

The New DOT Disadvantaged Business Enterprise (DBE) Regulation

Last year, the Congress reauthorized and the President signed legislation authorizing the DBE program. This program has been the Department of Transportation's most important tool for promoting equal opportunity in federal transportation contracting since it was first signed into law by President Reagan in 1983. On January 29, 1999, the Department issued a new final regulation to guide the administration of the DBE program. This new regulation has three major goals:

1. to create a level playing field on which DBEs can compete fairly,
2. to mend but not end the DBE program, and
3. to make the DBE program more effective and efficient for all participants.

This regulation responds to over 900 public comments on two previous proposed rules. It also scrupulously adheres to the points raised in numerous recent court cases dealing with the DBE program, including the Supreme Court's 1995 decision in *Adarand v. Peña*. And it addresses issues raised by Congress when the DBE program was reauthorized by bi-partisan majorities in both the Senate and the House last year. The result is a program which will do more than ever before to promote equal opportunity and will fulfill the President's promise to "mend but not end" affirmative action.

The Need for a Level Playing Field

While the nation has made great progress towards true equal opportunity, much remains to be done. This is especially true in the transportation-related construction industries. While minorities represent more than 20% of the population, they own only 9% of all construction firms and receive only about 5% of construction receipts. While women represent over 50% of the population, women-owned construction firms receive only 48 cents of every dollar that we would expect them to receive given their availability in the marketplace. The DBE program works to remedy these inequalities. Moreover, we know that when affirmative action programs like the DBE program are eliminated or curtailed at the state and local level, participation by women- and minority-owned firms plummets. The bottom line is this: the DBE program is still needed today to remedy discrimination.

Mending, But Not Ending the DBE Program

As required by the Supreme Court's *Adarand* decision, and as urged by Congress, the final regulation provides a narrowly tailored DBE program which serves a compelling governmental interest:

- Quotas are prohibited.
- Recipients must set goals based on local evidence of the actual availability of qualified DBEs.
- Recipients must use race-neutral methods (like outreach and technical assistance) to meet as much as possible of their overall goals.
- Business owners with a personal net worth of more than \$750,000 (excluding the value of the primary residence and the ownership interest in the business) may not participate in the program.
- Firms owned by socially and economically disadvantaged white males must be allowed to participate as DBEs.
- In order to minimize burden on non-DBEs, recipients must address "overconcentration" of DBEs in certain fields and ensure that bidders who make good faith efforts to obtain DBE participation will not lose contracts.
- Recipients have substantial flexibility to adapt the program to local conditions, including a program waiver provision that allows recipients to seek Secretarial approval for alternative ways of running the program.

- Individual firms must graduate from the program if they exceed the small business size caps or if the firm's owner exceeds the personal net worth cap. The entire DBE program will expire in 2004 unless reauthorized by Congress.
- **Promoting Effectiveness and Efficiency for All Participants:**
 - The regulation significantly improves administration of the program:
 - There will be "one-stop shopping" in each state for small firms applying for DBE certification. A firm will have to apply only once to be certified as a DBE for all highway, airport, and transit recipients in the state.
 - The regulation's certification standards are clearer and more specific, resolving many difficult issues that have led to confusion and litigation in the past.
 - The regulation mandates clearer and fairer certification procedures. It also streamlines the process by which firms appeal certification decisions to DOT.
 - Consistent with Secretary Slater's emphasis on "One DOT," all written guidance and interpretations of the regulation will be coordinated on a Department-wide basis, improving consistency as recommended by General Accounting Office reports on the program.

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