

# Facilitating Success



## *DBE Administrators, Vendors Must Have Solid Relationship*

*Lori E. Lightfoot,  
partner, Mayer Brown*

A viable Disadvantaged Business Enterprise program must strike the right balance between program integrity and business-friendly environment for vendors. Calibrating the right mix of regulations with a business-friendly environment is challenging and requires constant diligence. Since in large measure, any DBE program operates on an honor system with vendors, an airport authority must highlight and credit those vendors who sincerely embrace the important policy underpinnings of the DBE program and ensure that there is ample encouragement and support for doing things the right way. What follows are some practical recommendations on how best to strike that balance gleaned from experience and analysis of best practices in DBE programs.

The Code of Federal Regulations provides a framework for a DBE program, but the creation and execution is really left to a program's administrator. It is incumbent upon each DBE program administrator to

achieve compliance with all federal mandates and meet unique organizational goals. Essential elements of all effective DBE programs are (1) commitment at all organizational levels; (2) comprehensive and straightforward internal and external policies and procedures which span the pre-bid process through contract closure process; (3) the contractual and other tools, as well as sufficient resources to quickly address any problems as effectively as possible; and (4) highly skilled and motivated personnel who are in constant communication with their internal business partners and attuned to vendors and the nuances of individual markets.

### *Organizational Commitment*

An obvious but important point is that no DBE program can achieve real success

objectives. These leaders must be educated about the program so that at least at a high level they understand the program's important mandate.

Too often, the DBE unit will be segregated from the other business units, particularly in planning, strategy and communication. Consequently, many personnel who could impact the success or failure of a DBE program have no appreciation for its material aspects. So, there must be education and constant communication between those who primarily own the DBE function and the internal consumers of the program, such as the larger procurement or business units.

Fundamentally, a DBE program's objectives must embrace the federal mandate of providing disadvantaged businesses with opportunities to participate fully in the performance of federally funded

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unless the organization at all levels makes a commitment to the program's viability.

How does that happen? Like with any organizational priority, the key thought leaders must embrace the program's

contracts. The centerpiece of the program should be a strategic plan that incorporates important elements of an organization's overall strategic plan and identifies business development objectives for existing DBEs

and potential new business opportunities among DBEs. A necessary tool is a comprehensive availability study, which assesses the range of DBEs who are ready, willing and able to perform.

Armed with an availability study, the DBE program administrator can then set realistic annual and contract-specific DBE goals. The CFR establishes the baseline requirements for goal-setting. See 49 CFR §26.45.

### Setting Goals

As a practical matter, however, setting annual and contract-specific goals must be a collaborative effort between the DBE and respective business units. The business units possess invaluable information about upcoming contracts and the potential for DBE participation. The business units also routinely interface with vendors and could serve as important partners in compelling compliance with DBE objectives. So, there must never be a time when a business unit manager says, in effect, "I have no idea how this DBE goal was set for this contract. Someone just gave me the number and I put it in my bid specs."

In addition, if the annual or contract-specific goal is unrealistic, i.e. does not reflect the realities of the marketplace, at best vendors will engage in malicious compliance or at worst outright fraud. A high DBE goal may seem laudable and satisfy a particular constituency, but the actual percentage must be grounded in real data about DBEs who can provide a commercially useful function. See 49 CFR §26.5.

Going hand in hand with realistic goal-setting is the existence of a credible good-faith efforts waiver policy. Here again, the regulations allow for such waivers if a vendor demonstrates that it has made good-faith efforts to meet the goal, but has fallen short. The challenges with establishing a credible good-faith efforts policy fall are: (1) vendors try to make the exception the rule by making little or no effort to actually obtain DBE participation, or (2) vendors think any waiver request, no matter how reasonable, will be met with hostility and so they reflexively agree to meet the goal with full knowledge that it will be impossible. Neither result is desirable. The message must be clearly sent that the DBE program exercises due diligence in setting both its annual and

contract-specific goals.

Nonetheless, in some circumstances the DBE goal may be unattainable either because a contract is unique or some unforeseen market force. Where a vendor documents his good-faith efforts and demonstrates the lack of available DBE participation, a waiver should be given. The keys to successfully setting and obtaining realistic DBE participation on any contract is understanding the range of DBE availability in a given market; having detailed knowledge about the range of services involved in the contract; setting a data-driven goal that is contract-specific; and allowing good-faith effort waivers where a vendor has complied with pre-set, written guidelines.

### The Bid Process

The general bid-solicitation documents and the standard terms and conditions provide another avenue for reinforcing the expectations and responsibilities for DBE and non-DBE vendors alike. If the basic tools which the organization uses to govern its contractual relationships with vendors is silent, limited or vague about the DBE commitment, that failing will

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speak volumes about where the DBE program falls among the organization's priorities. Conversely, if the vendor's obligations are clearly set forth in the bid materials and the standard terms and conditions, it puts the vendor on notice, reinforces the DBE program's importance and hopefully eliminates any subsequent disputes about the scope or content of the DBE commitment.

In evaluating a vendor's DBE utilization plan, the emphasis, as the regulations require, should be on the DBE performing a CUF, i.e. the DBE must add real value to the contract and not merely be artificially

inserted into a contractual relationship merely to create the appearance of compliance. To address the CUF question, many of the same data points used in setting contract-specific goals are relevant: the scope of services for the contract; the available, relevant DBEs; proposed utilization of DBE(s); work allocated to non-DBEs – is it distinct from the proposed DBEs work or if not, what's the line of demarcation between the two sets of subcontractors so that there is actual DBE participation?

The best way to collect this information is through a subcontractor utilization plan which compels the lead vendor to identify all

proposed subcontractors, their respective scope of services and any affiliations between the various companies. Some DBE programs only require a vendor to provide DBE subcontractor information. This is a mistake. Having a snapshot of all proposed subcontractors in analyzing the CUF question is important to puts the DBE's projected work in context. Also, the DBE program administrator will be better positioned to evaluate any good-faith efforts waiver request if he knows how the entire contract will be apportioned. It will be readily apparent if the vendor is creating real opportunities for DBE participation or merely relegating the DBE to some peripheral function. Finally, any red flags regarding proposed DBE participation should emerge from comprehensive information about all proposed subcontractors.

All bid submittals should also contain a written certification by each proposed DBE affirming its participation in the bid and its ability to perform. The certification should also put the DBE on notice its responsibility to understand and comply with all DBE-related laws, regulations and policies, as well as consequences for any intentional, material misstatements or omissions. Some jurisdictions require the DBE to complete a separate affidavit; others rely on a short certification paragraph. Regardless of the format, the vendor should certify the following information:

- Certification under penalty of perjury;
- Authorization to execute the certification on behalf of the vendor;
- Have conducted reasonable due diligence in collecting the information provided;
- Understanding that the information provided contains material statements relied upon by the airport authority in its decision making;
- Information provided does not contain any untrue information or omit any material fact;
- Vendor has read and understands the DBE-related rules, regulations and policies applicable to the DBE program;
- Vendor is in compliance with those rules, regulations and policies;
- Vendor understands that if the airport authority determines that any information provided is intentionally false or misleading, the airport authority may pursue any and all remedies, as well as report misconduct to the appropriate certifying and law enforcement agencies.

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This certification language unambiguously expresses clear expectations for the DBE and identifies the consequences for the knowing provision of false statements or material omissions. Too harsh? In my experience, this kind of tough but clear language does not give legitimate vendors any pause, but does serve as a deterrent against all-too-commonplace problems with DBE participation on contracts: DBEs signing documents in blank, receiving no notice that they are part of a bid proposal or subsequent claims of ignorance about the contract's DBE requirements. Each DBE program administrator will have to decide at the outset how best to communicate to the vendor community the values and importance of the DBE program. The certification provides an important messaging opportunity.

### *After The Contract Is Awarded*


Having gathered comprehensive information about all proposed subcontractors and received written certification about the DBE participation, the DBE policies and procedures should also identify the reporting required for the vendor regarding DBE participation post-contract award. The best programs utilize a monthly report which reflects detailed information that affords real-time evaluation. The DBE participation reporting requirements should not be onerous. To facilitate accurate reporting, vendors must be given training, as well as a mechanism to pose questions outside of a formal training environment. Also, as part of the bid-submittal package, some DBE programs require identification of the vendors' internal DBE specialist and that person's credentials, particularly on large, long-term projects to allow evaluation of the vendor's DBE capabilities and to facilitate communication about DBE participation.

In addition to the above basic pre-bid and contractual requirements, the organization's standard terms and conditions must also include other oversight tools for the DBE program:

- Prohibitions against unilateral substitution of DBEs: The airport authority must be given prior written notice and provide authorization for any substitution regardless of the circumstances.
- Right to examine or audit books and records and to conduct employee

interviews: This audit function should encompass the primary vendor and all subcontractors and include heavy sanctions for non-compliance.

- Sanctions for non-compliance: Though most vendors perform contracts without any significant issues and are serious about their DBE commitment, the airport authority must have the ability to take decisive action against material and intentional misconduct with a credible threat of debarment or the designation of a vendor as "not responsible" for future bid opportunities.

The basic policies and procedures outlined above should lay the foundation for an effective and user-friendly DBE program. Of course, the airport authority must also commit other important resources in the form of highly skilled and dedicated staff, technology and other automation to the DBE program. In addition, constant and detailed communications with the vendor community, the ultimate consumers of the program, is essential. 

*Lori E. Lightfoot is a partner in the Mayer Brown lawyer firm and specializes in airport contracting.*



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