

- Section 26.21(b)(2); 26.43; 26.51(b)

- **What actions should a recipient take before implementing a small business program on federally assisted projects as a race- and gender-neutral means of facilitating DBE participation in meeting the recipient's overall goal?**
(Posted - 7/15/09)

Recipients are obligated to meet the maximum feasible portion of their overall goal through race- and gender-neutral means of facilitating DBE participation. See 49 CFR § 26.51.

Since the program was substantially revised in 1999, the Department has long recognized that race- and gender-neutral small business set aside programs may be an acceptable means of achieving the objective of § 26.51 without running afoul of the prohibition in § 26.43 against the use of set-asides or quotas. See related Q&A entitled "Does the rule's limitation on the use of set-asides apply to race-neutral small business set-asides?" "A small business goals program is another example of a race- and gender-neutral program that may provide opportunities for DBEs and non-DBEs to fairly compete for federally assisted contracts.

If a recipient intends to implement a small business program as one means of achieving its annual overall DBE goal, the recipient must, pursuant to 49 CFR § 26.21(b)(2), submit to the appropriate operating administration for prior approval an amendment to its DBE program plan to identify the program as an initiative implemented to provide contracting opportunities to DBEs and other small businesses.

In amending the DBE program plan, the small business program does not replace the DBE program or otherwise operate as a substitute for the DBE program. It is simply another race- and gender-neutral tool that may offer additional contracting opportunities to DBEs. Recipients are not required to develop such a program.

When a recipient uses a small business program to achieve DBE participation, it may count only the participation of small businesses that are certified under 49 CFR Part 26 toward its annual overall DBE goal. Race- and gender-neutral DBE participation obtained through the small business program must be calculated by dividing the total dollars to DBEs through the small business program by the total federal dollars. Race- and gender-neutral DBE participation is not calculated as a percentage of the total small business program.

As required by 49 CFR § 26.51(d), a recipient is expected to establish DBE contract goals to meet any portion of the annual overall goal it is unable to meet through the small business program or other race-neutral measures.

A proposed DBE program plan amendment should, at a minimum, contain the following elements: 1. a detailed description of the small business program, its objectives, and how it is designed to operate (e.g., firm eligibility/size criteria and means of ensuring eligibility of participating firms);

2. assurance that the program is authorized under state law;

3. assurance that certified DBEs that meet the size criteria established under the program are presumptively eligible to participate in the program;

4. assurance that there are no geographic preferences or limitations imposed on any federally assisted procurement included in the program;

5. assurance that there are no limits on the number of contracts awarded to firms participating in the program but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses; and

6. assurance that aggressive steps will be taken to encourage those minority and women owned firms that are eligible for DBE certification to become certified.

7. assurance that the program is open to small businesses regardless of their location (i.e., that there is no local or other geographic preference).

As a condition of approval, operating administrations may, in consultation with the recipient, limit the size and type of federally assisted contracts that participate in the small business program to ensure effective competition based on the availability of small businesses in the particular industry or work code.

The operating administration may not approve the small business program if it conflicts with other relevant federal requirements, and it may rescind its approval if it determines that the program is being implemented in a way that creates a de facto DBE set aside in violation of § 26.43.

Implementation of the small business program is subject to periodic review by the operating administration of its effectiveness in helping the recipient meet its annual overall DBE goal. Approval may be rescinded if the program is ineffective.

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 26.