
Office of Inspector General

Audit Report

WEAKNESSES IN THE DEPARTMENT'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM LIMIT ACHIEVEMENT OF ITS OBJECTIVES

Office of the Secretary

Report Number: ZA-2013-072

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Memorandum

**U.S. Department of
Transportation**

Office of the Secretary
of Transportation
Office of Inspector General

Subject: **ACTION:** Weaknesses in the Department's
Disadvantaged Business Enterprise Program Limit
Achievement of Its Objectives
Report No. ZA-2013-072

Date: April 23, 2013

From: Calvin L. Scovel III
Inspector General

Reply to
Attn. of: JA-60

To: Deputy Secretary

The Department of Transportation's (DOT) Disadvantaged Business Enterprises (DBE) program was created to help socially and economically disadvantaged individuals¹ who own and control small businesses to participate in contracting opportunities within DOT financial assistance programs. DOT distributed over \$4 billion to DBEs via its recipients² in fiscal year 2009 and almost \$3 billion in fiscal year 2010. However, during that period, DBE fraud and abuse cases increased significantly, making up nearly 25 percent of OIG active investigations for procurement and grant fraud in fiscal year 2010. Currently, DBE cases represent 29 percent of OIG active procurement and grant fraud investigations.

The DBE program's integrity depends in large part upon the establishment of systematic procedures to ensure that only certified firms are eligible to participate in the program. DOT's DBE regulations place this responsibility primarily on State transportation agencies. However, the program also requires DOT leadership, guidance, and oversight. Accordingly, our objectives were to assess the effectiveness of the Department's management and implementation of its DBE program. Specifically, our audit objectives were to determine whether (1) the Department³ provides adequate DBE program management, (2) DOT's Operating

¹ 49 CFR § 26.5 states a socially and economically disadvantaged individual means any individual who is a citizen (or legal, permanent resident) of the United States and who is (1) any individual who a recipient finds to be socially and economically disadvantaged on a case-by-case basis; or (2) any individual in the following groups: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, Women, or any additional group designated as socially and economically disadvantaged by the Small Business Administration (SBA).

² DBE program recipients can include State highway agencies, airports, transit authorities, and other State and local agencies that receive DOT funds.

³ Our use of the term "Department" in this report refers to the U.S. Department of Transportation, Office of the Secretary (OST).

Administrations and recipients sufficiently oversee and implement the DBE program, and (3) the Department achieves its program objective to help develop DBEs to succeed in the marketplace.

We conducted this review between April 2011 and October 2012 in accordance with generally accepted Government auditing standards. To conduct our work, we interviewed Department representatives from offices that have roles related to the DBE program: the Office of Small and Disadvantaged Business Utilization (OSDBU), the Departmental Office of Civil Rights (DOCR), and the Office of General Counsel (OGC). We also interviewed representatives from each of DOT's three Operating Administrations that are required to participate in the program: the Federal Transit Administration (FTA), the Federal Aviation Administration (FAA), and the Federal Highway Administration (FHWA).⁴ Finally, we visited or contacted 15 States. We conducted site visits at six randomly selected States⁵ and surveyed nine additional randomly selected States. As part of this audit, we selected a statistical sample of 121 DBE firms working on active federally funded projects, which allowed us to project the total amount of fiscal year 2009 DBE funds that could have been put to better use and the total amount of fiscal year 2009 DBE funds that was unsupported. Exhibit A further details our scope and methodology.

RESULTS IN BRIEF

The Department does not provide effective program management for the multibillion-dollar DBE program. The Department has not issued comprehensive, standardized DBE guidance or provided sufficient training to the recipients responsible for implementing the nationwide DBE program. Of the 15 States we surveyed, 14 States said they lacked clear DBE guidance from the Department, and 12 States said the Department did not provide adequate DBE training. In the absence of sufficient guidance or training, it is especially critical that the Department provide effective program management to help recipients and Operating Administrations achieve the goals of the program and comply with DBE regulations. Although the Department has strengthened its commitment to the program and taken some actions to improve program administration, the Department has not established a single line of accountability for the program, such as by assigning overarching DBE program management to a single Department level entity. Instead, it takes a fragmented approach by assigning only limited DBE program management responsibilities to three separate Departmental offices. Furthermore, these three offices do not fully implement even the limited responsibilities they have been assigned. For example, the DOCR does not fulfill

⁴ FHWA's awards represented nearly 80 and 65 percent of the Department's total DBE dollars in 2009 and 2010, respectively.

⁵ One of the six states was the District of Columbia.

its delegated responsibility⁶ to perform oversight reviews of the Operating Administrations and has mostly limited its DBE involvement to reviewing and adjudicating DBE certification appeals cases. DOT's lack of a single line of accountability for the DBE program makes it difficult for the Department to (1) track whether the DBE program is achieving its objectives, (2) accurately account for billions in annual DBE spending, and (3) ensure adequate communication with State and local recipients responsible for program implementation.

Operating Administrations and recipients do not adequately oversee or implement the DBE program, partly due to the Department's lack of integrated program management and standardized guidance on DBE practices. Operating Administrations' reviews of recipients' DBE practices are neither consistent nor comprehensive, leaving recipients' certification and contract compliance weaknesses unaddressed. Consequently, the State certifying agencies that we reviewed do not always adequately verify that firms applying for DBE certification meet the regulatory eligibility requirements. Based on our review, we estimate that \$124 million of the \$4.1 billion in DBE funds distributed across 52 U.S. States and territories⁷ in fiscal year 2009⁸ could have been put to better use if DOT and its recipients had implemented better internal controls over their certification processes.⁹ In addition, most recipients do not provide sufficient oversight at project sites to ensure that DBEs complete the work according to contract terms.

The Department has limited success in achieving its program objective to develop DBEs to succeed in the marketplace because recipients place more emphasis on getting firms certified as DBEs rather than assisting them to identify opportunities and to market themselves for DBE work on federally funded projects. As a result, the majority of certified DBE firms from the six States we visited—especially smaller firms—have been unsuccessful in obtaining federally funded contracts. For example, at the 6 States we visited, less than 20 percent of the 7,689 certified firms actually received work on federally funded projects. The recipients recognize this issue with DBE utilization; however, recipients have limited resources to help DBEs develop and obtain work as DBEs. In addition, the Department does not require recipients to actively track or report utilization data

⁶ *Organization and Delegation of Powers and Duties*, Final Rule, 77 Fed. Reg. 49964, 49974-5 (Aug. 17, 2012) (amending 49 CFR § 1).

⁷ The universe included Puerto Rico but did not include the Virgin Islands because it did not report DBE expenses in fiscal year 2009.

⁸ We based our projections on fiscal year 2009 amounts because these were the most current and complete data the Department was able to provide at the onset of our audit.

⁹ This estimate is based on our determination that 2 firms from our random sample of 121 currently certified firms had failed to meet eligibility requirements for continued DBE certification in fiscal year 2009 but collectively received over \$5.4 million in DBE awards and payments that year. Our estimate has an actual lower limit of \$5 million and a 90-percent upper confidence limit of \$329 million, with a best estimate of \$124 million.

showing the number of DBEs actually receiving work on federally funded DBE projects. Moreover, unlike SBA's 8(a) small business development program, the DBE program does not have a term limit on participation, so there is little incentive for firms to grow beyond the program.¹⁰ In the 6 States we visited, 55 of the 121 randomly selected DBEs working on active federally funded contracts have been certified DBEs for over 10 years.¹¹

We are making recommendations to enhance DOT's DBE program management, improve the implementation and oversight of the program, and help ensure that DBE funds are used to meet program objectives.

BACKGROUND

The Department's DBE program began in 1980 as a minority and women's business enterprise program under the authority of the Civil Rights Act of 1964. The Surface Transportation Assistance Act of 1982 contained the first statutory provision authorizing a DOT DBE program. Today the program is carried out by State and local transportation agencies under the rules and guidelines established in Title 49 CFR Part 26.¹² In addition, DOT's regulatory delegations¹³ assign implementation of all civil rights programs—including the DBE program—to the Operating Administrations, and certain elements of program accountability to DOCR, OGC, and OSDBU.¹⁴

The DBE program is unique to the transportation sector and covers contracts awarded by recipients, which can include State highway agencies, airports, transit authorities, and other State and local agencies that receive DOT funds. As required by law, each recipient receiving certain types of Federal transportation funding from DOT must implement a DBE program and establish an annual DBE participation goal.¹⁵

The DBE program has seven stated objectives, with DOT identifying three as primary: (1) providing a level playing field so DBEs can fairly compete for DOT-assisted projects, (2) ensuring that only eligible firms become certified as DBEs, and (3) assisting in the development of DBE firms so that they can compete

¹⁰ SBA's 8(a) Business Development Program was created to help small and disadvantaged businesses compete in the marketplace by focusing on providing business development support to produce businesses that continue to thrive in a competitive environment. Businesses "graduate" from the 8(a) Business Development Program when the program term expires after 9 years.

¹¹ The 121 DBEs' certification files we reviewed were randomly selected out of a total universe of 1,461 DBEs who were working on active federally funded contracts in the 6 sample states we visited.

¹² FAA also maintains a separate DBE program for airport concessions under 49 CFR Part 23.

¹³ 49 CFR § 1.

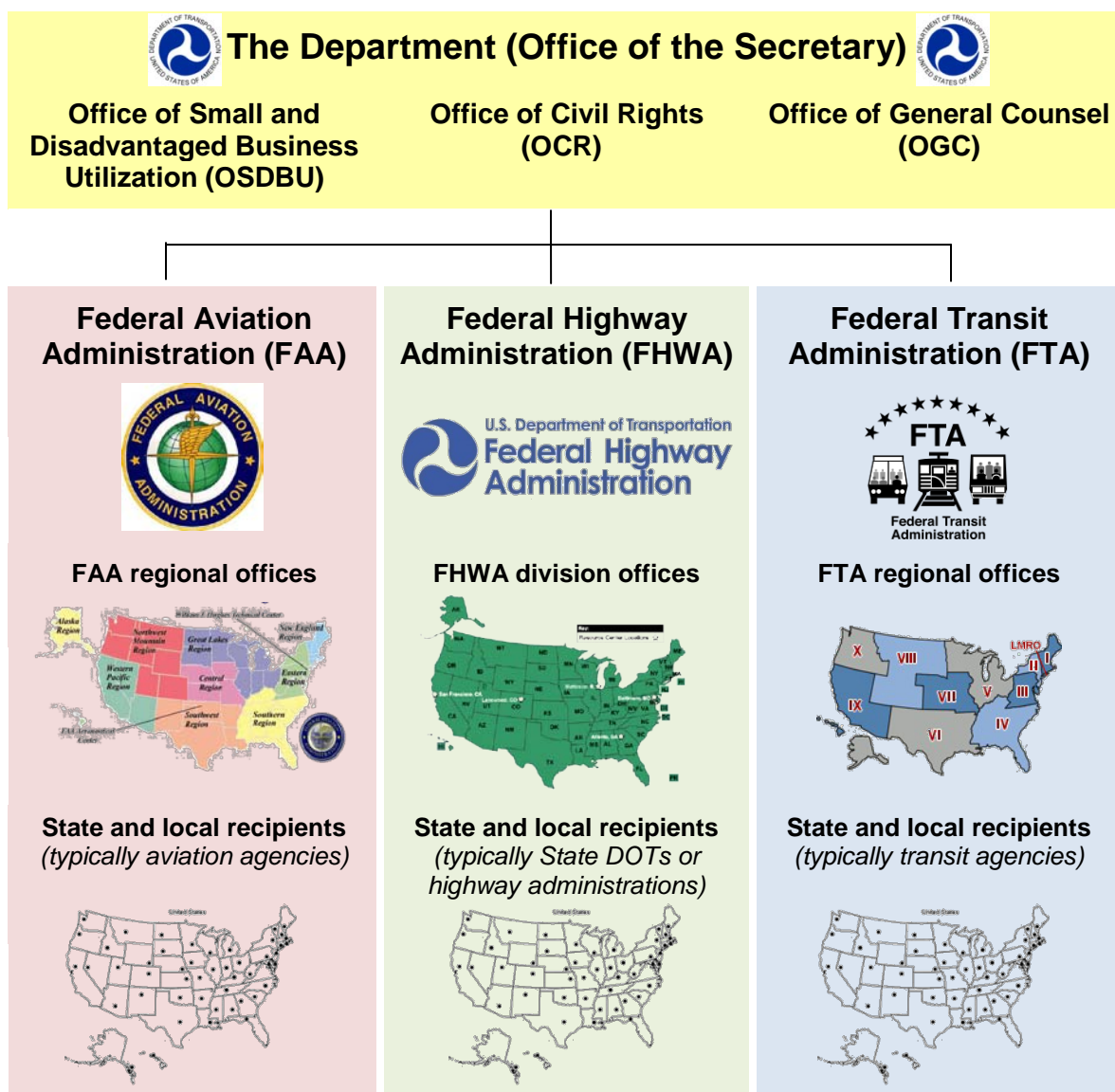
¹⁴ In August 2012, the Department issued a Final Rule, 77 Fed. Reg. 49964, which amended its regulatory delegations to modify the DOCR's, OGC's, and OSDBU's responsibilities pertaining to the DBE program; however, the changes do not assign overall program accountability to any one office.

¹⁵ 49 CFR § 26.3; 49 CFR § 26.21; and 49 CFR §26.45.

outside the DBE program. Once a DBE firm is certified, it can compete for contract awards as a DBE, which can provide a competitive advantage over non-DBE firms. DBE work is mostly subcontract work for a non-DBE prime contractor that commits to spend an established percentage of funding on DBE subcontractors.

DOT, State, and local transportation agencies share unique roles and responsibilities in administering the DBE program (see figure 1).

Figure 1. DOT's DBE Program Oversight Structure



- DOT's Office of the Secretary's role includes developing the rules and regulations for the DBE program, providing guidance to ensure compliance, and considering appeals from State certification decisions.

- FHWA, FTA, and FAA—along with their regional or division offices—are responsible for providing oversight to ensure recipients follow the regulations. Oversight includes performing compliance reviews, tracking recipients' DBE participation reports, approving recipients' DBE goals, and enforcing sanctions for DBE noncompliance.
- State and local transportation agencies, the recipients, implement their DBE programs pursuant to the DBE regulations. This includes certifying the eligibility of DBE firms,¹⁶ overseeing DBE contract performance, and establishing contract-specific DBE goals.

On January 28, 2011, DOT issued a Final Rule, with the intent to improve DBE program oversight and increase accountability for meeting DBE participation goals.¹⁷ Some revisions did not become effective until 2012.

THE DEPARTMENT DOES NOT PROVIDE EFFECTIVE DBE PROGRAM MANAGEMENT

The Department does not provide effective program management for its multibillion-dollar DBE program. The Department has not issued comprehensive, standardized DBE guidance or provided sufficient training to the recipients responsible for implementing the nationwide DBE program. In the absence of sufficient guidance or training, it is especially critical that the Department provide effective program management to help recipients and Operating Administrations achieve the goals of the program and comply with DBE regulations. Although the Department has strengthened its commitment to the program and taken some actions to improve program administration, the Department has not established a single line of accountability for the program and instead takes a fragmented approach by assigning only limited DBE program management responsibilities to three separate Departmental offices. DOT's lack of a single line of accountability for the DBE program makes it difficult for the Department to (1) track whether the DBE program is achieving its objectives, (2) accurately account for billions in annual DBE spending, and (3) ensure adequate communication with State and local recipients responsible for program implementation.

¹⁶ 49 CFR Parts 23 and 26 place primary responsibility for the certification process upon State transportation agencies, which are to ensure only bona fide small firms, owned and controlled by a socially and economically disadvantaged individual(s), are certified.

¹⁷ These revisions included increasing a DBE owners' personal net worth threshold, adding new post-award oversight duties, and expediting out-of-state DBE certifications.

The Department Lacks Comprehensive, Standardized DBE Program Guidance and Sufficient Training

The Department offers limited standardized guidance and training to the recipients responsible for implementing the nationwide DBE program. DBE officials for 14 of the 15 States we contacted stated that they lack clear and comprehensive guidance from the Department for the DBE program. For example:

- Officials for five of the six States we visited said they needed more guidance on verifying personal net worth when determining certification eligibility. DBE regulations require that a DBE firm owner must not have a personal net worth that exceeds \$1.32 million. Adequate guidance is essential since certification staffs are not required to have financial training. Without guidance or training, certification staff could miscalculate firm owners' net worth, allowing unqualified DBEs to participate in the program.
- Officials from 11 of the 15 States we contacted said they needed overall guidance on implementing the DBE Final Rule, which DOT issued in January 2011. According to State officials, the only available training on the Final Rule has been limited to either webinars or training at regional symposiums. In addition, the training has not provided comprehensive guidance on all changes included in the Final Rule.

The Department's guidance currently consists of the DBE regulations coupled with a list of "Q&As" posted on its DBE Web site. A senior official in OGC stated that the regulations and "Q&As" provide the information needed to implement the program. This senior official stated that the Department also provides guidance on a case-by-case basis in response to direct questions—through emails¹⁸ or conference calls to individual recipients. However, officials at the States we contacted reported that the Department can be slow to respond, and hesitant to provide definitive answers or issue written guidance. Furthermore, individual conference calls and emails do not provide for standardized documented guidance or training, a concern the Government Accountability Office (GAO) has identified with respect to this program several times starting in 1992.¹⁹

In the absence of departmentwide best practices or guidance, Operating Administrations occasionally issue informal, internal DBE guidance to their recipients. While the Operating Administrations are responsible for the oversight of their recipients' DBE program implementation, DBE regulations do not permit

¹⁸ OGC stated these emails are "not readily retrievable," so we could not verify whether guidance given was comprehensive.

¹⁹ GAO/RCED-92-148, *Highway Contracting: Disadvantaged Business Eligibility Guidance and Oversight are Ineffective*, September 1992; GAO/RCED-94-168, *Highway Contracting: Disadvantaged Business Program Meets Contract Goal, but Refinements are Needed*, August 1994; and GAO-01-586, *Disadvantaged Business Enterprises: Critical Information Is Needed to Understand Program Impact*, June 2001.

the Operating Administrations to issue official program guidance without the Secretary's or OGC's approval. For example, FAA reports it is developing a Best Practices in Monitoring and Enforcement tool for its recipients. However, this guidance is informal, specific to FAA, and lacks OGC approval. Accordingly, this guidance may not express the official views of the Department and could conflict with the Department's interpretations of the rules.

Additionally, 12 of the 15 State DBE officials we spoke to stated the Department does not provide adequate training for the DBE program. Although Department officials state that they provide training to recipients, we found it was infrequent and not comprehensive. For example, in fiscal years 2010 and 2011, the Department hosted 7 "in-person" training events, totaling 58 hours. However, the majority of those hours (83 percent) was limited to certification staff at just 5 States and only covered certification topics.

Although the Department's training has been limited, the Operating Administrations have conducted a significant number of training sessions for their individual recipients. For example, in 2010 and 2011, FAA conducted 35 DBE training events, and FTA conducted or participated in 41 events such as panel discussions, conferences, and webinars. FHWA holds multiple in-person training events in each of the States annually for its recipients. For example, in 2010 and 2011, FHWA's Florida Division Office conducted 34 DBE training events for its recipients, and the Michigan Division Office conducted 11 events for its recipients.

While Operating Administration training tools are good efforts, these events are often limited to specific Operating Administration recipients and require significant resources. In addition, the Department does not review or approve the Operating Administrations' training efforts and resources, so it cannot assure the accuracy and consistency of the training. Recipients have stated that they would prefer standardized Departmental training. According to the recipients, each Operating Administration has its own unique requirements and interpretations of the DBE program. Additionally, 10 out of the 15 States we contacted reported a critical need for more consistency among recipient DBE practices.

The Department Has Not Established a Single Line of Accountability To Manage Its Multibillion-Dollar DBE Program

In the absence of sufficient guidance or training, it is especially critical that the Department provide effective program management to help recipients and Operating Administrations achieve the goals of the program and comply with DBE regulations. According to DOT offices and individuals involved in the DBE program, the current administration has focused on the program more than past administrations. The Department has stated its commitment to the program in

testimony before Congress as well as through letters from the Secretary and Deputy Secretary to each governor and State DOT administrator. The Operating Administrations have also stressed to recipients the importance of setting and meeting DBE participation goals and indicated they will closely monitor recipients that do not meet goals. Additionally, the Department created a high-level DBE Task Force²⁰ in March 2010 that meets monthly to discuss the program and develop long- and short-term recommendations to improve its administration. In January 2012, DOCR implemented a web-based DBE certification and de-certification tracking system that is accessible to all States and may prove beneficial to the DBE program.²¹

Despite these actions, the Department has not established a single line of accountability for the program, such as assigning overarching DBE program management to a single Department level entity. Instead, it takes a fragmented approach by assigning only limited DBE program management responsibilities to three separate Departmental offices.²² Furthermore, these three offices do not fully implement even the limited responsibilities they have been assigned.

The Office of Management and Budget (OMB) and GAO emphasize that organizational structure, leadership, accountability, and communication are essential for effective management of major programs and can enable staff across an agency to work together in an integrated fashion.²³ In particular, effective departmental program management will provide direction and vision, facilitate the development of common processes and approaches, and identify and assess the risk that program objectives will not be met.

However, the Department does not provide effective program management because it has not assigned a single line of program accountability to any Department level entity. Instead, the Department's regulatory delegations assign limited aspects of DBE program responsibility to three separate offices—OSDBU, DOCR, and OGC.²⁴ For example, OSDBU has been delegated responsibility for ensuring that the DBE program and its policies are developed in a fair, efficient, and effective manner. However, DOCR is delegated responsibility for providing policy guidance and oversight to the Operating Administrations on the

²⁰ The DBE Task Force is chaired by the Director of OSDBU and composed of the heads of the OGC, Government Affairs, DOCR, FHWA, FAA, FTA, Federal Railroad Administration, and their respective DBE program directors.

²¹ We did not validate the functionality of this tracking system. As of the end of January 2012, the DOCR reported that the system was operational but still experiencing problems that needed to be corrected.

²² *Organization and Delegation of Powers and Duties*, 49 CFR § 1.

²³ GAO/AIMD-00-21.3.1, *Standards for Internal Control in the Federal Government*, November 1999; GAO-01-1008G, *Internal Control Management and Evaluation Tool*, August 2001; GAO-05-218G, *Framework for Assessing the Acquisition Function at Federal Agencies*, September 2005; OMB Circular A-123 *Management Accountability and Controls*, Revised June 21, 1995; *OMB Memorandum Conducting Acquisition Assessments under OMB Circular A-123*, May 21, 2008.

²⁴ *Organization and Delegation of Powers and Duties*, Final Rule, 77 Fed. Reg. 49964, 49975 (Aug. 17, 2012) (amending 49 CFR § 1).

implementation and enforcement of program requirements. As a result, the program's management structure is fragmented without ultimate accountability for overall program management assigned to one entity.

In addition, not all of the delegated responsibilities are being carried out in practice (see table 1). For example, the Department's delegations assign OSDBU with ensuring that the Department's small and disadvantaged policies and programs, including the DBE program, are developed in fair, efficient, and effective manner. However, OSDBU officials stated that they have limited involvement with the DBE program and mainly give technical assistance, provide financial services, and conduct outreach to stakeholders and Congress. In addition, OSDBU did not provide primary policy direction for the DBE program, which was a delegated responsibility in the regulation prior to the August 2012 revisions.²⁵ Furthermore, while DOCR has been delegated responsibility for providing guidance to and reviewing Operating Administrations' DBE implementation and enforcement practices, DOCR's only DBE-related activities involve reviewing and adjudicating certification appeals cases. DOCR has recently been working with the Operating Administrations to develop a plan to document the basic monitoring and enforcement responsibilities of the Operating Administrations and recipients. However, the outcome of these recent planning efforts and DOCR's actual role in providing oversight of the Operating Administrations' program enforcement has yet to be determined.

²⁵ *Organization and Delegation of Powers and Duties to the Director of the OSDBU*, Final Rule, 60 Fed. Reg. 2889-01, 2890 (January 12, 1995).

Table 1. Department's Office of the Secretary's DBE Roles

Secretary's Office (OST)	Delegated Authority and DBE Regulatory Role(s)	Current Role(s) in Practice
Office of Small and Disadvantaged Business Utilization (OSDBU)	<ul style="list-style-type: none"> • Ensures the Department's small and disadvantaged policies and programs are developed in fair, efficient, and effective manner • Provides opportunities, technical assistance, and financial services to the small and disadvantaged business community 	<ul style="list-style-type: none"> • The "face" of the DBE program: provides technical and financial assistance and conducts program outreach to stakeholders and Congress • Hosts DOT's DBE Web site
Department Office of Civil Rights (DOCR)	<ul style="list-style-type: none"> • Conducts all stages of the formal certification appeals process • Provides guidance to the Operating Administrations on the implementation and enforcement of DBE regulations • Periodically evaluates the Operating Administrations' enforcement of the program 	<ul style="list-style-type: none"> • Reviews and decides on DBE certification appeals • Develops a document outlining monitoring and enforcement responsibilities for Operating Administrations and recipients
Office of General Counsel (OGC)	<ul style="list-style-type: none"> • Is responsible for DBE legislation and regulations • Conducts all rulemaking proceedings • Review legal aspects of legislative matters • Reviews and approves all guidance issued by the Department 	<ul style="list-style-type: none"> • Reviews and approves all guidance and interpretations of DBE regulations • Drafts and issues rules that amend DBE regulations • Defends DOT in DBE-related court proceedings

Source: OIG analysis

GAO first identified DOT's lack of centralized DBE program management and accountability in 1992²⁶ and recommended that DOT designate a lead office for the program to improve communication and coordination. GAO emphasized the need for a lead office to develop, update, and coordinate the dissemination of policy and guidance, which the Department has not accomplished.

Although the DBE program is unique to DOT, other Federal agencies with unique, small and disadvantaged business programs demonstrate the best practice of assigning explicit, overall accountability and leadership to a central office. For example, the Environmental Protection Agency (EPA) manages its own DBE program established under 40 CFR Part 33. The EPA delegated central management of its DBE program to its Office of Small Business Programs, which is part of the Office of the Administrator. EPA's Office of Small Business Programs is accountable for carrying out explicit responsibilities as part of its overall management of the program. Some of these responsibilities include developing and monitoring program policy and procedures; providing outreach and training to internal and external program stakeholders; providing technical and

²⁶ GAO/RCED-92-148, *Highway Contracting: Disadvantaged Business Eligibility Guidance and Oversight are Ineffective*, September 1992.

programmatic assistance to disadvantaged businesses; and collecting, compiling, and analyzing data on the utilization of disadvantaged businesses under the Agency's DBE program.

Although the Department has not established formal overall program management accountability, until recently one senior official in the Department's OGC assumed an unofficial leadership role over the program. This senior official had over 30 years experience working on the program and drafting its regulations, and was considered the unofficial "go-to" person for answers to DBE-related questions. However, the DBE program comprised a fraction of this individual's responsibility because it was not his main job function. In August 2012, this official retired from the Department with no clear candidate to immediately assume the unofficial leadership role for the program. This loss of institutional knowledge and self-initiated leadership for the DBE program underscores the need for DOT to ensure the program has established accountability and leadership, and sufficient resources to provide adequate guidance, internal controls, and program management.

The Department Does Not Assess Its Achievement of Significant DBE Objectives

The Department does not use program assessment methods, such as performance measures, to manage and improve the DBE program and determine whether the overall program is meeting its stated objectives. GAO identifies good internal control management as having effective procedures in place to monitor the results of an agency's programs.²⁷ According to GAO, meaningful metrics are an important tool for an agency to assess the effectiveness of a program and provide a foundation for continuous improvement. While the Operating Administrations assess some objectives specifically for their recipients, such as their progress toward meeting DBE goals, there is no overall assessment at the Department level for the success of the program as a whole. For example, the Department cannot be sure that the program meets a key objective to assist in developing DBEs to compete successfully outside the program because it does not track how many DBE firms graduate from the program. In 1994, GAO reported on this issue, recommending to the Secretary that DOT develop performance measures to evaluate the progress of the DBE program in helping to develop firms to compete outside the program.²⁸

²⁷ GAO/AIMD-00-21.3.1, *Standards for Internal Control in the Federal Government*, November 1999.

²⁸ GAO/RCED-94-168, *Highway Contracting: Disadvantaged Business Program Meets Contract Goal, but Refinements are Needed*, August 1994.

The Department Lacks Accurate Spending and Award Data for the DBE Program

The Department does not track and, therefore, cannot account for its billions of dollars in annual DBE awards and payments. For example, when we requested DBE award and payment data for fiscal years 2007 through 2010, the Department spent several weeks contacting FHWA, FAA, and FTA to obtain this information. Transparency in how Federal dollars are spent in the DBE program is critical for ensuring accountability in the program and ensuring the effective and efficient performance and management of the program. In addition, the Operating Administrations' annual DBE awards and payments data, which the Department relies upon, are not verified for accuracy. For example, FHWA's National Review Team²⁹ found that New York State DOT's 2010 Uniform Report of DBE Commitment/Awards and Payments submitted to FHWA had math errors for dollar amounts and the number of contractors reported. Further, not all recipients have fully functioning systems in place to track payments and awards electronically, elevating the risk of human error with manual entry systems. A senior Department official also reported that the Operating Administrations are not collecting the same payment and award data or reporting them in the same manner. For example, FTA started collecting payment and award data electronically in 2011 and admitted that past data were not validated or of "sound quality." Without accurate data on its DBE outlays, the Department cannot determine whether it achieves its DBE goals.

The Department Has Limited Communication With Recipients

The Department has limited communication with State and local recipients regarding the DBE program. According to Federal internal control standards, effective communication ensures adequate means of information exchange with external stakeholders that may have significant impact on the agency's ability to achieve its goals.³⁰ However, officials for all 15 States we spoke to say that they have limited or no communication with DOT Headquarters about the DBE program. The States' contact with the Department was mostly limited to the senior official in OGC, who was until recently the Department's unofficial DBE expert, or to officials from DOCR on matters related to certification.

²⁹ FHWA established the National Review Team to help its Division Offices provide the level of accountability and transparency called for under the American Recovery and Reinvestment Act of 2009 (ARRA). The team conducts independent assessments of states' management of ARRA funds, reviewing state processes and compliance with Federal requirements in six key risk areas, one of which is DBE.

³⁰ GAO/AIMD-00-21.3.1, *Standards for Internal Control in the Federal Government*, November 1999.

OPERATING ADMINISTRATIONS AND RECIPIENTS DO NOT ADEQUATELY OVERSEE OR IMPLEMENT THE DBE PROGRAM

Although the Operating Administrations are responsible for oversight of DBE recipients' programs, the Department does not regularly assess the effectiveness of the Operating Administrations' oversight practices. Operating Administration oversight responsibilities are carried out inconsistently, and most divisions and regions do not perform reviews of DBE certification practices and project sites. We identified weak DBE certification and contract oversight practices at States, which increase the risk that ineligible firms will be certified as DBEs and allowed to work on DBE contracts and subcontracts.

Operating Administrations Do Not Ensure Effective Program Implementation

The Operating Administrations do not ensure that their recipients effectively implement the DBE program. Each Operating Administration uses different practices to oversee its recipients' DBE programs (see table 2), such as compliance and Unified Certification Programs (UCP)³¹ reviews. These varying oversight practices and reviews are limited in scope and not performed consistently.

Table 2. Operating Administrations' Oversight of DBE Recipients

FAA	
Current Oversight Actions or Practices	Weaknesses in Actions or Practices
Has four managers and staff at Headquarters (HQ) who spend at least half their time on the DBE program and eight full-time DBE staff mainly based in Los Angeles.	FAA's resources to provide DBE oversight are limited given that it has about 1,000 recipients.
Los Angeles team performed seven compliance reviews in 2011 to identify recipient practices and collect data to develop future guidance. These are fact-finding reviews rather than assessments.	Only 7 compliance reviews in 2011 even though FAA has about 1,000 DBE recipients. These reviews omit certification file reviews and project worksite visits.
Currently developing a DBE Toolkit and best practices document for its recipients.	This effort will offer future benefits, but is not yet complete.

³¹ 49 CFR Part 26 requires each State to establish and submit a UCP to the Secretary of Transportation for approval. A UCP is a signed agreement among a State's recipient agencies that provides "one-stop shopping" to applicants for certification, requiring an applicant to apply only once for a DBE certification that must be honored by all recipients in the State. A State's UCP agreement may consist of one or multiple DBE certification agencies; however, if multiple agencies are involved, certification granted by one State UCP agency must be honored by all agencies in the State.

FHWA	
Current Oversight Actions or Practices	Weaknesses in Actions or Practices
Has 1 full-time DBE Manager at HQ, who coordinates with civil rights officers at FHWA's 52 State Division Offices.	Only one civil rights officer per Division Office oversees the State's implementation of its civil rights programs, including DBE. Competing duties limit time available for DBE oversight.
Began requiring Division Offices to submit annual DBE oversight plans in 2010.	No minimum oversight requirements or evaluation of oversight implementation. Each Division Office determines its own oversight practices based, in part, on its risk analysis. ³² Therefore, some Division Offices do not review certification files or visit project worksites.
Division Offices conduct triennial reviews of five major Federal-aid civil rights programs, which include DBE.	The triennial reviews are not compliance reviews; rather, these assessments collect data to more accurately determine State transportation agencies' civil rights program implementation and to allocate resources. These assessments are not comprehensive and omit certification file reviews.
Each Division Office completes an annual risk assessment of its internal controls and business activities to identify its top risks.	The Division Offices' risk assessments are intended to comply with OMB A-123 internal controls requirements and are not a function of the OCR. The assessments can identify a division's DBE program as high-risk, but do not require reviews or follow ups.
FTA	
Current Oversight Actions or Practices	Weaknesses in Actions or Practices
Has one full-time DBE staff member at HQ with a dedicated contractor for compliance, UCP, and triennial reviews.	Only one civil rights specialist per regional office oversees all of the region's civil rights programs, limiting time available for DBE oversight. Recipients report limited contact with FTA regional offices nationwide.
Contractor performed 13 compliance reviews in fiscal year 2011.	Only 13 reviews even though FTA has about 600 DBE recipients. Of the 13 reviews, only 4 were finalized. The reviews also omit project worksite visits.
Only Operating Administration that conducts UCP reviews. FTA also performs triennial reviews of grantee performance and adherence to current FTA requirements.	Only three of the six UCP reviews conducted in fiscal year 2011 were finalized. DBE is also just 1 of 24 areas that FTA's triennial reviews examine. The triennials do not require certification file reviews.

Source: OIG analysis

³² FHWA Headquarters and each Division Office conduct and submit annual risk profiles to OST to support the Department's compliance with OMB A-123 internal controls requirements. The Risk Profile provides an assessment of internal controls, business activities, and top risks.

The Department's DBE regulations and limited guidance do not clearly define the Operating Administrations' oversight responsibilities. For example, the DBE regulations do not require the Operating Administrations to review recipients' certification practices, such as reviewing certification files to verify that State certifying agencies obtain sufficient supporting information or are performing required on-site reviews of a firm's business to ensure DBEs' eligibility. We also found Operating Administrations' program compliance reviews excluded on-site project visits and frequently involved few or no certification file reviews.

For example, FAA's Office of Civil Rights performed a compliance review of a \$4.2-million New York DBE subcontract³³ but did not review the associated DBE certification files. As a result, FAA's review failed to detect that the subcontractor was no longer an eligible DBE when the contract was awarded. Prior to award, the original owner had died, and the firm had not been certified under its new owner. Additionally, the firm had not submitted over 6 years of annual no change affidavits, which DBE regulations require to remain in good standing with the program.³⁴ Despite these circumstances affecting the firm's eligibility, the firm was never removed from the State's DBE directory. Certification file reviews would have been the only way to detect that the firm was no longer DBE-eligible.

Since much of the Operating Administrations' DBE oversight is carried out at the regional and division level, the Department's lack of clear guidance on Operating Administrations' responsibilities results in inconsistent oversight of recipients' DBE implementation—both among the Operating Administrations and from State to State. For example, the civil rights officer at FHWA's Louisiana Division Office has continual communication with Louisiana State's highway administration office and actively participates in both on-site compliance reviews and certification reviews. In contrast, the civil rights officer at FHWA's Maryland Division Office has little contact with Maryland State's highway administration office and has not participated in on-site compliance reviews or certification reviews.

Weak Recipient DBE Practices Increase Risk of Fraud and Improper Payments for the DBE Program

The lack of standard Departmental guidance and training, and inconsistent oversight by the Operating Administrations, has contributed to weaknesses in

³³ *FY 2011 ARRA DBE Compliance Review Final Report of the Teterboro Airport*, August 16, 2011.

³⁴ 49 CFR Part 26.83(j) requires a DBE to provide annually, on the anniversary of its certification date, an affidavit sworn to by the firm's owner affirming that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of the regulation; and no material changes in the information provided in its application form. Under 49 CFR Part 26.109(c), failure to provide this affidavit in a timely manner will result in a determination of failure to cooperate.

recipient DBE certification practices and oversight. As a result, the DBE program is exposed to significant risk of fraud, waste, and abuse.

Weak State Certification Practices Increase the Risk That Ineligible Firms Will Be Certified as DBEs

States' weak certification practices increase the risk that ineligible firms will be certified or granted continued DBE certification. The States we visited do not adequately verify that firms applying for DBE certification meet program eligibility requirements or continue to meet these requirements to maintain certification (see table 3).

Table 3. Summary of Key DBE Eligibility Requirements

A DBE firm owner must:	<ul style="list-style-type: none"> • be a socially and economically disadvantaged individual • have a personal net worth that does not exceed \$1.32 million • possess the power to control the firm's management and policies
A DBE firm must be:	<ul style="list-style-type: none"> • at least 51-percent majority owned by the socially and economically disadvantaged individual(s) • an independent business and cannot depend on its relationship with other firms • an existing small business and have average annual gross receipts that do not exceed certain size caps³⁵

Source: 49 CFR Part 26, Subpart D

Recipients did not always adequately verify DBE ownership or control eligibility. From a sample of 121 statistically selected DBEs' certification files, we identified 2 instances in which the firms were not eligible DBEs.³⁶ In our sample, which was selected using a stratified probability proportional to size sampling methodology, any instance in which a firm does not meet DBE eligibility requirements is significant. In one instance, the DBE owner was deceased,³⁷ and the new owner's majority ownership and control was not established and ultimately denied. These ineligible firms received a total of \$5.4 million in DBE awards and payments.³⁸ Because the firms did not meet DBE eligibility requirements, the \$5.4 million in fiscal year 2009 awards and payments may have been improper payments. Based on these findings, we estimate that \$124 million of the \$4.1 billion in DBE funds

³⁵ For example, firms may not exceed an overall DOT-specific cap, which is currently \$22.41 million.

³⁶ We reviewed a statistical sample of 121 out of 1,461 certification files from our 6 statistically selected sample States. The 1,461 certification files represent the universe of all DBEs working on active federally funded contracts in the 6 sample States during the time of our audit.

³⁷ A firm's original owner died, and the firm was never recertified under the new owner due to questions surrounding her control and expertise. However, the firm was never removed from the State's certified DBE directory.

³⁸ The \$5.4 million was out of a total of \$45 million in awards and payments made to the 121 firms included in our sample for fiscal year 2009.

distributed across 52 U.S. States and territories³⁹ in fiscal year 2009⁴⁰ could have been put to better use if DOT and its recipients had implemented better internal controls over their certification processes.⁴¹ We found several specific weaknesses in recipients' certification practices, as follows:

Personal Net Worth (PNW): Certification staff in five of the six States we visited reported that they are unsure how to accurately calculate or verify a firm owner's PNW. As a result, staff could certify unqualified firms. For example, we found that New York State granted DBE certification to a firm even though the owner's PNW exceeded the DBE eligibility threshold by \$570,000. However, the owner claimed a \$600,000 unpaid tax liability, lowering her PNW to \$30,000 below the PNW eligibility threshold.⁴² The State continued to recertify the firm even though the DBE did not consistently submit required annual affidavits of no change. In addition, we question whether significant unpaid taxes are valid liabilities when computing PNW.⁴³

Majority-Owned by Socially or Economically Disadvantaged Individual: State certification staff did not always perform third-party checks for related affiliates, duties of key controlling officials, and financial capabilities to verify ownership and control information reported by firms seeking DBE certification. These checks could help detect whether a firm is fraudulently alleging to be a qualified DBE. OIG investigators have convicted DBE owners of falsifying documentation to gain DBE certification.⁴⁴ In addition, we identified a DBE applicant in the District of Columbia who claimed to be a firm president but actually was the vice president who owned only 5 percent of the company. The firm did not meet the eligibility requirements according to the DBE regulations, yet was certified as a DBE. Certification staff could have detected this misrepresentation of ownership if they had verified firms' ownership and key controlling official information using commercial databases.

³⁹ The universe included Puerto Rico but did not include the Virgin Islands because it did not report DBE expenses in fiscal year 2009.

⁴⁰ We based our projections on fiscal year 2009 amounts because these were the most current and complete data the Department was able to provide at the onset of our audit.

⁴¹ Our estimate has an actual lower limit of \$5 million and a 90-percent upper confidence limit of \$329 million, with a best estimate of \$124 million.

⁴² 49 CFR Part 26.67(2)(i) states the PNW cap for DBE eligibility was \$750,000 for firms seeking eligibility prior to the January 2011 Final Rule, which increase the PNW to \$1.32 million.

⁴³ In September 2012, the Department issued a Notice of Proposed Rulemaking proposing a new PNW statement along with an accompanying instruction sheet for program application and continued certification.

⁴⁴ In 2006, a New York DBE owner pled guilty to obtaining DBE certification by submitting false corporate tax returns and other phony documentation, which allowed the firm to win a \$7.8 million DBE subcontract that her husband's non-DBE companies actually completed. The owner and the husband were sentenced to 15 months in prison and ordered to pay \$12,500. In another case, a Massachusetts DBE firm owner that had worked on five federally funded contracts, valued at approximately \$42 million, pled guilty to falsifying corporate tax returns to maintain DBE eligibility. The DBE firm was debarred from Federal contracting for 3 years.

Independence From Related Non-DBE Firms: To ensure eligibility, DBE regulations require State certifying agencies to scrutinize firms' relationships with non-DBE firms to verify independent control. In addition, the regulations state that certification staff evaluating a firm's independence may consider whether a firm's pattern of conduct indicates attempts to evade or subvert the program. However, certification staff did not always perform these verifications or did not perform them sufficiently to verify independence and control. We identified five instances in which the DBE did not appear to have clear control of its operations due to a potential lack of independence. Two of the five instances included:

- A Louisiana agency ultimately certified a DBE firm that had a history of switching names on key business documents from the father, a non-DBE, to the daughter, who was DBE-eligible. OIG investigations have led to convictions of firm owners for similar attempts to defraud the DBE program.⁴⁵
- One New York certification manager did not respond to an anonymous letter alleging that a DBE firm owner was not the actual majority owner and that the DBE has common ownership with two other firms using different names to skirt DBE size standards. The certification manager said there was no way he could follow up on it because the letter was anonymous and simply placed the letter in the certification file. The firm remains a certified DBE.

No-Change Affidavits: States' certification staff frequently do not enforce the requirement that certified DBE firms submit annual affidavits of no change, which disclose whether there have been any changes that would affect firms' ability to continue to meet DBE eligibility requirements.⁴⁶ We determined that 74 of the 121 DBE firms' certification files in our 6 sample States were missing some or all of these required annual affidavits. For example, a certification file for a District of Columbia DBE certified since 1996 included only one affidavit for fiscal year 2010.

From our statistical sample of 121 DBEs' certification files, we identified 20 firms that did not submit required annual affidavits in fiscal year 2009. Yet these firms received DBE contract awards and payments totaling nearly \$4.4 million during that year. Based on these results, we estimate that \$101 million of the \$4.1 billion

⁴⁵ In 2012, an OIG investigation resulted in the conviction of an Illinois firm owner on a mail fraud charge in connection with a scheme to use a front DBE on Government contracts. From about 1999 until about May 2006, the firm owner operated and controlled the operations of another company, a false front DBE company. The owner used the front company to wrongly obtain more than \$2.3 million in Government contracts where a DBE was required.

⁴⁶ The affidavit affirms that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements; and no material changes in the information provided in its application form. The affidavit specifically affirms that the firm continues to meet SBA business size criteria and the overall gross receipts cap, documenting this affirmation with supporting documentation of the firm's size and gross receipts.

in DBE funds distributed in fiscal year 2009 were unsupported.⁴⁷ These unsupported funds occurred because DOT and recipients allowed firms to remain certified without enforcing the requirement that firms must submit the annual affidavits ensuring continued good standing with regulatory requirements.

On-Site Certification Reviews: State certification staffs do not always conduct updated on-site certification reviews at regular intervals to verify DBEs' continued eligibility. During an on-site review, certification staff will perform steps such as visit the office of the applicant firm, interview the principal officers, review the equipment and licenses of the firm, and visit an actual job site to ensure the firm can perform the work it seeks to do in the DBE program. The regulations require certification staff to perform on-site certification reviews to determine firms' eligibility but do not specify definitive intervals for how often to conduct these reviews. For example, Utah DOT certification staff only conducts on-site certification reviews for initial applicants, while Illinois DOT certification staff conducts on-site certification reviews every 5 years. In our review of 106 DBE certification files,⁴⁸ we found 43 cases in which the State certification staff performed their most recent on-site certification visits over 5 years ago—9 of which performed their most recent on-site visit over 10 years ago. In the January 2011 Final Rule, the Department asserted that regular on-site certification reviews are an extremely important tool to help recipients prevent fraudulent firms or firms that no longer meet eligibility requirements from participating in the DBE program. However, the Department did not establish definitive time intervals for conducting on-site certification reviews.

Recipients Do Not Conduct Sufficient Oversight of DBEs at Job Sites

Job site monitoring is necessary to ensure that a DBE is performing the work identified in the contract, rather than acting as a “front company” for an ineligible firm performing the work. However, most of the recipients at the six States we visited did not effectively monitor or document DBE contractual performance at project sites. In addition, OIG investigative results provide examples of lack of effective job site monitoring and oversight, such as in April 2012 when a co-owner of a large concrete pre-cast company was convicted of conspiracy, mail fraud, wire fraud, and money laundering. The company had used a certified DBE as a front company to obtain DBE subcontracts. The concrete company performed the work but allowed the certified DBE to keep a cut of the payments. The DBE fraud was conducted over a 15-year period and allowed the company to win over \$136 million in fraudulent DBE subcontracts on 340 federally funded highway and transit construction projects performed throughout Pennsylvania.

⁴⁷ Our estimate has an actual lower limit of \$4 million and a 90-percent upper confidence limit of \$231 million, with a best estimate of \$101 million.

⁴⁸ For our statistical sample of 121 DBE certification files, we did not document site review dates for the 15 files we reviewed at our first sample state visit at the District of Columbia.

In an effort to improve recipient monitoring, the Department added additional post-award oversight requirements in its January 2011 Final Rule. Recipients must now perform job site compliance monitoring for all ongoing DBE projects. One way recipients can implement the new job site compliance rule is to increase coordination between DBE compliance staff and job site district engineers. To varying degrees, State DBE compliance officers already rely on staff located at construction sites for DBE oversight. However, construction employees do not necessarily focus—and in some cases are not fully trained—on DBE compliance because of their other responsibilities. Compliance officers from only 3 of 14⁴⁹ States reported regular interaction with job site construction staff. This lack of oversight at DBEs’ job sites can allow fraud to go undetected for years.

Weaknesses in State certification and project oversight are evident in the results of our DBE fraud investigations. In fiscal years 2010 and 2011 alone, OIG investigators uncovered a significant amount of DBE fraud, leading to over \$88 million in recoveries, restitutions, and fines—along with 10 indictments and 8 criminal convictions.

Recipients’ Staffing Issues Contribute to Certification and Compliance Monitoring Weaknesses

Many recipient agencies are understaffed. While DBE regulations require that each recipient have “adequate staff” to administer their program, 10 of the 15 States we randomly sampled reported that they do not have enough staff to perform all duties adequately. For example, due to staffing limitations, New York completes formal compliance reviews for only 20 of its approximately 500 active DBE highway projects. The District of Columbia DOT did not have any DBE staff to monitor DBE compliance until it hired a contractor in 2010. As a result, the agency did not perform compliance checks or monitoring prior to hiring the contractor in 2010.

In addition, recipients’ DBE liaison officers do not oversee complete program implementation. The DBE regulations require each recipient agency to have a DBE liaison officer who is responsible for implementing all aspects of the program.⁵⁰ We found that 9 of the 15 States reported that their DBE liaisons do not directly oversee all aspects of their programs. For example, Oregon DOT’s DBE liaison does not directly oversee the compliance staff, who report to the construction office. In addition, Oregon’s sole certification office for the entire State is located in a completely different agency from that of the DBE liaison, making it difficult for the DBE liaison to be aware of certification issues.

⁴⁹ One out of the 15 states we contacted did not respond to this question.

⁵⁰ *What is the requirement for a liaison officer*, 49 CFR § 26.25.

THE DEPARTMENT HAS LIMITED SUCCESS IN ACHIEVING ITS PROGRAM OBJECTIVE TO DEVELOP DBE FIRMS

The Department has limited success in achieving its program objective to develop DBEs to succeed in the marketplace because recipients place more emphasis on getting firms certified as DBEs rather than assisting them to identify opportunities and market themselves for DBE work on federally funded projects. In addition, the Department does not require recipients to actively track or report utilization data showing the number of DBEs actually receiving work on federally funded DBE projects. As a result, the Department has no way to measure achievement of this program objective. Moreover, unlike SBA's 8(a) small business development program, the DBE program does not have a term limit on participation, so there is little incentive for firms to grow beyond the program.

Recipients Do Not Adequately Develop DBE Firms To Succeed in the Marketplace

One of the Department's DBE program objectives is to help DBE firms succeed in the marketplace. The responsibility to develop DBE firms lies with the recipients who implement the DBE programs in each State. However, recipients focus most of their efforts on helping firms complete the lengthy DBE certification process, leaving few resources in place to help certified firms obtain DBE work on federally funded projects. As a result, State DBE officials stated that certified DBE firms are not sure how to market themselves or identify work opportunities. Without contract work, DBEs cannot grow and develop their businesses to be able to compete outside the program. For example, Maryland has a large database of almost 5,000 eligible DBE firms, but only 560 firms (12 percent) have ever received work as a subcontractor or prime contractor of a federally funded project.

In addition, even though the DBE program has been in place for over 30 years, the Department does not require its recipients to track or report on DBE utilization—that is, how many certified firms actually receive DBE work on federally funded contracts. Tracking and monitoring DBE utilization data could help the Department regularly assess the program's performance toward achieving its goals and motivate recipients to allocate resources toward developing DBE firms to succeed in the marketplace.

The majority of DBE firms in the six sample States we visited have not successfully obtained federally funded contracts. Less than 20 percent of certified DBEs in the 6 sample States have received DBE work on a federally funded project (see table 4).

Table 4. DBE Utilization Rates for Six Sample States⁵¹

Sample States	DBE That Have Received DBE Work	Number Of Certified DBEs	DBE Federal Utilization Rate
1 Maryland	560	4,863	11.5%
2 New York	514	1,370	37.5%
3 Oregon*	166	480	34.6%
4 Kansas*	62	205	30.2%
5 Louisiana	219	771	28.4%
6 District of Columbia**	-	-	-
Total Utilization	1,521	7,689	19.8%

* The aviation agencies in Oregon and Kansas were unable to provide utilization data because they do not have a system in place to track this information.

** The District of Columbia could not provide utilization data because it had only recently begun to track this data.

Source: OIG analysis of DBE utilization data submitted by the six sampled States

Smaller DBE firms often have difficulty competing for contracts. Larger DBE firms win more contracts because they tend to develop relationships with prime contractors when they demonstrate they can perform the work. For example, of Maryland's 560 DBEs that received awards through the DBE program, 4 firms consistently win the most contracts—over 100 contracts each, for a total of 609 contracts. In contrast, 202 of those 560 Maryland DBEs have won only 1 DBE contract since becoming certified.

The regulations state that a recipient may or, if an Operating Administration directs it to, must establish a DBE business development program (BDP)⁵² to assist firms in learning to compete successfully outside the DBE program. However, due in part to limited resources, recipients place less priority on BDPs because they are optional program elements. In addition, the Operating Administrations and recipients would find it difficult to know when a firm needs a BDP because the Department does not require them to collect data on DBE utilization.

Due to the competitive advantages a successful DBE gains from the program, there is little incentive for firms to grow beyond the DBE program. Unlike the SBA's 8(a) small business development program, DOT's DBE program does not have a term limit on participation. For example, 59 of the 121 DBEs we reviewed

⁵¹ We did not factor in State and locally funded contracts when determining utilization.

⁵² The purpose of a BDP is to further the development of DBEs, including but not limited to assisting them to move into nontraditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from the recipient.

were first certified over 10 years ago. State officials reported that some DBE firms deliberately limit the amount of new contract dollars they receive in order to stay below the average annual gross receipt cap of \$22.41 million required for DBE eligibility.⁵³

Some DBEs that have been in the program for over 10 years have received little to no DBE contract work since being certified. For example, in Oregon, 53 out of the 96 currently certified highway DBE firms (55 percent) were first certified over 10 years ago—13 have been certified since the 1980s. Yet, 24 of those 53 firms (45 percent) have received 5 or fewer contracting opportunities as a DBE.

CONCLUSION

DOT has spent billions of dollars through its DBE program to remedy past and current discrimination against socially and economically disadvantaged individuals competing for federally assisted projects. However, weaknesses in DBE program management and implementation have allowed ineligible firms to win DBE contracts and have left the majority of DBE firms without work. The Department's fragmented DBE program management structure can only be effective if Operating Administrations and recipients are offered clear DBE guidance and training with which to implement the program. Because the Department's DBE guidance and training is not sufficiently comprehensive, it must take a more proactive oversight approach to ensure that recipients comply with DBE regulations and make progress toward achieving DBE program goals. If the Department does not provide more comprehensive guidance and training or strengthen its program management, the DBE program may continue to be exposed to billions of dollars in fraud, waste, and abuse.

⁵³ *What rules govern business size determinations*, 49 CFR § 26.65.

RECOMMENDATIONS

We recommend that the Office of the Secretary:

1. Develop comprehensive guidance and best practices for DBE program implementation by involving DBE stakeholders from all levels. The guidance should provide direction for conducting certification processes, certification reviews, and on-site project reviews.
2. Formally assign one Department office the responsibility and accountability for integrating and managing the DBE program.

We recommend that the accountable DBE lead program office or the Office of the Secretary:

3. Develop program performance measures to regularly assess the DBE program and evaluate whether it is achieving its objectives;
4. Establish a centralized Departmental data system for collecting and tracking DBE commitment and award information and require that the Operating Administrations implement procedures to ensure that recipients are accurately reporting DBE award and other financial information.
5. Maintain the Department's DBE Web site to ensure it contains current information and includes accurate DBE program contact information;
6. Develop an oversight and compliance plan with the Operating Administrations to identify specific, required oversight processes and reviews and ensure that a sufficient number of reviews are performed based on assessed risk;
7. Require that recipients track and regularly report utilization data to the Operating Administrations, including each DBE's number of years in the program and the number of DBE subcontracts or prime contracts received since first becoming certified; and
8. Require that the Operating Administrations work with recipients to develop ways to improve utilization rates and require the establishment of Business Development Programs for firms that have not received DBE work for several years.

AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE

We provided OST with our draft report on November 2, 2012, and received its response on March 18, 2013. OST's complete response is included as an appendix to this report. While OST either concurred or partially concurred with all eight of our recommendations, it raised concerns that our findings are based primarily on the opinions of State officials without detailed or causal analysis. We disagree. Our findings are based on evidence from multiple sources including extensive data collection and analysis from State and local recipients, as well as interviews with multiple stakeholders. For example, we analyzed data from 15 statistically selected States, which received \$2.4 billion in DBE participation amounts—or 59 percent of the total universe for fiscal year 2009. We also analyzed the certification files for 121 randomly selected DBE firms and 18 randomly selected DBE contracts including aviation, transit, and highways. Further, we collaborated with OIG investigators who have recovered millions of dollars in Federal funding lost to DBE fraud and who shared their first-hand knowledge of the DBE oversight weaknesses that allow such fraud to occur.

For recommendations 4 and 5, OST either concurred or partially concurred, and presented reasonable timeframes and planned actions that meet the intent of our recommendations. Accordingly, we consider these recommendations resolved but open pending completion of the planned actions.

For recommendation 2, OST concurred stating that it plans to issue a departmental order designating the Secretary and Deputy Secretary with overall accountability and decision-making responsibility for the DBE program. OST also stated that the order will build upon the existing approach to program management but that it will specify the roles, relationships, and functions among the OST offices leading the program. However, our audit findings indicate that the current management approach is ineffective and that the OST offices leading the program are not fully carrying out their delegated responsibilities. The proposed actions meet the intent of our recommendation, and we consider this recommendation resolved. However, the recommendation remains open pending completion of the planned departmental order that establishes a decision-making framework for day-to-day management along with controls for holding lead offices accountable for fulfilling their delegated responsibilities. Since the Department does not plan to issue the order until March 1, 2014, we request that the Department provide us with an interim plan for implementing a decision process for the program.

For recommendations 1, 3, and 6, OST either concurred or partially concurred. However, we are requesting additional information before we can determine if the actions planned address the intent of these recommendations. Specifically:

For recommendation 1, OST partially concurred, stating that its DBE regulations in 49 CFR 26 are the definitive and primary source of guidance for the program. However, in defining what constitutes guidance, DOT has clarified that “guidance” refers to non-legislative rules (not legally binding regulations) intended to provide interpretations or policy statements.⁵⁴ OST also stated that the Q&As posted on OSDBU’s Web site provide useful supplemental guidance. Our review, however, determined that neither the DBE regulations nor the Q&As provide recipients with the full guidance they need, particularly when certifying DBE firms and conducting oversight at project sites. OST stated that DOT initiated a new training program in February 2013 that provides guidance on the DBE certification process. We agree that the new program focuses on certification guidance, but it does not provide comprehensive guidance for other program elements, such as on-site project compliance reviews, which we also determined was needed. In addition, the training program is targeted to certification staff, not all staff responsible for implementing the DBE program. Further, OST has not made the training materials available on the Department’s Web site. Accordingly, we are requesting that OST provide us with additional information clarifying whether it will (1) create training guidance for on-site project compliance reviews, (2) offer training programs for all staff involved in the DBE program, and (3) post training materials on the Department’s Web site. Until we receive this information, we consider recommendation 1 open and unresolved.

For recommendation 3, OST concurred but stated that performance measures have been in place for some time. However, OST’s response refers to measures that address whether recipients meet the Department’s goal to allocate 10 percent of authorized funds to DBEs. The intent of our recommendation is for OST to evaluate its progress against the seven DBE program objectives established in 49 CFR 26.1, which are separate from the 10-percent goal. Accordingly, we are requesting that OST specify what performance measures it plans to develop that will link to the seven DBE program objectives. Until we receive this information, we consider recommendation 3 open and unresolved.

For recommendation 6, OST partially concurred, stating that it is incumbent on each Operating Administration to determine the appropriate DBE oversight activities and to focus their limited resources on the greatest risk areas. While we agree that Operating Administrations should have the flexibility to tailor oversight to the unique risks of each State, the intent of our recommendation is to ensure that their oversight is sufficient. OST states that the DBE Task Force will “seek to” identify oversight minimum requirements and document specific actions needed to ensure each Operating Administration is providing adequate oversight and will determine whether DOOCR needs to enhance or modify its practices in this regard.

⁵⁴ DOT Web site, “Background on Guidance” <<http://www.dot.gov/regulations/background-guidance>>, and “Types of DOT Guidance” <<http://www.dot.gov/regulations/types-dot-guidance>>.

However, the Department's delegation of powers and duties in 49 CFR 1 specifically assigns DOCR responsibility to provide guidance and periodically evaluate the Operating Administrations' enforcement and implementation of the program. Since our audit determined that DOCR was not carrying out these delegated responsibilities, the Department needs to clarify how DOCR will do so. Accordingly, we are requesting that OST (1) require that the DBE Task Force identify and document the minimum oversight requirements and specific actions the Operating Administrations must take when overseeing the program and (2) specify the required actions DOCR must take to fulfill its delegated responsibility to provide guidance and periodically evaluate the Operating Administrations' enforcement and implementation of the program. Until we receive this information, we consider recommendation 6 open and unresolved.

For recommendations 7 and 8, OST partially concurred, but its planned actions do not meet the intent of our recommendations. Specifically:

For recommendation 7, OST partially concurred, stating that it is updating its data gathering requirements in its recent Notice of Public Rulemaking (NPRM). OST acknowledges that the NPRM does not address DBE utilization data but states that it is considering requiring utilization tracking in future rulemakings. Without utilization data, however, OST cannot evaluate whether it is achieving its regulatory DBE program objectives to create a level playing field on which DBEs can compete fairly or assist in the development of DBE firms to compete successfully in the marketplace.⁵⁵ We found that, while recipients spend considerable resources to certify DBE firms, most certified DBEs never receive work on Federal projects. Additionally, Congress has recently raised concerns about DBE utilization.⁵⁶ Accordingly, we request that OST reconsider its position and either (1) commit to adding the requirement for DBE utilization data collection in a future NPRM or (2) clarify how it measures whether the Department is meeting its stated program objectives to create a level playing field and develop DBEs to compete outside the program. OST also proposed a target date of December 31, 2014, to determine whether to require utilization tracking in future rulemakings; since this date is only a date to make a determination, it is not a timely completion date to address our recommendation. We consider recommendation 7 open and unresolved.

For recommendation 8, OST partially concurred, stating that it is not at the point where it can agree to require the establishment of BDPs. Instead, OST plans to task the DBE working group to determine whether efforts to improve utilization warrant attention, and if so, if there are existing approaches to encourage

⁵⁵ 49 CFR § 26.1(b) & (f).

⁵⁶ As part of the FAA Modernization and Reform Act of 2012, Congress has directed OIG to report on new DBE participation at the Nation's airports.

recipients to expand utilization. However, the DBE regulations already grant Operating Administrations the authority to require that recipients establish BDPs and encourage other mentor-protégé programs. Furthermore, a key DBE program objective is to help develop DBEs so they can compete outside the program. We request that OST clarify how it will require the Operating Administrations to work with recipients to develop ways to improve utilization rates for firms that have not received DBE work for several years. OST proposed a target date of December 31, 2014, to determine whether and how to proceed in this area; since this date is only a date to make a determination, it is not a timely completion date to address our recommendation. We consider recommendation 8 open and unresolved.

ACTIONS REQUIRED

OST's planned actions and timeframes for recommendations 2, 4, and 5 are responsive, and we consider them resolved but open pending completion of the planned actions. We consider recommendations 1, 3, 6, 7, and 8 open and unresolved. In accordance with Department of Transportation Order 8000.1C, we request that OST provide additional information regarding their planned actions for recommendations 1, 3, 6, 7, and 8, as described above, within 30 days of this report. We also request that OST submit revised completion dates for recommendations 7 and 8. In addition, we request that OST, within 30 days, provide us with an interim plan for implementing a decision process for the program until its planned Departmental order is completed. We appreciate the courtesies and cooperation of DOT representatives during this audit. If you have any questions concerning this report, please call me at (202) 366-1959; Mary Kay Langan-Feirson, Assistant Inspector General for Acquisition and Procurement Audits, at (202) 366-5225; or Terry Letko, Program Director, at (202) 366-1478.

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cc: DOT Audit Liaison, M-1
FAA Audit Liaison, AAE-100
FHWA Audit Liaison, HAIM-13
FTA Audit Liaison, TBP-30

EXHIBIT A. SCOPE AND METHODOLOGY

We conducted our work from April 2011 through October 2012 in accordance with generally accepted Government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Our audit scope included (1) the Department's Office of the Secretary's OSDBU, OCR, and OGC; (2) FHWA, FAA, and FTA (the three primary Operating Administrations that participate in the DBE program), including their division and regional offices; and (3) 15 randomly selected U.S. States using 2 distinct samples. We assessed each organization level's implementation of the DBE program to determine whether program management, oversight practices, and internal controls were adequate to ensure effective utilization of DBE funds to meet the program's objectives. This assessment included interviewing DBE managers and employees, reviewing written DBE policies and guidance, and determining the extent of interaction with other organizational levels involved in the DBE program. We based our assessment on DBE regulations contained in 49 CFR Part 26—but not on the January 2011 Final Rule, which came into effect after the scope of our review, nor on 49 CFR Part 23, which focuses on airport concessions.

Our statistical sampling plan relied on DBE participation amounts reported for fiscal year 2009, as these were the most current and complete data that the Department could provide at the beginning of the audit. We deemed these data sufficiently accurate for the purpose of our audit. We drew 2 distinct statistical samples to randomly select 15 out of the 52 U.S. States and territories¹ that participated in the DBE program: (1) a random sample of 6 States we visited and (2) a random sample of 9 additional States that we surveyed.

We used a stratified probability proportional to size sample to randomly select 6 States. To select this type of sample, we first stratified the universe of 52 States and territories into three tiers—"good," "bad," or "unknown"—based on OIG investigators' assessments of the States' DBE programs. We then selected two States from each tier using probability proportional to size, where the probability of selection was proportionate to the State's total fiscal year 2009 DBE participation amount. This type of sample gave States with larger total DBE participation dollars a greater chance of selection, while giving every dollar in the universe an equal chance. The six selected States and territories were the District of Columbia, Maryland, New York, Oregon, Louisiana, and Kansas. The States'

¹ The universe included Puerto Rico but did not include the Virgin Islands because it reported no DBE funds expended in fiscal year 2009.

fiscal year 2009 DBE participation amounts add up to \$1,079,192,875—or 27 percent of the \$4,068,125,337 nationwide total.

At each of these six States, we interviewed State officials, reviewed randomly selected DBEs' compliance files, and reviewed randomly selected DBE contracts to assess States' DBE oversight practices. Specifically, we reviewed a sample of 121 DBEs' certification files randomly selected from a universe of all 1,461 DBEs working on active, federally funded contracts for the 6 States during our audit.² Based on the results of our review, we projected the amount of unsupported funds and funds that could have been put to better use.³ In addition, at each of the six sample States, we reviewed a transit contract, highway contract, and aviation contract with either a DBE subcontractor or DBE prime contractor that we randomly selected from the State's universe of active, federally funded DBE contracts.

To capture a broader scope of State DBE practices nationwide, we surveyed 9 States randomly selected from the remaining 46 U.S. States and territories in our universe. We used the same stratified probability proportional to size sampling method used to select the six-State sample. The nine data call States include Washington, Utah, Florida, California, Illinois, Wisconsin, Pennsylvania, Texas, and Arkansas. The States' fiscal year 2009 DBE participation amounts add up to \$1,321,999,218—or 33 percent of the \$4,068,125,337 nationwide total. With these 2 State samples, our audit work covered \$2,401,192,092—or 59 percent of the total DBE participation amount for fiscal year 2009.

Throughout the audit, we collaborated with OIG investigators who have worked extensively with DBE fraud cases. We also reviewed recently closed DBE fraud cases and DOT OIG hotline complaints for potential fraud in our sample States. These investigative reviews helped us to determine DBE process weaknesses that allowed fraud to occur.

² The number of DBEs' certification files selected from each State was determined by the State's proportion of the total universe.

³ We projected with 90-percent confidence and a precision no greater than 5 percent of the fiscal year 2009 DBE distribution to all 52 U.S. States and territories in our universe. The precision for the projections is so large because the unsupported funds or funds that could have been put to better use varied widely by firm, from \$0 to \$5 million. Sixty-six of the 121 sampled firms (55 percent) had \$0 amounts because they did not receive any DBE payments or awards in fiscal year 2009.

Exhibit A. Scope and Methodology

EXHIBIT B. ACTIVITIES VISITED OR CONTACTED

Office of Small and Disadvantaged Business Utilization

Office of Civil Rights

Office of General Counsel

Federal Highway Administration

Federal Transit Administration

Federal Aviation Administration

Contact through site visits:

Office of Civil Rights, District of Columbia

Maryland Department of Transportation, Hanover, Maryland

State Highway Administration, Baltimore, Maryland

Maryland Transit Administration, Hanover, Maryland

Maryland Aviation Administration, Hanover, Maryland

Oregon Department of Transportation, Salem, Oregon

Oregon Tri-Met, Salem, Oregon

Oregon Aviation Administration, Salem, Oregon

New York State Department of Transportation, Albany, New York

Port Authority New York and New Jersey, Manhattan, New York

Metropolitan Transit Authority, Manhattan, New York

Department of Transportation and Development, Baton Rouge, Louisiana

Louis Armstrong New Orleans International Airport, New Orleans, Louisiana

Regional Transit Authority, New Orleans, Louisiana

Kansas Department of Transportation, Topeka, Kansas

Contact through DBE Liaisons for data call:

Department of Transportation, Washington

Department of Transportation, Utah

Department of Transportation, Florida

Department of Transportation, California

Department of Transportation, Illinois

Department of Transportation, Wisconsin

Department of Transportation, Pennsylvania

Department of Transportation, Texas

State Highway and Transportation Department, Arkansas

EXHIBIT C. MAJOR CONTRIBUTORS TO THIS REPORT

Name	Title
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APPENDIX. AGENCY COMMENTS



THE DEPUTY SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

March 18, 2013

MEMORANDUM TO: Calvin L. Scovel III
Inspector General

FROM: John D. Porcari 
Deputy Secretary

SUBJECT: Office of Inspector General Draft Report on the
Department's Disadvantaged Business Enterprise Program

The Disadvantaged Business Enterprise (DBE) Program Serves a Vital Need

The DBE program was designed as a vehicle to combat discrimination and its continuing effects by providing opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals to fairly compete for federally-assisted state and local transportation-related contracts. Within the Department, under the leadership of the Secretary and the Deputy Secretary, three entities in the Office of the Secretary (OST) – the Office of General Counsel (OGC), the Office of Civil Rights (OCR), and the Office of Small and Disadvantaged Business Utilization (OSDBU) -- provide leadership and direction to the three primary DOT operating administrations – the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA) -- involved in overseeing administration of the DBE program by state and local entities that are the recipients of federal funding. One primary measure used to assess the extent to which the program objective has been achieved is the proportion of federally-assisted contract funding awarded to DBEs. In fiscal year 2011, DOT grant and formula funds resulted in over \$41.6 billion in contracting and subcontracting opportunities. Thanks to the DBE program, small and disadvantaged businesses were able to successfully compete for contracting valued at more than \$4.4 billion, exceeding the 10 percent national aspirational goal for total DOT assisted contracting.

This Administration has striven to ensure that the DBE program effectively fulfills its statutory mandate. In 2011, the Department made substantial changes to the DBE program to improve program administration. Specific changes increased accountability for recipients with respect to meeting overall goals, modified and updated certification requirements, expedited interstate certification, and added new provisions to foster small business participation. The Department increased the Personal Net Worth (PNW) limitation for DBE owners from \$750,000, which was set in 1989, to \$1.32 million to account for the effect of inflation. The Department continues to

listen closely to stakeholders and maintains an ongoing dialogue intended to assure the continued effectiveness of the program. This includes addressing a number of technical and program administration issues in a pending Notice of Proposed Rulemaking that was issued within the last few months.

Comprehensive Guidance and Training are Available for the DBE Program

The primary source of comprehensive guidance for the DBE program is 49 CFR Part 26. The regulation covers all aspects of program administration and is revised and updated as necessary to strengthen, clarify, and improve program implementation based on experience acquired over the years and input sought from the program's many stakeholders. The rules are regularly supplemented with official guidance in the form of questions and answers (Q&As) that address practical application of the rules to real world situations and other issues raised by practitioners in the field. The most recent revision to the rule published on January 28, 2011, resulted from a series of roundtable discussions with stakeholders. Those discussions also led to the issuance of additional Q&As. In September 2012, the Department issued a Notice of Proposed Rulemaking that proposes further refinements in multiple areas, including certification related requirements and performance measures. The Department will continue to engage in similar discussions with stakeholders as one of many vehicles for identifying areas where additional guidance may be appropriate.

Since the DBE program rule was substantially revised in 1999 to respond to constitutional standards set by the courts, the DBE work group lead by the OGC, with representatives from OCR, OSDBU, FHWA, FTA, and FAA, has developed, and continues to develop, additional guidance as needed. There is a formal process within DOT to construct, review and approve this supplemental guidance before it is published on the OSDBU DBE website. The DBE work group coordinates the review of proposed Q&A guidance to ensure that it is consistent with applicable statutes and regulations before the final version is submitted to the General Counsel.

Our analysis of this OIG draft report indicates that its findings with regard to the adequacy of departmental guidance are based primarily on the opinion of a handful of state officials, without apparent detailed causal analysis linking guidance and programmatic issues. While these opinions are useful indicators of user community perceptions, they are not necessarily dispositive evidence of specific deficiencies. However in response to the issues discussed in the OIG report the Department will continue to review existing guidance and program implementation to determine whether there are useful and cost effective means to make further improvements.

The Department recognizes that effective training is critical to the success of the DBE program. Most of that training is conducted by the operating administrations responsible for ensuring compliance with DBE program requirements and is often appropriately tailored to respond to the specific needs of their respective recipients. The training provided is an important tool to help ensure guidance is clear and well understood, and facilitates consistency among recipients in the administration of the program.

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DOT Committed to Existing DBE Program Management Approach

The established OST management structure provides the leadership and oversight at the departmental level necessary to assist the operating administrations and their recipients in meeting the stated objectives of the DBE program delineated at 49 CFR § 26.1. However, we recognize that continued success for the DBE program requires thoughtful innovation, clarity, and good communication, and we are taking the steps necessary to achieve these objectives.

The Department has long been committed to a collaborative approach that makes the best use of limited resources and assigns those with the greatest expertise to address key areas of the program. Thus, individuals from the OSDBU focus on aspects of the program supporting DBE development of business acumen. OGC provides leadership in the development of national DBE program policy and in the provision of regulatory guidance. OCR, with its expertise in investigations and compliance, focuses on certification appeals and internal oversight. This type of structure enables the Department to avoid the necessity of hiring additional specialized staff that could be required under alternative management approaches. In addition, the Secretary has created a high-level DBE Task Force headed by my office to emphasize the importance of the program and to facilitate greater collaboration, communication, and accountability among the various DOT components responsible for discrete aspects of DBE program implementation and oversight.

Moving forward, the Department intends to reinforce the management structure for the DBE program by issuing a departmental order for the program clarifying that the Secretary and Deputy Secretary have overall accountability and decision making responsibility for the DBE program. Further, the order will clarify the roles and responsibilities of each of the OST offices with management responsibility for the DBE program and the operating administrations.

Recommendations and Responses

Recommendation 1: Develop comprehensive guidance and best practices for DBE program implementation by involving DBE stakeholders from all levels. The guidance should provide direction for conducting certification processes, certification reviews, and on-site project reviews.

Response: Concur in part. The Department is committed to providing sufficient guidance to ensure grantees implement the DBE program consistent with regulatory requirements. The primary source of comprehensive guidance for the DBE program is 49 CFR 26, as updated through the rulemaking process. As stated above, the regulation is the definitive source of guidance for the DBE program including Certification Standards in Subpart D and Certification Procedures in Subpart E. Based on continuing experience with the regulation, and input received from various sources, the Department will continue to update the regulation to ensure its guidance for recipients on DBE requirements is comprehensive and up-to-date. The updates to the CFR are intended to build upon guidance and incorporate best practices in the specific requirements and in the preamble to each rule.

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The Department also maintains useful supplemental guidance in the form of Questions and Answers (Q&A's) on the OSDBU DBE website to assist recipients and contractors in their efforts to comply with the Department's DBE requirements. As described above, there is a formal process within DOT to construct, review and approve this supplemental guidance before it is published. The Department is continuing to develop guidance in the form of additional Questions and Answers (Q&As) that will assist recipients in understanding and applying the DBE program rules, particularly with respect to the new rules that took effect in 2011, such as the rule establishing a streamlined process for obtaining interstate certification, and other certification and oversight issues including those identified in the OIG report.

Finally, the Department seeks to build upon best practices through enhanced certification training. On February 15, 2013, DOT initiated a new training program that addresses all elements of the certification process, including areas specifically mentioned in the OIG report, like evaluating personal net worth information, conducting on-site certification reviews, detecting and preventing fraud, and identifying best practices. This training helps to ensure guidance is clear and well understood to assist recipients in the proper application of certification requirements. The process used to develop this training included input from certifying entities in all 50 states and the District of Columbia and has been reviewed by OST and the operating administrations. The training will be delivered on-line and in-person. A refresher course, advanced training, and webinars are planned for the future. To date, 168 individuals are taking the online training, representing 40 states, the District of Columbia, and Puerto Rico. In addition, FTA has posted on its website training videos on basic DBE program requirements for those new to the program. We are confident that the totality of existing guidance provided by the Department addresses the need identified by the OIG in its report and request this recommendation be closed.

Recommendation 2: Formally assign one Department office the responsibility and accountability for integrating and managing the DBE program.

Response: Concur. The Department will improve clarity and understanding of roles and responsibilities by issuing a departmental order for the program by March 1, 2014. This order will expressly state that the Secretary and Deputy Secretary maintain overall accountability and decision making responsibility for the DBE program. Further the directive will specify the roles, relationships and functions among the OST offices leading this program and the operating administrations that are overseeing its implementation by recipients. The order will be structured to recognize and build upon the synergies of the existing approach to program management.

Recommendation 3: Develop program performance measures to regularly assess the DBE program and evaluate whether it is achieving its objectives.

Response: Concur. Performance measures have been in place for some time that address the overall extent to which state goals are met. For example, the statutory 10 percent aspirational goal at the national level is the quintessential performance measure for the DBE program. Overall, the Department seeks to make use of the best available data to provide information on the extent to which the program is achieving its goal of providing a level playing field on which DBEs can complete fairly for DOT-assisted contracts. These measures were critiqued by the

Government Accountability Office (GAO) in 2011, and the Department, in its September 2012 Notice of Proposed Rulemaking (NPRM), proposed modifications to the data collection that may address the issues raised by the GAO and improve performance measures for the program. As the subject of ongoing rulemaking activity, the Department is working through this issue, with a goal of issuing a final rule once our review is complete. The Department intends to identify, by March 1, 2014, other appropriate performance measures to gauge the overall effectiveness of the DBE program recognizing the objectives set out in the rule.

Recommendation 4: Establish a centralized Departmental data system for collecting and tracking DBE commitment and award information and require that the Operating Administrations implement procedures to ensure that recipients are accurately reporting DBE award and other financial information.

Response: Concur in Part. Each operating administration currently maintains information relating to its implementation of the program to determine the extent to which recipients are achieving the goals established in each state. Since the establishment of the DBE Task Force, the operating administrations report monthly to the OSDDBU on DBE participation data, enabling the Department to gauge its performance in meeting the national, aspirational DBE participation goal. Thus, the tracking and centralization of that data is already underway and the ongoing NPRM contains efforts to further refine and improve that data. I intend to direct the DBE Task Force to review existing data collection systems within the Department to determine whether they may be used to track DBE data. As part of this review, the task force will assess whether operating administrations have adequate systems in place to reasonably assure the accuracy of the data reported, and whether additional guidance is needed in this regard. We anticipate completing this action by March 1, 2014.

Recommendation 5: Maintain the Department's DBE Web site to ensure it contains current information and includes accurate DBE program contact information.

Response: Concur. OSDDBU's website hosts a DBE webpage that includes program background information, official departmental guidance; and US DOT and state DOTs contact information. OSDDBU will ensure the DBE webpage is up-to-date and organized in a user friendly manner by August 30, 2013, and review the information subsequently every 6 months to ensure it remains up to date.

Recommendation 6: Develop an oversight and compliance plan with the Operating Administrations to identify specific, required oversight processes and reviews and ensure that a sufficient number of reviews are performed based on assessed risk.

Response: Concur in part. It is incumbent on each of the operating administrations to determine the appropriate specific oversight activities commensurate with their implementation of the DBE program. It is important that the operating administrations maintain sufficient flexibility in program oversight to focus their limited resources on DBE program issues that each state has identified as posing the greatest risk. For example, in any given year, DBE program concerns in Alabama may differ significantly from program concerns in Minnesota. Any departmentwide requirements for oversight must carefully balance the need for flexibility by operating

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administrations with the potential benefit to be achieved through greater conformity. However, we recognize the potential utility of examining the oversight activities performed by each of the operating administrations, the type of risk assessment used, and issues surrounding implementation to ensure that actions are consistent, effective and coordinated. The DBE task force will seek to identify oversight minimum requirements, best practices, and document specific actions needed to ensure each operating administration is providing adequate oversight. It will also determine whether DOCR needs to enhance or modify its practices in this regard. We anticipate completing this action by March 1, 2014.

Recommendation 7: Require that recipients track and regularly report utilization data to the Operating Administrations, including each DBE's number of years in the program and the number of DBE subcontracts or prime contracts received since first becoming certified.

Response: Concur in part. The Department is in the process of updating its data gathering requirements for recipients, as described in the pending NPRM. The proposed changes in the NPRM offer the potential to improve the Department's awareness of DBE achievements. Tracking the number of years an entity is in the program and the number of subcontracts they receive as a result of their participation is not a part of the NPRM. Nonetheless, the Department will consider including the recommended action as a proposal in a subsequent rulemaking and will make a determination prior to December 31, 2014, as to whether to move forward with this proposal.

Recommendation 8: Require that the operating administrations work with recipients to develop ways to improve utilization rates and require the establishment of Business Development Programs for firms that have not received DBE work for several years.

Response: Concur in part. Although operating administrations work closely with recipients to increase DBE participation in contract opportunities at the state level by providing training, outreach events, and webinars, not all recipients have been able to meet their DBE goals. Certainly, the Department would like as many DBEs as possible to benefit from the program by providing capable and reliable services to the states. We note that some of the operating administrations have been innovative in their attempts to improve the effectiveness of the DBE program. For example, FHWA has a DBE Supportive Services (DBE/SS) Program in which funds are apportioned to state departments of transportation to provide training, assistance, and services to certified DBE firms for the purpose of improving their capacity and business acumen. While we are not at the point where we can agree to require the establishment of business development programs, we agree that it is important to ensure there is a sharing of best practices in effectively implementing the DBE program across the Department. I intend to task the DBE working group to determine whether this is an activity that warrants attention, and if so, whether there are approaches available to encourage recipients to expand utilization to cast the widest possible net with regard to the DBE program that would be appropriately implemented from a departmental perspective. We intend to make a determination as to whether and how to proceed in this area by December 31, 2014.