



**REQUEST FOR PUBLIC COMMENT**  
**NVTC's Disadvantaged Business Enterprise Policy, Program and Goal**

At its meeting of January 5, 2012, the Northern Virginia Transportation Commission (NVTC) adopted Resolution #2182 authorizing its staff to publish and seek public comment on the proposed policy and a goal of 5.6 percent of its federally funded contract value to be awarded to Disadvantaged Business Enterprises (DBE) each year for the three-year period of 2012-2014.

After receiving public comments, NVTC intends to act on the proposed policy, program and goal at its business meeting of March 1, 2012. The policy, program and goal would then be provided to the Federal Transit Administration and NVTC would continue to report regularly on its progress in achieving the goal.

The attached memorandum dated December 22, 2011 contains the policy and goal and describes how the calculation of the goal was performed. NVTC co-owns with the Potomac and Rappahannock Transportation Commission (PRTC) the Virginia Railway Express and PRTC has established a goal of 5.6 percent. NVTC has shared the same goal as PRTC for many years, and until this action, PRTC has reported to FTA on behalf of NVTC and VRE. Consequently, it is important to maintain continuity among these closely related agencies.

NVTC requests public comments on all aspects of the policy and goal and particularly whether the goal should be set at 5.6 percent as recommended or the lower calculated value of 2.8 percent (refer to the attached memo).

NVTC has also prepared a more detailed DBE program, which is attached.

To provide public comment, please respond by letter or email to:

Mariela Garcia-Colberg  
Transit Projects and Grants Specialist  
Northern Virginia Transportation Commission  
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Arlington, VA 22201  
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**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

March 1, 2012

## **Objectives/Policy Statement**

The Northern Virginia Transportation Commission (NVTC) (hereinafter called the commission) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. The commission has received federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, the commission has signed assurances that they will comply with 49 CFR Part 26.

It is the policy of the commission to ensure that DBE's, as defined in §26.5, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also NVTC's policy:

- ◆ To ensure nondiscrimination in the award and administration of DOT-assisted contracts;
- ◆ To create a level playing field on which DBE's can compete fairly for DOT-assisted contracts;
- ◆ To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
- ◆ To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBE's;
- ◆ To help remove barriers to the participation of DBE's in DOT assisted contracts; and
- ◆ To assist the development of firms that can compete successfully in the market place outside the DBE Program.

Mariela Garcia-Colberg, NVTC's Transportation Projects and Grants Specialist, has been delegated as the DBE Liaison Officer. In that capacity, she is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the commission in its financial assistance agreements with the Department of Transportation.

NVTC's staff has disseminated this policy statement to their Commissioners and all the components of their organization. They have distributed this statement to DBE and non-DBE business communities that perform work for them on DOT-assisted contracts.

## **Objectives**

1. Appoint a DBE liaison officer, who shall have direct, independent access to NVTC's Executive Director concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of NVTC's DBE program. NVTC's DBE liaison officer is Mariela Garcia-Colberg.
2. Thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in NVTC's community and make reasonable efforts to use these institutions. NVTC will also encourage its prime contractors to use such institutions.
3. The DBE liaison officer, together with NVTC's director of finance, will create and establish prompt payment mechanisms for all contractors and subcontractors and provide appropriate means to enforce the requirements of these mechanisms. These shall be included in all of NVTC's Request for Proposals, Invitations for Bid and resulting project contracts.
4. NVTC's DBE program will include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently ( e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was

committed. This mechanism will include a written certification that NVTC has reviewed contracting records and monitored work sites in its district for this purpose. This monitoring will be conducted as part of the close-out reviews for a contract.

5. The monitoring and enforcement mechanism will provide for a running tally of actual DBE attainments (*i.e.*, payments actually made to DBE firms), including a means of comparing these attainments to commitments.
6. In order to foster small business participation, NVTC will include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.
7. NVTC will incorporate all of the DBE program objectives in its agreements with subrecipients. NVTC will monitor the performance of these subrecipients and will implement appropriate mechanisms to ensure compliance with the DBE program requirements.
8. In the event that a subrecipient fails to comply with DBE program requirements, NVTC may terminate the subrecipient's agreement for default. Termination shall be effective by serving a notice of termination on the subrecipient setting forth the manner in which the subrecipient is in default.

### **Definitions of Terms**

The terms used in this program have the meanings defined in 49 CFR §26.5.

**Executive Director's Commitment to the Disadvantaged Business Enterprise Program**

I, Richard K. Taube, Executive Director of the Northern Virginia Transportation Commission, will take Affirmative Action to ensure that Disadvantaged Business Enterprises shall have maximum practical opportunity to participate in the performance of the contracts financed in whole or in part with funds derived from the Federal Transit Administration.

I will direct the NVTC staff to provide for the maximum utilization of Disadvantaged Business Enterprises including financial institutions, and to use all practical means to ensure that Disadvantaged Business Enterprises have the maximum practical opportunity to compete for contract and subcontract work let by the commission.

In keeping with this commitment it is my pledge to work toward achieving the following DBE goals for the award of FTA-assisted contracts, excluding vehicle procurements. The goal for utilization of the DBE's shall be **5.6%** of the construction, supply and consultant contract dollar amounts.

\_\_\_\_\_  
Richard K. Taube, Executive Director  
Northern Virginia Transportation Commission

Date \_\_\_\_\_

**1. Nondiscrimination**

The commission will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, gender, national origin or ethnicity.

In administering its DBE program, the commission will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, gender, national origin or ethnicity.

**2. DBE Program Updates**

The commission will continue to carry out this program until all funds from DOT financial assistance have been expended. The commission will provide to DOT updates representing significant changes in the program.

**3. Quotas**

The commission does not and shall not use quotas in any way in the administration of this DBE program.

**4. DBE Liaison Officer (DBELO)**

The commission has designated the following individual as their DBE Liaison Officer:

Mariela Garcia-Colberg  
2300 Wilson Boulevard, Suite 620  
Arlington, VA 22201  
(703) 524-3322  
[mariela@nvtdc.org](mailto:mariela@nvtdc.org)

In that capacity, Ms. Garcia-Colberg is responsible for implementing all aspects of the DBE program and ensuring that the Commission comply with all provisions of 49 CFR Part 26. Ms. Garcia-Colberg has direct, independent access to the Executive Director concerning DBE program matters.

Ms. Garcia-Colberg is responsible for developing, implementing and monitoring the DBE program, in coordination other appropriate officials. Duties and responsibilities include the following:

- ◆ Gathers and reports statistical data and other information as required by DOT.
- ◆ Reviews third party contracts and purchase requisitions for compliance with this program.
- ◆ Ensures that bid notices and requests for proposals are available to DBE's in a timely manner.
- ◆ Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals) and monitors results.
- ◆ Analyzes the Commission' progress toward goal attainment and identifies ways to improve progress.
- ◆ Participates in pre-bid meetings as needed.
- ◆ Advises the Executive Director on DBE matters and achievement.
- ◆ Participates with the legal counsel and project managers to determine contractor compliance with good faith efforts.

- ◆ Provides DBE's with information and assistance in preparing bids, obtaining bonding and insurance.
- ◆ Plans and participates in DBE training seminars.
- ◆ Provides outreach to DBE's and community organizations to advise them of opportunities.

Reconsideration Official

The commission's reconsideration official will be Mr. Rick Taube, Executive Director of the Northern Virginia Transportation Commission (NVTC). Mr. Taube will abide by the requirements for reconsideration as stated in §26.53(d).

**5. Federal Financial Assistance Agreement Assurance**

The commission has signed the following assurance, applicable to all DOT-assisted contracts and their administration:

The commission shall not discriminate on the basis of race, color, sex, gender, national origin or ethnicity in the award and performance of any DOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The commission shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The commission's DBE Program, as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the commission of their failure to carry out its approved program, the Department may impose sanctions as provided for under §26.101 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

**6. DBE Financial Institutions -Investigation of Opportunities for the Use of Banks owned and controlled by minorities or women.**

The commission has a practice of reviewing its banking needs perpetually and making specific inquires every two or three years. Because of the nature of its business, and extent of its banking needs, there are a limited number of financial institutions that can fulfill all of the separate commission's service requirements. It has also been determined that by using one institution at a time for such service, the commission has greater control, and productivity and economic gain are enhanced. At the present time, there is no minority or female owned and controlled financial institutions with which the commission does business.

**7. Directory**

The commission does not certify firms as DBE's but utilize the Department of Transportation of the Commonwealth Virginia (VDOT) and the Virginia Department of Minority Business Enterprises (VDMBE) Certified DBE Vendor lists to determine which firms may be counted as DBE's. The directories list the firm's name, address, and phone number and the type of work the firm has been certified to perform as a DBE.

These directories are revised periodically. Because of the size of VDOT's directory, copies are not appended; however, these directories are available online at VDOT's website

([www.virginiadot.org](http://www.virginiadot.org)). Likewise, VDMBE's list can be found online ([www.dmb.state.va.us](http://www.dmb.state.va.us)).

## **8. Contract Assurance**

The commission will ensure that the following clause is placed in every DOT-assisted contract and subcontract:

The contractor or subcontractor shall not discriminate on the basis of race, color, sex, gender, national origin or ethnicity in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the Commission deems appropriate.

## **9. Prompt Payment**

The commission includes the following clause in each DOT-assisted prime contract:

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 30 days from the receipt of each payment the prime contractor receives from the respective commission. The prime contractor agrees further to return retainage payments to each subcontractor within 30 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the respective Commission. This clause applies to both DBE and non-DBE subcontractors. Work may be credited toward goals only when payments are actually made to DBE's.

## **10. Monitoring and Enforcement Mechanisms**

The commission will bring to the attention of the Department of Transportation any fraudulent or dishonest conduct in connection with the program, so that DOT can take the steps provided in §26.107. They also will consider similar action under their own legal authorities, including responsibility determinations in future contracts.

The commission has implemented appropriate mechanisms to ensure compliance with the part's requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state and local law).

## **11. Overall Goals**

The commission's overall goal for 2012-2014 is the following:

**5.6%** of the Federal financial assistance the commission will expend in DOT-assisted contracts (exclusive of FTA funds to be used for the purchase of transit vehicles).

Given the amount of DOT-assisted contracts the commission expects to get during FY 12-14 period which is estimated to be \$5,000,000, a goal of \$280,000 in contract awards to DBE's has been established.

**Method**

NVTC's overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate in NVTC's USDOT-assisted contracts.

There are several steps that need to be completed in order to establish DBE goals. The first step in establishing an overall goal for DBE participation is to establish a base figure for the relative availability of DBE vendors within NVTC's service area (Northern Virginia and Washington, DC). In order to determine NVTC's base figure, NVTC will use the goal already set by PRTC, which is another USDOT recipient in the same market, and has already set its overall goal in compliance with federal regulations. PRTC has set its FY10-12 at **5.6%** which also applies to the Virginia Railway Express (VRE). PRTC and NVTC co-own VRE, so that it is sensible to retain continuity among NVTC, PRTC and VRE.

After calculating NVTC's base figure, the second step is to adjust for differences between PRTC and NVTC's contracting program, if any. After studying PRTC's contracting program and comparing it to that of NVTC, NVTC believes the two are comparable and utilize the same types of firms. NVTC USDOT assisted projects expected to be initiated during the federal fiscal periods 2012-2014 include construction of a Falls Church intermodal transit facility; preliminary design of Alexandria Potomac Yard transit improvements including final design and construction of entrances; design of an intermodal station on Eisenhower Avenue; design, construction and project management of King Street metrorail access improvements; and design and construction of improvements for Alexandria Transit. Firms that will be utilized include general management, planning services, engineering services, and construction.

Then, the federal DBE regulations require that the base goal should be adjusted using past participation rates of DBEs on USDOT-funded projects. Past participation percentages are derived from **actual commitments** to DBE certified firms by the prime contractor for the past three completed federal fiscal year reporting periods. In NVTC's case, that would be FY, '09, '10 and '11. At this juncture, NVTC will probably have to use combined PRTC data because it is the only one NVTC have available. The adjusted goal is then calculated by adding the base goal percentage to the median percentage, from the previous three years, and then diving by two.

Past Participation of NVTC

Year	FFY 2011	FFY 2010	FFY 2009
Percent of total dollars to DBE	0	0	0

**Median = 0%**

Using 0% as the median percentage for past participation resulted in the following formula used to calculate the adjusted base goal:

<b>Adjusted Goal</b>	<b>Formula</b>
<b>%</b>	$=([\text{base}]5.6\%+[\text{median}] 0\%) / 2$

**Proposed Goal 2.8%**

**However, NVTC wishes to maintain the same goal as PRTC and VRE, which is 5.6%**

**12. Transit Vehicle Manufacturers**

If the commission ever procured transit vehicles, it will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, the commission may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

**13. Process**

An important part of setting the DBE goal is public participation. NVTC must consult with minority, women’s and general contractor groups, community organizations and others which could be expected to have information about DBEs.

Once staff sets the proposed NVTC DBE goals and gains commissioners’ provisional approval, the commission will publish a notice in a Northern Virginia newspaper and available minority – focused media informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the commission’s principal office for 30 days following the date of the notice, and informing the public that the Commission will accept comments on the goals for 45 days from the date of the notice. If public comments are received, the goal must be reconsidered and reviewed by the Commissioners; if not, the Commissioners can adopt the goal. The commission overall goal submission to DOT will include a summary of information and comments received during this public participation process and our responses.

The commission shall submit its overall goal to DOT on March 30, 2012.

The commission will begin using its overall goal right away, unless we have received other instructions from DOT.

**14. Breakout of Estimated Race-Neutral and Race-Conscious Participation**

The commission will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. The commission uses the following race-neutral means to increase DBE participation, including but not limited to:

- ◆ Give priority to race-neutral means (including gender neutrality).
- ◆ Through outreach, technical assistance, procurement process modifications to increase opportunities for all small businesses, not just DBEs, and do not involve setting specific goals for the use of DBEs on individual contracts.
- ◆

- ◆ The commission estimates that, in meeting our overall goal of **5.6%**, we will obtain **5.6%** from race-neutral participation.

### **15. Contract Goals**

The commission will use contract goals to meet any portion of the overall goal the commission do not project being able to meet using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

The commission will establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. The commission needs not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work)

The commission will express its contract goals as a percentage of the federal share of a DOT-assisted contract.

### **16. Good Faith Efforts**

The commission treats bidder/offers' compliance with good faith effort requirements as a matter of responsiveness. Each solicitation for which a contract goal has been established will require the bidders/offers to submit the following information:

- ◆ Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contact negotiation procedures.
- ◆ The names and addresses of DBE firms that will participate in the contract;
- ◆ A description of the work that each DBE will perform.
- ◆ The dollar amount of the participation of each DBE firms participation.
- ◆ Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal.
- ◆ Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
- ◆ If the contract goal is not met, evidence of good faith efforts.

### **17. Demonstration of Good Faith Efforts**

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts.

The Contract Officer is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive pertaining to the contract:

The commission will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before we commit to the performance of the contract by the bidder/offeror.

**18. Administrative Reconsideration**

Within 30 days of being informed by the relevant commission that it is not responsive because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the appropriate reconsideration official at the address provided below.

NVTC  
2300 Wilson Boulevard, Suite 620  
Arlington, VA 22201  
703-524-3322  
nvtc@nvtc.org

The reconsideration official will not have played any role in the original determination that the bidder/offeror did not make document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. The commission will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process may not be appealed to the Department of Transportation.

**19. Good Faith Efforts when a DBE is replaced on a contract**

The commission will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. The commission will require the prime contractor to notify the DBE Liaison Officer immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In this situation, the commission will require the prime contractor to obtain NVTC's prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. If the contractor fails or refuses to comply in the time specified, our contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

**20. Counting DBE Participation**

The commission will count DBE participation toward overall and contract goals as provided in 49 CFR §26.55.

**21. Certification**

The commission does not certify DBE's; however, the commission does recognize certification by the Virginia or Maryland Department of Transportation, WMATA, Amtrak or any other transportation or transit agency receiving federal DOT funds.

## **22. Information Gathering and Reporting**

- **Bidders List**

The commission will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the bidders list approach to calculating overall goals. The bidders list will include the name, address, DBE/non-DBE status, age and annual gross receipts of firms. The Transportation Project Manager will maintain this information on site.

- **Monitoring Payments to DBE's**

NVTC will require prime contractors to maintain records and documents of payments to DBE's for three years following the performance of the contract. Any authorized representative of the commission or DOT will make these records available for inspection upon request. This reporting requirement also extends to any certified DBE subcontractor.

NVTC will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.

NVTC will perform interim audits of contract payments to DBE's. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

## **23. Reporting to DOT**

The commission will report DBE participation on a semi-annual basis, using the form entitled "Uniform DBE Awards or Commitments and Payments."

### **Attachment 1: Proof of Goal Advertisement**