and Disadvantaged Business Utilization (OSDBU). The twelve regional SBTRC provide technical, bonding and financial assistance to small businesses, including DBEs to help prepare them to compete and participate in federally funded transportation contracts. The Northwest SBTRC was established in 2008 through a cooperative agreement with the Economic Alliance of Snohomish County and serves Washington, Oregon, Idaho and Alaska businesses. Since its inception the SBTRC has helped small disadvantaged businesses in Washington state obtain more than \$125 million in bonding capacity and \$2.5 million in access to capital (Short Term Lending Program/US DOT line of credit).

### **Effective federal assistance program practices**

PTAC and SBTRC have found the following government agency assistance program practices to be effective in supporting small businesses obtain government contracts:

1. Engage in targeted outreach to specific businesses to become certified businesses, walk those businesses through the different types of certification and help identify which certifications apply to that business
2. Connect certified businesses with prime contractors through informal and formal meeting opportunities

3. Ensure certified business are invited to bid presentations and encourage them to bid on available contracts
4. Offer trainings and education that fit the needs and schedules of small businesses;
  - a. Regularly survey small businesses regarding their training needs and interests
  - b. Be mindful in planning and scheduling trainings - extensive travel and time away from the day-to-day operations of the business, especially during peak seasons, is not feasible for most small businesses
  - c. Specialized programs should offer training that is otherwise not readily accessible to small businesses; minimize redundant trainings by multiple entities
5. For government agencies that have available contracts to bid: provide a consistent method of communication with small business contractors as well as minority community advocacy organizations when updating or changing requirements for contracting. Clearly identify the current requirements, what is changing, and how the new requirements will impact the small business contractor.

Relationship building was cited by both the Washington State PTAC and Northwest SBTRC Directors as an elementary and vital component to successfully aiding DBEs. This includes establishing strong working relationships with DBEs, prime contractors and the state and federal transportation agencies. Strong relationships between government entities that provide assistance leads to better referrals between the programs, for the benefit of the DBE firm. With these relationships and support services combined, government contracting can be made accessible for small businesses to compete.

## STATE MINORITY BUSINESS ENTERPRISE PROGRAMS

At least 38 states, Washington D.C. and Puerto Rico have state-level Minority Business Enterprise (MBE) programs, based on a 2016 survey by NCSL. These may or may not include a transportation related component. Most states have a MBE set-aside (or quota) as a core component of their program.

Five states set-asides are specifically identified in the NSCL report:

Connecticut—set-aside mandate of 25 percent for small businesses with 25 percent of that amount to be awarded to MBEs. Legislation [here](#).

Illinois—state set-side goal of 20 percent.

Ohio—state target of 15 percent for MBEs. Legislation [here](#).

New York—state target of 30 percent for minority and women-owned businesses and a 6 percent goal for veteran with disability owned businesses. Compilation of codes [here](#).

New Jersey—set-aside goal of 25 percent for small businesses.”

The MBE set-asides for state monies in these five states ranges from 15-30 percent.

NCSL and other sources were not aware of best practices for state programs.

## DEFINITIONS

**Commercially Useful Function (CUF).** A DBE performs a CUF when it is responsible for actually performing, managing, and supervising the work for which it is contracted for. To perform a commercially useful function, the DBE must also be responsible for negotiating the price, ordering and paying for any materials utilized for the work. For additional details, see: [Title 49, Part 26.55](#)

**DBE Certified Firm.** A company that has received DBE certification by the state's certifying entity for meeting the requirements of the DBE designation; to be certified a DBE must prove it is:

1. Independently owned by person(s) who are deemed socially and economically disadvantaged, with daily operations controlled by the eligible owner(s);
2. Have less than \$23.98 million in gross receipts over the previous three years; and
3. A personal net worth of less than \$1.32 million

**Good Faith Effort (GFE).** The GFE can be achieved by the bidder meeting the project DBE goal OR if not meeting the goal, adequately documenting how the bidder took all necessary and reasonable steps to achieve the set DBE goal. For additional details, see: [Appendix A to Part 26](#)

**Mentor/Protégé Program.** A state must obtain approval from FHWA, FAA or FTA to operate an official Mentor/Portege Program within its DBE Program. An official program will be eligible to utilize federal funds to administer the Mentor/Protégé program. The purpose of the Mentor/Protégé Program is to support the further development of DBE firms and assist them in moving into non-traditional areas of work and/or gaining the ability to compete without DBE program support in the marketplace. For additional details, see: [Appendix D to Part 26](#)

**Promising Practices.** This is the term used by FHWA for DBE program practices that are current, creative and transformative implementation strategies for DBE Program requirements; and that have been utilized successfully by at least one state. A list of promising practices is currently being compiled by the FHWA Resource Center and is anticipated to be published in early 2017.

**Race Conscious.** Activities that focus exclusively on assisting DBE firms; setting specific DBE goals on a project is a race conscious measure

**Race Neutral.** Activities or services that could benefit and assist all small businesses, including DBEs. Including things such as bonding, marketing and technical assistance

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