

DBE and ACDBE Goal-Setting



**Federal Aviation
Administration**

Office Of Civil Rights

*ACHIEVING SAFETY
THROUGH DIVERSITY*

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2015 ACI-NA Conference

October 4, 2015



Goal Setting and Implementation

Purpose of Overall Goal and Project Goal

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Approaches to Calculate Goal

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8 Minimum Requirements

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Purpose of Overall ACDBE Goal

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Purpose of Overall ACDBE Goal

Accountability Requirements

Who Must Have a DBE Program/Set Goals?

- Program: FAA grant recipients for airport planning or development awarding prime contracts \$250,000 or more in FAA funds in a FFY
- Goals: FAA recipients who anticipate awarding \$250,000 or more in FAA funds in prime contracts in a FFY

Purpose of Overall Goal

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

- FAA Recipients: annual goal reviewed **every 3 years**

Overall Goal and Project Goals

Same Substantive and Procedural
Requirements



Must Follow USDOT's "Tips for Goal-Setting in the DBE Program"

<http://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

FAA Reviews Goals Using Same Guidance

Overall Goal and Project Goals

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

5

Approaches to Calculate the DBE Goal

5 Approaches to Calculate the DBE Goal

1. DBE Directory + Census Data
2. Bidders List
3. Disparity Study Data
4. Goal from another DOT Recipient
5. Alternative Methods

5 Approaches to Calculate the DBE Goal

1. DBE Directory + Census Data

- Determine ready, willing, and able DBEs in your market area from the DBE Directory
- Determine ready, willing, and able all firms in your market area from the Census Data
- Determine all ready, willing, and able firms performing work under the same NAICS codes
- $\text{Number of DBEs} \div \text{Number of all firms} = \text{Base figure for relative availability}$

5 Approaches to Calculate the DBE Goal

2. Bidders List

- 26.11(c) Requirement
- Bidders from the past 3 years
- Successful and unsuccessful bidders

5 Approaches to Calculate the DBE Goal

3. Disparity Study Data

- ❑ Percentage figure derived from data



5 Approaches to Calculate the DBE Goal

4. Goal from another DOT Recipient

- Same or substantially similar market
- Overall goal must be in compliance with 49 C.F.R. 26.45
- Goal can be used as base figure

5 Approaches to Calculate the DBE Goal

5. Alternative Methods—49 C.F.R. 26.45(c)(5)

- Demonstrable evidence of local market conditions
- Prequalification list or bidders list must meet regulatory requirements
- If list does not meet the regulatory requirements, you must supplement with additional sources

Identify Method Selected

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



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Minimum Requirements Included in each Method

1. FAA-Assisted Contracting Opportunities

- ALL FAA-Assisted Activities that include Possible Contracting Opportunities
- Include Potential Contracting Opportunities
- Assign Appropriate NAICS Code for Contracting Opportunities

2. Geographic Market Area

Determine Relevant Geographic Market Area (GMA): Geographic distribution of contractors and subcontractors and area in which contracting dollars are spent.

Note: Relevant Market Area **may not** be the same State geographic boundaries

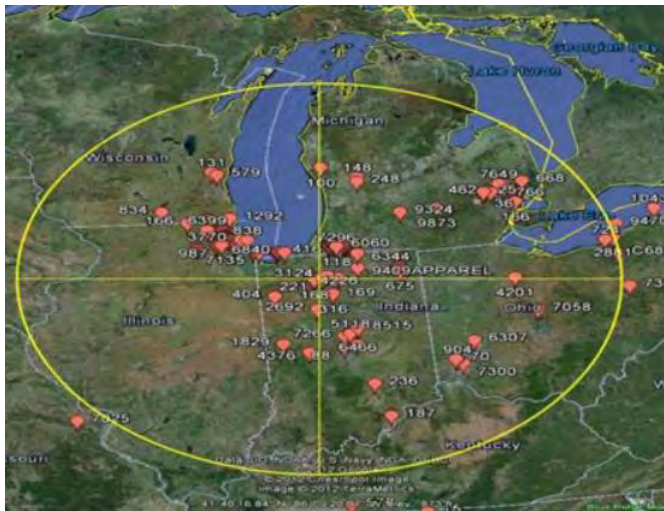
3. Step One: Base Figure



DBEs

Potential DBEs

All other Firms



- Geographic Market Area
- NAICS Codes

3. Step One: Base Figure, cont'd.

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

= Base Figure

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

<http://www.census.gov/epcd/cbp/view/cbpview.html>

3. Step One: Base Figure, cont'd. *Example Using Bidders List*

$$\frac{10 \text{ DBEs bid or quoted on prime or subcontracts}}{100 \text{ Total Firms bid or quoted on prime or subcontracts}} = 10.00 \% \text{ Base Figure}$$

3. Step One: Base Figure, cont'd. Bidders List Method

49 CFR §26.45(c)(2): **Acceptable only** if you have a method of collecting data on:

- ALL businesses, successful OR unsuccessful, that have bid or quoted on prime or subcontracts during the previous three years
- ALL DBE and non-DBE subcontractors that submitted bids or quotes during that time period.

3. Step One: Base Figure, cont'd. Disparity Study Method

- A disparity study typically yields best data available.
- If you have conducted a disparity study in market area and choose another method, explain why.

4. Weighting

Weighting by Work Type

- Provides a more narrowly-tailored model of availability
- Weights used are proportion of dollars spent within each industry: resulting percentage is more heavily influenced by availability in industries where more dollars are spent

4. Weighting, cont'd.

- Apply NAICS code to each type of work in your project
- Tally the dollars spent in each work type category as a percentage of the total contract dollars spent
- Assign work types to each DBE and non-DBE firm

4. Weighting, cont'd.

Example

Your contracts primarily in Trucking, Engineering/Design, and Construction:

Industry	Contract \$	% of Dollars (weight)	% of Dollars		Weighted %
			DBEs	Non-DBEs	
Trucking	\$100	5.00%	1	18	0.28%
Engineering/Design	\$100	5.00%	1	17	0.29%
Construction	\$1800	90.00%	8	65	11.08%
Total	\$2000	100.00%	10	100	11.65%

5. Identify Sources

DBE Directory



US Census Data



FAA db-E Connect



or Supplemental Sources

6. Step Two Adjustment

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

Step Two adjustment not required but if you don't, you must include an explanation.

6. Step Two Adjustment, cont'd.

Median Past DBE Participation (MPP)

- Use median DBE participation data from past 3 to 5 years to demonstrate capacity (percentages)
- If MPP figure is very similar to Step One base figure, you are not required to make adjustment for past participation

6. Step Two Adjustment, cont'd.

MPP Example

1. Tally total DBE achievement percentages for 3 to 5 years.

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

6. Step Two Adjustment, cont'd.

MPP Example

2. Choose median (**not average**) percentage:

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

3. MPP % with Base Figure %:

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

6. Step Two: Adjustment, cont'd.

Other Evidence

- Information from disparity studies
 - Lack of access to financing/bonding
 - Statistical employment data
 - Other data affecting likely DBE participation, e.g., drastic changes in the economy

7. Race-Neutral/Race-Conscious Breakdown

- Projection of Race-Neutral and Race-Conscious Participation
- Maximum Feasible Portion of Overall Goal using Race-Neutral Measures
 - ❑ Specify which race-neutral measures will be used
- **Must** Establish Contract Goals to Meet Remaining Portion of Goal

Race-Neutral Projection

Example

1. Tally total RN DBE achievement percentages for 5 years.

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

Race-Neutral Projection, cont'd.

2. Choose median RN percentage:

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

3. Apply to adjusted base figure for final goal:

$$\begin{aligned} & 6.65\% \text{ Race-Conscious} \\ + & \underline{5.00\% \text{ Race-Neutral}} \\ = & 11.65\% \text{ Adj. BF} \end{aligned}$$

Race-Neutral Measures

May Benefit DBEs **and** other Small Businesses

Determine the Small Business Needs within your Geographic Area

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

Race-Conscious Measures

9th Circuit Recipients

AK, AZ, CA, HI, ID, MT, NV, OR WA

Must Examine All Available Evidence of Discrimination

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

Include Evidence with Goal Methodology



*Western States Paving Co. v. Washington Dept. of
Transportation, 407 F. 3d 983 (9th Cir. 2005)*

7. Consultation

Small Business Community and Stakeholder Engagement

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

7. Consultation, cont'd.

Must submit evidence of public participation

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



7. Consultation, cont'd.

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

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



8. Proof of Publication

Must Post on Official Internet Webpage

May Post on other Media Outlets

- Must allow 30 day public comment period**



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Purpose of Overall ACDBE Goal

Accountability Requirements

Purpose of Overall ACDBE Goal

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

What is a Concession?

- Engaged in sale of goods and/or services to the public or a business that provides goods and services to those businesses
- Even if no office, store or other type of location on the airport premises it may still be considered a concession IF activities take place at the airport
 - Advertising
 - Web-based or electronic businesses accessible at the airport
 - Businesses that provide goods and services to concessionaires

What is a Concession?

- Simply deliver to or pick up passengers from the airport
= *Not a concession*
- Presence on the airport (taxi dispatcher, limo ticket booth, or car rental counter)
= *Is a concession*

Who Must Have ACDBE Goals?

- Recipients who are required to have an ACDBE Program must also establish two separate overall ACDBE goals – **Car Rentals** and **Concessions Other Than Car Rentals**
- Goal (each) due if annual revenue over preceding three years is greater than \$200K
- Goal covers three-year period; review annually for good fit
- Report significant adjustments to FAA
- Participation by all certified ACDBES

Establishing ACDBE Goals

Failure to establish and implement goals

or

Establish and implement differently (w/o approval)

= Non-Compliance



No FAA Financial Assistance

Establishing ACDBE Goals

- Objective is to estimate percentage of base figure that would be performed by ACDBEs in the absence of discrimination and its effects
- That is the estimated ACDBE participation that would occur if there were a “level playing field” for firms to work as concessionaires for your airport
- You must complete the goal-setting process separately for each of the two overall goals identified

Establishing Overall ACDBE Goals

- Goal based on evidence of R/W/A ACDBEs relative to all businesses R/W/A to participate
- Cannot rely on 10% national aspirational goal, previous overall goal, or past ACDBE participation rates without reference to relative availability of ACDBEs in your market
- Market area = geographical area where majority of firms seeking to do business with the airport and where those firms receiving substantial majority of concessions-related revenues are located
- Market area may be different for different types of concessions.

5

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ACDBE – Base for Car Rental Goal

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

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

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

ACDBE – Base for Concession Goal Other Than Car Rentals

- Includes total gross receipts of concessions
- **Does not include:**
 - **gross receipts of car rental operations**
 - dollar amount of management contract or subcontract with a non-ACDBE and gross receipts of business activities to which a management or subcontract with a non-ACDBE pertains
 - Any portion of a firm's estimated gross receipts that will not be generated from a concession

ACDBE Goal: Non-Car Rental *Example*

- Previous 3-year average concession revenues are \$1M
- Over next three years, airport:
 - expects consistent revenue
 - estimates revenues to existing concessions will grow by 5% (e.g., inflation plus increased passenger traffic)
 - does not anticipate major changes to increase or decrease concession revenue
- Base for goal is \$1,050,000

ACDBE Goal: Non-Car Rental

Example, cont'd.

- Using DBE Directories/Census Data
 - Calculate number of ACDBE in your directory and divide it by number of all concession businesses in Census data using the same NAICS and same market area

For example:

7 ACDBEs divided by 200 businesses = 3.5%

ACDBE Goal: Non-Car Rental

Example, cont'd.

- Using Active Participants List
 - Determine number of ACDBE that have participated or attempted to participate in your concessions program and divide it by number of all concession businesses that have participated or attempted to participate

For example:

22 ACDBEs divided by 276 businesses = 7.9%

ACDBE Goal: Non-Car Rental

Example, cont'd.

- Using Data from a Disparity Study
 - Use a percentage figure derived from an applicable study
- Using Goal of Another Recipient
 - Make adjustments for local area in Step 2

ACDBE - Step 2 Adjustment: Things to Remember

- Do not mix/divide goods and services purchases by gross receipts; and
- Divide gross receipts by gross receipts or goods and services by goods and services

Apples to Apples and Oranges to Oranges!

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

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

ACDBE – Info to Include with Overall Goal Submittal

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

How the Goal Can Be Met

- **Race-conscious measures must be used when race-neutral measures alone are not projected to be sufficient to meet an overall goal:**
 - Concession-specific goals
 - Negotiating with potential concessionaire to include ACDBE participation, through direct ownership arrangements
 - Other methods that take a competitor's ability to provide ACDBE participation into account (prior approval of FAA required)

How the Goal Can Be Met

- If setting concession-specific goals to obtain ACDBE participation through direct ownership arrangement with an ACDBE, calculate goal as a percentage of total estimated annual gross receipts from the concession.
- If the goal applies to purchases and/or leases of goods and services, calculate by dividing estimated dollar value of such purchases and/or leases from ACDBEs by total estimated dollar value of all purchases to be made by the concessionaire.

How the Goal Can Be Met

- To be eligible to be awarded the concession, competitors must make good faith efforts to meet this goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so.
- The administrative procedures applicable to contract goals in part 26, §26.51-53, apply with respect to concession-specific goals.

ACDBE Car Rental Goal

- Enforcement provisions in car rental firm's contracts
- Point to current regulations to show car rental companies what is required

Direct Ownership by ACDBE

- Airport businesses subject to ACDBE goals (except car rental companies) must make GFE to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with ACDBEs
- Direct ownership arrangement means a joint venture, partnership, sublease, licensee, franchise, or other arrangement in which a firm owns and controls a concession

ACDBE – Submittal Process

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

ACDBE – Submittal Process

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



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Purpose of Overall ACDBE Goal

Accountability Requirements

Accountability Report (Shortfall Requirements)

A recipient that does not meet its overall DBE or ACDBE goal **in any given year** must submit a written analysis to the FAA of **why the goal was not met** and **corrective measures** to be taken.

Accountability Report (Shortfall Requirements)

- Analyze reasons for difference between overall goal and awards/commitments in that year
- Establish specific steps to correct problems in order to fully meet goal for new fiscal year

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



Accountability Report (Shortfall Requirements)

- **Core 30 Airports** must submit analysis and corrective actions within 90 days of end of fiscal year
- FAA Approval = In Compliance
- **All Other Airports** must analyze and prepare corrective action plan but do not have to submit to FAA. Maintain records for three years and make available to FAA, upon request
- FAA may require modifications to overall goal methodology: Changes to RC/RN projections or additional RC/RN measures

DBE Shortfall Submission Dates: What If...

Your FY 2014-2016 is 10% Goal

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

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

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

Drafting a Shortfall Analysis:

First, review Uniform Report for accuracy!

Shortfall Percentage



Drafting a Shortfall Analysis:

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



Drafting a Shortfall Analysis:

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



Drafting a Shortfall Analysis:

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



Drafting a Shortfall Analysis:

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



Drafting a Shortfall Analysis:

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



Drafting a Corrective Action Plan: Elements

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

Accountability Report (Shortfall Requirements)

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

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

The End!

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