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## **Title 49 —Transportation**

### **Subtitle A —Office of the Secretary of Transportation**

#### **Part 26** Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs

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# **PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS**

**Authority:** 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C. 47113, 47123; Sec. 1101(b), Pub. L. 114-94, 129 Stat. 1312, 1324 (23 U.S.C. 101 note); Sec. 150, Pub. L. 115-254, 132 Stat. 3215 (23 U.S.C. 101 note); Pub. L. 117-58, 135 Stat. 429 (23 U.S.C. 101 note).

**Source:** 64 FR 5126, Feb. 2, 1999, unless otherwise noted.

## **Subpart A—General**

### **§ 26.1 What are the objectives of this part?**

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- (e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- (f) To promote the use of DBEs in all types of federally assisted contracts and procurement activities conducted by recipients.
- (g) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- (h) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

[64 FR 5126, Feb. 2, 1999, as amended at 79 FR 59592, Oct. 2, 2014; 89 FR 24963, Apr. 9, 2024]

### **§ 26.3 To whom does this part apply?**

- (a) If you are a recipient of any of the following types of funds, this part applies to you:
  - (1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Public Law 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Titles I, II, III,

and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114-94; and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Public Law 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Public Law 105-178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law 112-141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114-94; and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58), Public Law 117-58.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Mariana Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

[89 FR 24963, Apr. 9, 2024]

## § 26.5 Definitions.

**Affiliation** has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

**Alaska Native** means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

**Alaska Native Corporation** (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

**Assets** mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

**Business, business concern or business enterprise** means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

**Compliance** means that a recipient has correctly implemented the requirements of this part.

**Contingent Liability** means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

**Contract** means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

**Contractor** means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

**Days** mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

**Department or DOT** means the U.S. Department of Transportation, including the Office of the Secretary, the Departmental Office of Civil Rights, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

**Disadvantaged Business Enterprise or DBE** means a for-profit small business concern—

- (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged; and
- (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

**DOT-assisted contract** means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

**FTA Tier I recipient** means an FTA recipient to whom this part applies that will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$670,000 in FTA funds in a Federal fiscal year.

**FTA Tier II recipient** means an FTA recipient to whom this part applies who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which does not exceed \$670,000 in FTA funds in a Federal fiscal year.

**Good faith efforts** means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

**Immediate family member** means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

**Indian Tribe or Native American Tribe** means any federally or State-recognized Tribe, band, nation, or other organized group of Indians (Native Americans), or an ANC.

**Joint venture** means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

**Liabilities** mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

**Native Hawaiian** means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

**Native Hawaiian Organization** means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

**Noncompliance** means that a recipient has not correctly implemented the requirements of this part.

**Notice of decision or NOD** means determination that denies a firm's application or decertifies a DBE.

**Notice of intent or NOI** means recipients letter informing a DBE of a suspension or proposed decertification.

**Operating Administration or OA** means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

**Personal net worth or PNW** means the net value of an individual's reportable assets and liabilities, per the calculation rules in § 26.68.

**Primary industry classification** means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available online on the U.S. Census Bureau website: [www.census.gov/naics/](http://www.census.gov/naics/).

**Primary recipient** means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

**Principal place of business** means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business. The term does not include construction trailers or other temporary construction sites.

**Program** means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

**Race-conscious** measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

**Race-neutral** measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

**Recipient** means any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or that has applied for such assistance.

**Secretary** means DOT's Secretary of Transportation or the Secretary's designee.

**Set-aside** means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

**Small Business Administration or SBA** means the United States Small Business Administration.

**SBA certified firm** refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

**Small business concern** means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.65(b).

**Socially and economically disadvantaged individual** means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a group and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  - (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
  - (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
  - (iii) "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
  - (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Mariana Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
  - (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, Maldives, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

(3) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

**Spouse** means a married person, including a person in a domestic partnership or a civil union recognized under State law.

**Transit vehicle manufacturer (TVM)** means any manufacturer whose primary business purpose is to manufacture vehicles built for mass transportation. Such vehicles include, but are not limited to buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Businesses that perform retrofitting or post-production alterations to vehicles so that such vehicles may be used for public transportation purposes are also considered TVMs. Businesses that manufacture, mass-produce, or distribute vehicles primarily for personal use are not considered TVMs.

**Tribally-owned concern** means any concern at least 51 percent owned by an Indian tribe as defined in this section.

**Unsworn declaration** means an unsworn statement, dated and in writing, subscribed as true under penalty of perjury.

**You** refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35553, June 16, 2003; 76 FR 5096, Jan. 28, 2011; 79 FR 59592, Oct. 2, 2014; 89 FR 24963, Apr. 9, 2024]

## § 26.7 What discriminatory actions are forbidden?

- (a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.
- (b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

## § 26.9 How does the Department issue guidance and interpretations under this part?

- (a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 express the official positions and views of the Department of Transportation or any of its operating administrations.
- (b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:



The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.

[72 FR 15617, Apr. 2, 2007]

## § 26.11 What records do recipients keep and report?

- (a) You must submit a report on DBE participation to the concerned Operating Administration containing all the information described in the Uniform Report to this part. This report must be submitted at the intervals required by, and in the format acceptable to, the concerned Operating Administration.
- (b) You must continue to provide data about your DBE program to the Department as directed by DOT Operating Administrations.
- (c) You must obtain bidders list information as described in paragraph (c)(2) of this section and enter it into a system designated by the Department.
  - (1) The purpose of this bidders list information is to compile as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your federally assisted contracts for use in helping you set your overall goals, and to provide the Department with data for evaluating the extent to which the objectives of § 26.1 are being achieved.
  - (2) You must obtain the following bidders list information about all DBE and non-DBEs who bid as prime contractors and subcontractors on each of your federally assisted contracts:
    - (i) Firm name;
    - (ii) Firm address including ZIP code;
    - (iii) Firm's status as a DBE or non-DBE;
    - (iv) Race and gender information for the firm's majority owner;
    - (v) NAICS code applicable to each scope of work the firm sought to perform in its bid;
    - (vi) Age of the firm; and
    - (vii) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (e.g., less than \$1 million; \$1-3 million; \$3-6 million; \$6-10 million; etc.) rather than requesting an exact figure from the firm.
  - (3) You must collect the data from all bidders for your federally assisted contracts by requiring the information in paragraph (c)(2) of this section to be submitted with their bids or initial responses to negotiated procurements. You must enter this data in the Department's designated system no later than December 1 following the fiscal year in which the relevant contract was awarded. In the case of a "design-build" contracting situation where subcontracts will be solicited throughout the contract period as defined in a DBE Performance Plan pursuant to § 26.53(e), the data must be entered no later than December 1 following the fiscal year in which the design-build contractor awards the relevant subcontract(s).
- (d) You must maintain records documenting a firm's compliance with the requirements of this part. At a minimum, you must keep a complete application package for each certified firm and all Declarations of Eligibility, change notices, and on-site visit reports. These records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Other

certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

- (e) The State department of transportation in each Unified Certification Program (UCP) established pursuant to § 26.81 must report to DOT's Departmental Office of Civil Rights each year, the following information:
  - (1) The number and percentage of in-state and out-of-state DBE certifications by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);
  - (2) The number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;
  - (3) The number of decertified firms:
    - (i) Total in-state and out-of-state firms decertified;
    - (ii) Names of in-state and out-of-state firms decertified because SEDO exceeded the personal net worth cap;
    - (iii) Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.
  - (4) The number of in-state and out-of-state firms summarily suspended;
  - (5) The number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantage status;
  - (6) The number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status.

[89 FR 24964, Apr. 9, 2024]

## § 26.13 What assurances must recipients and contractors make?

- (a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance: The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).
- (b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance: The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of

DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the contractor from future bidding as non-responsible.

[79 FR 59593, Oct. 2, 2014]

## § 26.15 How can recipients apply for exemptions or waivers?

- (a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.
- (b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:
  - (1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.
  - (2) Your application must show that—
    - (i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;
    - (ii) Conditions in your jurisdiction are appropriate for implementing the proposal;
    - (iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and
    - (iv) Your proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.
  - (3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

- (i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49;
  - (ii) Your level of DBE participation continues to be consistent with the objectives of this part;
  - (iii) There is a reasonable limitation on the duration of your modified program; and
  - (iv) Any other conditions the Secretary makes on the grant of the waiver.
- (4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

## Subpart B—Administrative Requirements for DBE Programs for Federally Assisted Contracting

### § 26.21 Who must have a DBE program?

- (a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:
  - (1) All FHWA primary recipients receiving funds authorized by a statute to which this part applies;
  - (2) All FTA recipients receiving planning, capital and/or operating assistance must maintain a DBE program.
    - (i) FTA Tier I recipients must have a DBE program meeting all the requirements of this part.
    - (ii) Beginning 180 days after the publication of the final rule, FTA Tier II recipients must maintain a program locally meeting the following requirements of this part:
      - (A) Reporting and recordkeeping under § 26.11;
      - (B) Contract assurances under § 26.13;
      - (C) Policy statement under § 26.23;
      - (D) Fostering small business participation under § 26.39; and
      - (E) Transit vehicle procurements under § 26.49.
  - (3) FAA recipients receiving grants for airport planning or development that will award prime contracts the cumulative total value of which exceeds \$250,000 in FAA funds in a Federal fiscal year.
- (b)
  - (1) You must submit a conforming DBE program to the concerned Operating Administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except goals that are reviewed by the relevant OA).
  - (2) You do not have to submit regular updates of your DBE program plan if you remain in compliance with this part. However, you must submit significant changes to the relevant OA for approval.
- (c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your DBE program until all funds from DOT financial assistance have been expended.

[89 FR 24965, Apr. 9, 2024]

### **§ 26.23 What is the requirement for a policy statement?**

You must issue a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

### **§ 26.25 What is the requirement for a liaison officer?**

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

### **§ 26.27 What efforts must recipients make concerning DBE financial institutions?**

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

### **§ 26.29 What prompt payment mechanisms must recipients have?**

- (a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.
- (b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. You must use one of the following methods to comply with this requirement:
  - (1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.
  - (2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.
  - (3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.
- (c) For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

- (d) Your DBE program must include the mechanisms you will use for proactive monitoring and oversight of a prime contractor's compliance with subcontractor prompt payment and return of retainage requirements in this part. Reliance on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is not a sufficient monitoring and oversight mechanism.
- (e) Your DBE program must provide appropriate means to enforce the requirements of this section. These means must be described in your DBE program and should include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.
- (f) Prompt payment and return of retainage requirements in this part also apply to all lower-tier subcontractors.
- (g) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:
  - (1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.
  - (2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.
  - (3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

[68 FR 35553, June 16, 2003, as amended at 89 FR 24965, Apr. 9, 2024; 89 FR 55089, July 3, 2024]

## § 26.31 What information must a UCP include in its DBE/ACDBE directory?

- (a) In the directory required under § 26.81(g), you must list all firms eligible to participate as a DBE and/or ACDBE in your program. In the listing for each firm, you must include its business address, business phone number, firm website(s), and the types of work the firm has been certified to perform as a DBE and/or ACDBE.
- (b) You must list each type of work a DBE and/or ACDBE is eligible to perform by using the most specific NAICS code available to describe each type of work the firm performs. Pursuant to § 26.73(a), your directory must allow for NAICS codes to be supplemented with specific descriptions of the type(s) of work the firm performs.
- (c) Your directory may include additional data fields of other items readily verifiable in State or locally maintained databases, such as State licenses held, Prequalifications, and Bonding capacity.
- (d) Your directory must be an online system that permits the public to search and/or filter for DBEs by:
  - (1) Physical location;
  - (2) NAICS code(s);
  - (3) Work descriptions; and

- (4) All optional information added pursuant to paragraph (c) of this section. The directory must include a prominently displayed disclaimer (e.g., large type, bold font) that states the information within the directory is not a guarantee of the DBE's capacity and ability to perform work.
- (e) You must make any changes to your current directory entries by November 5, 2024.

[89 FR 24965, Apr. 9, 2024; 89 FR 55089, July 3, 2024]

### **§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?**

- (a) If you determine that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.
- (b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with § 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.
- (c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.

### **§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?**

- (a) You may or, if an operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.
- (b) As part of a BDP or separately, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.
  - (1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protégé program.
  - (2) In the mentor-protégé relationship, you must:
    - (i) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any contract let by the recipient; and
    - (ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.
  - (3) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program. See Appendix D of this part for guidance concerning the operation of mentor-protégé programs.

- (c) Your BDPs and mentor-protégé programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

[64 FR 5126, Feb. 2, 1999, as amended at 89 FR 24966, Apr. 9, 2024]

### § 26.37 What are a recipient's responsibilities for monitoring?

- (a) A recipient must implement appropriate mechanisms to ensure compliance with the requirements in this part by all program participants (e.g., applying legal and contract remedies available under Federal, State, and local law). The recipient must set forth these mechanisms in its DBE program.
- (b) A recipient's DBE program must also include a monitoring and enforcement mechanism to ensure that work committed, or in the case of race-neutral participation, the work subcontracted, to all DBEs at contract award or subsequently is performed by the DBEs to which the work was committed or subcontracted to, and such work is counted according to the requirements of § 26.55. This mechanism must include a written verification that you have reviewed contracting records and monitored the work site to ensure the counting of each DBE's participation is consistent with its function on the contract. The monitoring to which this paragraph (b) refers may be conducted in conjunction with monitoring of contract performance for other purposes such as a commercially useful function review.
- (c) You must effectively implement the following running tally mechanisms:
  - (1) With respect to achieving your overall goal, you must use a running tally that provides for a frequent comparison of cumulative DBE awards/commitments to DOT-assisted prime contract awards to determine whether your current implementation of contract goals is projected to be sufficient to meet your annual goal. This mechanism should inform your decisions to implement goals on contracts to be advertised according to your established contract goal-setting process.
  - (2) With respect to each DBE commitment, you must use a running tally that provides for a frequent comparison of payments made to each listed DBE relative to the progress of work, including payments for such work to the prime contractor to determine whether the contractor is on track with meeting its DBE commitment and whether any projected shortfall exists that requires the prime contractor's good faith efforts to address to meet the contract goal pursuant to § 26.53(g).

[89 FR 24966, Apr. 9, 2024]

### § 26.39 Fostering small business participation.

- (a) Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.
- (b) This element must be submitted to the appropriate DOT operating administration for approval as a part of your DBE program. As part of this program element you may include, but are not limited to, the following strategies:
  - (1) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million).



- (2) In multi-year design-build contracts or other large contracts (e.g., for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
  - (3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.
  - (4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.
  - (5) To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.
- (c) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your DBE program.

[76 FR 5097, Jan. 28, 2011, as amended at 89 FR 24966, Apr. 9, 2024]

## Subpart C—Goals, Good Faith Efforts, and Counting

### § 26.41 What is the role of the statutory 10 percent goal in this program?

- (a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.
- (b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.
- (c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

### § 26.43 Can recipients use set-asides or quotas as part of this program?

- (a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.
- (b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

### § 26.45 How do recipients set overall goals?

- (a) **General rule.**
  - (1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.
  - (2) If you are an FTA Tier II recipient who intends to operate a race-neutral DBE program, or if you are an FAA recipient who reasonably anticipates awarding \$250,000 or less in FAA prime contract funds in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA, respectively, for that Federal fiscal year.

- (b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.
- (c) **Step 1.** You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.
- (1) **Use DBE Directories and Census Bureau Data.** Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market that perform work in the same NAICS codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, <https://www.census.gov/programs-surveys/cbp.html>;) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.
  - (2) **Use a bidders list.** Determine the number of DBEs that have bid or quoted (successful and unsuccessful) on your DOT-assisted prime contracts or subcontracts in the past three years. Determine the number of all businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all businesses to derive a base figure for the relative availability of DBEs in your market. When using this approach, you must establish a mechanism (documented in your goal submission) to directly capture data on DBE and non-DBE prime and subcontractors that submitted bids or quotes on your DOT-assisted contracts.
  - (3) **Use data from a disparity study.** Use a percentage figure derived from data in a valid, applicable disparity study.
  - (4) **Use the goal of another DOT recipient.** If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.
  - (5) **Alternative methods.** Except as otherwise provided in this paragraph, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market. The exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of paragraph (c)(2) of this section, is not an acceptable alternative means of determining the availability of DBEs.
- (d) **Step 2.** Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at your overall goal. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

- (1) There are many types of evidence that must be considered when adjusting the base figure. These include:
    - (i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;
    - (ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and
    - (iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.
  - (2) If available, you must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:
    - (i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;
    - (ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.
  - (3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.
- (e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:
- (1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming three fiscal years.
  - (2) If you are an FTA or FAA recipient, as a percentage of all FT or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the three forthcoming fiscal years.
  - (3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.
    - (i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.
    - (ii) A project goal covers the entire length of the project to which it applies.
    - (iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.
    - (iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f)

(1)

- (i) If you set your overall goal on a fiscal year basis, you must submit it to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's website.
  - (ii) You may adjust your three-year overall goal during the three-year period to which it applies, in order to reflect changed circumstances. You must submit such an adjustment to the concerned operating administration for review and approval.
  - (iii) The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.
  - (iv) While you are required to submit an overall goal to FHWA, FTA, or FAA only every three years, the overall goal and the provisions of Sec. 26.47(c) apply to each year during that three-year period.
  - (v) You may make, for informational purposes, projections of your expected DBE achievements during each of the three years covered by your overall goal. However, it is the overall goal itself, and not these informational projections, to which the provisions of section 26.47(c) of this part apply.
- (2) If you are a recipient and set your overall goal on a project or grant basis as provided in paragraph (e)(3) of this section, you must submit the goal for review at a time determined by the FHWA, FTA or FAA Administrator, as applicable.
- (3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence you relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see § 26.51(c)).
- (4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the operating administration will be guided by goal setting principles and best practices identified by the Department in guidance issued pursuant to § 26.9.
- (5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:
- (i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and
  - (ii) Avoid imposing undue burdens on non-DBEs.
- (6) Timely submission and operating administration approval of your overall goal is a condition of eligibility for DOT financial assistance.

- (7) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive DOT financial assistance.

(g)

- (1) In establishing an overall goal, you must provide for consultation and publication. This includes:

- (i) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to paragraph (f) of this section. You must document in your goal submission the consultation process you engaged in. Notwithstanding paragraph (f)(4) of this section, you may not implement your proposed goal until you have complied with this requirement.

- (ii) A published notice announcing your proposed overall goal before submission to the operating administration on August 1st. The notice must be posted on your official Internet Web site and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your official Internet Web site.

- (2) At your discretion, you may inform the public that the proposed overall goal and its rationale are available for inspection during normal business hours at your principal office and for a 30-day comment period. Notice of the comment period must include addresses to which comments may be sent. The public comment period will not extend the August 1st deadline set in paragraph (f) of this section.

- (h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 65 FR 68951, Nov. 15, 2000; 68 FR 35553, June 16, 2003; 75 FR 5536, Feb. 3, 2010; 76 FR 5097, Jan. 28, 2011; 79 FR 59593, Oct. 2, 2014; 89 FR 24966, Apr. 9, 2024; 89 FR 55089, July 3, 2024]

## § 26.47 Can recipients be penalized for failing to meet overall goals?

- (a) You cannot be penalized, or treated by the Department as being in noncompliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.
- (b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

- (c) If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith:
- (1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;
  - (2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;
  - (3)
    - (i) If you are a state highway agency; one of the 50 largest transit authorities as determined by the FTA; or an CORE 30 airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.
    - (ii) As a transit authority or airport not meeting the criteria of paragraph (c)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to FTA or FAA on request for their review.
  - (4) FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.
  - (5) You may be regarded as being in noncompliance with this Part, and therefore subject to the remedies in § 26.103 or § 26.105 of this part and other applicable regulations, for failing to implement your DBE program in good faith if any of the following things occur:
    - (i) You do not submit your analysis and corrective actions to FHWA, FTA, or FAA in a timely manner as required under paragraph (c)(3) of this section;
    - (ii) FHWA, FTA, or FAA disapproves your analysis or corrective actions; or
    - (iii) You do not fully implement the corrective actions to which you have committed or conditions that FHWA, FTA, or FAA has imposed following review of your analysis and corrective actions.
  - (d) If, as recipient, your Uniform Report of DBE Awards or Commitments and Payments or other information coming to the attention of FTA, FHWA, or FAA, demonstrates that current trends make it unlikely that you will achieve DBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FHWA, FTA, or FAA, as applicable, may require you to make further good faith efforts, such as by modifying your race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 89 FR 24966, Apr. 9, 2024]

## § 26.49 What are the requirements for transit vehicle manufactures (TVMs) and for awarding DOT-assisted contracts to TVMs?

- (a) If you are an FTA recipient, you must require in your DBE program that each TVM, as a condition of being authorized to bid or propose on FTA assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.
  - (1) Only those TVMs listed on FTA's list of eligible TVMs, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved at the time of solicitation are eligible to bid.
  - (2) A TVM that fails to follow the requirements of this section and this part will be deemed as non-compliant, which will result in removal from FTA's eligible TVMs list and ineligibility to bid.
  - (3) An FTA recipient's failure to comply with the requirements set forth in paragraph (a) of this section may result in formal enforcement action or appropriate sanction as determined by FTA (e.g., FTA declining to participate in the vehicle procurement).
  - (4) Within 30 days of becoming contractually required to procure a transit vehicle, an FTA recipient must report to FTA:
    - (i) The name of the TVM that was the successful bidder; and
    - (ii) The Federal share of the contractual commitment at that time.
- (b) If you are a TVM, you must establish and submit to FTA an annual overall percentage goal for DBE participation.
  - (1) In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts on which you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by your own forces.
    - (i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBEs.
    - (ii) You must exclude from this base figure funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.
    - (iii) In establishing an overall goal, you must provide for public participation. This includes consultation with interested parties consistent with § 26.45(g).
  - (2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients, except that TVMs set and submit their goals annually and not on a triennial basis.
- (c) TVMs must comply with the reporting requirements of § 26.11, including the requirement to submit the Uniform Report of DBE Awards or Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements.
- (d) TVMs must implement all other requirements of this part, except those relating to UCPs and DBE certification procedures.

- (e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of the equipment must meet the same requirements (including goal approval by FHWA or FAA) that TVMs must meet in FTA assisted procurements.
- (f) Recipients may establish project-specific goals for DBE participation in the procurement of transit vehicles from specialized manufacturers when a TVM cannot be identified.
  - (1) Project-specific goals established pursuant to this section are subject to the same review and approval and must be established as prescribed in the project goal provisions of § 26.45.
  - (2) FTA must approve the decision to use a project goal before the recipient issues a public solicitation for the vehicles in question.
  - (3) To support the request to develop a project goal, recipients must demonstrate that no TVMs are available to manufacture the vehicle.

[89 FR 24966, Apr. 9, 2024]

## § 26.51 What means do recipients use to meet overall goals?

- (a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.
- (b) Race-neutral means include, but are not limited to, the following:
  - (1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.
  - (2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);
  - (3) Providing technical assistance and other services;
  - (4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
  - (5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
  - (6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;



- (7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
  - (8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
  - (9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.
- (c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.
- (d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.
- (e) The following provisions apply to the use of contract goals:
- (1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.
  - (2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.
  - (3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.
  - (4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.
- (f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:
- (1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year, unless it becomes necessary in order meet your overall goal.

*Example to paragraph (f)(1):* Your overall goal for Year 1 is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year 1. However, if part way through Year 1, your DBE awards or commitments are not at a level that would permit you to achieve your overall goal for Year 1, you could begin setting race-conscious DBE contract goals during the remainder of the year as part of your obligation to implement your program in good faith.

- (2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

*Example to paragraph (f)(2):* In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

- (3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

*Example to paragraph (f)(3):* Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

- (4) If you obtain DBE participation that exceeds your overall goal in two consecutive years using contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

*Example to paragraph (f)(4):* In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the

contract goal projection by 25 percent (i.e., from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two *consecutive* years of exceeding overall goals.

- (g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 79 FR 59595, Oct. 2, 2014; 89 FR 24967, Apr. 9, 2024]

## § 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

- (a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:
  - (1) Documents that it has obtained enough DBE participation to meet the goal; or
  - (2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.
- (b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:
  - (1) Award of the contract will be conditioned on meeting the requirements of this section;
  - (2) All bidders or offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:
    - (i) The names and addresses of DBE firms that will participate in the contract;
    - (ii) A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
    - (iii) The dollar amount of the participation of each DBE firm participating;
    - (iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and
    - (v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment. Each DBE listed to perform work as a regular dealer or distributor must confirm its participation according to the requirements of paragraph (c)(1) of this section.

- (vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and

(3)

- (i) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

- (A) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

- (B) No later than 7 days after bid opening as a matter of responsibility. The 7 days shall be reduced to 5 days beginning January 1, 2017.

- (ii) Provided that, in a negotiated procurement, such as a procurement for professional services, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient. This paragraph (b)(3)(ii) does not apply to a design-build procurement, which must follow the provisions in paragraph (e) of this section.

- (c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.

- (1) For each DBE listed as a regular dealer or distributor you must make a preliminary counting determination to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based on its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in § 26.55(e)(2)(iv)(A), (B), and (C) and (e)(3) under the contract at issue. Your preliminary determination shall be made based on the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function will be consistent with the preliminary counting of such participation. Where the DBE supplier does not affirm that its participation will meet the specific requirements of either a regular dealer or distributor, you are required to make appropriate adjustments in counting such participation toward the bidder's good faith efforts to meet the contract goal. The bidder is responsible for verifying that the information provided by the DBE supplier is consistent with the counting of such participation toward the contract goal.

- (2) [Reserved]

- (d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

- (1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

- (2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.

- (3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.
  - (4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.
  - (5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.
- (e) In a design-build contracting situation, in which the recipient solicits proposals to design and build a project with minimal-project details at time of letting, the recipient may set a DBE goal that proposers must meet by submitting a DBE Open-Ended DBE Performance Plan (OEPP) with the proposal. The OEPP replaces the requirement to provide the information required in paragraph (b) of this section that applies to design-bid-build contracts. To be considered responsive, the OEPP must include a commitment to meet the goal and provide details of the types of subcontracting work or services (with projected dollar amount) that the proposer will solicit DBEs to perform. The OEPP must include an estimated time frame in which actual DBE subcontracts would be executed. Once the design-build contract is awarded, the recipient must provide ongoing monitoring and oversight to evaluate whether the design-builder is using good faith efforts to comply with the OEPP and schedule. The recipient and the design-builder may agree to make written revisions of the OEPP throughout the life of the project, e.g., replacing the type of work items the design-builder will solicit DBEs to perform and/or adjusting the proposed schedule, as long as the design-builder continues to use good faith efforts to meet the goal.
- (f)
- (1)
- (i) You must require that a prime contractor not terminate a DBE or any portion of its work listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm per paragraph (g) of this section) without your prior written consent, unless you cause the termination or reduction. A termination includes any reduction or underrun in work listed for a DBE not caused by a material change to the prime contract by the recipient. This requirement applies to instances that include, but are not limited to, when a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.
  - (ii) You must include in each prime contract a provision stating that:
    - (A) The contractor must utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains your written consent as provided in this paragraph (f); and
    - (B) Unless your consent is provided under this paragraph (f), the prime contractor must not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.
- (2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the listed DBE or any portion of its work.

- (3) Good cause does not exist if the prime contractor seeks to terminate a DBE or any portion of its work that it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged, or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award. For purposes of this paragraph (f)(3), good cause includes the following circumstances:
- (i) The listed DBE subcontractor fails or refuses to execute a written contract;
  - (ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
  - (iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements;
  - (iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
  - (v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR parts 180, 215, and 1200 or applicable State law;
  - (vi) You have determined that the listed DBE subcontractor is not a responsible contractor;
  - (vii) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;
  - (viii) The listed DBE is ineligible to receive DBE credit for the type of work required;
  - (ix) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract; and
  - (x) Other documented good cause that you determine compels the termination of the DBE subcontractor.
- (4) Before transmitting to you its request to terminate a DBE subcontractor or any portion of its work, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you sent concurrently, of its intent to request to terminate and the reason for the proposed request.
- (5) The prime contractor's written notice must give the DBE 5 days to respond, advising you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract/or portion thereof and why you should not approve the prime contractor's request. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than 5 days.
- (6) In addition to post-award terminations, the provisions of this section apply to pre-award deletions or changes to DBEs or their listed work put forward by offerors in negotiated procurements.
- (g) When a DBE subcontractor or any portion of its work is terminated by the prime contractor as provided in paragraph (f) of this section, or the firm fails to complete its work on the contract for any reason, including when work committed to a DBE is not countable or reduced due to overestimations made prior to award, the prime contractor must use good faith efforts to include additional DBE participation to the extent needed to meet the contract goal. The good faith efforts shall be documented by the contractor. If the recipient requests documentation under this provision, the contractor shall submit the documentation

within 7 days, which may be extended for an additional 7 days, if necessary, at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

- (h) You must include in each prime contract the contract clause required by § 26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that section you deem appropriate if the prime contractor fails to comply with the requirements of this section.
- (i) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.
- (j) You must require the contractor awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5098, Jan. 28, 2011; 79 FR 59595, Oct. 2, 2014; 89 FR 24967, Apr. 9, 2024; 89 FR 55089, July 3, 2024]

## § 26.55 How is DBE participation counted toward goals?

- (a) When a DBE participates in a contract, you count only the value of the work performed by the DBE toward DBE goals.
  - (1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
  - (2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
  - (3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
- (b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
- (c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

- (1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is performing and the DBE credit claimed for its performance of the work, and other relevant factors.
  - (2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.
  - (3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected within normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.
  - (4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
  - (5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.
- (d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
- (1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
  - (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
  - (3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
  - (4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
  - (5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers



receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

*Example to paragraph (d)(5):* DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks equipped with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

- (6) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

*Example to paragraph (d)(6):* DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

- (7) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

- (e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)

- (i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies.
- (ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that owns (or leases) and operates a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications. When a DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE is not a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.

(2)

- (i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies (including transportation costs).

- (ii) For purposes of this section, a regular dealer is a firm that owns (or leases) and operates, a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in sufficient quantities, and regularly sold or leased to the public in the usual course of business.
- (iii) Items kept and regularly sold by the DBE are of the "general character" when they share the same material characteristics and application as the items specified by the contract.
- (iv) You must establish a system to determine that a DBE regular dealer per paragraph (e)(2)(iv)(A) of this section, over a reasonable period of time, keeps sufficient quantities and regularly sells the items in question. This system must also ensure that a regular dealer of bulk items per (e)(2)(iv)(B) of this section owns/leases and operates distribution equipment for the products it sells. This requirement may be administered through questionnaires, inventory records reviews, or other methods to determine whether each DBE supplier has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer prior to its participation. The system you implement must be maintained and used to identify all DBE suppliers with capacity to be eligible for 60 percent credit, contingent upon the performance of a CUF. This requirement is a programmatic safeguard apart from that described in § 26.53(c)(1).
  - (A) To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A DBE supplier performs a CUF as a regular dealer and receives credit for 60 percent of the cost of materials or supplies (including transportation cost) when all, or at least 51 percent of, the items under a purchase order or subcontract are provided from the DBE's inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the DBE's inventory.
  - (B) A DBE may be a regular dealer in such bulk items as petroleum products, steel, concrete or concrete products, gravel, stone, or asphalt without owning and operating a place of business as provided in paragraph (e)(2)(ii) of this section if the firm both owns and operates distribution equipment used to deliver the products. Any supplementing of regular dealers' own distribution equipment must be by a long-term operating lease and not on an ad hoc or contract-by-contract basis.
  - (C) A DBE supplier of items that are not typically stocked due to their unique characteristics (e.g., limited shelf life or items ordered to specification) should be considered in the same manner as a regular dealer of bulk items per paragraph (e)(2)(iv)(B) of this section. If the DBE supplier of these items does not own or lease distribution equipment, as described above, it is not a regular dealer.
  - (D) Packagers, brokers, manufacturers' representatives, or other persons who arrange, facilitate, or expedite transactions are not regular dealers within the meaning of paragraph (e)(2) of this section.
- (3) If the materials or supplies are purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, count 40 percent of the cost of materials or supplies (including transportation costs). A DBE distributor is an established business that engages in the regular sale or lease of the items specified by the contract. A DBE distributor assumes responsibility for the items it purchases once they leave the point of origin (e.g.,

a manufacturer's facility), making it liable for any loss or damage not covered by the carrier's insurance. A DBE distributor performs a CUF when it demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE distributor. If these conditions are met, DBE distributors may receive 40 percent for drop-shipped items. Terms that transfer liability to the distributor at the delivery destination (e.g., FOB destination), or deliveries made or arranged by the manufacturer or another seller do not satisfy this requirement.

- (4) With respect to materials or supplies purchased from a DBE that is neither a manufacturer, a regular dealer, nor a distributor, count the entire amount of fees or commissions charged that you deem to be reasonable, including transportation charges for the delivery of materials or supplies. Do not count any portion of the cost of the materials and supplies themselves.
- (5) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer, distributor, or a transaction facilitator) on a contract-by-contract basis.
- (f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in § 26.87(j)).
- (g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.
- (h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the contractor has paid the DBE the amount being counted.

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## Subpart D—Certification Standards

### § 26.61 Burden of proof

- (a) In determining whether to certify a firm, the certifier must apply the standards of this subpart. Unless the context indicates otherwise, singular terms include their plural forms and vice versa.
- (b) The firm has the burden of demonstrating, by a preponderance of the evidence, *i.e.*, more likely than not, that it satisfies all of the requirements in this subpart. In determining whether the firm has met its burden, the certifier must consider all the information in the record, viewed as a whole.
  - (1) **Exception 1.** In a decertification proceeding the certifier bears the burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for certification under the rules of this part.
  - (2) **Exception 2.** If a certifier has a reasonable basis to believe that an individual who is a member of a group in § 26.67(a) of this section is not, in fact, socially and/or economically disadvantaged, the certifier bears the burden of proving, by a preponderance of the evidence, that the individual is not socially and/or economically disadvantaged.

[89 FR 24969, Apr. 9, 2024]

## § 26.63 General certification rules.

(a) **General rules.** Except as otherwise provided:

- (1) The firm must be for-profit and engaged in business activities.
- (2) In making eligibility determinations, a certifier may not consider whether a firm performs a commercially useful function (CUF), or the potential effect on goals or counting.
- (3) A certifier cannot condition eligibility on State prequalification requirements for bidding on contracts.
- (4) Certification is not a warranty of competence or suitability.
- (5) A certifier determines eligibility based on the evidence it has at the time of its decision, not on the basis of historical or outdated information, giving full effect to the “curative measures” provisions of this part.
- (6) Entering into a fraudulent transaction or presenting false information to obtain or maintain DBE certification is disqualifying.

(b) **Indirect ownership.** A subsidiary (*i.e.*, S) that SEDOs own and control indirectly is eligible, if it satisfies the other requirements of this part and only under the following circumstances.

- (1) **Look-through.** SEDOs own at least 51 percent of S through their ownership of P (*i.e.*, the parent firm) as shown in the examples following.
- (2) **Control.** SEDOs control P, and P controls S.
- (3) **One tier of separation.** The SEDOs indirectly own S through P and no other intermediary. That is, no applicant or DBE may be more than one entity (P) removed from its individual SEDOs.
- (4) **Examples.** The following examples assume that S and its SEDOs satisfy all other requirements in this part.
  - (i) **Example 1 to paragraph (b)(4).** SEDOs own 100 percent of P, and P owns 100 percent of S. S is eligible for certification.
  - (ii) **Example 2 to paragraph (b)(4).** Same facts as Example 1, except P owns 51 percent of S. S is eligible.
  - (iii) **Example 3 to paragraph (b)(4).** SEDOs own 80 percent of P, and P owns 70 percent of S. S is eligible because SEDOs indirectly own 56 percent of S. The calculation is 80 percent of 70 percent or  $.8 \times .7 = .56$ .
  - (iv) **Example 4 to paragraph (b)(4).** SEDOs own and control P, and they own 52 percent of S by operation of this paragraph (b). However, a non-SEDO controls S. S is ineligible.
  - (v) **Example 5 to paragraph (b)(4).** SEDOs own 60 percent of P, and P owns 51 percent of S. S is ineligible because SEDOs own just 31 percent of S.
  - (vi) **Example 6 to paragraph (b)(4).** P indirectly owns and controls S and has other affiliates. S is eligible only if its gross receipts, plus those of all of its affiliates, do not exceed the applicable small business size cap of § 26.65. Note that all of P's affiliates are affiliates of S by virtue of P's ownership and/or control of S.

(c) **Indian Tribes, NHOs, and ANCs** —

- (1) **Indian Tribes and NHOs.** A firm that is owned by an Indian Tribe or Native Hawaiian organization (NHO), rather than by Indians or Native Hawaiians as individuals, is eligible if it meets all other certification requirements in this part.
- (2) **Alaska Native Corporations (ANCs).**
  - (i) Notwithstanding any other provisions of this subpart, a subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification if it meets all the following requirements:
    - (A) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;
    - (B) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and
    - (C) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.
  - (ii) As a certifier to whom an ANC-related entity applies for certification, a certifier must not use the Uniform Certified Application. The certifier must obtain from the firm documentation sufficient to demonstrate that the entity meets the requirements of paragraph (c)(2)(i) of this section. The certifier must also obtain sufficient information about the firm to allow the certifier to administer its program (e.g., information that would appear in a UCP directory).
  - (iii) If an ANC-related firm does not meet all the conditions of paragraph (c)(2)(i) of this section, then it must meet the requirements of paragraph (c)(1) of this section in order to be certified.

[89 FR 24969, Apr. 9, 2024]

## § 26.65 Business size determinations.

- (a) **By NAICS Code.** A firm (including its affiliates) must be a small business, as defined by the Small Business Administration (SBA). The certifier must apply the SBA business size limit in 13 CFR part 121 which corresponds to the applicable primary industry classifications (NAICS codes). The firm is ineligible when its affiliated "receipts" (computed on a cash basis), as defined in 13 CFR 121.104(a) and averaged over the firm's preceding five fiscal years, exceed the applicable SBA size cap(s).
- (b) **Statutory cap.** Even if a firm is a small business under paragraph (a) of this section, it is ineligible to perform DBE work on FHWA or FTA assisted contracts if its affiliated annual gross receipts, as defined in 13 CFR 121.104, averaged over the firm's previous three fiscal years exceed \$30.72 million (as of March 1, 2024). The Department will adjust this amount annually and post the adjusted amount on its website available at <https://www.transportation.gov/DBEsizestandards>.

[89 FR 24970, Apr. 9, 2024; 89 FR 55089, July 3, 2024]

## § 26.67 Social and economic disadvantage.

### (a) *Group membership* –

- (1) **General rule.** Citizens of the United States (or lawfully admitted permanent residents) who are women, Black American, Hispanic American, Native American, Asian Pacific American, Subcontinent Asian American, or other minorities found to be disadvantaged by the Small Business Administration (SBA), are rebuttably presumed to be socially and economically disadvantaged. A firm owner claiming the presumption must specify of which groups in this paragraph (a)(1) she or he is a member on the Declaration of Eligibility (DOE).
- (2) **Native American group membership.** An owner claiming Native American group membership must submit a signed DOE as well as proof of enrollment in a federally or State-recognized Indian Tribe. An owner claiming Native Hawaiian or Alaska Native group membership must submit documentation legally recognized under State or Federal law attesting to the individual's status as a member of that group.
- (3) **Questioning group membership.** (1) Certifiers may not question claims of group membership as a matter of course. Certifiers must not impose a disproportionate burden on members of any particular group. Imposing a disproportionate burden on members of a particular group could violate Title VI of the Civil Rights Act of 1964, paragraph (b) of this section, and/or 49 CFR part 21.
  - (i) If a certifier has a well-founded reason(s) to question an owner's claim of membership in a group in paragraph (a)(1) of this section, it must provide the individual a written explanation of its reason(s), using the most recent email address provided. The firm bears the burden of proving, by a preponderance of the evidence, that the owner is a member of the group in question.
  - (ii) A certifier's written explanation must instruct the individual to submit evidence demonstrating that the individual has held herself/himself/themself out publicly as a member of the group for a long period of time prior to applying for DBE certification, and that the relevant community considers the individual a member. The certifier may not require the individual to provide evidence beyond that related to group membership.
  - (iii) The owner must email the certifier evidence described in paragraph (a)(3)(ii) of this section no later than 20 days after the written explanation. The certifier must email the owner a decision no later than 30 days after receiving timely submitted evidence.
  - (iv) If a certifier determines that an individual has not demonstrated group membership, the certifier's decision must specifically reference the evidence in the record that formed the basis for the conclusion and give a detailed explanation of why the evidence submitted was insufficient. It must also inform the individual of the right to appeal, as provided in § 26.89(a), and of the right to reapply at any time under paragraph (d) of this section.

### (b) *Rebuttal of social disadvantage.*

- (1) If a certifier has a reasonable basis to believe that an individual who is a member of a group in paragraph (a)(1) of this section is not, in fact, socially disadvantaged, the certifier must initiate a § 26.87 proceeding, regardless of the firm's DBE status. As is the case in all section § 26.87 proceedings, the certifier must prove ineligibility.
- (2) If the certifier finds that the owner is not socially disadvantaged, its decision letter must inform the firm of its appeal rights.

(c) **Rebuttal of economic disadvantage** —

(1) **Personal net worth.** If a certifier has a reasonable basis to believe that an individual who submits a PNW Statement that is below the currently applicable PNW cap is not economically disadvantaged, the certifier may rebut the individual's presumption of economic disadvantage.

(i) The certifier must not attempt to rebut presumed economic disadvantage as a matter of course and it must avoid imposing unnecessary burdens on individual owners or disproportionately impose them on members of a particular group.

(ii) The certifier must proceed as provided in § 26.87.

(2) **Economic disadvantage in fact.**

(i) To rebut the presumption, the certifier must prove that a reasonable person would not consider the individual economically disadvantaged. The certifier may consider assets and income, free use of them or ready access to their benefits, and any other trappings of wealth that the certifier considers relevant. There are no assets (including retirement assets), income, equity, or other exclusions and no limitations on inclusions. A broad and general analysis suffices in most cases: the owner has, or enjoys the benefits of, income of X; two homes worth approximately Y; substantial interests in outside businesses Q, R, and S; four rental properties of aggregate value Z; etc. The certifier need only demonstrate “ballpark” values based on available evidence. The reasonable person is not party to detailed financial information. S/he considers the owner's overall circumstances and lifestyle.

(ii) The certifier must proceed as provided in § 26.87.

(d) **Non-presumptive disadvantage.** An owner who is not presumed to be SED under paragraph (a) of this section may demonstrate that he is SED based on his own experiences and circumstances that occurred within American society.

(1) To attempt to prove individual SED, the owner provides the certifier a Personal Narrative (PN) that describes in detail specific acts or omissions by others, which impeded his progress or success in education, employment, and/or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons.

(2) The PN must identify at least one objective basis for the detrimental discrimination. The basis may be any identifiable status or condition. The PN must describe this objective distinguishing feature(s) (ODF) in sufficient detail to justify the owner's conclusion that it prompted the prejudicial acts or omissions.

(3) The PN must state how and to what extent the discrimination caused the owner harm, including a full description of type and magnitude.

(4) The owner must establish that he is economically disadvantaged in fact and that he is economically disadvantaged relative to similarly situated non-disadvantaged individuals.

(5) The owner must attach to the PN a current PNW statement and any other financial information he considers relevant.

(6) This rule does not prescribe how the owner must satisfy his burden of proving disadvantage. He need not, for example, have filed any formal complaint, or prove discrimination under a particular statute.

*Example 1 to paragraph (d):* A White male claiming to have experienced employment discrimination must provide evidence that his employment status and/or limited opportunities to earn income result from specific prejudicial acts directed at him personally because of an ODF, and not, e.g., an economic recession that caused widespread unemployment.

[89 FR 24970, Apr. 9, 2024; 89 FR 55089, July 3, 2024]

## § 26.68 Personal net worth.

- (a) **General.** An owner whose PNW exceeds \$2,047,000 is not presumed economically disadvantaged. The Department will adjust the PNW cap pursuant to paragraph (d) of this section.
- (b) **Required documents.** Each owner on whom the firm relies for certification must submit a DOE and a corroborating personal net worth (PNW) statement, including required attachments. The owner must report PNW on the form, available at <https://www.Transportation.gov/DBEFORMS>. A certifier may require an owner to provide additional information on a case-by-case basis to verify the accuracy and completeness of the PNW statement. The certifier must have a legitimate and demonstrable need for the additional information.
- (c) **Reporting.** The following rules apply without regard to State community property, equitable distribution, or similar rules. The owner reports assets and liabilities that she owns or is deemed to own. Ownership tracks title to the asset or obligor status on the liability except where otherwise provided or when the transaction results in evasion or abuse.
  - (1) The owner excludes her ownership interest in the applicant or DBE.
  - (2) The owner excludes her share of the equity in her primary residence. There is no exclusion when the SEDO does not own the home.

*Example 1 to paragraph (c)(2):* The owner and her spouse hold joint title to their primary residence, for which they paid \$300,000 and are coequal debtors on a bank mortgage and a home equity line of credit with current combined balances of \$150,000. The owner may exclude her \$75,000 share of the \$150,000 of total equity.

- (3) The owner includes the full value of the contents of her primary residence unless she cohabits with a spouse or domestic partner, in which case she excludes only 50 percent of those assets.
- (4) The owner includes the value of all motor vehicles, including watercraft and ATVs, titled in her name or of which she is the principal operator.
- (5) The owner excludes the liabilities of any other party and those contingent on a future event or of undetermined value as of the date of the PNW Statement.
- (6) The owner includes her proportional share of the balance of a debt on which she shares joint and severable liability with other primary debtors.

*Example 2 to paragraph (c)(6):* When the owner co-signs a debt instrument with two other individuals, the rule considers her liable for one-third of the current loan balance.



- (7) The owner includes assets transferred to relatives or related entities within the two years preceding any UCA or DOE, when the assets so transferred during the period have an aggregate value of more than \$20,000. Relatives include the owner's spouse or domestic partner, children (whether biological, adopted or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner). Related entities include for-profit privately held companies of which any relative is an owner, officer, director, or equivalent; and family or other trusts of which the owner or any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable.
- (8) The owner excludes direct payments, on behalf of immediate family members or their children, to unrelated providers of healthcare, education, or legal services.
- (9) The owner excludes direct payments to providers of goods and services directly related to a celebration of an immediate family member's or that family member's child's significant, normally non-recurring life event.
- (10) The owner excludes from net worth all assets in qualified retirement accounts but must report those accounts, the value of assets in them, and any significant terms and restrictions concerning the assets' use, to the certifier.

(d) **Regulatory adjustments.**

- (1) The Department will adjust the PNW cap by May 9, 2027 by multiplying \$1,600,000 by the growth in total household net worth since 2019 as described by "Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h)" produced by the Board of Governors of the Federal Reserve (<https://www.federalreserve.gov/releases/z1/>), and normalized by the total number of households as collected by the Census in "Families and Living Arrangements" (<https://www.census.gov/topics/families/families-and-households.html>) to account for population growth. The Department will adjust the PNW cap every 3 years on the anniversary of the adjustment date described in this section. The Department will post the adjustments on the Departmental Office of Civil Rights' web page, available at <https://www.Transportation.gov/DBEPNW>. Each such adjustment will become the currently applicable PNW limit for purposes of this regulation.
- (2) The Department will use formula 1 to this paragraph (d)(2) to adjust the PNW limit:

Formula 1 to Paragraph (d)

<p>Future Year PNW Cap</p> <p>= [\$1,600,000] *</p>	$\frac{\text{Q1-Q4 Average Household Net Worth of Future Year} / \text{Total Households of Future Year}}{\text{Q1-Q4 Average Household Net worth of 2019 (\$106,722,704 million} / \text{Total Households of 2019 (128,579)}}$
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- (e) **Confidentiality.** Notwithstanding any provision of Federal or State law, a certifier must not release an individual's PNW statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 or to any other State to which the individual's firm has applied for certification under § 26.85.

[89 FR 24971, Apr. 9, 2024; 89 FR 55089, July 3, 2024]

## § 26.69 Ownership.

- (a) **General rule.** A SEDO must own at least 51 percent of each class of ownership of the firm. Each SEDO whose ownership is necessary to the firm's eligibility must demonstrate that her ownership satisfies the requirements of this section. If not, the firm is ineligible.
- (b) **Overall Requirements.** A SEDO's acquisition and maintenance of an ownership interest meets the requirements of this section only if the SEDO demonstrates the following:
  - (1) **Acquisition.** The SEDO acquires ownership at fair value and by one or more "investments," as defined in paragraph (c) of this section.
  - (2) **Proportion.** No owner derives benefits or bears burdens that are clearly disproportionate to their ownership shares.
  - (3) **Maintenance.** This section's requirements continue to apply after the SEDO's acquisition and the firm's certification. That is, the SEDO must maintain her investment and its proportion relative to those of other owners.
    - (i) The SEDO may not withdraw or revoke her investment.
    - (ii) When an existing co-owner contributes significant, additional, post-acquisition cash or property to the firm, the SEDO must increase her own investment to a level not clearly disproportionate to the non-SED0's investment.
      - (A) **Example 1 to paragraph (b)(3)(ii).** SEDO and non-SED0 own DBE 60/40. Their respective investments are approximately \$600,000 and \$400,000. The DBE has operated its business under this ownership and with this capitalization for 2 years. In Year 3, the non-SED0 contributes a \$2 million asset to the business. The SED0, as a result, owns 60 percent of a \$2 million asset without any additional outlay. Her ownership interest, assuming no other pertinent facts, is worth \$1.2 million more than it was before. Unless the SED0 increases her investment significantly, it is clearly disproportionate to the non-SED0's investment and to her nominal 60 percent ownership. She has not maintained her investment.
      - (B) **Example 2 to paragraph (b)(3)(ii).** Same facts except that the DBE purchases the asset with a combination of 30 percent operating income and 70 percent proceeds of a bank loan. The SED0 maintains her investment because it remains in proportion to the non-SED0's investment and to the value of her 60 percent ownership interest.
      - (C) **Example 3 to paragraph (b)(3)(ii).** Same facts except that the non-SED0, not a bank, is the DBE's creditor. The SED0 has not maintained her investment because the benefits and burdens of her ownership are clearly disproportionate to those of the non-SED0. The transaction may also raise § 26.71 concerns.
    - (iii) An organic increase in the value of the business does not affect maintenance because the value of the owners' investments remains proportional. In Example 2 above, the SED0 and the non-SED0 own the new asset at 60 percent and 40 percent of its net value of \$60,000.

(c) **Investments.** A SEDO may acquire ownership by purchase, capital contribution, or gift. Subject to the other requirements of this section, each is considered an “investment” in the firm, as are additional purchases, contributions, and qualifying gifts.

(1) Investments are unconditional and at full risk of loss.

(2) Investments include a significant outlay of the SEDO's own money.

(3) For purposes of this part, title determines ownership of assets used for investments and of ownership interests themselves. This rule applies regardless of contrary community property, equitable distribution, banking, contract, or similar laws, rules, or principles.

(i) The person who has title to the asset owns it in proportion to her share of title.

(ii) However, the title rule is deemed not to apply when it produces a certification result that is manifestly unjust.

(4) If the SEDO jointly (50/50) owns an investment of cash or property, the SEDO may claim at least a 51 percent ownership interest only if the other joint owner formally transfers to the SEDO enough of his ownership in the invested asset(s) to bring the SEDO's investment to at least 51 percent of all investments in the firm. Such transfers may be gifts described in paragraph (e) of this section.

(d) **Purchases and capital contributions.**

(1) A purchase of an ownership interest is an investment when the consideration is entirely monetary and not a trade of property or services.

(2) Capital that the SEDO contributes directly to the company is an investment when the contribution is all cash or a combination of cash and tangible property and/or realty.

(3) Contributions of time, labor, services, and the like are not investments or components of investments.

(4) Loans are not investments. The proceeds of loans may be investments to the extent that they finance the SEDO's qualifying purchase or capital contribution.

(5) Debt-financed purchases or capital contributions are investments when they comply with the rules in this section and in § 26.70.

(6) Guarantees are not investments.

(7) The firm's purchases or sales of property, including ownership in itself or other companies, are not the SEDO's investments.

(8) Other persons' or entities' purchases or capital contributions are not the SEDO's investments.

(e) **Gifts.** A gift to the SEDO is an investment when it meets the requirements of this section. The gift rules apply to partial gifts, bequests, inheritances, trust distributions, and transfers for inadequate consideration. They apply to gifts of ownership interests and to gifts of cash or property that the SEDO invests. The following requirements apply to gifts on which the SEDO relies for her investment.

(1) The transferor/donor is or immediately becomes uninvolved with the firm in any capacity and in any other business that contracts with the firm other than as a lessor or provider of standard support services;

(2) The transferor does not derive undue benefit; and

- (3) A writing documents the gift. When the SEDO cannot reasonably produce better evidence, a receipt, cancelled check, or transfer confirmation suffices, if the writing identifies transferor, transferee, amount or value, and date.
- (f) **Curative measures.** The rules of this section do not prohibit transactions that further the objectives of, and compliance with, the provisions of this part. A SEDO or firm may enter into legitimate transactions, alter the terms of ownership, make additional investments, or bolster underlying documentation in a good faith effort to remove, surmount, or correct defects in eligibility, as long as the actions are consistent with this part.
  - (1) The certifier may notify the firm of eligibility concerns and give the firm time, if the firm wishes, to attempt to remedy impediments to certification.
  - (2) The firm may, of its own volition, take curative action up to the time of the certifier's decision. However, it must present evidence of curation before the certifier's decision.
  - (3) The certifier may provide general assistance and guidance but not professional (legal, accounting, valuation, etc.) advice or opinions.
  - (4) While the certifier may not affirmatively impede attempts to cure, it may maintain its decision timeline and make its decision based on available evidence.
  - (5) The certifier must deny or remove certification when the firm's efforts or submissions violate the rules in paragraph (g) of this section.
- (g) **Anti-abuse rules.**
  - (1) The substance and not the form of transactions drives the eligibility determination.
  - (2) The certifier must deny applications based on sham transactions or false representations, and it must decertify DBEs that engage in or make them. Transactions or representations designed to evade or materially mislead subject the firm to the same consequences.
  - (3) Fraud renders the firm ineligible and subjects it to sanctions, suspension, debarment, criminal prosecution, civil litigation, and any other consequence or recourse not proscribed in this part.

*Example 1 to paragraph (g)(3):* SEDO claims an investment consisting of a contribution of equipment and a significant amount of her own cash. She shows that she transferred title to the equipment and wrote a check from an account she alone owns. She does not disclose that her brother-in-law lent her the money and she must repay him. The firm is ineligible under paragraphs (g)(1) and (2) of this section.

[89 FR 24972, Apr. 9, 2024]

## § 26.70 Debt-financed investments.

- (a) Subject to the other provisions of this subpart, a SEDO may borrow money to *finance* a § 26.69(c) investment entirely or partially if the SEDO has paid, on a net basis, at least 15 percent of the total value of the investment by the time the firm applies for certification.

*Example 1 to paragraph (a) introductory text:* A SEDO who borrows \$9,000 of her \$10,000 cash investment in Applicant, Inc., must have repaid, from her own funds, at least \$500 of the loan's

principal by the time Applicant, Inc. applies for certification.

*Example 2 to paragraph (a) introductory text:* A SEDO who finances \$8,000 of a \$10,000 investment in Applicant may apply for Applicant's certification at any time.

*Example 3 to paragraph (a) introductory text:* A SEDO who contributes to the Applicant equipment worth \$40,000, which she purchased with \$10,000 of her own money and \$30,000 of seller financing may apply for Applicant's certification at any time.

- (1) The SEDO pays the net 15 percent portion of the investment to Seller or Applicant (as the case may be) from her own, not borrowed, money.
  - (2) Money that the SEDO receives as a § 26.69(e) gift is her own money.
  - (3) The firm, whether Applicant or DBE, does not finance any part of the investment, directly or indirectly.
- (b) The loan is real, enforceable, not in default, not offset by another agreement, and on standard commercial, arm's length terms. The following conditions also apply.
- (1) The SEDO is the sole debtor.
  - (2) The firm is not party to the loan in any capacity, including as a guarantor.
  - (3) The SEDO does not rely on the company's credit or other resources to repay any part of the debt or otherwise to finance any part of her investment.
  - (4) The loan agreement requires level, regularly recurring payments of principal and interest, according to a standard amortization schedule, at least until the SEDO satisfies requirements in paragraph (a) of this section.
  - (5) The loan agreement permits prepayments, including by refinancing.
- (c) If the creditor forgives or cancels all or part of the debt, or the SEDO defaults, the entire debt-financed portion of the SEDO's purchase or capital contribution is no longer an investment.

*Example 4 to paragraph (c):* SEDO finances \$40,000 of a \$50,000 investment, and the firm becomes certified. When the SEDO has repaid half of the loan's principal and associated interest, the creditor forgives the remaining \$20,000 debt. The SEDO's investment is now \$10,000.

- (d) Paragraph (c) of the section does not prohibit refinancing with debt that meets the requirements of this section or preclude prompt curation under § 26.69(f).

[89 FR 24973, Apr. 9, 2024]

## § 26.71 Control.

### (a) General rules.

- (1) One or more SEDOs of the firm must control it.
- (2) Control determinations must consider all pertinent facts, viewed together and in context.

- (3) A firm must have operations in the business for which it seeks certification at the time it applies. Certifiers do not certify plans or intentions, or issue contingent or conditional certifications.
- (b) **SEDO as final decision maker.** A SEDO must be the ultimate decision maker in fact, regardless of operational, policy, or delegation arrangements.
- (c) **Governance.** Governance provisions may not require that any SEDO obtain concurrence or consent from a non-SEDO to transact business on behalf of the firm.
  - (1) **Highest officer position.** A SEDO must hold the highest officer position in the company (e.g., chief executive officer or president).
  - (2) **Board of directors.** Except as detailed in paragraph (c)(4) of this section, a SEDO must have present control of the firm's board of directors, or other governing body, through the number of eligible votes.
    - (i) **Quorum requirements.** Provisions for the establishment of a quorum must not block the SEDO from calling a meeting to vote and transact business on behalf of the firm.
    - (ii) **Shareholder actions.** A SEDO's authority to change the firm's composition via shareholder action does not prove control within the meaning of paragraph (c) of this section.
  - (3) **Partnerships.** In a partnership, at least one SEDO must serve as a general partner, with control over all partnership decisions.
  - (4) **Exception.** Bylaws or other governing provisions that require non-SEDO consent for extraordinary actions generally do not contravene the rules in paragraph (c) of this section. Non-exclusive examples are a sale of the company or substantially all of its assets, mergers, and a sudden, wholesale change of type of business.
- (d) **Expertise.** At least one SEDO must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature. The requirements of this paragraph (d) vary with type of business, degree of technological complexity, and scale.
- (e) **SEDO decisions.** The firm must show that the SEDO critically analyzes information provided by non-SEDOS and uses that analysis to make independent decisions.
- (f) **Delegation.** A SEDO may delegate administrative activities or operational oversight to a non-SED individual as long as at least one SEDO retains unilateral power to fire the delegate(s), and the chain of command is evident to all participants in the company and to all persons and entities with whom the firm conducts business.
  - (1) No non-SED participant may have power equal to or greater than that of a SEDO, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.
  - (2) Non-SED participants may not make non-routine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the SEDO's consent.
  - (3) Written provisions or policies that specify the terms under which non-SED participants may sign or act on the SEDO's behalf with respect to recurring matters generally do not violate this paragraph (f), as long as they are consistent with the SEDO having ultimate responsibility for the action.
- (g) **Independent business.**

- (1) If the firm receives from or shares personnel, facilities, equipment, financial support, or other essential resources, with another business (whether a DBE or non-DBE firm) or individual on other than commercially reasonable terms, the firm must prove that it would be viable as a going concern without the arrangement.
- (2) The firm must not regularly use another firm's business-critical vehicles, equipment, machinery, or facilities to provide a product or service under contract to the same firm or one in a substantially similar business.
  - (i) **Exception 1.** Paragraphs (g)(1) and (2) of this section do not preclude the firm from providing services to a single customer or to a small number of them, provided that the firm is not merely a conduit, captive, or unnecessary third party acting on behalf of another firm or individual. Similarly, providing a volume discount to such a customer does not impair viability unless the firm repeatedly provides the service at a significant and unsustainable loss.
  - (ii) **Exception 2.** A firm may share essential resources and deal exclusively with another firm that a SEDO controls and of which the SEDO owns at least 51 percent ownership.
- (h) **Franchise and license agreements.** A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the certifier should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, if the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

[89 FR 24973, Apr. 9, 2024]

## § 26.73 NAICS codes.

- (a) A certifier must grant certification to a firm only for specific types of work that the SEDO controls. To become certified in an additional type of work, the firm must demonstrate to the certifier only that its SEDO controls the firm with respect to that type of work. The certifier must not require that the firm be recertified or submit a new application for certification but must verify the SEDO's control of the firm in the additional type of work.
  - (1) A correct NAICS code is the one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification.
  - (2) If there is not a NAICS code that fully, clearly, or sufficiently narrowly describes the type(s) of work for which the firm seeks certification, the certifier must supplement or limit the assigned NAICS code(s) with a clear, specific, and concise narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is insufficient.

- (3) Firms and certifiers must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.
- (4) A certifier may change a certification classification or description if there is a factual basis in the record, in which case it must notify the firm 30 days before making the change. Certifiers may not apply such changes retroactively.
- (5) In addition to applying the appropriate NAICS code, the certifier may apply a descriptor from a classification scheme of equivalent detail and specificity. Such a descriptor (e.g., a "work code") does not supersede or limit the types of work for which a DBE is eligible under an appropriate NAICS code.

(b) [Reserved]

[89 FR 24974, Apr. 9, 2024]

## Subpart E—Certification Procedures

### § 26.81 Unified Certification Programs.

- (a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).
  - (1) All recipients in the same jurisdiction (normally a State) must sign an agreement establishing a UCP and submit the agreement to the Secretary for approval.
  - (2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.
  - (3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.
  - (4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.
- (b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.
  - (1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.
  - (2) The UCP shall provide "one-stop shopping" to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.



- (3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.
- (c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.
- (d) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The Jurisdiction of Original Certification UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm's application.
- (e) Subject to DOT approval as provided in this section, recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.
- (f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.
- (g) Each UCP must maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other States certified under the provisions of this part), the information required by § 26.31. The UCP must make the directory available to the public electronically, on the internet. The UCP must update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.
- (h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5100, Jan. 28, 2011; 89 FR 24974, Apr. 9, 2024; 89 FR 55089, July 3, 2024]

## § 26.83 What procedures do certifiers follow in making certification decisions?

- (a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.
- (b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.
- (c)
  - (1) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:
    - (i) A certifier must visit the firm's principal place of business, virtually or in person, and interview the SEDO, officers, and key personnel. The certifier must review those persons' résumés and/or work histories. The certifier must maintain a complete audio recording of the interview. The certifier must also visit one or more active job sites (if there is one). These activities comprise the "on-site review" (OSR), a written report of which the certifier must keep in its files.

- (ii) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing
- (iii) Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards;
- (iv) Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records;
- (v) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.
- (vi) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;
- (vii) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.
- (viii) Require potential DBEs to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this part.

(2) You must use the application form available at <https://transportation.gov/DBEFORMS> without change or revision. However, you may provide in your DBE program, with the written approval of the concerned operating administration, for supplementing the form by requesting specified additional information not inconsistent with this part.

(3) The certifier must ensure that the SEDO signs the Declaration of Eligibility (DOE) at the end of the Uniform Certification Application (UCA), subscribed to as true under penalty of perjury that all information provided is current, accurate, and complete.

(4) You must review all information on the form prior to making a decision about the eligibility of the firm. You may request clarification of information contained in the application at any time in the application process.

(d) When another certifier, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other certifier.

(e) [Reserved]

(f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.

(g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

(h)

- (1) Once a certifier has certified a firm, the firm remains certified unless and/or until the certifier removes certification, in whole or in part (*i.e.*, NAICS code removal), through the procedures of § 26.87.
- (2) The certifier may not require a DBE to reapply for certification, renew its certification, undergo a recertification, or impose any functionally equivalent requirement. The certifier may, however, conduct a certification review at any reasonable time and/or at regular intervals of at least two years. The certification review may, at the certifier's discretion, include a new OSR. The certifier may also make an unannounced visit to the DBE's offices and/or job site. The certifier may also rely on another certifier's report of its OSR of the DBE.
- (i) If you are a DBE, you must inform the certifier or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.
  - (1) Changes in management responsibility among members of a limited liability company are covered by this requirement.
  - (2) You must attach supporting documentation describing in detail the nature of such changes.
  - (3) The DBE must notify the certifier of a material change in its circumstances that affects its continued eligibility within 30 days of its occurrence, explain the change fully, and include a duly executed DOE with the notice. The DBE's non-compliance is a § 26.109(c) failure to cooperate.
- (j) A DBE must provide its certifier(s), every year on the anniversary of its original certification, a new DOE along with the specified documentation in § 26.65(a), including gross receipts for its most recently completed fiscal year, calculated on a cash basis regardless of the DBE's overall accounting method. The sufficiency of documentation (and its probative value) may vary by business type, size, history, resources, and overall circumstances. However, the following documents may generally be considered "safe harbors," provided that they include all reportable receipts, properly calculated, for the full reporting period: audited financial statements, a CPA's signed attestation of correctness and completeness, or all income-related portions of one or more (when there are affiliates) signed Federal income tax returns as filed. Non-compliance, whether full or partial, is a § 26.109(c) failure to cooperate.
- (k) The certifier must advise each applicant within 30 days of filing whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.
- (l)
  - (1) The certifier must render a final eligibility decision within 90 days of receiving all information required from the applicant under this part. The certifier may extend this time period once, for no more than an additional 30 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. On a case-by-case basis, the concerned OA may give the certifier one deadline extension if it approves a written request explaining why the certifier needs more time. The certifier's failure to issue a compliant decision by the applicable deadline is a constructive denial of the application, appealable to DOT under § 26.89. In this case, the certifier may be subject to enforcement actions described in §§ 26.103 and 26.105.
  - (2) [Reserved]
- (m)

- (1) A certifier may notify the applicant about ineligibility concerns and allow the firm to rectify deficiencies within the period in paragraph (l) of this section.
- (2) If a firm takes curative measures before the certifier renders a decision, the certifier must consider any evidence it submits of having taken such measures. The certifier must not automatically construe curative measures as successful or abusive.
  - (i) **Example 1 to paragraph (m)(2).** The firm may obtain proof of an investment, transaction, or other fact on which its eligibility depends.
  - (ii) **Example 2 to paragraph (m)(2).** An owner or related party may create a legally enforceable document of irrevocable transfer to the SEDO.
  - (iii) **Example 3 to paragraph (m)(2).** The firm may amend an operating agreement, bylaw provision, or other governance document, provided that the amendment accurately reflects the parties' relationships, powers, responsibilities, and other pertinent circumstances.
- (n) Except as otherwise provided in this paragraph (n), if an applicant for DBE certification withdraws its application before the certifier issues a decision, the applicant can resubmit the application at any time. However, the certifier may place the reapplication at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn. The certifier may apply the § 26.86(c) waiting period to a firm that has established a pattern of withdrawing applications before its decision.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003; 76 FR 5100, Jan. 28, 2011; 79 FR 59598, Oct. 2, 2014; 89 FR 24974, Apr. 9, 2024; 89 FR 55090, July 3, 2024]

## § 26.85 Interstate certification.

- (a) **Applicability.** This section applies to a DBE certified in any UCP.
- (b) **General rule.** When a DBE applies to another UCP for certification, the new UCP must accept the DBE's certification from its jurisdiction of original certification (JOC). The JOC is the State in which the firm maintains its principal place of business at the time of application unless and until the firm loses certification in that jurisdiction.
- (c) **Application procedure.** To obtain certification by an additional UCP, the DBE must provide:
  - (1) A cover letter that specifies that the DBE is applying for interstate certification, identifies all UCPs in which the DBE is certified (including the UCP that originally certified it)
  - (2) An electronic image of the UCP directory of the original UCP that shows the DBE certification; and
  - (3) A new DOE.
- (d) **Confirmation of eligibility.** Within 10 business days of receiving the documents required under paragraph (c) of this section, the additional UCP must confirm the certification of the DBE preferably by reference to the UCP directory of the JOC.
- (e) **Certification.** If the DBE fulfills the requirements of paragraph (c) of this section and the UCP confirms the DBE's certification per paragraph (d) of this section, the UCP must certify the DBE immediately without undergoing further procedures and provide the DBE with a letter documenting its certification.

- (f) **Noncompliance.** Failure of the additional UCP to comply with paragraphs (d) and (e) of this section is considered non-compliance with this part.
- (g) **Post-interstate certification proceedings.**
  - (1) After the additional UCP certifies the DBE, the UCP may request a fully unredacted copy of all, or a portion of, the DBE's certification file from any other UCP in which the DBE is certified.
  - (2) A UCP must provide a complete unredacted copy of the DBE's certification materials to the additional UCP within 30 days of receiving the request. Confidentiality requirements of §§ 26.83(d) and 26.109(b) do not apply.
  - (3) Once the new UCP certifies, then it must treat the DBE as it treats other DBEs, for all purposes.
  - (4) The DBE must provide an annual DOE with documentation of gross receipts, under § 26.83(j), to certifying UCPs on the anniversary date of the DBE's original certification by its JOC.
- (h) **Decertifications.**
  - (1) If any UCP has reasonable cause to remove a DBE's certification, in whole or in part (*i.e.*, NAICS code removal), it must notify the other UCPs in which the DBE is certified ("other jurisdictions") via email. The notice must explain the UCP's reasons for believing the DBE's certification should be removed.
  - (2) Within 30 days of receiving the notice, the other jurisdictions must email the UCP contemplating decertification a concurrence or non-concurrence with the proposed action. The other jurisdictions' responses may provide written arguments and evidence and may propose additional reasons to remove certification. A jurisdiction's failure to timely respond to the reasonable cause notice will be deemed to be a concurrence.
  - (3) After a UCP receives all timely responses, it must make an independent decision whether to issue a NOI and what grounds to include.
  - (4) Other UCPs may, before the hearing, submit written arguments and evidence concerning whether the firms should remain certified, but may not participate in the hearing.
  - (5) If the UCP finds the firm ineligible the firm immediately loses certification in all jurisdictions in which it is certified. The NOD must include appeal instructions provided on the Departmental Office of Civil Rights' web page, available at <https://www.transportation.gov/dbeappeal>. The UCP must email a copy of its decision to the other jurisdictions within 3 business days.
  - (6) The rules of paragraph (h) do not apply to attempts to decertify based upon a DBE's actions or inactions pertaining to §§ 26.83(j) (Declaration of Eligibility) and 26.109(c) (failure to cooperate).
  - (7) Decertifications under this paragraph (h) must provide due process to DBEs.
    - (i) If a UCP decides not to issue a NOD removing the DBE's certification, no jurisdiction may initiate decertification proceedings, within one year, on the same or similar grounds and underlying facts.
    - (ii) If a DBE believes a UCP unfairly targets it with repeated decertification attempts, the DBE may file a complaint to the appropriate OA.
  - (8) The Department's appeal decisions are binding on all UCPs unless stated otherwise.

[89 FR 24975, Apr. 9, 2024; 89 FR 55090, July 3, 2024]

## § 26.86 Decision letters.

- (a) When a certifier denies a firm's request for certification or decertifies the firm, the certifier must provide the firm a NOD explaining the reasons for the adverse decision, specifically referencing the evidence in the record that supports each reason. A certifier must also include, verbatim, the instructions found on the Departmental Office of Civil Rights' web page, available at <https://www.transportation.gov/dbeappeal>.
- (b) The certifier must promptly provide the applicant copies of all documents and other information on which it based the denial if the applicant requests them.
- (c) The certifier must establish a waiting period for reapplication of no more than 12 months. That period begins to run the day after the date of the decision letter is emailed. After the waiting period expires, the denied firm may reapply to any member of the UCP that denied the application. The certifier must inform the applicant of that right, and specify the date the waiting period ends, in its decision letter.
- (d) An appeal does not extend the waiting period.

[89 FR 24976, Apr. 9, 2024]

## § 26.87 Decertification.

- (a) **Burden of proof.** To decertify a DBE, the certifier bears the burden of proving, by a preponderance of the evidence, that the DBE does not meet the certification standards of this part.
- (b) **Initiation of decertification proceedings.**
  - (1) A certifier may determine on its own that it has reasonable cause to decertify a DBE.
  - (2) If an OA determines that there is reasonable cause to believe that a DBE does not meet the eligibility criteria of this part, the OA may direct the certifier to initiate a proceeding to remove the DBE's certification.
    - (i) The OA must provide the certifier and the DBE written notice describing the reasons for the directive, including any relevant documentation or other information.
    - (ii) The certifier must immediately commence a proceeding to decertify as provided by paragraph (e) of this section.
  - (3) Any person may file a complaint explaining, with specificity, why the certifier should decertify a DBE. The certifier need not act on a general allegation or an anonymous complaint. The certifier must keep complainants' identities confidential as provided in § 26.109(b).
    - (i) The certifier must review its records concerning the DBE, any material the DBE and/or complainant provides, and any other available information. The certifier may request additional information from the DBE or conduct any other investigation that it deems necessary.
    - (ii) If the certifier determines that there is reasonable cause to decertify the DBE, it initiates a decertification proceeding. If it determines that there is not such reasonable cause, it notifies the complainant and the DBE in writing of its decisions and the reasons for it.
- (c) **Notice of intent (NOI).** A certifier's first step in any decertification proceeding must be to email a notice of intent (NOI) to the DBE.
  - (1) The NOI must clearly and succinctly state each reason for the proposed action, and specifically identify the supporting evidence for each reason.

- (2) The NOI must notify the DBE of its right to respond in writing, at an informal hearing, or both.
- (3) The NOI must inform the DBE of the hearing scheduled on a date no fewer than 30 days and no more than 45 days from the date of the NOI.
- (4) If the ground for decertification is that the DBE has been suspended or debarred for conduct related to the DBE program, the certifier issues a NOD decertifying the DBE. In this case, there is no NOI or opportunity for a hearing or written response.

(d) **Response to NOI.**

- (1) If the DBE wants a hearing, it must email the certifier saying so within 10 days of the NOI. If the DBE does not do so, it loses its opportunity for a hearing.
- (2) The certifier and DBE may negotiate a different hearing date from that stated in the NOI. Parties must not engage in dilatory tactics.
- (3) If the DBE does not want a hearing, or does not give timely notice to the certifier that it wants one, the DBE may still provide written information and arguments to the certifier rebutting the reasons for decertification stated in the NOI.

(e) **Hearings.**

- (1) The purpose of the hearing is for the certifier to present its case and for the DBE to rebut the certifier's allegations.
- (2) The hearing is an informal proceeding with rules set by the hearing officer. The SEDO's attorney, a non-SEDO, or other individuals involved with the DBE may attend the hearing and answer questions related to their own experience or more generally about the DBE's ownership, structure and operations.
- (3) The certifier must maintain a complete record of the hearing, either in writing, video or audio. If the DBE appeals to DOT under § 26.89, the certifier must provide that record to DOT and to the DBE.

(f) **Separation of functions.** The certifier must ensure that the decision in a decertification case is made by an individual who did not take part in actions leading to or seeking to implement the proposal to decertify the DBE and is not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

- (1) The certifier's method of implementing this requirement must be made part of its DBE program and approved by the appropriate OA.
- (2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of this part.

(g) **Notice of decision.** The certifier must send the firm a NOD no later than 30 days of the informal hearing and/or receiving written arguments/evidence from the firm in response to the NOI.

- (1) The NOD must describe with particularity the reason(s) for the certifier's decision, including specific references to the evidence in the record that supports each reason. The NOD must also inform the firm of the consequences of the decision under paragraph (i) of this section and of its appeal rights under § 26.89.
- (2) The certifier must send copies of the NOD to the complainant in an ineligibility complaint or to the OA that directed the certifier to initiate the proceeding.

- (3) When sending a copy of an NOD to a complainant other than an OA, the certifier must not include information reasonably construed as confidential business information, unless the certifier has the written consent of the firm that submitted the information.
- (4) The certifier must make an entry in DOCR's Online Portal within 5 days of the action. The certifier must enter the name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision.

(h) **Status of firm during proceeding.** A DBE remains certified until the certifier issues a NOD.

(i) [Reserved]

(j) **Consequences.** Decertification has the following effects on contract and overall goals and DBE participation:

- (1) When a prime contractor has made a commitment to use a DBE, but a subcontract has not been executed before the certifier issues the NOD as provided for in paragraph (g) of this section, the committed firm does not count toward the contract goal. The recipient must direct the prime contractor to meet the contract goal with an eligible DBE or demonstrate to the recipient that it has made good faith efforts to do so.
- (2) When the recipient has made a commitment to using a DBE prime contractor, but a contract has not been executed before the certifier issues the NOD, the decertified firm does not count toward the recipient's overall DBE goal.
- (3) If a prime contractor has executed a subcontract with a DBE before the certifier issues the NOD, the prime contractor may continue to receive credit toward the contract goal for the firm's work. In this case, however, the prime contractor may not extend or add work to the contract without prior written consent from the recipient.
- (4) If a prime contractor has executed a subcontract with a DBE before the certifier issues the NOD, the prime contractor may continue to receive credit toward the contract goal as set forth in paragraph (j)(3) of this section; however, the portion of the decertified firm's continued performance of the contract must not count toward the recipient's overall goal.
- (5) If the recipient executed a prime contract with a DBE that was later decertified, the portion of the decertified firm's performance of the contract remaining after the certifier issued the NOD must not count toward an overall goal, but the DBE's performance of the contract may continue to count toward satisfying any contract goal.
- (6) The following exceptions apply to this paragraph (j):
  - (i) If a certifier decertifies a firm solely because it exceeds the business size standard during the performance of the contract, the recipient may continue to count the portion of the decertified firm's performance of the contract remaining after the certifier issued the NOD toward the recipient's overall goal as well as toward the contract goal.
  - (ii) If the certifier decertifies the DBE because it was acquired by or merged with a non-DBE, the recipient may not continue to count the portion of the decertified firm's performance on the contract remaining, after the certifier issued a NOD, toward either the contract goal or the overall goal, even if a prime contractor has executed a subcontract with the firm or the recipient has executed a prime contract with the DBE that was later decertified. In this case, if eliminating the credit of the decertified firm will affect the prime contractor's ability to meet the



contract goal, the recipient must direct the prime contractor to subcontract to an eligible DBE to the extent needed to meet the contract goal or demonstrate to the recipient that it has made good faith efforts to do so.

[89 FR 24976, Apr. 9, 2024; 89 FR 55090, July 3, 2024]

## § 26.88 Summary suspension of certification.

- (a) **Definition.** Summary suspension is an extraordinary remedy for lapses in compliance that cannot reasonably or adequately be resolved in a timely manner by other means.
  - (1) A firm's certification is suspended under this part as soon as the certifier transmits electronic notice to its owner at the last known email address.
  - (2) During the suspension period, the DBE may not be considered to meet a contract or participation goal on contracts executed during the suspension period.
- (b) **Mandatory and elective suspensions —**
  - (1) **Mandatory.** The certifier must summarily suspend a DBE's certification when:
    - (i) The certifier has clear and credible evidence of the DBE's or its SEDO's involvement in fraud or other serious criminal activity.
    - (ii) The OA with oversight so directs.
  - (2) **Elective.**
    - (i) The certifier has discretion to suspend summarily if it has clear and credible evidence that the DBE's continued certification poses a substantial threat to program integrity.
    - (ii) An owner upon whom the firm relies for eligibility does not timely file the declaration and gross receipts documentation that § 26.83(j) requires.
- (c) **Coordination with other remedies.** In most cases, a simple information request or a § 26.87 NOI is a sufficient response to events described in paragraphs (b)(1) and (2) of this section. The certifier should consider the burden to the DBE and to itself in determining whether summary suspension is a more prudent and proportionate, effective response. The certifier may *elect* to suspend the same DBE just once in any 12-month period.
- (d) **Procedures —**
  - (1) **Notice.** The certifier must notify the firm, by email, of its summary suspension notice (SSN) on a business day during regular business hours. The SSN must explain the action, the reason for it, the consequences, and the evidence on which the certifier relies.
    - (i) Elective SSNs may not cite more than one reason for the action.
    - (ii) Mandatory SSNs may state multiple reasons.
    - (iii) The SSN, regardless of type, must demand that the DBE show cause why it should remain certified and provide the time and date of a virtual show-cause hearing at which the firm may present information and arguments concerning why the certifier should lift the suspension. The SSN must also advise that the DBE may provide written information and arguments in lieu of or in addition to attending the hearing.

- (2) **Hearing.** The hearing date must be a business day that is at least 15 but not more than 25 days after the date of the notice. The DBE may respond in writing in lieu of or in addition to attending the hearing; however, it will have waived its right to a hearing if it does not confirm its attendance within 10 days of the notice and will have forfeited its certification if it does not acknowledge the notice within 15 days. The show-cause hearing must be conducted as a video conference on a standard commercial platform that the DBE may readily access at no cost.
- (3) **Response.** The DBE may provide information and arguments concerning its continuing eligibility until the 15th day following the suspension notice or the day of the hearing, if any, whichever is later. The DBE must email any written response it provides. Email submissions correctly addressed are effective when sent. The certifier may permit additional submissions after the hearing, as long as the extension ends on a business day that is not more than 30 days after the notice.
- (4) **Scope and burdens.**
  - (i) Suspension proceedings are limited to the suspension ground specified in the notice.
  - (ii) The certifier may not amend its reason(s) for summarily suspending certification, nor may it electively suspend the firm again during the 12-month period following the notice.
  - (iii) The DBE has the burden of producing information and/or making arguments concerning its continued eligibility, but it need only contest the reason cited.
  - (iv) The certifier has the burden of proving its case by a preponderance of the evidence. It must issue an NOD within 30 days of the suspension notice or lift the suspension. Any NOD must rely only on the reason given in the summary suspension notice.
  - (v) The DBE's failure to provide information contesting the suspension does not impair the certifier's ability to prove its case. That is, the uncontested evidence upon which the certifier relies in its notice, if substantial, will constitute a preponderance of the evidence for purposes of the NOD.
- (5) **Duration.** The DBE remains suspended during the proceedings described in this section but in no case for more than 30 days. If the certifier has not lifted the suspension or provided a rule-compliant NOD by 4:30 p.m. on the 30th day, then it must lift the suspension and amend applicable DBE lists and databases by 12 p.m. the following business day.

(e) **Recourse —**

- (1) **Appeal.** The DBE may appeal a final decision under paragraph (d)(4)(iv) of this section, as provided in § 26.89(a), but may *not* appeal the suspension itself, unless paragraph (e)(2) of this section applies.
- (2) **Enforcement.**
  - (i) The DBE may immediately petition the Department for an order to vacate a certifier's action if:
    - (A) The certifier sends a second elective SSN within 12 months, or
    - (B) Cites multiple reasons in an elective SSN contrary to paragraph (d)(1)(i) of this section.
  - (ii) The DBE may also petition to the Department for an order to compel if the certifier fails to act within the time specified in paragraph (d)(5) of this section.
- (3) In either case, the DBE must:
  - (i) Email the request under the subject line, "REQUEST FOR ENFORCEMENT ORDER" in all caps;

- (ii) Limit the request to a one-page explanation that includes:
  - (A) The certifier's name and the suspension dates;
  - (B) Contact information for the certifier, the DBE, and the DBE's SEDO(s); and
  - (C) The general nature and date of the firm's response, if any, to the second suspension notice; and
  - (D) The suspension notice(s).

[89 FR 24977, Apr. 9, 2024; 89 FR 55090, July 3, 2024]

## § 26.89 Appeals to the Department.

- (a)
  - (1) Applicants and decertified firms may appeal adverse NODs to the Department.
  - (2) An ineligibility complainant or applicable Operating Administration (the latter by the terms of § 26.87(c)) may appeal to the Department if the certifier does not find reasonable cause to issue an NOI to decertify or affirmatively determines that the DBE remains eligible.
  - (3) Appellants must email appeals as directed in the certifier's decision letter within 45 days of the date of the letter. The appeal must at a minimum include a narrative that explains fully and specifically why the firm believes the decision is in error, what outcome-determinative facts the certifier did not consider, and/or what part 26 provisions the certifier misapplied.
  - (4) The certifier's decision remains in effect until the Department resolves the appeal or the certifier reverses itself.
- (b) When it receives an appeal, the Department requests a copy of the certifier's complete administrative record including a video, audio, or transcript of any hearing, which the certifier must provide within 20 days of the Department's request. The Department may extend this time period when the certifier demonstrates good cause. The certifier must ensure that the administrative record is well organized, indexed, and paginated and the certifier must provide the appellant a copy of any supplemental information it provides to DOT.
- (c)
  - (1) The Department may accept an untimely or incomplete appeal if it determines, in its sole discretion, that doing so is in the interest of justice.
  - (2) The Department may dismiss non-compliant or frivolous appeals without further proceedings.
- (d) The Department will avail itself of whatever remedies for noncompliance it considers appropriate.
- (e) The Department decides only the issue(s) presented on appeal. It does not conduct a *de novo* review of the matter, assess all eligibility requirements, or hold hearings. It considers the administrative record and any additional information that it considers relevant.
- (f)
  - (1) The Department affirms the certifier's decision if it determines that the decision is consistent with applicable rules and supported by substantial evidence.

- (2) The Department reverses decisions that do not meet the standard in paragraph (f)(1) of this section.
- (3) The Department need not reverse if an error or omission did not result in fundamental unfairness or undue prejudice.
- (4) The Department may remand the case with instructions for further action. When the Department specifies further actions, the certifier must take them without delay.
- (5) The Department generally does not uphold the certifier's decision based on grounds not specified in its decision.
- (6) The Department resolves appeals on the basis of facts demonstrated, and evidence presented, at the time of the certifier's decision.
- (7) The Department may summarily dismiss an appeal. Reasons for doing so include, but are not limited to, non-compliance, abuse of process, appellant or certifier request, and failure to state a claim upon which relief can be granted.
- (g) The Department does not issue advisory opinions.
- (h) All decisions described in paragraph (f) of this section are administratively final unless they say otherwise.
- (i) DOCR posts final decisions to its website, available at <https://www.transportation.gov/DBEDecisions>.

[89 FR 24978, Apr. 9, 2024]

## § 26.91 What actions do certifiers take following DOT certification appeal decisions?

- (a) If you are the certifier from whose action an appeal under § 26.89 is taken, the decision is binding. It is not binding on other certifiers.
- (b) If you are a certifier to which a DOT determination under § 26.89 is applicable, you must take the following action:
  - (1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.87(j) take effect.
  - (2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.
  - (3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.
  - (4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.
  - (5) If the Department affirms your determination, no further action is necessary.

- (c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other certifiers with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such certifiers must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other certifiers must take the DOT action into account in any certification action involving the firm. However, other certifiers are not required to certify the firm based on the DOT decision.

[64 FR 5126, Feb. 2, 1999, as amended at 89 FR 24979, Apr. 9, 2024]

## Subpart F—Compliance and Enforcement

### § 26.101 What compliance procedures apply to recipients?

- (a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.
- (b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

### § 26.103 What enforcement actions apply in FHWA and FTA programs?

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

- (a) **Noncompliance complaints.** Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.
- (b) **Compliance reviews.** The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.
- (c) **Reasonable cause notice.** If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in noncompliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.
- (d) **Conciliation.**

- (1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.
- (2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as complying. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.
- (3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.
- (4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.
- (e) **Enforcement actions.**
  - (1) Enforcement actions are taken as provided in this subpart.
  - (2) Applicable findings in enforcement proceedings are binding on all DOT offices.

[64 FR 5126, Feb. 2, 1999, as amended at 89 FR 24979, Apr. 9, 2024]

### **§ 26.105 What enforcement actions apply in FAA programs?**

- (a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.
- (b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.
- (c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

### **§ 26.107 What enforcement actions apply to firms participating in the DBE program?**

- (a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.
- (b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 2 CFR parts 180 and 1200.
- (c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

- (d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.
- (e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

[64 FR 5126, Feb. 2, 1999, as amended at 76 FR 5101, Jan. 28, 2011]

## § 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

### (a) *Availability of records.*

- (1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.
- (2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

(b) **Confidentiality of information on complainants.** Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

(c) **Cooperation.** All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

(d) **Intimidation and retaliation.** If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003; 76 FR 5101, Jan. 28, 2011]

## Appendix A to Part 26—Guidance Concerning Good Faith Efforts

- I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.
- II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix.

The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

- III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (*i.e.*, obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.
- IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A.

- (1) Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.
- (2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.



- B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.
- C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.
- D.
  - (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.
  - (2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- E.
  - (1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.
  - (2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.
- F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

- G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
- V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in § 26.53(b)(2)(vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.
- VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts except in design-build procurement.

[79 FR 59600, Oct. 2, 2014, as amended at 89 FR 24979, Apr. 9, 2024]

## Appendix B to Part 26 [Reserved]

## Appendix C to Part 26—DBE Business Development Program Guidelines

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

- (A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages; a developmental stage and a transitional stage.
- (B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility criteria contained in part 26.
- (C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability in non-traditional areas of work and/or work outside the DBE program.
- (D) The business plan should contain at least the following:

- (1) An analysis of market potential, competitive environment and other business analyses estimating the program participant's prospects for profitable operation during the term of program participation and after graduation from the program.
  - (2) An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of DBE participation.
  - (3) Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (C) and (D)(1) of this appendix;
  - (4) Estimates of contract awards from the DBE program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and
  - (5) Such other information as the recipient may require.
- (E) Each participant should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient should establish an anniversary date for review of the participant's business plan and contract forecasts.
- (F) Each participant should annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast should be included in the participant's business plan. The forecast should include:
- (1) The aggregate dollar value of contracts to be sought under the DBE program, reflecting compliance with the business plan;
  - (2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of DBE participation;
  - (3) The types of contract opportunities being sought, based on the firm's primary line of business; and
  - (4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.
- (G) Program participation is divided into two stages;
- (1) a developmental stage and
  - (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.

- (H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to, the number of contracts, aggregate amount of the contract received, years in business, growth potential, etc.
- (I) Beginning in the first year of the transitional stage of program participation, each participant should annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of DBE participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth the same information as required under paragraph (F) of steps the participant will take to continue its business development after the expiration of its program term.
- (J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace, its further participation within the program may be determined by the recipient.
- (K) In determining whether a concern has substantially achieved the goals and objectives of its business plan, the following factors, among others, should be considered by the recipient:
  - (1) Profitability;
  - (2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;
  - (3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;
  - (4) Ability to obtain bonding;
  - (5) A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and
  - (6) Good management capacity and capability.
- (L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification should also provide the participant 45 days from the date of service of the letter to submit in writing information that would explain why the proposed basis of graduation is not warranted.
- (M) Participation of a DBE firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient should take such action if over a 2-year period a DBE firm exhibits such a pattern.

## Appendix D to Part 26—Mentor-Protégé Program Guidelines

- (A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.
- (B)
  - (1) Any mentor-protégé relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.
  - (2) To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.
- (C) DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protégé agreement.