

Disadvantage Business Enterprise Trainings

Question and Answers

- 1. Question: If Caltrans ends up with a larger percent of DBE awards than the overall goal, they have to stop awarding to DBE proposers? Or just stop trying to attract DBE proposers?**
Answer: No, Caltrans will not stop awarding to DBE proposers. Instead, Caltrans will adjust to a lower DBE goal requirement for each contract.
- 2. Question: We have been seeing primes becoming DBEs, they are hitting our contract goal by 70%. Is this a trend you are seeing statewide? Or the end goal of the program?**
Answer: Sometimes a contract is awarded to DBE firms if a DBE is a low prime bidder. This is not a trend.
- 3. Question: How does the Overall Goal vs Contract Goal being set as far as the actual percentage is concerned? Does the Contract Goal need to be ALWAYS greater than or equal to Overall Goal?**
Answer: The Overall Goal is calculated from a Disparity study from previous projects data. The contract goal is based on subcontracting opportunities, location of work, and the availability of ready, willing and able DBE firms for that contract.
- 4. Question: If the project does not meet the DBE goal, what sanctions will apply**
Answer: A contractor shall make good faith efforts (GFE) to meet the DBE goal. Depending on the causes that result in the short in DBE goal, there may or may not have penalties. Penalties may include withholding of funding, not get reimbursed, or lost funding eligibility for future projects.
- 5. Question: Is available DBEs based on the county you are in or the Caltrans district you are in?**
Answer: Based on Caltrans District.
- 6. Question: Is there a guide for establishing the reduction factor?**
Answer: The reduction factor is determined by the Office of Civil Right based the disparity study and the achievement of current DBE goal.
- 7. Question: In the calculations, what happens if less than 7 DBE's are available?**

Answer: If you have less than 7 DBEs available for a certain item of works, you need to determine if the item of work has components of trucking or material supply. If there is trucking, apply a factor of 10%; if there is material supply, apply a factor of 12% to that item of work. If there are no trucking or material, then apply a factor of 0.

- 8. Question: When I use the search to find DBEs and choose the Dist. 3 box, I still get contractors from all over the state. Is there a way to narrow it down by county? The county checkboxes don't appear to narrow the data.**

Answer: This should not happen. OCR has corrected all the 00 district DBE firms. Please inform us if this happen again so it can be revised.

- 9. Question: If you have an on-call Contract for Surveying services, do you calculate the DBE goal prior to executing a new "task" under that on-call contract each time it is utilized for a different project?**

Answer: For current practice, a DBE goal is required at the on-call master contract.

- 10. Question: How is Caltrans vetting the CUCP database? Many of the resulting DBE firms are not based the state of California. Often, it's just a work crew traveling up and down the state, without any "real" local office in the state.**

Answer: The process of certification is outlined in the CFR. However, if Primes are finding that DBEs are not bidding in areas that they say they are available to do the work, then Primes need to compile this information and share with the OCR Certification Branch.

- 11. Question: How do you set an overall contract goal on an on-call contract when the work is not specified until the work order is requested by staff?**

Answer: You need to do your best to have an estimate of the scope of work and determine your budget. Based on the scope of work, you can come up with a DBE goal, we understand that may be ball park number.

- 12. Question: If the prime contractor's bid meets the DBE goal, are they still required to provide the GFE documentation, or is that primarily used if a bidder fails to meet the goal?**

Answer: If a prime contractor meets the DBE goal in a bid, they are not required to submit the GFE documentation. However, they are encouraged to submit the GFE documentation in case errors have been made to avoid losing the opportunity of winning the bid.

- 13. Question: Is there a DBE goal if we solicit via RFP for FEMA funded contract?**

Answer: RFPs & RFQs are covered by Chapter 10 of the LAPM, there are DBE goals associated

14. Question: If prime does not meet the DBE goal, and GFE was found to be sufficient by local agency, can the agency award to prime or does Caltrans have the final say?

Answer: If it is a consultant contract smaller than or equal to \$500,000, or a construction contract smaller than or equal to \$2,000,000, the local agency determines that GFE is adequate, the agency can award to the prime. Otherwise the GFE has to be submitted to DLAE and the DLAE will be forwarded to DBEgoal.gfe@dot.ca.gov for review. If the Caltrans review is different from the agency's initial evaluation, the local agency needs to take Caltrans review feedback into consideration and reevaluate the GFE package. After the reevaluation, if local agency still thinks that the GFE is adequate, the local agency can award the contract.

15. Question: In the FHWA presentation, I believe there was a comment about submitting written confirmation from the DBE that they will do the work. Is there a form for that in the LAPM? Form 15-G is from the prime to complete, not the DBE, correct? if so where can I find the guidelines

Answer: Any written confirmation from a DBE firm will be valid. There is no special form. For construction contract, a copy of DBE's quote can serve as the confirmation.

16. Questions: If on the middle of the project DBE sub decided to refuse to do the work and walked away from the project, does the general contractor still obligated to meet the goal?

Answer: If in the middle of the project, a DBE sub refuse to do the work and walked away from the project, the contractor shall inform the local agency and make good faith efforts to find another DBE to perform the same amount of work.

17. Question: What should agencies do when DBE search by Work Code results in DBEs that are not also certified under the proper NAICS Code?

Answer: To be able to perform the work, a DBE must be certified under appropriate NAICS and Caltrans work codes. Please inform Caltrans OCR if this happen.

18. Question: Are the available DBEs based on the county you are in or the Caltrans district you are in?

Answer: Please see the answer to question 5.

19. Question: Is Caltrans working to correct the DBE Database to eliminate the "00" statewide designation to ensure that firms actually are willing to perform work within specific Districts and meeting requirement to keep the DBE Program narrowly tailored.

Answer: The district "00" has been eliminated. If you still has "00" district issue when you search CUCP data base, please let us know.

- 20. Question: Are there any guidelines for when a quote can be considered unreasonable? Like 5% above lowest, 10%, etc?**

Answer: This is a business decision. Refer to Appendix A to Part 26 - Guidance Concerning Good Faith Efforts of the 49 CFR 26.

- 21. Question: Please provide any contact information regarding FEMA and DBE if you have it.**

Answer: FEMA does things a bit differently... look at their PAPPG:

https://www.fema.gov/sites/default/files/documents/fema_pappg-v4-updated-links_policy_6-1-2020.pdf

- 22. Question: When setting the DBE Goal, if the item of work has a material component, do agencies also need to check that corresponding Supply Work Code to determine that there are actually any DBE material suppliers available? (The same question would apply for DBE trucking availability.)**

Answer: ~~Yes, consider the supply and trucking work codes.~~ (Response revised on 8/4/2022)

No, according to a meeting with OCR on 8/4/2022, no need to perform further check.

- 23. Question: Are local agencies required to use Caltrans forms for funds passed through Caltrans to the local agency? Or can we use our own forms?**

Answer: Caltrans forms are preferred.

- 24. Question: What happens if the DBE makes a mistake on 15-G?**

Answer: It is the responsibility of the prime contractor and subcontractor to make sure the form is complete and right.

- 25. Question: For funds passed through Caltrans to the local agency subrecipients, do we count those funds/commitments in OUR DBE goal analysis, or exclude this data because Caltrans includes the data in their DBE analysis?**

Answer: The DBE requirements go with each contract with federal fund that has subcontracting opportunities, local agencies shall count these funds/commitments in their DBE goal analysis.

- 26. Question: How does Caltrans hold 2nd tier subcontractors accountable for reporting payments to the 1st tier sub and to the Prime?**

Answer: Per the LAPM CH 16 under Role of the RE, the Local Agency RE is responsible for monitoring and enforcing the DBE provisions of a contract. Local Agency will withhold payment from prime if the prime fails to submit the 9-F within the submittal deadline. It is the responsibility of the prime contractor/consultant to ensure that the 1st and 2nd tier subs submit their payment records timely to the prime for reporting.

27. Question: For reconsideration officer/panel? Does it need to be a panel or could just be an individual?

Answer: A panel is preferred.

28. Question: Is FEMA require DBE, given that their projects are considered "Emergency"?

Answer: The normal DBE requirements are applicable to all ER funded projects.

29. Question: FHWA Emergency Repair funding is available on major collector and higher functional classification roads. FEMA Public Assistance funding is available for minor collector and local roads. Check FEMA PA Assistance and Policy Guide for more information

Answer: This is not a question.

30. Question: Is there any guidance on calculating the DBE goal if the agency wants to include optional/additive bid items in a construction contract (bid items that may or may not be included in the contract depending on bid results)? Should the DBE Goal be calculated based on the total estimate, including the optional/additive items?

Answer: DBE goal calculation should be based on the total bid items, excluding contingencies.

31. Question: For Form 9-B, our Legal department has minor redlines - are we allowed to submit redlines for Caltrans review?

Answer: Yes.

32. Question: For 10-O1, contractors submit the amount not equivalent to the line bid item because it includes their markup. Sometimes, the amount is less than bid item. They put the dollar amount they're paying the subs. Which method is correct, bid item amount or amount the prime is paying the sub?

Answer: Bid item amount is correct.

Comment (from attendee): *I think that it should be the amount paid to the DBE, the contractor markup should not be included in the commitment. it needs to be the amount paid to the DBE subcontractor*

33. Question: At the 9-D in the sum, where is it regulated to use the 80%. Or can it be changed?

Answer: The reduction factor was determined by Caltrans Office of Civil Right (OCR). Local agencies use 80% in their contract DBE calculation. OCR may adjust the reduction factor when review and approve the DBE calculation on the basis of contract by contract.

34. Question: Is the 16-Z1 also submitted by the contractor on a monthly basis?

Answer: Yes.

35. Question: If a DBE firm is certified at the time of bidding, but becomes de-certified during the contract period, are we able to count the entire work performed by the former DBE firm or only during the period of certification?

Answer: If a DBE firm becomes ineligible in the middle of a contract (i.e., due to decertification), the prime contractor may continue to use the DBE firm on the contract and may continue to receive credit toward its DBE goal for the DBE firms' work. In this case, or in a case where the DBE firm is already under contract prior to becoming ineligible, the portion of the ineligible DBE firm's performance of the contract remaining after the notice of its ineligibility must not count toward the State-wide DBE overall goal, but may count toward the contract goal.

If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the local agency may continue to count its participation on that contract toward overall and contract participation.

36. Question: Is the goal then reduced?

Answer: ~~DBE Substitution/termination covered in 49 CFR 26.53(f)(1)(i)~~ The question is not clear.

37. Question: If a DBE does not perform the work due to COVID shelter in place, is that considered an emergency work exception?

Answer: If a DBE can not perform the work, the prime need to contact the local agency to terminate and replace the DBE firm, following the procedures in 49 CFR 26.53.

38. Question: The current statewide Overall Goal is 17.6%, do agencies/cities need to meet the 17.6% as well in our Contract goal at the end of fiscal year? If the answer to first bullet item is No, then if the Contract Goal for the agency's 10 projects calculated to be 2%, 5%, 6%, etc. and the average at the end of fiscal year is only 5%, would this be OK? What is the acceptable reduction factor by Caltrans?

Answer: The Contract Goals that are set statewide need to result in the DBE participation statewide meeting the Overall Goal annually (Federal Fiscal Year, October-September). This is generally a Caltrans responsibility. Each LPA should have its Contract Goals set by contract. This could be higher or lower than 17.6%. LPAs do not have to meet the Overall (statewide) Goal, but if an agency is consistently missing its

DBE commitment it would probably be a red flag. 17.6% is the statewide DBE goal for the time being and is a DBE goal that we all strive to meet. Each contract will have a DBE goal that can be higher or lower than the statewide DBE goal. Regarding the "reduction factor", LPAs use 80% in their contract DBE goal calculations. Caltrans may adjust the factor when review and approve the contract goal calculation.

In addition, there are three things that are "goals" that we talk about around DBE.

- 1) The statewide overall goal set by Caltrans/FHWA approval*
- 2) The Contract Goal set by Caltrans/Agency (I think that there is a form that does this calculation for LPA Projects. This "Contract Goal" is used to advertise the contract.*
- 3) The DBE Commitment at award: This is the "goal on the contract". The winning prime may have a higher, lower, or the same number than the #2 Contract Goal after winning the bid. That number, if the Agency accepts the bid, becomes the target, and would be the "DBE Commitment".*

An agency might get a lower number on the DBE Commitment than the Contract Goal, and that is allowed with a "Good Faith Effort" determination. But if the DBE Commitment isn't met consistently, there is likely an issue, because the DBE Commitment is required to be in the contract and missing the target without justification is a violation of regulation.

39. Question: How did congress determine that the DBE program needed to be continued? We bid local-funded projects all the time without DBE programs and receive bids from all races, genders, and sizes and are required by law to award to the lowest responsible & responsive bidder... regardless of DBE status. Why do we continue to need these programs? This is not 1965 anymore.

Answer: Congress passed the "Fixing America's Surface Transportation Act" (or "FAST Act") including language which called for the continuation of the program. California Constitution, Section 31, which in general disallows preferential treatment in public contracting, specifically exempts any "action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State."

40. Question: How do the agencies verify that DBE firm is actually doing the work?

Answer: DBE firms' work can be counted toward DBE credit only if DBE firms perform commercially useful function (CUF). The prime contractor is ultimately responsible for ensuring that a DBE performs a CUF. At the same time, State and Federal regulations require LPAs ensure work committed to a DBE is being performed by the correct firm, and that firm is performing a CUF. There are steps listed in the Local Assistance Procedures Manual (LAPM) Chapter 16 of how to make sure DBE requirements are complied and followed. The steps consist of Before the Work, During the Work, and After the Work. Please refer to the LAPM for details.

41. Question: Could you please clarify, the DBE rule only applies to Federally funded projects, and not state/locally funded projects?

Answer: State-only funded projects do not have DBE requirements unless they also have federal funding.

42. Question: Can you please elaborate "pro forma"?

Answer: The term "pro forma" is not defined in 49 C.F.R. Part 26. Utilizing the dictionary definition of "pro forma" will likely be the best step in understanding the regulation.

43. Question: Just to clarify the DBE rule doesn't apply to locally funded projects, that are strictly funded by a City, with no Federal or State funds, right?

Answer: Correct. The DBE requirements apply only to projects with Federal funds.

44. Question: What happens if Caltrans does not meet their set goals? Does the FHWA retract their delegation?

Answer: This question should be about the statewide goal. If Caltrans do not meet the statewide DBE goal, it will come up with measures and methods to correct and reach the goal.

45. Question: Is there any plan to update the Work Code List to account for a broader scope of work categories for those of us who do not only procure construction related services. The conversion of NAICS to WCC's is not a clean process.

Answer: Caltrans is in the process of working on the NAICS and WCC.

46. Question: What is the reduction factor amount?

Answer: Current reduction factor is 80%.

47. Question: Is the responsibility to subcontract to a DBE fall on the prime contractor? How do we identify a DBE? Is it enough as a local agency to include a DBE clause in the specs and coordinate that goals are met?

Answer: The Prime Contractor is responsible to make available a portion of the contract work to DBE subcontractors. A list of the subcontractors is required to be submitted with the bid package for construction contract. Local agency should make sure that the contract includes all the required contract language for federal-aid project. Please refer to Exhibit 10-R for consultant contracts and Exhibit 12-G for construction contracts.

48. Question: If our project includes federal dollars and we have to follow DBE requirements, we get those requirements through Caltrans not FHWA?

Answer: The DBE requirements comes from the Title 49 Code of Federal Regulations Part 26 (49 CFR 26), FHWA form 1273, Disadvantaged Business Enterprises, Part 1. The require contract languages are covered in LAPM Chapter 9, Exhibit 12-G: Required Federal-Aid Contract Language, Exhibit 10-R: A&E Boilerplate Agreement Language.

49. Question: Is there a process to enforce the use of DBE engineering work? We have lot's of engineering work in our area but we are never used for any of the required DBE work.

Answer: The purpose of the DBE training is to provide some tools that LPAs can follow when working on projects with Federal funds. The power point of DLA DBE procedures presented in the training details the procedures to implement the DBE requirements.

50. Question: Is there a minimum time frame in which the prime needs to give any subcontractors a time to respond back? We had a contractor reach out to a DBE company with only a 1 day turn-around time. We weren't able to find anything on the LAPM or any other documents on minimum requests for reaching out to DBE companies.

Answer: LAPM requires to advertise a consultant contract for at least 14 calendar days, a construction contract for at least three weeks.

51. Question: Who is responsible for doing outreach to get inform minority business owners and women business owners of the DBE certification program?

Answer: For local agency administered projects, LPAs are responsible for doing outreach.

52. Question: Race Conscious methods are typical and expected in our office - by setting a contract DBE goal on all of our FHWA -funded projects. Also, the goal and coal calc (Caltrans forms 15-G and 9-d) are expected in the request for funds and contract award documents. This is all in the face of our organization having met its goal the previous year. We follow these steps anyway, leaning on the disparity study. This is correct and justifiable, right?

Answer: Although race-conscious means (i.e. establish DBE contract goals) is one way to meet portion of Caltrans overall statewide annual DBE goal, Caltrans expects sub-recipient to meet the maximum feasible portion of Caltrans statewide annual DBE goal through race-neutral methods. Therefore, LPA's DBE program shall have race-neutral measures.

53. Question: A GFE is not required where the goal is met, right?

Answer: GFE package is not required when DBE goal is met. However, primes are encouraged to submit GFE with their bids and proposals in case errors are made.

54. Question: Is there a step-by-step instruction for local agencies to comply with all DBE requirements? We've seen the 7 steps to calculate the DBE goal, and contractor's documentation of GFE, but not a complete picture of what a local agency needs to do, such as submitting forms to be reviewed by DLA, etc.

Answer: DBE requirements are covered by LAPM chapter 9.

55. Question: What happens if you only have 1 bidder on a project and the bidder is not meeting the goal. Can we work with the bidder to change their commitment?

Answer: A construction contract is awarded through open competitive bidding to the lowest and responsive bidder. A bidder cannot change his or her bid after bids are opened to change the DBE commitment.

56. Question: What is considered to be an excessive difference between a DBE subcontractor bid price and a non DBE subcontractor bid price? I've had contractors tell me that \$1 is excessive since all contracts are awarded to the lowest bidder.

Answer: This is a business decision. Refer to Appendix A to Part 26 - Guidance Concerning Good Faith Efforts of the 49 CFR 26.

57. Question: If the Prime on a project is a DBE, would this satisfy the DBE goal?

Answer: Yes.

58. Question: What is the criteria that OCR uses to increase the reduction factor for a particular contract higher than 80%?

Answer: OCR has reviewed existing DBE goal setting methodology and the previous DBE contract goal data for districts. OCR has analyzed the average overall DBE contract goal, the total number of contracts with a DBE goal, the number of Good Faith Efforts evaluations and the number of certified DBEs.

After evaluating and analyzing the existing and previous DBE data, OCR to increase the DBE goal reduction factor for the rest of the current year. This increase will be on a basis of contract by contract.

59. Question: Regarding the 5 calendar day requirement for DBE forms to be turned in, can that time period be changed to 5 business days if it is advertised as such by the Local Agency? 5 calendar days is very restrictive when taking weekends and holidays into account.

Answer: 5 calendar days are required by 49 CFR 26.

60. Question: Are the 7 day and 15 day, business day or calendar day?

Answer: In DBE program, all days are calendar days unless otherwise specified.

61. Question: Instead of specifically including the contract language, is referring to CFR code or LAPM sufficient?

Answer: It is not sufficient by just referring to a CFR code or LAPM.

62. Question: The language that must be included in the contract cited in this presentation are all in Exhibit 12-G, or 10-R correct? Meaning, local agencies do not need to modify standard contract language to include the required language as long as Exhibit 12-G or 10-R is attached to the bid documents?

Answer: Required contract languages are included in the exhibits 12-G and 10-R except that the monitoring and enforcement mechanism for prompt payment due to that LPAs may stipulate different mechanisms in their contracts.

63. Question: Is the 9B currently required every 2-years. Not ANNUALLY?

Answer: 9B is required annually by 6/30.

64. Question: Exhibit 10-R, for Non-AE, do you have any suggestions which Articles to be included in our Contracts?

Answer: From perspective of DBE, they should have same DBE requirements as the A&E contracts. However, Non-A&E and A&E contracts have different procurement requirements.

65. Question: Certain forms are to be collected strictly for A&E transactions, correct? When it is not an A&E, certain forms are not required, correct? I have had to correct some Caltrans Accounts Receivable staff as to the appropriateness of some of the forms

Answer: Please clarify the question, it seems that it's not a DBE question.

66. Question: Is 9-F prepared and submitted by the contractor/consultant?

Answer: Yes, The Prime Contractor/Consultant is required to prepare and submit the Exhibit 9-F.

67. Question: Office of Regional Planning (ORP) Funds use different forms (ADM 0227F, ADM 3069 ADM 17F). I take it we should use ORP forms when the funds are from ORP and similarly, when using Office of Local Assistant (OLA) funds, use OLA forms?

Answer: Use DLA forms only when the funds are via the Division of Local Assistance.

68. Question: We don't use a lot of Local Assistance (LA) funds. What I'd like to clarify is, if we use LA funds, do we follow the same process to set a DBE goal as we would when using Office of Regional Planning (ORP) funds? Please confirm that a DBE is MANDATORY for all LA funded projects? I ask because ORP funded projects only require a DBE goal on 4 specific ORP funds.

Answer: If you get Federal funds via the Division of Local Assistance, follow the procedures described in the Local Assistance procedures Manual (LAPM). DBE requirements need to be complied for all Federal-aid projects.

69. Question: We're seeing more contractors using online GFE services which use automated means to reach DBEs who are subscribers and are on lists with the service. The GFEs consist of reams of paperwork that document automated processes. Has there been further Caltrans review of these automated GFE services, and the produced GFEs that come from them? Do they count as a sufficient outreach?

Answer: Contractors are ultimately responsible for their good faith efforts and ensuring that it is adequately performed. The use of these services may or may not be adequate outreach depending on the contract. When using the services, please include the criteria of the DBE search and any related supporting solicitation documentation.

70. Question: In the calculations, what happens if less than 7 DBE's are available?

Answer: If less than 7 DBE firms are available for a item of work, the local agency need to determine if the work item has trucking or material or supply components. Apply 10% to trucking, 12% to material/supply. If there is neither trucking nor material/supply, apply 0% to the item work.