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Federal DBE Program Compliance

2024 PEPS Conference

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Disadvantaged Business Enterprise Program
Airport Concessions Disadvantaged Business Enterprise Program

FINAL RULE

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Updates to the USDOT DBE Program Final Rule

Published April 9, 2024
Effective as of May 9, 2024



Data Collection by Recipients and Submission to U.S. DOT



Rule Changes

- Expands “MAP-21” Annual DBE Directory Report, to include information such as DBE application rates and characteristics in statewide directories.
- Expands Uniform Reports data to include names of DBEs, NAICS codes performed in a contract, federally assisted contract number(s), and the dollar value of the contract.
- Requires recipients to submit their “bidders list,” to a new centralized U.S. DOT database with additional data fields. (e.g., the scope/type of work DBEs bid on, whether successful).

Impacts

- Meets Administration’s approach that data should drive decision making and measuring program impact
- OAs and DOT can understand the universe of firms (by work type) that bid and win on contracts.
- Trends, gaps, and opportunities can be better described.

Updated: Status of DBE after Notification of Decertification

Rule Changes

Impacts

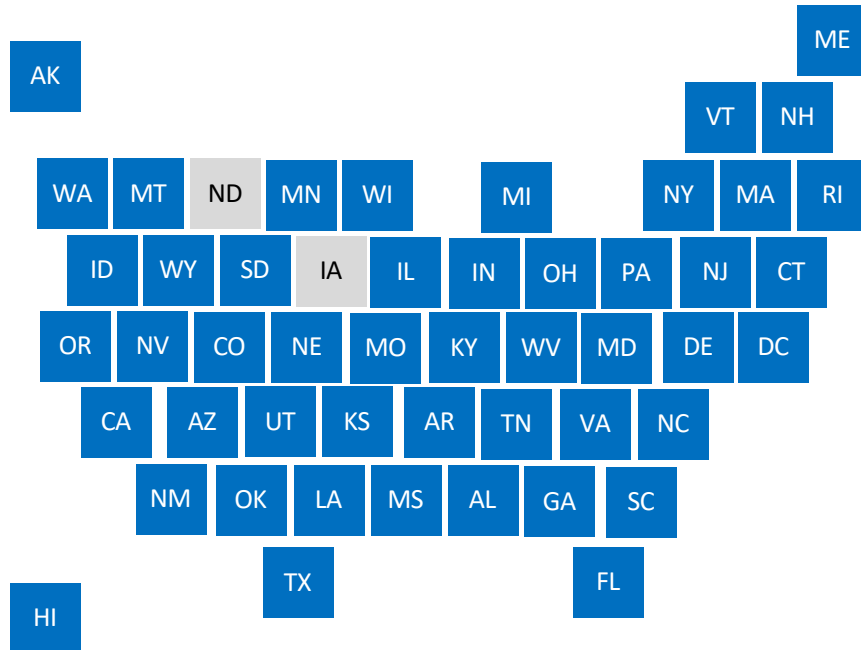


- A Prime contractor is only permitted to add work or extend a completed contract with a previously certified firm if it receives **prior written consent of the recipient**.
- A DBE that is notified of its decertification after a subcontract has been executed **can no longer** continue to be counted toward the contract or overall goal if it loses its certification because it was **purchased by a non-DBE**.
- Use GFE if necessary to meet the goal.

- Is a good check on actions that could run counter to the DBE program.
- Provides additional DBE opportunities if a DBE is decertified due to its purchase by a non-DBE.

OEPP applies to your state if you can answer YES

- Does your state have design-build legislation?



- Does your state use design-build for transportation projects?
- Does your state have a race-conscious DBE program? Does your state set DBE goals on projects?

DBE Open-Ended Performance Plans Now Required for Design Build Contracts



Rule Changes

- Prime contractors responding to requests for proposals in design-build procurements **must submit open ended performance plans** instead of committing to named DBEs

Resources:

- [DBE Program Administration and Oversight on Projects with Alternative Contracting and Procurement Methods Handbook](#)
- [FHWA Every Day Counts – Rethinking DBE for Design-Build Website](#)
- [EDC 7 Spotlight: Rethinking DBEs for Design Build](#)

Impacts

- Open ended DBE performance plans (OEPP) bring in DBEs as details of work, scheduling, etc., become better known as the project progresses
- Creates opportunities for more, and more meaningful, DBE participation
- More real jobs, fewer DBE terminations and good faith efforts

Prompt Pay & Return of Retainage (49 CFR § 26.29)

Clarification Language:

- The rule clarifies that every recipient's DBE program must include mechanisms it will use for **proactive monitoring** and oversight of prime contractors' compliance with subcontract prompt payment and return of retainage requirements.
- **Reliance on complaints** or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is **insufficient**.
- Specifies the prompt payment requirements flow down to **all lower tier subcontractors**.



U.S. Department of Transportation
Federal Highway Administration

DBE PROMPT PAYMENT AND RETURN OF RETAINAGE MONITORING TOOLKIT



Terminations and Substitutions (49 CFR § 26.53)

Clarification Language:

- “Terminations” need not be terminations in full, but that “**partial terminations,**” e.g., removing a work item or decreasing the amount of work committed to a DBE would still require prime contractors to follow the good cause process
- Terminations, on the one hand, and replacement or substitution, on the other, are two **separate and distinct processes.**
- Approval of a Termination is NOT DEPENDENT on the approval of a substitution at the same time.

Commercially Useful Function Review (49 CFR § 26.55)



Clarification Language:

- New Rule clarifies that a CUF review is necessary for every DBE that performs for credit toward a recipient's overall goal and a contract goal.
- DBEs used race-neutrally must be monitored. Recipients must keep an accounting of each contractor's progress in attaining a contract goal through progressive payments to the committed DBEs ([Running Tally](#))



The running tally requirement is essential so recipients can [intervene in real-time](#) if they observe a prime contractor falling short of a contract goal.

New and Updated Personal Net Worth Cap and Size Calculation



Net Worth Rule Changes

- New cap of \$2.047 million based on Federal Reserve data of household income, deemed a better measure of adjustment than CPI.
- Adjustment mechanism allows for future upward adjustments without the rulemaking process.
- New rule excludes retirement assets
- Removes consideration of state or community property laws in determining value of primary residence and contents
- Reworked “ability to accumulate substantial wealth” rules are the backstop to excessive wealth



Business Size Rule Changes

Codifies measurement of NAICS code size from 3-5 years as required by law. The rule still includes the statutory size cap and 3 years average for Part 26.

Net Worth Impact

- Adjusts from 2011 cap and levels the definition of “economically disadvantaged” to that of non-disadvantaged wealth
- Responds to industry and small business concerns that the current level hurts firms.
- Fosters national interest of not penalizing for retirement

Business Size Impact

Balances a firm’s lean and boom years and keeps DBEs in the program

New Interstate Certification Rule

1. Certified DBE applies for interstate certification with another UCP (State B)

2. State B confirms certification of firm in its “jurisdiction of original certification” (JOC) within 10 business days

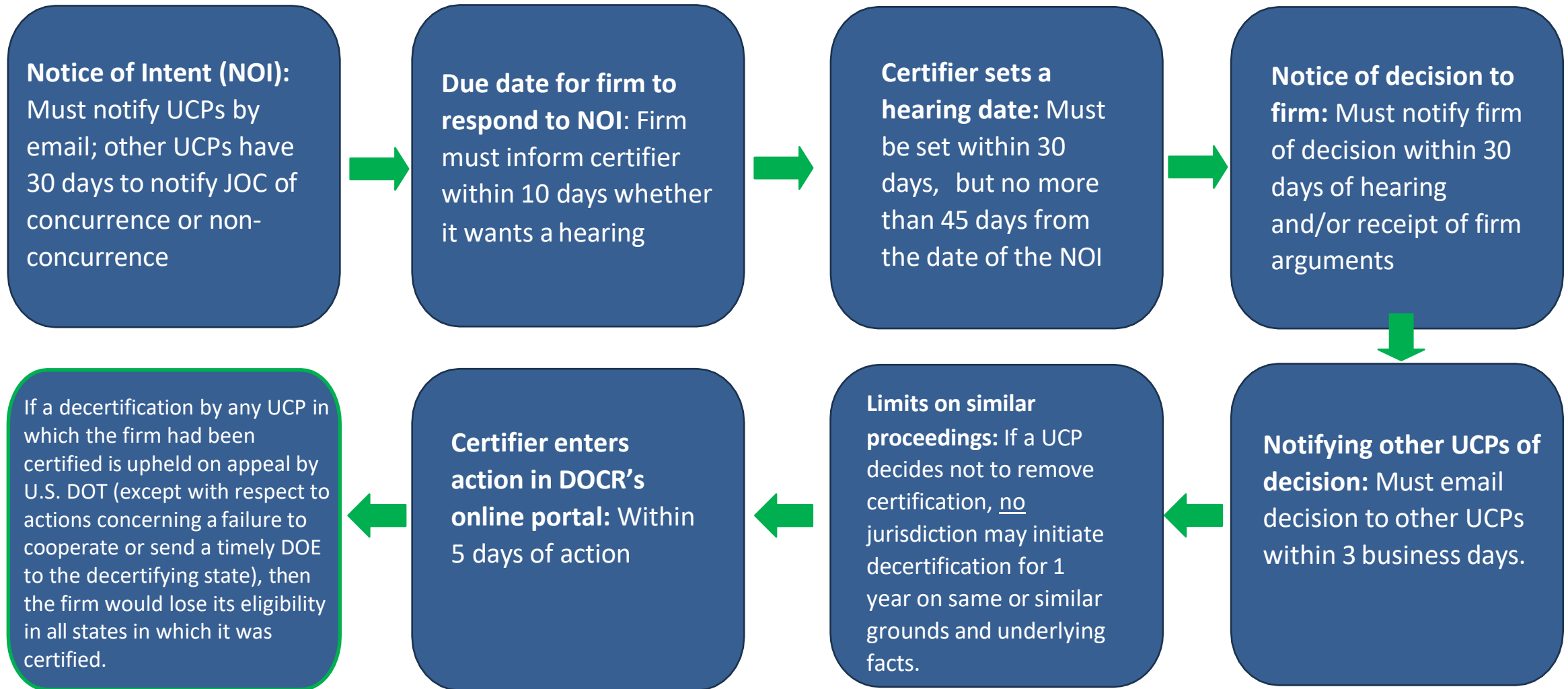
3. State B certifies the firm immediately and notifies the firm. Once the new UCP certifies, then it must treat the DBE as it treats other DBEs, for all purposes.

4. State B may ask for JOC’s full or partial certification file

5. If State B makes this request, State B must provide the file within 30 days

6. Annual declaration of eligibility is filed on the JOC anniversary date

Decertification Procedures Rebuilt



Individual Determinations of Social and Economic Disadvantage § 26.67(d)



Appendix E is Removed!!

Personal Narrative (PN) Required

Non-presumptive disadvantage. An owner who is not presumed to be SED 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 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.

Individual Determinations of Social and Economic Disadvantage, cont'd § 26.67(d)



Personal Narrative (PN) Required

(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: 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.

Evidence and Rebuttal of Economic Disadvantage



“Ability to accumulate substantial wealth:” the 6-factor test eliminated!!

Economic Disadvantage in Fact.

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, financial equity, or other exclusions and no limitations on what can be included.

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.

The certifier must proceed as provided in § 26.87.

Ownership Provisions Rebuilt

§ 26.69(e) Gifts

(e) 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.

Virtual On-Site Visits and Recorded Visits § 26.83



On-site visits to the firm's principal place of business to interview the SEDO, officers, and key personnel can be conducted **virtually or in person**.



The certifier must maintain a complete audio recording of the site visit 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.



Certifiers must ensure that the SEDO signs the DOE.

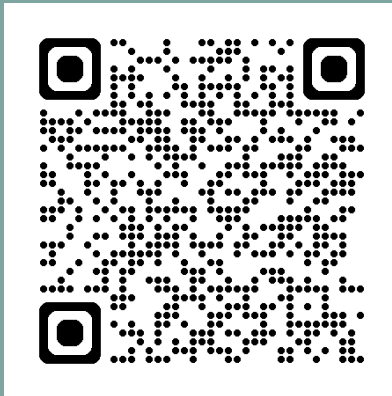


Avoid routine questionnaires or checklists.

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.**

Non-compliance, whether full or partial, is a § 26.109(c) failure to cooperate, and grounds to initiate decertification proceedings.

2024 Live and Virtual DBE/ACDBE Rule Trainings



ACDBE Final Rule Overview

April 23, 2024

DBE/ACDBE Final Rule Changes: Certification Eligibility Requirements

April 29, 2024

DBE/ACDBE Final Rule Changes: Certification Procedures

May 1, 2024

DBE Supplier Definitions, CUF Performance Requirements, and Pre-Award Counting Requirements

May 8, 2024

FTA's Tier II Requirements in the New DBE Rule

May 21, 2024

DBE Status After Losing Certification During Contract Performance

May 22, 2024

DBE Final Rule Changes: DBE Open Ended Performance Plans (OEPP) for Design-Build Contracts

June 18, 2024

Final Rule Prompt Payment and Return Retainage requirements with rollout of a Tool and Toolkit

July 24, 2024

Requirements for TVMs in the New DBE Rule

July 30, 2024



Questions & Discussion