DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Parts 23 and 26

[Docket No. DOT–OST–2022–0051]

RIN 2105–AE98

Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT or the Department).

ACTION: Final rule.

SUMMARY: The U.S. Department of Transportation (DOT or Department) is amending its Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) program regulations. The DBE and ACDBE programs are designed to allow small businesses owned and controlled by socially and economically disadvantaged individuals to compete fairly for DOT funded contracts let by State and local transportation agencies and in airport concession opportunities. The final rule improves program implementation in major areas, including by updating the personal net worth and program size thresholds for inflation; modernizing rules for counting of material suppliers; incorporating procedural flexibilities enacted during the coronavirus (COVID–19) pandemic; adding elements to foster greater usage of DBEs and ACDBEs with concurrent, proactive monitoring and oversight; updating certification provisions with less prescriptive rules that give certifiers flexibility when determining eligibility; revising the interstate certification process to provide for reciprocity among certifiers; and making technical corrections to commonly misinterpreted rules.

DATES: This rule is effective May 9, 2024.

FOR FURTHER INFORMATION CONTACT: For questions related to the final rule or general information about the DBE and ACDBE Program regulations, please contact Marc D. Pentino, Associate Director, Disadvantaged Business Enterprise Programs Division, Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W78–302, Washington, DC 20590, at 202–366–6968/*marc.pentino@dot.gov* or Lakwame Anyane-Yeboa, ACDBE and DBE Compliance Lead, Disadvantaged Business Enterprise Programs Division, Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W78–103, Washington, DC 20590, at 202–366–9361/*Lakwame.Anyane-Yeboa@dot.gov.* Questions concerning part 23 amendments should be directed to Marcus England, Office of Civil Rights, National Airport Civil Rights Policy and Compliance (ACR–4C), Federal Aviation Administration, 600 Independence Ave. SW, Washington, DC 20591, at 202–267–0487/*marcus.england@faa.gov* or Nicholas Giles, Office of Civil Rights, National Airport Civil Rights Policy and Compliance (ACR–4C), Federal Aviation Administration, 600 Independence Ave. SW, Washington, DC 20591, at 202–267–0201/*nicholas.giles@faa.gov.* Office hours are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

Electronic Access and Filing

This document, the Notice of Proposed Rulemaking (NPRM), all comments received, and all background material may be viewed online at *www.regulations.gov* using the docket number listed above. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.federalregister.gov* and the Government Publishing Office's website at *www.GovInfo.gov.*

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Executive Summary

This final rule modernizes the DBE and ACDBE program rules to provide greater clarity and flexibility to DOT recipients and enhance the ability of DBEs to compete on a level playing field for DOT-assisted [1] contract opportunities. Spanning over 40 years, the DBE and ACDBE programs are small business initiatives intended to prevent discrimination, and to remedy the effects of past discrimination, in DOT-assisted contracting markets and airport concession opportunities. Since 1983, Congress has authorized the DBE program for highway and transit projects, most recently in Section 11101(e) of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58) (November 15, 2021). Congress codified the ACDBE program in 1987. (See 49 U.S.C. 47107(e)). In reauthorizing the DBE program in the BIL, Congress received and reviewed testimony and documentation from numerous sources which show that discrimination, its effects, and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States. *See* BIL, section 11101(e)(1).

The current rules and the revisions contained herein leave intact the goal setting rules that have been in place over many decades. These rules, then and now, prohibit DBE contract quotas; and they do not impose any penalties for failing to meet DBE goals, unless a recipient fails to administer its program in good faith. Every court to have considered the constitutionality of the program, as implemented by these regulations, has held that these limitations and other flexibilities embedded in the DBE program—such as the ability of recipients to seek waivers of or exemptions from certain provisions, the requirement for recipients to reexamine their programs and program goals every three years, and the authority to decertify firms that do not continue to meet certification standards—ensure that DOT's DBE regulations, on their face, are narrowly tailored to achieve the compelling interest that has been identified by Congress, thus satisfying strict scrutiny.

[1] 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.

On July 21, 2022, the Department issued a notice of proposed rulemaking (NPRM) in the **Federal Register** (87 FR 43620) setting forth the major categories of revisions, the Department's rationale, and proposed rule text. In July and August 2022, the Department held seven virtual listening sessions to brief the public and stakeholders on the proposals and to solicit further input. Recordings of the sessions are posted on the Department's DBE web page *https://www.transportation.gov/dbe-rulemaking,* and a transcript of all comments received are available at *Regulations.gov* (DOT–OST–2022–0051). DOT extended the comment period deadline from September 19 until October 31, 2022, through a notice published in the **Federal Register** on September 1, 2022 (87 FR 53708).

The Department received approximately 400 written comments from State departments of transportation, transit authorities, airports, DBEs, non-DBEs, representatives of various stakeholder organizations, and individuals. Many of the comments were extensive and covered numerous proposed changes. Some commenters suggested changes beyond the scope of what the Department proposed in the NPRM. We fully considered all written comments we received.

Congress created the DBE and ACDBE programs by statute and has continued to reauthorize the program in successive transportation reauthorization laws. The purpose of this rulemaking is to make technical improvements to the Department's DBE and ACDBE programs, including modifications to the forms used by program and certification-related changes. While this rule has implications for program eligibility, it does not change the underlying programs and projects being carried out with DOT funds. However, the Department recognizes that certain provisions focus on discrete aspects of the DBE and ACDBE programs. Therefore, the Department finds that the various provisions of this final rule are severable and able to operate functionally if severed from each other. In the event a court were to invalidate one or more of this final rule's unique provisions, the remaining provisions should stand, thus allowing this congressionally mandated program to continue to operate.

Part 26

Subpart A—General

1. Bipartisan Infrastructure Law (BIL) and Fixing America's Surface Transportation Act (FAST Act) (§ 26.3)

The Department proposed adding citations to applicable surface authorization legislation. We received no comments, and the final rule adopts our proposal with minor technical corrections to the text.

2. Definitions (§ 26.5)

NPRM

In addition to minor technical and spelling changes, the NPRM proposed new or altered definitions of disadvantaged business enterprise, principal place of business, transit vehicle, transit vehicle dealer, transit vehicle manufacturer, and unsworn declaration. In addition, because "home state" is no longer being used as a term of art in the regulation, we are removing that definition from the current rule.

Comments

Disadvantaged Business Enterprise

The majority of the comments addressed the proposed addition of "be engaged in transportation-related industries" to the definition of "disadvantaged business enterprise." We proposed the addition because applicants that have no capability or interest in working on DOT-assisted contracts seek DBE certification for other, unrelated reasons, resulting in an unnecessary burden on certifiers' workloads.

Ten of the 40 commenters (mostly recipients and DBEs) supported the proposed definition, though most requested clarification because they found it confusing. They stated that an absence of clarification would cause difficulty in determining which firms were in transportation-related industries and which were not, and the results could easily be inconsistent and arbitrary. Some commenters noted that many DBEs do not have specific mentions of transportation in their North American Industry Classification System (NAICS) codes. A few recipients asked how they should handle DBEs that might not be performing work in transportation-related industries.

The majority of commenters who sought clarification, as well as several others who opposed the proposal altogether, opined that the limitation would constrain opportunities for small businesses, especially those in the goods and services sector or new or non-traditional types of work. One commenter cited the example of firms supporting electric vehicles or related infrastructure.

Very few of the commenters who sought clarification proposed an approach that would better clarify the definition. One State DOT suggested there could be a ''stop here'' entry on the Uniform Certification Application, analogous to the current check entry box on which an applicant would check whether it was a for-profit firm, on which a company could affirm that it intended to work on transportation projects.

Principal Place of Business

All three commenters supported the proposal, though one asked for more guidance.

Transit Vehicles, Manufacturers, and Dealerships

For comments and the Department's response related to the definitions of transit vehicle, transit vehicle manufacturer, and transit vehicle dealership, please see the portion of the preamble below concerning TVMs.

Unsworn Declaration

With the exception of one State DOT, which thought DOT's proposal could enable fraud, all of the more than 20 commenters on the concept and definition of unsworn declaration, both recipients and DBEs, supported the proposal. The main reason was that it reduced the burden on both firms and certifiers. One State DOT suggested the idea be extended to information provided in on-site interviews as well as applications. One transit agency suggested having a witness sign the declaration, the use of which it thought should be limited to declarations of eligibility (DOEs) or interstate certification applications.

Miscellaneous Comments Received

Some commenters asked for the addition of such groups as LGBTQ individuals, disabled veterans, individuals with disabilities, and persons from North Africa and the Middle East to the definition of ''socially and economically disadvantaged individual.'' One commenter found the definition of ''affiliation'' confusing but did not suggest a clarification.

As has been the case during past rulemakings, a few commenters disliked the use of the term ''disadvantaged business enterprise,'' finding its connotation too negative. Those commenters suggested alternatives like ''historically underutilized business,'' ''business inclusion program,'' or making the ''D'' in DBE stand for diverse, dynamic, or distinguished. A commenter wished to exclude ''micro purchases,'' as defined in Federal procurement rules, from the definition of ''contract.'' One commenter asked to expand the definition of ''DOT-assisted contract'' to include all contracts relating to any phase of a DOT-assisted project (*e.g.,* State or locally funded pre-construction engineering or design of a project that would ultimately gain DOT funding).

DOT Response

Disadvantaged Business Enterprise

With respect to comments on the proviso in the definition of ''disadvantaged business enterprise'' that a DBE be one ''engaged in transportation-related industries,'' we considered two program concerns. On one hand, some Unified Certification Programs (UCPs) may have been burdened by significant numbers of applications from firms that appear not to have interest in, or the ability to work on, the DOT-assisted contracts of recipients. For example, some firms may seek certification from a UCP in order to become eligible for State and local programs in areas unrelated to transportation. We believe it is useful to limit such burdens on certifiers, which themselves have limited resources.

On the other hand, it would be counterproductive to use language that could be interpreted as limiting DBE program participation given the diversity of the types of work that DOT-assisted projects entail. Thus, we exclude ''engaged in transportation-related industries'' from the definition of DBE.

Instead, the final rule requires applicants to describe in detail in the Uniform Certification Application (UCA)—with examples wherever possible—the type(s) of work they envision performing on DOT-assisted contracts. The UCA will not be considered complete if the applicant omits this information. During the onsite visit, for example, certifiers should ask applicants to describe the nature of their work and what they seek to achieve with certification. If the applicant's response reasonably suggests to the certifier that the firm would likely not have opportunities to participate in, or has no intention of pursuing participation in, DOT-assisted contracts, the certifier should encourage the applicant to withdraw its UCA in order to avoid unnecessary expenditures of time and effort by all parties. This mechanism fulfills the intended purpose of the now-deleted ''transportation-related industries'' language.

Unsworn Declaration

Given commenters' general support of our proposal, and the likelihood that permitting unsworn declarations will reduce burdens and maintain program integrity, the final rule adopts the proposal without substantive change.

Principal Place of Business

We believe that the NPRM's proposed definition of ''principal place of business'' is clear as written, and the final rule incorporates it without change.

Other Comments

The Department does not have legal authority to add groups (*e.g.,* LGBTQ persons or disabled veterans) to the current list of groups whose members are rebuttably presumed socially and economically disadvantaged. However, persons who are not members of a presumptive group may qualify as socially and economically disadvantaged through individual determination procedures as detailed in § 26.67(d).

We recognize that some commenters were uncomfortable with possibly negative connotations of the term ''disadvantaged business enterprise.'' We leave the program name unchanged. It is well-recognized and cited as such in the statutes authorizing the program, and changing the name of the program may lead to confusion.

3. Reporting Requirements (§ 26.11 and Appendix B)

NPRM

The NPRM proposed adding and changing three reporting requirements. First, the NPRM proposed adding ten new data fields to the Uniform Report of Awards, Commitments and Payments (Uniform Report) that recipients submit annually, such as work category/trade a firm performed in a contract, federally assisted contract number, and terminations (for the complete list, see 87 FR 43624 (July 21, 2022)). We believed this additional information would help the Department evaluate whether the DBE program is making progress toward the objectives stated in § 26.1 of the regulation. Recipients would submit the Uniform Report in a manner acceptable to the relevant OA, but the form itself, while on the DOT website, would no longer be printed in the regulation.

The NPRM also proposed to require recipients to obtain and enter bidders list data into a centralized, searchable database that the Department would specify. The data points for this bidders list would be expanded to include race and gender information for a firm's socially and economically disadvantaged owner (SEDO) and the NAICS code applicable to each scope of work the firm proposed to perform in its bid. The NPRM asked for comment on the estimated costs for developing and maintaining such a database. The Department said that since recipients already collect most of the information that would be reported on the bidders list, reporting this data would be beneficial to the Department in evaluating program success with anticipated minimal impact on stakeholders.

Third, the NPRM asked for comments on expanding the information collected through what is referred to as the MAP–21 data report. That report includes information taken from each State's UCP directory and reporting on the percentage and location of DBEs owned and controlled by women, by disadvantaged individuals who are not women, and individuals who are women and are also otherwise disadvantaged. The NPRM proposed collecting data on the following six additional items: the number and percentage of in-state and out-of-state SEDOs by gender and ethnicity; the number of applications received from in-state and out-of-state firms and the number of each found eligible or ineligible; the number of in-state and out-of-state firms decertified or summarily suspended; the number of in-state and out-of-state applications involving a request for an individual determination of social and economic disadvantage; the number of in-state and out-of-state firms certified based on such a determination; and the number of DBEs prequalified in their work type by the Department. The Department proposed creating a similar data requirement for ACDBEs.

Comments

This section was one of the most frequently commented upon of any subject in the NPRM, with some commenters expressing general support for the proposals, some expressing general opposition, and others delving into the details of one or more of the reports.

General Comments on Proposed Reports

Of the nearly 60 commenters who expressed a view (pro or con) about the Uniform Report and MAP–21 report proposals, a significant majority, predominantly recipients, opposed the proposals. Often, these comments did not distinguish closely between the MAP–21 report and the Uniform Report but talked about the NPRM's reporting requirements generally.

Opponents primarily expressed that the proposals were too detailed and created unnecessary burdens and costs, particularly for local agencies and subrecipients. The required information would be difficult to collect, and create a cumbersome, time-consuming process, sometimes involving manual reporting (*e.g.,* concerning listing replaced firms), keeping staff from doing more substantive work. One recipient said it would have to double its staff to handle the requirements, for example. Another said that handling the proposed Uniform Report requirements would double its staff time on that work by 16 hours per year. Programs are short-staffed as it is, others said, especially for small recipients and some saw the expanded Uniform Report items as a substantial change. Certification could be slowed down.

While some commenters in this category said the requested information could be helpful, they did not think that its potential use outweighed the burdens involved. One commenter questioned the use the Department would make of the additional data; something more specific than ''program evaluation'' in general was needed to justify new collections. Instead of making reporting requirements more complex, commenters said they should be reduced and simplified (*e.g.,* one contractor suggested limiting fields to firm name, disadvantaged group membership, contracts, and DBE commitment amount).

Some commenters also thought that certain fields in the report were duplicative or redundant. For example, one commenter said that information about decertifications had to be reported in three different places. A few commenters thought some fields, such as those addressing decertifications and terminations, did not fit well in the Uniform Report. Another said the proposed reports generally were not relevant to ACDBEs. Rather than sending one report to the OA and another to DOCR, there should be a single, streamlined form sent to only one office at DOT.

Some commenters recommended that DOT convene a recipients' group to do a feasibility study and figure out how to make the reports work efficiently prior to adopting the proposals. Commenters suggested time frames from one to five years to phase in the requirements. Other commenters suggested that the Department should also develop, test, and make available a uniform, centralized database before imposing requirements that all recipients, vendors, and subcontractors could use and delay implementation 3 to 5 years.

Commenters said that such a database would allow data from different sources to merge and that the database should be made available to users through an online portal. Other commenters said DOT should provide funding for recipients to comply with the expanded requirements and provide more guidance on the reporting forms and process.

Supporters of the proposals included some recipients but were predominantly DBEs. Generally, they favored obtaining the additional detailed data for program evaluation purposes. Some cited particular items they thought were useful, such as race/ethnic/gender data, explaining that those items could keep better track of the use of Black-owned firms. Some commenters suggested collection of additional data points such as dollar amount of contracts by NAICS codes, and some commenters recommended that recipients be required to maintain copies of all prime contracts and subcontracts.

Bidders Lists

A large majority of the over 40 comments concerning the NPRM's bidders list proposal opposed it. A few comments, all but one of which were from DBEs, supported the proposal for the reasons stated in the preamble. Some of these comments favored the idea of a centralized database for bidders list information. One asked for more data on the actual use of successful DBE bidders, to address the issue of prime contractors listing DBEs in their bid and then not using them.

Most of the comments opposing the proposal were from recipients. Some of these commenters said that the existing bidders list requirements were sufficient, and that there was no need to make any changes. They asserted that the proposed changes to the Uniform and MAP–21 reports would be unduly burdensome and create an unfunded mandate. One airport trade organization member noted it would take 25 hours to complete the MAP–21 report of ACDBEs in various categories rather than the 3.2 hours estimated.

Commenters said that the NPRM underestimated the costs and burdens of the proposal, particularly with recipients for small staffs. One commenter estimated that its staff would have to take an extra 20 minutes per project under the proposed system, adding up to 13 hours per month, in contrast to the eight hours forecast in the NPRM. Another said it could take weeks of staff time per year to comply.

Another estimated that it would take two hours of staff time to enter information into the system for each bidder.

A few commenters expressed concern that prime contractors would be disincentivized from hiring DBE subcontractors, especially if they had to input information at the time of submitting a bid or offer. They also stated that it would reduce the data available to recipients. One commenter explained that it would be better if a bidder on a prime contract could submit information within a short time after the time the bid or offer was submitted, such as five days. One recipient said it typically allows prime contractors until the end of the month in which a letting takes place to submit bidders list data. On the other hand, a comment said that bidders list items should be submitted at the time of bid or offer. Another commenter suggested that to reduce burdens on prime contractors, recipients should collect information directly from subcontractors. One commenter recommended that firms submit to the recipient the NAICS codes they have worked on in the past year.

In addition to the general concern about burdens, a number of commenters focused on the centralized database that the NPRM said the Department would specify. Some thought having to communicate with such a database would be a source of administrative burdens for their staff. Others, while sympathetic to the concept of a centralized database, pointed to the fact that the Department had not yet specified the database to be used. Without such a system being in place, including a standard format, they said, the proposed changes would not work. Two commenters said that rather than creating a centralized database, DOT should make software available to allow interface with UCP directories and create reports. Another was concerned that, in the absence of an actual centralized system, recipients would develop their own electronic formats, which were likely to be incompatible with each other.

Some commenters questioned the utility of bidders lists. One said that such a list is an imperfect tool to gauge DBE interest in the program, since some DBEs do not submit bids because, in their experience, prime contractors typically use the same DBE firms that they always use. Because of this, another commenter said, firms effectively drop out of the program because they are not getting any work, even if they maintain their certified status. Others said that bidders lists have proved not to be an accurate or reliable indicator of DBEs' availability or interest in seeking contracts.

One commenter suggested that DBEs should not have to submit confidential or proprietary business information, another suggested that race/ethnic/gender information should be part of bidders list entries; while another indicated that some firms may decline to submit this information. Another asked if there should be an exemption to some requirements for publicly traded firms. One commenter suggested working with American Association of State Highway and Transportation Official's Civil Rights and Labor Committee on how best to handle bidders list issues.

Detailed Comments on Reporting and Bidders List Contents

Commenters had a wide variety of comments on details of the documents discussed in this portion of the NPRM. A commenter wanted to clarify the meaning of ''awards,'' ''commitments, and ''payments.'' It said the age of a firm should be entered only for DBEs. Another suggested that termination data should be submitted as ''known DBE terminations during the reporting period'' to capture a lag in information reaching the recipient from contractors.

One commenter suggested not using ''dollar value of contract,'' preferring the use of ranges (*e.g.,* less than $100,000 or $100,000–500,000). On the other hand, another commenter thought that the dollar value of contracts and NAICS codes involved were very important information to capture. That same commenter also thought that information on firms that have exceeded size standards was important, to see if the program was creating sustainable growth.

Another commenter wanted to make sure that the reporting would include professional services, even in States that do not include professional services in their DBE goals. One commenter said it does not do prequalifications, and so did not know how to respond to that field. One commenter expressed uncertainty about how reporting could be uniform since different States have different prequalification requirements. The commenter was also unsure what ''work type'' meant, and how firms prequalified in some, but not all, of the areas in which they were certified could be counted.

With respect to terminations and replacements of DBEs, one commenter thought reports should include the date of contract award, the date of the prime's termination notice, the reasons for the action, and the DBE's response. Another commenter agreed that the reason should be reported, adding that any resulting revisions of the recipient's overall goal should be noted. One commenter said that termination data should be reported in the semi-annual reporting timeframe, using a Google or Excel spreadsheet, and that the reporting should include the number of terminations and NAICS codes of terminated firms. Another commenter also supported using Excel spreadsheets or XML files for reporting this and other information into the reports, rather than relying on manual inputs of information.

Two commenters addressed the ''running tally'' requirement, one saying it did not currently have a running tally provision and was unsure how to develop one. Another asked how the running tally provision differed from the ''open'' and ''completed'' reporting fields, suggesting that the information requested was duplicative. Another commenter suggested that information about DBE's that have been decertified or graduated only be included in the ''open'' and ''completed'' fields, while a different commenter suggested that, for re-entering firms, the reports include the date and basis of graduation, the date of reapplication, and the basis for re-entry.

Some commenters expressed concern about what data should be submitted and by whom. One commenter said that the DBE owner's contact information and the ZIP code of the firm's principal place of business need not be reported. Another suggested that if multiple contracts were awarded to a firm during a reporting period, there should not have to be multiple entries of the firm's information. Two others said that if recipients submitted basic information (*e.g.,* a firm's certification number and NAICS code), the Operating Administration (OA), rather than the recipient, should enter other information about the firm.

One commenter asked whether race and gender were intended to be entered for all firms or only DBEs, and how the recipient would handle situations in which a firm is certified in more than one NAICS code. Another commenter advocated expanding the information reported, adding such items as the number and percentage of in-state and out-of-state firms by race and ethnicity, looking at applications, decertifications, and prequalifications information.

With respect to the bidders list, one commenter raised several questions. Would the centralized database be available at all times to recipients, as opposed to only during certain reporting periods? Would the December 1 date for submitting information apply to the bid date or the contract award date, when one was before and the other was after December 1? How would micro purchases and single bidder or sole source procurements be handled? How should a recipient handle incomplete forms submitted by bidders? Since the commenter had a race-neutral program, how would ''subcontract approval'' be reported? This commenter, as well as another, said that reporting a high volume of bids would be very burdensome and expensive.

A few commenters said that prime contractors should have to submit most or all of the data required for the bidders list, while another said that recipients should collect bidders list information directly from bidders for subcontracts or certification process records, rather than indirectly through prime contractors.

One commenter said that, with respect to engineering firms, the bidders list should include the number of such firms bidding on prime contracts or subcontracts, the number of such firms that were shortlisted or awarded, and the total number of engineering contracts with and without DBE goals.

DOT Response

As described in this preamble (see discussion of § 26.11 and Appendix B), the final rule adopts revisions to all three reporting requirements, including the creation of a centralized bidders list system.

A recipient must provide its bidders list collection information in a standardized and centralized form. Although recipients are already obligated to gather most of this data, the rule imposes the additional step of reporting this information. However, the burden of this reporting process is expected to be minimal since recipients are already required to collect most of the information. One commenter stated that it does not collect bidder information on a per project basis. That recipient maintained that the compliance burden would be more than minimal. We respond that the current rule requires collection for all projects. The bidders list data that needs to be reported to DOT includes specific details such as the race and gender information for the owners of all firms and the NAICS code that is applicable to each scope of work proposed by the firm in its bid.

To ensure usability and standardization of the bidders list data, the Department will build a comprehensive and searchable database to house this information, a feature recommended by a commenter. The final rule allows for a delay in the requirement to allow ample time for the Department to complete the development of the database and ensure its readiness before recipients are obligated to submit the necessary data. Once the database is fully operational, recipients will be able to seamlessly enter the required information with minimal additional burden. Recipients may use the information to set their overall goals.

With this data, the Department will analyze the representation of DBEs within the bidding process. This assessment will enable a closer examination of the specific types of work that DBEs actively pursue and competitively bid for. Ultimately, this analysis will serve as a vital tool in monitoring the effectiveness of the rule and guiding future policy decisions. It enables the Department to make informed assessments regarding the impact of the regulations and take appropriate actions to address any identified shortcomings, thereby ensuring that DBEs can compete fairly for DOT-assisted contracts.

For the Uniform Report, the Department is requiring recipients to submit names of DBEs, NAICS codes performed in a contract, federally assisted contract number(s), and the dollar value of the contract. We disagree with a commenter who stated entering this information constitutes a substantial expansion of what is collected, because these data points should already be tabulated by the recipient in order for them to properly upload the current report. We inadvertently listed prequalification in the uniform report draft rule and deleted it from the final rule. We agree with commenters' concerns regarding ''work categories'' and exclude the ambiguous category from the final rule. Also, after careful consideration, the Department believes that the proposed data collection on terminations would pose significant challenges for recipients. Given the complexities and challenges inherent in collecting and reporting termination data, the Department believes that it would be unreasonable to mandate recipients to undertake this task. We must strike a balance between gathering valuable information for analysis and avoiding excessive administrative burden for recipients. The Department will continue to explore alternative approaches and strategies that can provide meaningful insights into terminations without imposing disproportionate burdens on recipients.

The additional uniform report information will help the Department evaluate whether the DBE program is making progress toward the objectives stated in § 26.1 of the regulation. Recipients would submit the Uniform Report Form online in a manner acceptable to the relevant OA. The Department will post a copy of the form, which is no longer posted in the regulation, to the DOT website.

Finally, the Department expands the MAP–21 data report collection to cover six items mentioned in the NPRM: the number and percentage of in-state and out-of-state SEDOs by gender and ethnicity; the number of applications received from in-state and out-of-state firms and the number of each found eligible or ineligible; the number of in-state and out-of-state firms decertified or summarily suspended; the number of in-state and out-of-state applications involving a request for an individual determination of social and economic disadvantage; and the number of in-state and out-of-state firms certified based on such a determination. Decertified DBEs that exceed gross receipts and PNW caps must be reported using MAP–21 data instead of the uniform report proposed in the NPRM.

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

4. Tiered Program Requirements for FTA Recipients (§ 26.21)

NPRM

Under the current rule, FTA recipients who will award prime contracts exceeding $250,000 (cumulatively) in a fiscal year must have a DBE program meeting all requirements of part 26. Based on changes in the consumer price index (CPI) since 1983 (the year the $250,000 value was established), the NPRM proposed to increase this value to $670,000. FTA recipients receiving planning, capital, or operating assistance who will award prime contracts (other than transit vehicle purchases) that cumulatively exceed $670,000 in a fiscal year would be required to comply with every requirement of part 26 and have a full DBE program. Recipients awarding prime contracts totaling $670,000 or less would also have to maintain a program, but compliance with only certain provisions of part 26 would be required. Specifically, these recipients would be subject to the requirements for reporting and recordkeeping, contract assurances, a policy statement, fostering small business participation, and transit vehicle procurements.

The Department's records show that in most years there were about 80 FTA recipients awarding between $250,000 and $670,000 per year. The Department estimated that the change would provide cost savings for such recipients from the reduction in administrative burdens. Based on attainment data from previous years, the Department found that if there were any reductions in total program-level DBE participation, the reduction would be minimal.

Comments

Commenters on this issue, predominately transit operators and DBEs, were almost evenly divided. Supporters were attracted to the reduction in administrative burdens for some small transit providers. One commenter suggested raising the value further, to $750,000, while another suggested that a similar threshold should be established for airports. One supporter of the proposal asked the Department to define ''significant changes'' to a DBE program that would require OA approval (this provision, in proposed § 26.21(b)(2), applies to all OAs).

Opponents pointed to the estimated 80 transit operators that would not have to maintain full DBE programs, saying that this would reduce opportunities for DBEs. All recipients should have DBE programs, some comments said. One commenter said a problem could arise for a recipient who had been below the threshold but then received a large grant that put it above the threshold. The recipient would have to quickly create a full program, the commenter said.

Most of the commenters not in favor of the proposals or who expressed negative opinions were concerned that DBEs seeking to work with smaller recipients would not be afforded a level playing field because the DBE programs of such recipients would not be subject to as stringent oversight by FTA. These commenters were concerned that less oversight would result in these recipients taking the program less seriously.

DOT Response

The final rule is adopting this proposal substantively unchanged from the NPRM. The Department recognizes that the proposed regulatory text used a structure and phrasing that may not have been clear to some readers. Though commenters did not address the clarity of the drafting specifically, the comments suggested there may be some confusion as to what requirements apply to which recipients. In response to these comments, the final rule includes definitions for FTA Tier I and FTA Tier II recipients. Further, the final rule adds paragraphs to § 26.21(a)(2) to list the applicable requirements for Tier II recipients more clearly. The Department notes that under the new requirement, all FTA recipients that receive planning, capital, or operating assistance and award FTA funded contracts must have a DBE program.

The Department takes seriously commenters' concerns that some affected recipients might operate their DBE programs less robustly under the new rules. The Department expects that the positive impacts of expanding DBE program requirements to almost all FTA recipients mitigates that risk. The intent of reducing administrative burdens on smaller recipients is to allow them to direct a greater share of their resources towards implementing the DBE program elements that expand opportunities for DBEs, and the Department expects that they will do so. Under the final rule, all FTA recipients with DBE programs will be subject to enhanced reporting requirements, which will allow FTA to conduct more effective oversight.

As explained in the Regulatory Impact Analysis of the NPRM, if every single contract awarded annually to DBEs by the approximately 80 recipients that award between $250,001 and $670,000 annually (in prime contracts) went instead to non-DBEs, 99.7 percent of Federal funds awarded to DBEs on FTA assisted contracts would still be awarded to DBEs. In response to the comments received, FTA reviewed Uniform Report data for fiscal year 2021 to better understand the potential impact of the proposed Tier II DBE program on contract awards to DBEs. The data shows that 195 recipients reported awarding between $0 and $250,000 in that fiscal year. Of those, 159 operated completely race-neutral DBE programs. Of the remaining 36 recipients with race conscious goals, five awarded race conscious contracts to DBEs, resulting in $170,913 of cumulative awards to DBEs through the use of race-conscious means (or 0.02 percent of total dollars to DBEs that year).

The Department expects that many Tier II recipients will operate entirely race-neutral programs, though they are not prohibited from employing race-conscious means as necessary. The Department does not anticipate any reduction in awards to DBEs by Tier II recipients under the new rules, especially in light of increased funds being awarded by FTA to transit agencies. Further, FTA will be conducting *more* oversight of recipients currently awarding $250,000 or less. FTA will remain responsible for ensuring that *all* FTA recipients subject to the DBE program are awarding and administering their contracts in a nondiscriminatory manner, and the reporting requirements under the new rules will provide FTA the information needed to ensure compliance.

Regarding the comment that discusses the impact of receiving a large grant, as compared to the current rule the final rule would reduce the risk and mitigate the negative impact of exceeding the threshold due to a single grant. First, and as a matter of clarification, whether a recipient is tier I or II is determined by the value of contracts it awards, not the value of funds it receives from FTA. Under the current rule, since the contract value threshold is low ($250,000), there is a greater risk than under the final rule that a recipient will be required to implement all DBE program requirements after receiving a large grant. Further, since FTA Tier II recipients will be operating DBE programs, the additional administrative burden of becoming an FTA Tier I recipient is comparatively less than under the current rule, since recipients below the current threshold do not have the experience and administrative infrastructure to operate an effective DBE program. Finally, the Department expects recipients to budget and plan accordingly, and if a large grant is awarded then appropriate and commensurate resources should be devoted to compliance.

Regarding the comment that suggested raising the contract value to $750,000, the Department notes that $670,000 represents an inflationary adjustment, and there is no evidence to support that $750,000 would be more effective. Regarding the comment asking the Department to define ''significant changes'' to program plans, the Department notes that the final rule does not change what qualifies as a significant change.

5. Unified Certification Program (UCP) DBE/ACDBE Directories (§§ 26.31 and 26.81(g))

NPRM

The NPRM proposed to expand existing DBE and ACDBE directories to allow certified firms to display information about the firms' ability, availability, and capacity to perform work. The Department thought that this would provide a one-stop tool that would enable DBEs to market their services and help prime contractors seek out potential DBE subcontractors. Directories would include a standard set of options for information that firms could choose to make public, such as a capability statement, State licenses held, prequalifications, personnel and firm qualifications, bonding coverage, recently completed projects, equipment capability, and a link to the firm's website. UCPs would not have to vouch for the accuracy of the information provided.

The NPRM would also eliminate the option for a hard copy directory since online availability of the information is sufficient. The NPRM said that the Department anticipated that UCPs could implement the proposed requirements by January 1, 2024, or 180 days after the final rule. However, the Department sought comment on having a phase-in period to allow necessary changes to be made.

Comments

This subject was among the most heavily commented upon in the NPRM, attracting over 70 comments. Of the almost 50 comments that expressed an opinion about the overall wisdom of the proposal, a majority fully or partially supported it. Many other comments addressed details of the directory process or had other ideas of how the directory process could best work.

Comments from supporters said that an expanded directory would help DBEs market themselves to primes, especially if DBEs could update information in an efficient way. Such a directory would be useful to primes searching for DBEs for a contract and could help to avoid the ''can't find qualified DBEs'' excuse for failing to meet goals, one comment said. More detail in the directory would also save DBEs from being inundated with solicitations from primes for work in areas in which the DBEs are not interested. DBEs, several comments said, should be allowed to add data about their operations, since NAICS codes, by themselves, provide only limited information about what a firm does.

Some supporters of the proposal nevertheless noted concerns about it. For example, commenters believed that the information in the expanded directories would be helpful to DBEs but acknowledged that costs and administrative burdens could be a problem, throwing the cost-effectiveness of the expanded directories into question. One asked whether there would be any DOT funds to support the expansion. Another supported the proposed expansion only if DBEs were not allowed to be certified in all 50 States under the interstate certification proposal in the NPRM. Others were concerned that, despite disclaimers to the contrary, the public would think that information about firms in the directory had been vetted for accuracy by certifiers. If certifiers were expected to verify information submitted by DBEs, another asked, how would certifiers determine the accuracy and timeliness of the information?

One commenter wanted to make sure that capability information about a firm be specific; another, however, thought that information about bonding and equipment should not be included because some of this information could be proprietary and could change from project to project. Other commenters suggested that owners' race and gender information should be included or that additional information categories should be included.

One commenter expressed concern that there would be large burdens on certifiers if they, rather than DBEs themselves, had to input data about the firms. It estimated that it would take 30 minutes to two hours of staff time per procurement for this process. Another commenter wanted the rule to prohibit recipients from using data from the expanded directory to judge which firms are ready, able, and willing to work.

A small number of commenters suggested that the Department go beyond the proposed changes and create a centralized, nationwide database, to which DBEs could upload information and which would be user-friendly and readily searchable by such terms as State and type of work. A variation on this idea was that States' UCP directories should be merged together to avoid duplication and inconsistency. A comment said that such a directory should specify which states a firm is certified in and should be in an Excel format and include the DBE's email and the SEDO's presumptive group membership. It could also include information on a firm's ability to perform a commercially useful function (CUF).

The principal objection of commenters who opposed the proposal is that it would add costs, take additional staff time, and create unnecessary administrative burdens. New software and additional staff would be needed, and staff would be unable to keep up with the workload they claimed.

Two commenters said that adding too much detail about firms would be counterproductive, and making sure information was updated would be a slow and difficult process. Another said that most of the proposed fields were available in commercial software, but seldom used. Similarly, another commenter questioned the usefulness of the added fields.

Commenters were concerned that there could be confusion about what a prime contractor could get credit for, based on representations in material DBEs added, since self-reported capability statements could be misleading. For this reason, one commenter said, DBEs should not be able to upload information themselves. Another said that capacity, availability, and other detailed information should not be entered, as that could lead to inaccuracy, discrimination, and lost opportunities. Two commenters suggested that it would be simpler and less burdensome to limit additional information to a link to the DBEs' websites, making additional directory fields unnecessary.

There was a wide variety of other comments concerning directories and the NPRM's proposal. A commenter expressed concern that, with many firms potentially being added to a UCP's directory as the result of the interstate certification proposal, the availability numbers used for goal setting could be distorted, even though many of the newly added firms might not be available to work in projects in the State. On the other hand, another commenter was concerned that directories might undercount firms that were potentially ready, willing, and able to work in a State, affecting goals in the other direction.

Some commenters were concerned about computer security and privacy. Two mentioned a concern about the privacy implications of including home addresses for businesses operated out of the SEDO's home, particularly in the context of more widespread certification under the interstate certification proposal. Some commenters thought the proposed implementation time frame for the new requirements was too short, and should be extended a year, or until software development and vendors were in place.

A commenter asked that more detail about the specifics of directory format, including using a spreadsheet and having search functions based on such factors as NAICS and ZIP codes. Another commenter wanted more to ensure that the dates when details concerning such items as prequalification, licensing, or bonding would be displayed. A commenter asked that all UCP directories use a standard format. Another commenter said the Department should give a unique identifier for each DBE that would be consistent across all UCP directories. A commenter recommended that directory entries have a notation about whether a DBE firm was eligible for FAA projects but not FTA or FHWA projects, because of differences in applicable size standards.

DOT Response

The main purpose of the DBE directory is to show DBEs, prime contractors, and the public which firms are certified as a DBE to do the various kinds of work that take place in DOT-assisted contracts. The directory is not primarily about the resources, equipment, bonding, experience, or other qualifications of a firm to do particular sorts of work. In performing their due diligence in selecting DBE contractors, considering those factors is a task for prime contractors.

We understand that it is useful for prime contractors to have such information readily at hand. One important means of making this information available to prime contractors would be for DBEs to include such information on their websites, which would then be linked to their entries in UCP directories.

In the NPRM, we proposed including fields for many of these types of information in UCP directories. However, we recognize, as commenters pointed out, that mandating a large expansion of the content of directories could create additional administrative burdens for certifiers. We are also concerned about some pitfalls that we recognize about open data fields for firms to enter their own information (*e.g.,* accuracy, information that has not been updated, unintended exclusion of eligible firms, available information being inconsistent from one firm to another).

In light of these concerns, DOT has limited the elements that must be included. They are firm name, location, NAICS code(s), and websites. The directory, which we now clarify must be an online platform, must permit the public to search and/or filter for these items in addition to the types of work a firm is seeking to perform. We will also mandate that 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.

Certifiers may, at their discretion, include optional additional fields in their directories, including those proposed for inclusion in the NPRM. UCPs with sufficient resources may include such fields in their electronic directories, while others may find it more feasible to simply tell firms to provide a link to their own company websites, which would include the information they wanted prime contractors to access. UCPs have the responsibility, under the final rule, to ensure that mandatory items about firms are and remain accurate. UCPs permitting permissive entry of other information about firms' capabilities should also take steps to ensure that what the firms enter is accurate and up to date, including removal of inaccurate or untimely information they learn of. But the disclaimer mentioned above must state, UCPs do not warrant the accuracy of information provided by firms, and users' reliance upon it is at their own risk. Prime contractors always need to fact-check the claims made by firms they are considering doing business with.

6. Monitoring Requirements (§ 26.37)

NPRM

The NPRM would make a number of changes concerning a recipient's monitoring responsibilities. Recipients must monitor race-neutral participation by DBEs as well as participation on contracts that have DBE goals. The recipient would have to verify that a DBE was performing work on a contract, the recipient would also have to verify that it was performing a commercially useful function (CUF). This dual verification would have to occur on every contract involving a DBE. The NPRM emphasized the need for recipients to keep a ''running tally'' of its overall DBE attainment as well as each prime contractor's payments to DBEs it is using to meet its goal, rather than waiting until the end of the contract.

Comments

Monitoring Proposal

Most of the over 30 commenters on the NPRM supported the idea of more intensive and consistent monitoring of work in the DBE program, some saying they were already effectively doing what the NPRM proposed. Design/build contracts were one place where more monitoring was needed, a commenter said. The focus should be on actual dollars that DBEs receive, and payments should be confirmed on a regular and frequent basis, particularly to ensure compliance with prompt payment requirements.

Monitoring should continue throughout the procurement process and involve all elements of the recipient's organization, not just the civil rights office. More resources for monitoring are necessary, another comment said, because often times monitoring is not happening as it should. A comment said that DOT should verify commitment and performance numbers as well as CUF matters. One comment suggested that recipients use independent, third-party monitors.

Some of the comments supported the ''running tally'' requirement, especially the point that this applies to progress throughout the contract, and not just at the end of the project. One comment said that there should be written verification or a signed checklist concerning progress. Similarly, another said that there should be payment reconciliation on all invoices issued by DBEs.

Two comments questioned how and whether the running tally provision would apply to race-neutral contracts. Two others said that for funding or software reasons, implementation of the running tally provision should be phased in as funding, or software, becomes available (which one of these comments said would take 3–5 years). Another commenter, a recipient, said that more monitoring procedures are not needed beyond what it was already doing and that the OAs should provide uniform forms for monitoring purposes. One comment asked how often monitoring would have to be done and what the effect would be on staff workload. Another asked whether ''local public agencies'' that are part of FHWA's local public agency program would have to follow the proposed requirements applying to principal recipients themselves.

Other Enforcement Comments

Several comments talked about enforcement matters generally in the DBE program, rather than the specifics of the NPRM's monitoring proposal. One detailed a complaint about the commenter's perceived failure of a major recipient to enforce the program effectively. Another asked for stricter enforcement by the Department, since the commenter did not believe recipients could be trusted. There should be stiffer sanctions for noncompliance, including debarment of contractors, and DBEs who violate the rules should be decertified, other comments said. Another suggested that the Department should set up a public list of prime contractors' performance in meeting goals and getting DBE ''waivers.'' A commenter said that the Department should crack down on misuse of waivers and exemptions that evaded DBE requirements. A commenter asked for greater involvement by the Office of Inspector General (OIG) and the imposition of penalties for noncompliance. On the other hand, a commenter said that audits should focus more on customer service, rather than on negative matters.

DOT Response

Bidders on contracts with DBE contract goals can meet their obligations in one of two ways, which are equally acceptable under the regulation. First, they can enlist sufficient DBE participation to meet the goal. Second, they can document sufficient good faith efforts to meet the goal. Either route results in compliance with the requirements of the rule. The second route is not a ''waiver'' of the requirements of the regulation. This is simply an alternative method of compliance, one necessary to avoid the DBE program becoming a quota-based program that would not be narrowly tailored, as is legally required.

We believe that the running tally requirement is an important element of the compliance monitoring that all recipients are responsible for completing. It ensures that, throughout the course of a contract, the recipient will know whether a DBE is doing the work to which the prime contractor has committed, whether payments to DBEs are timely, and whether DBEs are performing a commercially useful function. If problems are found, then they can be corrected at a time before it becomes too late to do anything about them as a practical matter. We believe it is crucial to avoid situations where issues are revealed only when a contract is completed, and there are no available measures to achieve the meaningful DBE participation that was promised at contract award.

The optimal frequency of running tally inspections of a contract is likely to vary with the length and complexity of the contract. In a relatively simple, 60-day contract involving one DBE, for example, a running tally check 30 days after the beginning of the contract might suffice. In a more complex, multi-year contract, involving several DBEs, more frequent checks focusing on the times when the DBEs would be performing their tasks would be appropriate. While there is not a one-size-fits-all interval for running tally checks, it is essential that a recipient know at all times what is going on with DBE participation on its projects. ''There was a problem we didn't know about until after the fact'' is not an acceptable way for a recipient to oversee a project.

The Department chose to clarify that the ''running tally'' not only applies to monitoring contract goal attainment but also to monitoring the recipient's progress toward attaining its overall goal each year. Recipients must meet the maximum feasible portion of their overall goal by using race-neutral means (§ 26.51(a)), establishing contract goals to meet any portion of the overall goal that the recipient does not project being able to meet using race-neutral means (§ 26.51 (d)). Accordingly, recipients need a mechanism to keep a running tally of progress toward annual goal achievement that provides for a frequent comparison of current DBE awards/commitments to DOT-assisted prime contract awards to determine whether the use of contract goals is appropriate.

It is also important to emphasize who provides information that goes into the running tally. The DBE program is not the exclusive province of a recipient's civil rights or business diversity office, the staff of which are often small. The DBE program is the responsibility of all parts of the recipient's program and of all personnel who work with it.

On a highway construction project, for example, it is inconceivable that resident engineers, inspectors, procurement officials, and others would not be keeping track of the progress of the work, whether the work met schedules and specifications, whether the work was meeting budget projections, etc. The DBE program is an element of the contract no less than these routine matters that are regularly overseen, and needs to be given the same attention and, importantly, by the same people. The same individuals who inspect a project to see if, for example, materials meet specifications and that a project is on time and on budget can and should be trained, and required, to give the same attention to providing the information informing the recipient's running tally. It is part of their job. This is a point that the Department has emphasized over many years, and we wish to re-emphasize it here. When the Department reviews a recipient's compliance, we will be paying special attention to whether the recipient is doing what needs to be done in this respect.

Subpart C—Goals, Good Faith Efforts, and Counting

7. Prompt Payment and Retainage (§ 26.29)

NPRM

Responding to Congressional mandates and OIG recommendations, the Department in 2016 issued guidance concerning prompt payment and retainage. The guidance emphasized that recipients had responsibility for affirmatively monitoring contractors' compliance with prompt payment and retainage requirements, rather than relying on complaints from subcontractors. However, a 2020 FHWA review of recipients' practices showed that many were not fulfilling this responsibility adequately. Therefore, the NPRM proposed a specific provision concerning mandating affirmative monitoring and an enforcement mechanism, including appropriate penalties for noncompliance. Requirements would flow down to lower-tier subcontractors as well as prime contractors.

Comments

DBE and recipient commenters generally supported the NPRM proposal, emphasizing the need for affirmative monitoring and stressing the need for prompt payment to avoid cash flow problems for subcontractors. Commenters who mentioned the flow-down of requirements to lower-tier contractors also supported the proposal. Several commenters asked for a clarification of the rule that would specifically authorize enforcement of State laws mandating payment to subcontractors with a shorter period of the time than the 30 days provided for in § 26.29(b).

Many of these commenters and others emphasized the need for closer oversight and stricter enforcement; a few made suggestions about what this would look like. Monitoring should be conducted on a regular and frequent basis (*e.g.,* monthly). Other commenters suggested mandating a 10- or 15-day rather than 30-day payment period. Some commenters advocated those penalties (*e.g.,* 3 percent of the subcontractor's invoice, interest on late payments) be assessed against tardy contractors.

Several comments proposed alternative ideas to achieve the objective of prompt payment. One was to provide an incentive to prime contractors who paid subcontractors on time or early, such as a bonus or gaining points that could be used in future procurements. Another was to follow a model the commenter said was used in the Department of Defense and some SBA programs, involving an automated payment system and online certifications that payments have been made on time.

A comment suggested that recipients could set up an escrow-like account to pay subcontractors in the event prime contractors were late. Some commenters emphasized that primes should send invoices to recipients on time or that recipients could avoid problems by making partial payments to primes when a subcontractor's portion of the work was completed, as opposed to waiting until the entire project had been completed. A commenter suggested that DOT should develop software for grantees to track payments by all parties at all stages of the process.

Comments from some recipients, especially in the transit industry, expressed concern about affirmative monitoring being burdensome, especially for smaller recipients that have limited staff. Other commenters thought that applying prompt payment requirements to all subcontractors, rather than just DBEs, exceeded the scope of the DBE program.

DOT Response

We believe as a basic, upper limit, standard for a national program, the proposed 30-day period for payment and for the return of retainage following the satisfactory completion of a DBE's work on its portion of the overall contract is appropriate. We agree with commenters that when State law or a recipient's program calls for a quicker turnaround time, that shorter requirement prevails. For example, if State M's law calls for payment to be made in 15 days, all recipients in that State would have to observe the 15-day rule. On the other hand, if State P's law allowed 45 days for payment or the return of retainage, the regulation would require the action to be taken in 30 days on a DOT-assisted contract.

We strongly encourage recipients to establish shorter time frames for lower tier subcontractors, because these smaller businesses have more acute cash flow needs than their larger counterparts. While we are not adopting, as generally applicable national requirements, the various ideas that commenters suggested to make prompt payment and retainage more effective, we encourage recipients to adopt measures that will work in their circumstances, and we will work with recipients to incorporate such measures in their DBE programs. The idea of providing special incentives for contractors, merely for doing what they are supposed to do, is not one that the Department supports, however.

In any case, adopting strong enforcement mechanisms is critical to making prompt payment and retainage return requirements work. For example, making failure to meet these requirements a material breach of contract, or an explicit cause for liquidated damages in the prime contract, are among many possible measures for this purpose. Letting failure to comply go unnoticed, or to be without consequences, is not an acceptable option. As part of their normal oversight of recipient operations, as well as in compliance reviews, the OAs will make prompt payment and return of retainage a point of emphasis.

8. Transit Vehicle Manufacturers (TVMs) (§§ 26.5 & 26.49)

NPRM

The Department proposed several changes to provisions in 49 CFR part 26 related to requirements for FTA assisted transit vehicle procurements. The NPRM included revisions in § 26.5 to the definition of TVM and proposed two new definitions, transit vehicle and transit vehicle dealership. Additionally, the Department proposed several revisions to § 26.49 to clarify reporting requirements for FTA recipients and TVMs.

The NPRM proposed terminology changes to make § 26.49 more reader-friendly and clear, such as using ''TVM'' consistently to refer to transit vehicle manufacturers and using the term ''eligible'' rather than ''certified'' when referring to a TVM's eligibility to bid. The Department also sought to clarify that a contract to procure vehicles from a transit vehicle dealership (TVD) does not qualify as a contract with a TVM, even if the vehicle was originally manufactured by a TVM.

Comments

Definitions

The proposed definitions of transit vehicles, manufacturers, and dealers drew only a small number of comments, most of which supported the changes, though a transit authority and a consultant sought more clarity. As noted above, a commenter said that a transit vehicle dealer (TVD) should be more simply defined as a firm that sells transit vehicles (including modified vehicles) made by a transit vehicle manufacturer (TVM), whether or not the dealer is ''primarily engaged'' in selling such vehicles.

Terminology

The few comments addressing the proposed change from ''certified'' to ''eligible'' in § 26.49(a)(1) and (2) supported it.

Procuring Transit Vehicles

Two commenters agreed that a vehicle purchased from a non-TVM should not be treated in the TVM category for goal and reporting purposes. Another suggested that paratransit vehicles like SUVs and vans be allowed to be purchased from dealers rather than manufacturers.

Two commenters expressed concerns about the proposal that vehicles purchased from TVDs are not treated under the TVM provisions of the rule. Both said they procure ADA paratransit vehicles from TVDs. One concern was that because a TVD is not a TVM under the proposal, FTA funding would not be available for the paratransit vehicle purchases. A related concern was that since most TVDs are non-DBE firms, there are no meaningful contacting opportunities for DBEs in that field and hence no point in setting contract goals for TVDs. Moreover, a commenter noted that the proposal could limit DBE opportunities related to paratransit vehicles that might exist through the TVM program.

A commenter recommended that neither modified nor unmodified transit vehicles purchased through TVDs should be included in a recipient's goals or uniform reports.

A State DOT said that it procured its paratransit vehicles from TVDs, which then would not count as TVMs under the proposed language. It was concerned that FTA therefore would not treat such purchases as eligible for Federal funds because, as TVDs rather than TVMs, they could not participate in the TVM program. The commenter was unsure how a recipient would comply with the rule under these definitions. Moreover, it said, most TVDs are owned by socially and economically disadvantaged individuals (SEDs) and have few if any DBE subcontracting opportunities. It suggested that recipients be able to report purchases of such vehicles from TVDs in the same manner as for TVMs.

TVM Goal Submissions

Four commenters recommended that TVMs only have to submit goals every three years, rather than annually. This would reduce burdens, they said.

Ferries

The NPRM did not address ferries specifically, but several commenters noted the difficulty in applying the TVM rules to ferry procurements. For example, commenters suggested that the proposed definition of transit vehicle would likely result in additional confusion as to how to treat procurements of ferries because they are vehicles that clearly should be regarded as transit vehicles yet are manufactured by entities that should not be considered TVMs.

TVM Other Details

A commenter said that since TVMs report directly to FTA, a TVM should not have to report the same data to recipients. Another commenter said that TVMs should not have to provide confidential bidders list information in their DBE goal submission; FTA can audit their records for this information if needed.

A commenter suggested amending § 26.49(a)(4) to say, ''becoming contractually required [as opposed to the proposed ''obligated''] to procure a transit vehicle.'' Another commenter said that it thought that NAICS codes do not cover vehicle component manufacturers adequately.

Another commenter supported the proposed revision of § 26.49(c) that clarified that TVMs would have to submit reports only for years in which they were eligible. It also suggested that the ''awards/commitments'' line item in section A of the Uniform Report form be clarified to apply only to work performed in the U.S., to be consistent with the language in § 26.49(b) that limits TVM goals to work performed in the U.S. A transit advocacy organization added that since many TVMs may be small businesses with limited staff, TVMs should be required to submit their goal information in the same three-year interval as recipients, thus further reducing the paperwork burden. Overall, this organization commented that any additional administrative burdens could result in fewer DBE businesses participating, fewer bids, less competition, and longer lead time for new capital projects.

DOT Response

§ 26.5 Definitions

The final rule will adopt the proposed definition of TVM. In response to the comments expressing concern over applying the definition to ferry manufacturers, the final rule further clarifies how recipients may establish project goals to procure transit vehicles from entities that are not eligible TVMs. See the discussion of § 26.49(f) below.

After considering the comments received, the Department decided not to adopt the proposed definition of transit vehicle. As noted in the preamble to the 2022 NPRM, the Department recognizes that there is some ambiguity as to what qualifies as a ''transit vehicle procurement'' and is therefore subject to special rules. However, since these situations are relatively rare and the most appropriate course of action depends on the unique facts and circumstances, the Department expects that providing training, guidance, and technical assistance will be more effective than issuing a one-size-fits-all regulatory definition.

The final rule will not include a definition for transit vehicle dealer. Commenters explained that small transit agencies routinely use dealers to procure transit vehicles, and that paratransit vehicles are often procured through dealers. As discussed elsewhere in this notice, these comments persuaded the Department to maintain the status quo with respect to dealership transactions in § 26.49. Since the definition would only be relevant if the Department retained the proposal in § 26.49, there is no need for a definition.

§ 26.49 Procuring Transit Vehicles

As noted above, the proposed revisions to § 26.49 received mixed comments. Generally, commenters agreed that the proposals would clarify the requirements. The Department appreciates the comments in support of the proposed change from ''certified'' to ''eligible'' in § 26.49(a)(1) and (2). Accordingly, the final rule adopts this change as proposed. The Department agrees with the commenter who suggested that the word ''required,'' instead of ''obligated,'' better conveys the necessary action that triggers the 30-day reporting requirement in § 26.49 (a)(4). The final rule therefore uses the term ''required.'' Several commenters opined that the proposed addition of paragraph (a)(5) addressing awards to dealerships could severely disrupt vehicle acquisition practices by small transit agencies and paratransit providers. In response to these comments, the final rule does not adopt proposed paragraph (a)(5) or otherwise address awards to dealerships. The final rule substantively adopts all other proposed changes in § 26.49 with only minor additional revisions to paragraph (a)(2) for clarity. Additionally, the final rule incorporates changes to paragraph (f) to address situations in which recipients establish project goals.

§ 26.49 TVM Goal Submissions

The Department recognizes that TVMs are required to set and submit goals more frequently than recipients. The timelines are different because TVMs and direct recipients (often transit agencies in the case of FTA funds) fundamentally differ in their ability to predict contracting opportunities. Generally, transit agencies are able to predict the projects they will undertake over the next three years with a relatively high degree of accuracy, which allows transit agencies to accurately predict the scale and scope of contracts they will award. TVMs, though, are often limited to the information their potential clients (often transit agencies) make available. Since most transit agencies do not provide extensive details on the vehicles that they intend to procure prior to issuing a public solicitation, which in many cases is within months (at most) of the deadline to submit bids, TVMs cannot accurately predict the federally funded subcontracting opportunities they will have available in several years. Thus, the Department will retain the requirement for TVMs to set DBE goals on an annual basis and submit goal methodologies annually. Without more information from commenters, we are unaware of how this administrative burden can result in fewer DBEs participating, fewer bids, etc.

Ferries

The Department understands that large ships are manufactured by shipyards, and that the shipyard industry is different from bus and rail manufacturing industries. Shipyards are contracted by entities from various other industries to build vessels specified to the customer's needs. Smaller vessels, though, are typically manufactured by well-known brands, and may be specialized by the manufacturer or third parties. Thus, there are aspects of ferry manufacturing that are unique to the shipbuilding industry. However, other aspects are similar to the rest of the transit vehicle manufacturing industry. Such factors mean that ferry procurements are often best addressed through project goals pursuant to § 26.49(f). As discussed below, the final rule clarifies how to apply project goals to transit vehicle procurements from specialized manufacturers when a TVM cannot be identified.

Use of Project Goals

The final rule revises § 26.49(f) to clarify how to use project goals to procure transit vehicles. The revisions codify and clarify current practices and are in response to comments expressing confusion over how to apply the TVM rules to ferry procurements (project goals may be used to acquire vehicles other than ferries).

The final rule adds new paragraphs (f)(1), (f)(2) and (f)(3) and simplifies paragraph (f) to clarify that project goals are used in cases when transit vehicles are procured from specialized manufacturers when a TVM cannot be identified. Pursuant to paragraph (f)(1), if a recipient establishes a project goal, it must use the process prescribed in § 26.45 to do so. This effectively requires recipients to use the same methodology for project goals as overall goals. Pursuant to paragraph (f)(2), FTA must approve the recipient's decision to use a project goal before the recipient issues a public solicitation for vehicles. Paragraph (f)(3) requires recipients to demonstrate that no TVMs are available to manufacture the transit vehicle it intends to procure.

The Department established the project goal option in paragraph (f) in 2014. This option has always been intended to maintain the spirit of the DBE program when compliance with the general rule would be impracticable or create more barriers for DBEs in the transit vehicle manufacturing industry. Often, this scenario occurs when a transit agency intends to procure a vehicle for transit purposes but the entities that manufacture the vehicle do not meet the TVM definition (and are not excluded from the definition).

It has been FTA's longstanding practice that if a recipient can show that it is procuring transit vehicles with FTA funds and there are no entities that qualify as TVMs that manufacture such vehicles, the recipient may use a project goal to procure the vehicles. If a recipient intends to use a project goal, the recipient must request FTA's approval of that decision, and must not issue a public solicitation until FTA has approved the decision. The request for approval must demonstrate that the recipient looked for and could not identify a TVM that manufactures the vehicles sought. To be clear, the project goal does not have to be approved by FTA prior to the recipient's issuance of a request for proposals. Generally, recipients will be required to submit the project goal methodology prior to issuing a public solicitation, though FTA may make case-by-case decisions depending on the facts and circumstances; only under extraordinary circumstances will FTA permit recipients to submit the goal methodology after contract award. This is similar to how FTA reviews and approves all project and overall goals.

TVM Other Details

Regarding the comments on duplicative reporting requirements imposed by part 26 and locally by recipients, the Department recognizes that recipients have legitimate reasons for collecting information from TVMs, some of which may also be reported to FTA. Thus, the Department does not believe it would be prudent at this time to limit recipients' ability to collect such information.

Regarding the comments on confidential bidders lists submitted with goal methodologies, part 26 only requires submission of such information if the TVM chooses to use a bidders list when calculating its overall goal. Otherwise, TVMs are merely required to retain their bidders lists on file. Since it would be impossible to verify the validity of a goal based on a bidders list without reviewing the bidders list, the Department intends to continue to require TVMs to submit their bidders lists when they choose to use a bidders list in their goal methodology.

The final rule adopts the proposed changes to § 26.49(c). Regarding the comment about changing the Uniform Report to clarify that only domestically performed work is to be included in the report, the Department does not believe that this specific change is necessary. We acknowledge that the final rule will result in several changes to the Uniform Report; FTA will issue guidance to TVMs on how to fulfill their reporting requirements under the new rules.

The Department appreciates the comment that discussed the inadequacy of NAICS codes to describe the sort of work available in the vehicle manufacturing industry. The Department intends to use the data it collects under the final rule to learn more about the opportunities available to small businesses and DBEs in the vehicle manufacturing industry.

Finally, the Department intends to use this notice to clarify longstanding policy on how to count DBEs performing on transit vehicle procurements. In recognition of the complex supply chain necessary to manufacture a transit vehicle, the Department has always permitted TVMs to count awards to any certified DBE if the DBE is certified in the State in which it performs the work, regardless of whether the TVM is present in the State. More recently, particularly in the context of ferry procurements, the Department has been asked to allow recipients to count awards to DBEs certified in States other than the recipient's home State if the recipient is using a project goal. The Department has found that such practices can be an effective means of ensuring DBEs are afforded opportunities to compete on transit vehicle procurements. Thus, the Department may approve such practices when sufficiently justified (here, the Department reminds recipients and TVMs that work performed outside of the United States or its territories must not be counted).

9. Procedures for Good Faith Efforts on Design-Build Contracts With DBE Goals (§ 26.53)

NPRM

The NPRM proposed that, in a negotiated procurement (*e.g.,* for professional services), the bidder or offeror may make a binding commitment to meet the goal at the time of bid submission or presentation of initial proposals but provide the detailed information about its DBE participation later, before selection. This provision would not apply to design/build contracts, however.

The NPRM proposed that for a design-build contract, the bidder or offeror would submit a DBE Performance Plan (DPP) with its proposal. The DPP would have to include a commitment to meet the goals and provide details—including dollar amounts and time frames—for the type of subcontracting work or services the proposer will solicit DBEs to perform. The recipient would monitor the design-builder's good faith efforts (GFE) to comply with the DPP and its schedule. The recipient and design-builder could agree to revisions of the DPP over the course of the project.

Comments

DBE Performance Plans

Nearly 50 commenters, from all the major interests, addressed the NPRM's DPP proposal. Of these, about 40 supported the proposed concept, though many had suggestions for modifying the proposal.

In addition to agreeing with the NPRM's rationale for DPPs, supporters said that the DPP would help small businesses seeking work on large projects and would update the regulation to be consistent with existing best practices. Several comments said that they already used something like a DPP in their procurements. Other advantages include, commenters said, giving greater flexibility to prime contractors while allowing for detailed planning and monitoring to provide better experiences for DBEs.

One suggestion made by numerous commenters for modifying the proposal was to have a "hybrid" or two-step process in design/build procurements. That is, for the design and pre-construction phases of a project, recipients could use this flexibility to set goals that the design-builder would have to meet up front, as traditionally done in the DBE program. For the longer construction phase, recipients would have a process like that described in the NPRM.

A few commenters suggested that if, as might happen in smaller design/build projects, a contractor meets the goal with sufficient DBE commitments before the project started, the DPP might not be required for the project. A comment requested that prime contractors be required to commit to DBEs as soon as possible in the process.

Other suggestions included setting specific time frames in which actual DBE contracts would have to be executed and making the DPP process available to a broader scope of projects than design/build projects *per se* (*e.g.,* public-private partnerships). To make this point clearer, some comments said, the regulation should use a term like ''alternative delivery'' rather than ''design/build'' for projects involving a DPP.

Several commenters wanted to make sure that there was active and frequent monitoring of contractors' performance under the DPP. Commenters suggested that DOT could assist this process by providing monitoring software and additional funding to deal with the costs of additional resources for evaluating and monitoring DPPs, and that DOT should also provide more details about what an adequate DPP looks like. Other commenters suggested that DOT should also provide guidance on how to deal with issues that may arise in the course of a project (*e.g.,* change orders), several commenters said, as well as on proper use of DPPs to avoid bids nonresponsive bids.

A few commenters asked how, if at all, the DPP concept would apply to contracts that have race-neutral goals (*e.g.,* as is commonly the case in Florida). One comment suggested that since many design/build projects are large, DBE size standards should be increased for firms participating in them. Another commenter asked that the regulation prohibit prime contractors from making small, incremental additions to their contracts to avoid making firm commitments to subcontractors for DBE work. Another pointed to what it thought could be an inconsistency between the DPP proposal and present Appendix A, section VI, which says that a promise to use DBEs after contract award is not considered responsive to the contract solicitation or to constitute GFE.

If what a prime contractor promises in a DPP does not happen, then what is a recipient to do, some commenters asked. In addition to monitoring, these commenters said, the rule should take enforcement action and impose consequences on prime contractors who are in noncompliance with their DPP obligations. One commenter said, however, that enforcement can be difficult because contractors often do not understand what is involved in a DPP.

The smaller number of comments opposed to the DPP proposal said that moving away from the requirement to have prime contractors commit to specific DBEs in advance would diminish opportunities for DBEs. A comment suggested that a bidder on a prime contract should have to always meet a goal or show GFE before being awarded a contract, no matter what the structure of the contract may be. DBEs need time to get working capital, employees, and equipment in order; and advance notice at the start of a project is important to enabling them to do so, a commenter noted. Another commenter asserted that the premise of the proposal is mistaken, it is not that difficult to identify subcontractors at the start of a project, it said. In the absence of requiring compliance before contract award, DBE participation could become an afterthought for the prime contractor and recipient.

Others opposing the proposal said that implementing the DPP proposal could increase burdens and costs for recipients, delay projects, or lead to additional restrictions or conditions on RFPs, potentially deterring some bidders.

DOT Response

Commenters generally approved of the concept of a DBE performance plan in design/build contracts, and we continue to believe that this will be a useful tool in managing DBE participation in a type of contract in which award of the contract occurs before the design is complete and the details of the work, quantities, and scheduling are not yet known. We agree with commenters that there may well be circumstances in which DBE subcontractors can be selected for the design phase of a project at the outset, in which case the DBE Performance Plan would include commitments to those firms while listing the work types it plans to solicit DBEs to perform in the remainder of the plan. While we appreciate that many projects span over the course of several years, at this time, it is only those contract procurement and delivery methods that lack the details needed to make subcontracting commitments prior to contract award to which the Department approves of the use of a DBE Performance Plan.

Since the beginning of the DBE program in the 1980s, the Department has heard complaints from prime contractors that they cannot find sufficiently qualified, capable DBEs to meet goals on a project. This belief itself appears to be one of the effects of discrimination that the program is designed to combat, and it can act as a self-fulfilling prophecy preventing prime contractors from exerting optimal efforts to find DBEs to meet a goal, whether on a traditional contract or a design-build project. Making good faith efforts to find DBEs is essential to compliance with the regulation. Open communication among the recipients and prime contractors is essential to ensure that the work commitments in the performance plan result in actual subcontracts. With agreement of the parties, work types identified up front could be altered to account for actual work needed in real time; however as long as there are subcontracting opportunities, the recipient must enforce the prime contractor's requirement to make ongoing good faith efforts to meet the goal. We do appreciate the comment that Appendix A needs to be revised to provide an exception for design-build contracts. We are making that alteration. In addition, we are re-naming the DBE Performance Plan to DBE Open Ended Performance Plan (OEPP) to align with the FHWA's EDC–7 initiative.[2] Other than these changes, we are adopting the proposal as proposed in the NPRM without substantive change.

10. Terminations (§ 26.53(f))

NPRM

The NPRM restated the prohibition on terminating DBE subcontractors' work without the recipient's written consent (*e.g.,* because the prime contractor wanted to self-perform the work or use a different firm for the work that had been committed to the DBE). The NPRM further clarified that ''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 process by providing a ''good cause'' reason it proposes to terminate, provide the DBE with time to respond, and not terminating before receiving prior written consent from the recipient. The NPRM also proposed to clarify that termination, on the one hand, and replacement or substitution, on the other, are two separate and distinct processes.

Comments

The majority of the nearly 20 commenters supported the proposal. They agreed that a prime contractor may not terminate a DBE's contract without the recipient's written consent. Some of these comments said that it made sense

[2] In 2009, FHWA launched the Every Day Counts (EDC) initiative in cooperation with state, local, and industry partners to speed up the delivery of highway projects and create a broad culture of innovation within the highway community. Proven innovations and enhanced business processes promoted through EDC facilitate greater efficiency at the state and local levels, saving time, money, and resources that can be used to deliver more projects. The EDC initiative is a state-based model to identify and rapidly deploy proven, yet underutilized innovations to shorten the project delivery process, enhance roadway safety, reduce traffic congestion, and improve environmental sustainability. Rethinking DBE for design-build projects is one of the innovations being promoted in the seventh round of the EDC initiative.

to fold the notion ''substitution'' into the overall ''termination'' framework, since a substitution had the effect of terminating the original contractor. One commenter wanted to make sure that the five-day period for a recipient's consent had elapsed before the prime contractor actually terminated the DBE. Another said that, if there was additional work to be done in the scope of a DBE's work, and the goal had been met, the DBE should complete the additional work, rather than the prime contractor self-performing it.

Some commenters sought clarifications of the proposal. Three commenters said that a recipient's removal of work intended for a DBE to perform should not be treated as a termination by the prime contractor. There could be circumstances, another commenter said, in which a recipient would need to make a determination in less than five days; for example, there may be an urgent need to ensure that hauling supplies to the job site happens on time. In such a case, the commenter said, the recipient would have to respond to the contractor's written notice in 24 hours, and a formal termination process could follow.

The small number of opponents preferred retaining the former regulation's provisions. Some thought that the list of ''good cause'' reasons for termination is too restrictive.

DOT Response

In the NPRM, the Department underscored that any time a prime contractor seeks to terminate a DBE to which it had made a commitment in response to a contract goal or approved substitution, it must follow the process set out in § 26.53(f). The Department sought to clarify that this requirement applies not only to a complete termination but also to a ''partial termination,'' *i.e.,* eliminating a *portion* of work committed to a DBE. For example, a ''partial termination'' in which a prime contractor wishes the DBE to do $100,000 worth of work as opposed to the originally committed $200,000, is just as much subject to the approval as an action to terminate the DBE firm entirely. This would not apply to change orders initiated by the recipient that had the effect of eliminating some or all of the work to which a DBE was committed to perform.

The Department continues to believe that it is important to separate the termination requirements from the substitution process. We have found that some recipients will not allow the prime contractor to terminate a DBE until it has submitted a substitution. Other recipients forgo the termination process and merely require the prime contractor to submit a request for substitution. The due process requirements in § 26.53(f) are essential to protect DBEs committed toward a contract goal, or approved replacement, from arbitrary elimination. This is true whether or not a substitution of another firm for the terminated DBE's work is intended. Again, after considering the comments, we are adopting the termination and substitution provisions as proposed in the NPRM.

11. DBE Supplier Credit (§ 26.55(e))

NPRM

As noted in the 2022 NPRM preamble (87 FR 43631–43632), the issue of how to count DBE credit for suppliers has long been a subject of debate and extensive stakeholder input. Changes over the years in the way that materials are delivered for projects and the importance of concepts like the ''regular dealer'' to DBE suppliers and prime contractors seeking to meet goals have been among the frequent topics of discussion.

Based on the Department's consideration of stakeholder input, the NPRM proposed several changes to the counting provisions of § 26.55(e). First, a prime contractor could meet no more than 50 percent of a goal on a given contract through use of DBE suppliers (including manufacturers, regular dealers, distributors, or transaction facilitators). A recipient could, with prior OA approval, make exceptions to this limit (*e.g.,* for material-intensive contracts). The purpose of this proposal was to prevent the use of DBE suppliers from crowding out opportunities for other types of DBE contractors on a project.

To avoid ad hoc, post-contract award determinations of whether the contributions of a supplier were those of a ''regular dealer'' eligible for 60 percent credit, the NPRM proposed that recipients establish a system to determine, before contract award, whether a DBE supplier meets the basic requirements for being a regular dealer. That is, does the firm generally engage in the sale or purchase of the items in question or items having the general character of those to be supplied under the contract? As part of this pre-award process, the recipient would look at such questions as whether the items would be provided from the supplier's inventory, whether the supplier would have physical possession of the items, or, in the case of bulk items, whether the supplier would deliver the items using its own distribution equipment. Goal credit would ultimately be decided on a contract-by-contract basis based on the recipient's final evaluation of whether the firm would provide a commercially useful function (CUF) deserving of 60 percent regular dealer credit.

The recipient's system for carrying out this proposal would also evaluate situations in which all or most of a regular dealer's supplies come from its inventory, but other sources, such as a manufacturer, would provide additional minor quantities of items related to those in the contract.

In addition, the recipient's system would consider situations in which a DBE supplies items/goods that are not typically stocked (*e.g.,* specialty items). A DBE that provides such items would be eligible for 60 percent regular dealer credit if, like a supplier of bulk items, it used its own distribution equipment.

One of the issues that stakeholders have discussed is the handling of ''drop shipping,'' in which a DBE supplier arranges to have a product sent from its manufacturer to the job site, without passing physically through the hands of the DBE. On the one hand, this arrangement appears similar to that of a transaction facilitator, whose credit is limited to its fees or commissions. On the other, some stakeholders said that dealers in bulk items with distributorship agreements had a good deal of control of a transaction, take significant risks, and often use their own delivery equipment, meaning that their involvement went beyond being simply a transaction facilitator.

To address these concerns, the NPRM proposed that a ''distributor'' having a valid distributorship agreement receive 40 percent credit for the items it provides. Recipients would have to review distributorship agreements, prior to contract award, to determine their validity with respect to each purchase order/subcontract and the risk the DBE assumes. Where a distributor ''drop ships'' materials without assuming risk, or does not operate according to its distributorship agreement, its credit would be limited to fees or commissions.

The NPRM proposed to retain the existing requirement that to receive credit for supplying materials, a DBE must negotiate the price of supplies, determine quality and quantity, order the materials, and pay for the materials itself.

The NPRM would clarify the definition of ''manufacturer'' by proposing that manufacturing includes blending or modifying raw materials or assembling components to create the finished product to meet contract specifications. Minor modifications do not count as manufacturing eligible for 100 percent credit.

Comments

The 50 Percent Limit on Credit Toward Goals for Use of Suppliers

This provision of the NPRM attracted over 60 comments, which, by roughly a 5–1 ratio, opposed the Department's proposal. DBEs, non-DBEs, and recipients found reasons for objecting to the proposed limit on the use of suppliers to meet goals. Commenters opposing the proposal did so on a variety of grounds.

Several comments challenged the factual basis for the proposal. A DBE supplier said that there were no statistics or other evidence supporting the proposal, making the limit arbitrary, a point other commenters made as well.

A non-DBE contractor said that there were no studies showing that DBE suppliers were favored over other kinds of DBEs, or showing what percentage of goals were being met by different categories of DBE firms. Nor was there evidence that suppliers or manufactures were being used at a greater rate in the DBE program than in the construction industry generally, or that the participation of non-supplier DBEs were unduly limited under the present rule. The comment added that the only evidence in the NPRM preamble for the proposal was a reference to a 2018 stakeholder meeting in which some DBE participants had said that, on some contracts, prime contractors were able to meet all or most of DBE goals through use of suppliers, especially of bulk items, making use of other types of DBEs unnecessary. It depends, one commenter said: in some contracts in which his company had been involved, goals had been met mostly or entirely with DBEs other than suppliers.

A State-level contractors' association said that it had been told by its State DOT that it does not keep numbers on the participation of DBE suppliers vs. other DBEs, resulting in a lack of evidence that could provide a basis for a supplier limit. A national-level contractors' association said, referencing the stakeholder meeting mentioned above, that use of comments constituted rulemaking by anecdote. Moreover, it said, it had not been given the opportunity to participate in the meeting, the results of which had never been published. Another commenter noted it did not appear that the views of prime contractors or recipients had been solicited in the stakeholder meeting cited in the NPRM preamble.

Commenters who are or who represented recipients expressed concern that the proposal did not take into account the realities of their contracting activities, such as the unique characteristics of contracts, the needs associated with each contract, and the availability of DBEs relevant to the work of each contract. Two such commenters said that in their jurisdictions, there was not an excess of suppliers, one of them noting that only 20 percent of the DBEs in its directory were suppliers. Others said that the provision would not work with respect to contracts heavily involving bulk and other materials (*e.g.,* asphalt), therefore harming businesses who focus on those materials. One recipient said that there were often few DBEs to work on contracts in rural areas, making reliance on suppliers more important there.

Recipients and contractors both said that the proposal would adversely affect the ability of prime contractors to meet contract goals and of recipients to meet overall goals. Recipients' goals might have to be lowered as a result, especially when a contract did not provide significant opportunities for non-supplier DBEs. For example, one State contractors' association said that materials made up 60–80 percent of typical highway contracts in its State. On a paving contract for example, a commenter said, there might be only two or three, usually small, scopes of work that a DBE subcontractor could perform. If a contractor could count only suppliers to meet half of its goal, it would make it impossible to meet goals in many cases, commenters asserted, given what they characterize as the frequent unavailability of other types of ready, willing and able non-supplier firms. The effects of the pandemic on small business could make this problem worse, a prime contractor suggested. All this would make more good faith efforts ''waivers'' necessary, commenters said.

A few recipients expressed the concern that the proposal could increase their workload and create confusion or delays in their administration of their contracting activities.

A frequent comment opposing the proposal is that it would unfairly create financial harm to DBE suppliers. These firms have configured their businesses to meet the requirements of the existing rule, commenters said, making considerable investments in facilities, inventory, and employees. They would have fewer opportunities to work under the proposal, as the rule favors one category of DBEs over another, with the result that suppliers would lose income and could even be forced out of business. One DBE stated that it would cut their business in half.

A few comments also asked how the exception process was supposed to work. When would recipients have to go to an OA to have an exception approved, and what would be the OAs' criteria for approving the request? A commenter suggested there should be a deadline for an OA's response to a request for an exception (*e.g.,* five days). One comment suggested that the matter of exceptions should be delegated to recipients, without needing approval from an OA.

Some commenters also had suggestions for modifying the proposal. One would allow suppliers to count 50 percent of their gross sales for credit. Another suggested giving recipients flexibility to decide what level of credit (*e.g.,* 50, 60, or some other percentage) applied to a particular contract. Another suggestion was to calibrate credit according to the percentage of supplies on a contract. If supplies account for 80 percent of a contract, then the recipient would allow DBE suppliers' contribution to count for 80 percent of the goal. Another variation would be to apply the 50 percent limit with respect to commitments in the pre-award process, but then count the entire amount of actual supplier participation toward actual attainment at the end of the project.

The smaller number of commenters who supported the proposal, or at least did not object to it, said they thought the proposal fair and useful to keep open opportunities for non-supplier DBEs. Some supporters said there should be exceptions for materials-heavy contracts (*e.g.,* guardrails). Another said it could support a 50 percent limit for large contracts but not smaller contracts. A few recipients said the issue did not much impact their operations. One comment asked how the provision would apply to situations where there was no contract goal. A few comments wanted stricter limits on supplier participation (*e.g.,* 25 percent).

Regular Dealer Issues

The largest number of comments on regular dealer issues focused on the proposal that recipients have a system to make contract-by-contract pre-award decisions about whether a supplier deserved 60 percent credit as a regular dealer.

More than 20 comments, mostly from recipients, opposed the idea. Their primary objection was that implementing the proposal would be confusing, difficult, and burdensome. For example, there would be additional work for contract administrators, which could delay contact awards. Prime contract bidders would face an undue burden, as they would have to do additional due diligence to make sure that the credit they were claiming for DBE participation was consistent with the recipient's determination in each case. These determinations could be subjective and subject to challenge.

Most of the comments opposed to the proposal stated that if there was to be a determination about whether a supply firm was a regular dealer, it should be made by the UCP at the time of certification, not on a pre-award basis on each contract by the recipient. On the other hand, a commenter objected to UCPs performing this function, since it would result in a *de facto* certification of regular dealers.

A few comments supported the proposal. One comment suggested that the approval of a DBE as a regular dealer could be done as part of a recipient's good faith efforts review. Another suggested that firms could submit an affidavit attesting to its meeting regular requirements as part of the pre-award process. Another recommended that a CUF review for regular dealers consider such factors as the firm's ability to secure the items, do their own takeoffs and quantity planning, get quotes, and have distribution agreements.

On other regular dealer matters, a few commenters said that the credit awarded to regular dealers should remain at 60 percent. Some would increase the percentage (*e.g.,* to 75, 80, or 100 percent). One commenter said that regular dealers in specialized fields for items such as bridges should be able to count 100 percent. Another commenter favored 100 percent credit if the firm's workforce was predominately minority or female. One commenter said the entire regular dealer concept was outdated and should be taken out of the regulation. The commenter urged that the regulation talk about suppliers in general in a simpler way.

Other commenters requested clarification with respect to terms like keeping a ''sufficient quantity'' of materials in stock (which the commenter said could vary among different kinds of items), ''drop shipper,'' or ''specialty items.'' Another asked how a recipient could make regular decisions with respect to out-of-state firms that were certified via interstate certification. Another provided a detailed typology of regular dealers, bulk suppliers, and brokers/transaction expediters.

Commercially Useful Function

In addition to its role in determining whether a firm was a regular dealer, some comments addressed CUF decisions more generally. Two supported doing CUF reviews on all federally assisted contracts, while another thought doing so would too burdensome if applied to contracts without a DBE goal. One of these asked for more specific CUF criteria. One wanted to streamline the process by allowing a CUF review that would apply to all jobs within a year, while another commenter thought certifiers could verify CUF at the time of certification.

Recipients, not prime contractors, should make CUF determinations, one commenter said. Another added that recipients should not be able to request CUF data from prime contractors; the prime contractor should get DBE credit unless there is documented evidence of noncompliance. Another was concerned that CUF reviews and the ''running tally'' monitoring requirements could become confused with one another.

A commenter thought that prime contractors should be able to do several things to assist DBEs without running afoul of CUF requirements. These included providing specialized training through a shared superintendent or foreman, access to contract management software and back- office assistance, sharing of equipment and workers, and guarantees consistent with industry practice.

Bulk Suppliers and Supplies of Specialty Items

The 60 percent credit given to suppliers of bulk materials and specialty items is a subcategory of the treatment of regular dealers under the rule. There was a division of opinion among commenters about whether, as the NPRM proposed, these suppliers would need to have their own distribution equipment to count for 60 percent credit towards a DBE goal.

Several comments said that leasing equipment was a common industry practice among suppliers, and that suppliers should not be penalized for doing so. Being unable to lease distribution equipment would be burdensome and could make DBE suppliers uncompetitive, one comment said. A distinction based on physical delivery of products is unrealistic, a DBE supplier said, as suppliers have to do a lot of work that adds value no matter how products are delivered.

One recipient suggested that an equipment lease should be long term (*e.g.,* at least a year). Others would make allowance for a situation in which a supplier that had its own distribution equipment used a short- or long-term lease arrangement for items that are infrequently needed (*e.g.,* highway signs) or to supplement their own equipment, as needed (*e.g.,* through engaging owner-operators).

Among other comments on the subject, a few supported the proposal as written. Another raised a problem concerning what it said was a common practice of manufacturers (*e.g.,* of structural steel) shipping their products to the job site using their own trucking company. The commenter wondered whether there would be a CUF for a DBE in such a situation.

Drop Shipping and Distributors

All but a few of over 40 comments that addressed this issue opposed the NPRM's proposal, though not all for the same reasons. A mix of recipients, DBEs, and non-DBEs said that the proposal was unclear, confusing, overly complex, burdensome, and difficult to administer. Recipients do not have expertise in evaluating the validity of a distributorship agreement, some said, adding that the NPRM did not provide guidance or criteria to aid this task. It could be difficult for recipients to distinguish between those transactions counted at 40 and 60 percent, another comment asserted. One comment suggested that other factors aside, all drop-shipped goods should be counted at a fixed percentage (*e.g.,* 30 or 50 percent) to simplify matters.

Two commenters thought that, as comments had suggested about regular dealer evaluations, decisions about the validity of distributorship agreements should be made in advance, through the certification process. Monitoring would be very hard to accomplish, requiring intensive work. Recipients should have the flexibility to determine how much credit to permit for drop-shipped goods, depending on the circumstances of individual contracts, a comment said. Some commenters were concerned that the 40 percent number was arbitrary, lacking a basis in evidence.

Another theme expressed by some commenters was that drop shipping was a normal industry practice for building and construction materials, particularly in this day of just-in-time logistics. Firms that do business this way, assuming that they insure the goods and bear the risk of loss, should not be penalized by the lower 40 percent level for credit. If a firm delivers or insures the material, commenters of this view said, it should count at the 60 percent level, even if drop shipped. The proposal could make it difficult for small firms to make a profit, another said. This is particularly true, one commenter said, for made-to-order items that are not typically kept in warehouses (*e.g.,* rail ties and switches). The proposal could place DBE shippers at a competitive disadvantage compared to non-DBEs.

On the other hand, a few comments opposed any credit for drop shipping distributors, beyond fees and commissions, saying that regular dealers add more value and have more overhead costs. Moreover, a comment said, the proposal opens opportunities for fraud. Others said that distributorship was not a valid business model. In a similar vein, a few commenters suggested that a lower percentage (*e.g.,* 20 or 30 percent) should count. Another said that drop shipping credit should be permitted only for large quantities or oversized items that are difficult to store in a warehouse.

A few comments did support the proposal, though with the caveats that more guidance from DOT would be needed about what a valid distributorship agreement should look like, and that close scrutiny of such agreements by recipients would be necessary to make the concept work.

Negotiating Price of Supplies

Relatively few comments addressed the proposal to continue in effect the current requirement that, to get credit, a DBE supplier must negotiate the price of supplies, determine quality and quantity, order the materials, and pay for the materials itself. Some said that there are situations (*e.g.,* airport lighting) when the price of items cannot be negotiated. An equal number of comments supported the proposal. One of them added that a DBE should have to perform, and not outsource, all of the four required functions; otherwise, there would be opportunities for fraud and abuse. In any case, another said, recipients had to enforce these requirements strictly.

Definition of Manufacturer

A majority of the 13 comments that addressed this proposal supported it, though some asked for clarification of what constituted a ''minor'' modification of materials. Commenters asked whether activities like adding logos to uniforms, cement mixing trucks, coating rebar, or cutting materials to a specific size would count as manufacturing or minor modifications. Some comments also suggested using SBA regulations in 13 CFR 121.406 to define what constitutes a manufacturer. One comment asked that manufacturers not be subject to the proposed 50 percent limit on DBE credit for supplies provided to a project.

Other Comments

One comment said that there should be a special rule for counting disposal of hazardous materials, such as a percentage of the disposal costs. Two others said that DBE credit should be allowed for at least some of the work that a DBE subcontracts to a non-DBE, at least as long as the non-DBE is not an affiliate. Another said that brokers had a legitimate role, asking that the rule define their proper role.

DOT Response

50 Percent Limit on Credit Toward Goals for Use of Suppliers

In proposing the 50 percent limit on the counting of DBE participation by suppliers toward goals, the Department was responding to the perception of many DBEs, as well the experience of DOT staff, that prime contractors find it easier to meet DBE contract goals through obtaining supplies and materials from DBE suppliers than through using DBE subcontractors who work on projects on the ground. For example, on a highway project it can be simpler for a prime contractor to buy paving materials through a DBE supplier than to engage a DBE to install the materials. This has given rise to the concern that DBE subcontractors can be frozen out of opportunities, since goals may be able to be met without them. By limiting the portion of the goal that could be met by using suppliers, the Department hoped to keep open a significant percentage of work that would then be available for DBE subcontractors.

Nevertheless, the Department has been persuaded by the comments that this provision should not be included in the final rule. Comment periods on proposed rules are not simply votes, and in making this decision the Department is not simply responding to the numbers of comments opposing the proposal. Rather, we believe that commenters made reasonable points about the basis and potential effects of the proposal.

We find plausible the concern that if suppliers could not comprise more than 50 percent of a goal, many contract goals might not be met, resulting in higher numbers of goal attainment through documented good faith efforts instead of sufficient DBE subcontracting; this may have possible implications for overall goal attainment. This concern appears particularly credible with respect to contracts that emphasize bulk supplies like asphalt or petroleum products, or projects that may be located in parts of States or work scopes in which few DBE subcontractors may be available.

The proposed exception mechanism, as well as some of the commenters' suggestions for modifications that could be added to a supplier limit regime to provide greater flexibility, are well intended, but could easily lead to greater complexity and inconsistency in program administration. In any event, because we are not adopting the 50 percent limit provision, they are unnecessary.

Our underlying concern about ensuring that the program does not have inadvertent adverse effects on DBE subcontractors is addressed through other changes to the present rule that are adopted in this final rule. The definition of regular dealer is being strengthened to emphasize the necessity of regular dealers having facilities, inventories, and/or distribution/delivery equipment in order for 60 percent of the value of their supplies to be counted toward goals.

The new distributor definition limits to 40 percent the credit that can be obtained for many drop-shipped goods, provided the DBE bears risk for loss or damage of such items. The credit for broker and expediter participation continues to be limited to fees or commissions. These provisions should reduce the incentives and opportunities for prime contractors to over-rely on suppliers to meet goals to the detriment of other DBEs. We expect recipients to enforce these provisions rigorously and to take care, at the pre-award stage, to ensure that bidders on prime contractors do not obtain credit beyond what the provisions permit.

The Department also understands commenters' point that creating a provision that would directly benefit one category of DBEs at the expense of another category does risk being arbitrary. It is likewise the case that DBE suppliers, particularly those that are regular dealers, have a reliance interest in retaining full access to the program, and may often have made considerable investments to establish their position in the program. To limit their business opportunities could well cause them economic harm, as comments asserted, based solely on the type of work they do.

The risk of arbitrariness increases absent quantitative information to support an impression—even one based on considerable anecdotal experience—that there is a problem that such a regulatory provision is needed to solve. The Department recognizes that it does not collect information from recipients about the type of work DBEs perform on contracts. The Department proposed in the NPRM the ability to collect that information as part of recipient's required submission of the Uniform Report of DBE Awards, Commitments, and Payments. It may be that reliable data showing that DBE subcontractors are effectively shut out of opportunities to work on projects by prime contractors' over-reliance on suppliers to meet goals could make a ''market failure'' case for imposing a provision like that of the NPRM; however, without that information at the present time, the Department is declining to change the rule at this time.

Going forward, the Department will have recipient data from the updated Uniform Report of DBE Awards, Commitments and Payments regarding not only the number and dollar amount of DBEs that participated on federally assisted contracts that we currently collect, but information on the type of work performed by those DBEs as well. Depending on what such data shows, the Department may reconsider whether a limit on goal credit for DBE suppliers is appropriate.

Commercially Useful Function and Regular Dealer Issues

Finding a means of limiting potential over-crediting of suppliers, while not unreasonably limiting their participation, is an important step toward creating a well-balanced DBE program.

We believe that we can achieve this objective by having recipients pay close attention, at the pre-award stage, to how suppliers proposed to be used by a prime contract bidder can go far to avoiding over-crediting in a way well-suited to the circumstances of a particular contract.

Recipients are already required to carefully examine, before contract award, whether the bidder has committed to a sufficient number of DBEs in sufficient amounts to meet the contract goal or has submitted adequate documentation of good faith efforts. Often, however, recipients assume that DBEs committed as suppliers are entitled to 60 percent of the cost of supplies when evaluating pre-award goal attainment. The final rule requires recipients to look in detail at how a DBE supplier would provide supplies and materials to the contract to provide more certainty whether the contractor would be entitled to count 60 percent of the cost of supplies toward goal attainment during contract performance. The recipient would do so through asking a series of questions with respect to the role of a proposed DBE supplier. In so doing, it would not determine whether a DBE was, in some intrinsic sense, a ''regular dealer.'' The inquiry would not focus on the nature of the firm, but on what the firm proposed to do on a particular contract and how it proposed to carry out its responsibilities.

The Department determined that the proposed change to § 26.55 with respect to requiring bidders submitting commitments to DBE suppliers to include is better placed in § 26.53(c)(1). Thus, § 26.53(c)(1) of the final rule describes the nature of the questions and affirmations a proposed DBE supplier will provide, and the prime bidder will include in the pre-award process for each contract. This information helps the recipient to determine if the firm should be awarded 60 or 40 percent credit for supplies. For example, the recipient would ask, whether on a particular contract, the DBE supplier will be using its own distribution equipment, whether it maintain a warehouse or other facility, whether it engages in the sale of the sort of goods involved in the contract to the public on a regular basis, etc. We will also make available a form tool on the Departmental Office of Civil Rights' website.

Drop Shipping and Distributorship Issues

In an effort to address the fact that drop-shipping is a common way of doing business, we proposed that drop-shipping by a DBE that has a distributorship agreement with a manufacturer would be able to count 40 percent of the value of materials toward goals. The distributorship agreement concept troubled many commenters, both from the viewpoint of how recipients would decide if an agreement was legitimate and the fact that many, especially smaller, DBE suppliers might not have the resources to enter such an agreement. Commenters said that if a DBE supplier took enough risk, it should be entitled to credit regardless of whether it was part of a formal relationship of this kind with a manufacturer.

The Department will respond to these comments by eliminating the distributorship agreement proposal. Instead, as part of the pre-award review for firms proposing to drop-ship items, the recipient would determine whether the proposed supplier 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. Again, the Department's form tool will have questions to help recipients make this determination. If the proposed drop-shipper met these criteria, it would receive 40 percent credit for the cost of the items. We anticipate that many bulk material items may well fall into this category, if all the requirements are met.

The current rule's provisions for 100 percent credit for materials provided by a DBE manufacturer, and for credit limited to the fees or commissions for firms who did not meet the criteria for 60 or 40 percent credit, would remain the same. The Department believes that detailed enforcement of all the supplier provisions discussed above would be sufficient to prevent or limit over-crediting of suppliers, to the detriment of other kinds of DBEs, to make the proposed 50 percent cap on supplier credit toward goals unnecessary, while respecting the arrangements that may be appropriate to the wide variety of contracts in DOT-assisted programs. To make this approach work, recipients would have to ensure that bidders and proposed DBE suppliers specify and certify the details of the work that would be performed and how it will be performed, so that post-award monitoring could ensure that commitments were being met.

Other Matters

The Department adopts the NPRM provisions concerning the definition of manufacturers and the responsibility of DBEs for negotiations concerning price without change. In regard to a commenter's view that credit be allowed for work performed by a non-DBE subcontractor, such an approach is not aligned with the intent of the program. The comments regarding the disposal of hazardous materials and brokers were not proposed in the NPRM and are therefore outside the scope of this final rule. DOCR appreciates the commenters' input and will consider any information or recommendations the commenters may have on these issues.

Subpart D—Certification Standards

12. General Certification Rules (§ 26.63)

NPRM

Proposed § 26.63 of the NPRM was largely a redesignation of the material previously found in § 26.73. The one substantive change of note would be that, in place of current § 26.73(e), concerning DBEs owned by holding or parent companies, the NPRM would substitute a simpler provision saying that there could be one level of ownership above the company seeking certification. That is, there could be a subsidiary and its parent company, but there could not be a ''grandparent'' company above both of them. Eligibility in such a situation assumes cumulative 51 percent ownership of the subsidiary company and that other eligibility requirements were met. The proposal includes several examples of arrangements that would or would not be eligible under the revised rule.

Comments

There were 10 comments on this proposal; all but one favored it. The unfavorable comment expressed concern that the proposal could compromise the independence of the subsidiary firm.

Several commenters addressed the regulation's approach to certification in general. For example, some commenters asked the Department to simplify the certification process, which they characterized as a lengthy, costly, and paperwork intensive process that was an obstacle and deterrent to firms seeking to enter the program.

Other comments said that the annual submissions of a DOE and financial data were unnecessarily burdensome on both DBEs and certifiers. It would be better to require this submission only every two or three years. Moreover, in the context of the interstate certification proposal, the burden on firms would be multiplied if they had to submit a DOE to every State in which they had become certified.

Two comments suggested having independent third-party administrators do certification reviews instead of recipient personnel. Another commenter suggested better education and training about Federal and State program rules (*e.g.,* requirements for continuing education). Another commenter recommended and that the Department develop a code of conduct for certifiers.

DOT Response

The final rule adopts NPRM's proposal to limit DBEs to having one level of ownership above an operating DBE company. That is, there could be a ''parent'' company but not a ''grandparent'' company. The rule does not specify the type of business entity involved in the level above the operating company, as long as it permitted the operating company's ownership to meet certification requirements.

The final rule also retains the requirement for the annual DOE for all companies. A firm that is certified in multiple States must submit DOEs to all States in which it was certified on the anniversary date of its certification by the jurisdiction of original certification (JOC).

Given the frequent turnover of certifier personnel, and the errors in the certification process that too often come to light in the certification appeal process, it is clear that training is key to smooth operation of the certification function. This is especially true when, following the issuance of this final rule, new and changed certification standards go into effect. While we are not mandating a specific number of ''continuing certification hours'' for staff, or setting forth a standard curriculum at this time, the Department intends to make comprehensive training opportunities available to certifiers, which we expect all certifiers to take advantage of.

13. Business Size (§§ 26.65, 23.33)

NPRM

Only small businesses may participate in the DBE program. The business size limit for applicant and certified DBEs seeking to participate in FHWA and FTA assisted contracts is adjusted for inflation per the BIL. As of this final rule, this statutory gross receipts cap is $30.40 million. A DBE firm must still meet the size standard(s) appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts. These standards vary by industry according to the NAICS code(s) defined by the Small Business Administration (SBA).

The adjusted gross receipts cap does not apply to determining a firm's eligibility for participation in FAA assisted projects. This is due to a recent statutory change that eliminated this requirement for FAA assisted contracts. This means that the Department does not have the discretion to change these size standards through administrative action. DBE firms working on FAA assisted projects must meet the size standard(s) appropriate to the type(s) of work based solely on the applicable NAICS code(s) size standard(s). UCP directories must clearly indicate which firms are only eligible for counting on FAA assisted work. (There are separate size standards for the part 23 ACDBE program that are not affected by recent changes in SBA regulations pursuant to the Small Business Runway Extension Act of 2018 (Pub. L. 115–324).)

The NPRM proposed to conform the Department's rule so that a firm's compliance with NAICS code size standards would be based on its average annual gross receipts over the firm's previous five fiscal years. However, under § 1101(e)(2)(A)(i) and (ii) of the Bipartisan Infrastructure Law (BIL), only the firm's gross receipts for the most recent three fiscal years may be submitted to determine whether it meets the small business statutory size cap.

The NPRM also addressed size provisions in the ACDBE program. There would be minor changes to part 23 and a reference to pay telephone operators would be removed. The NPRM would also remove a requirement for adjusting the ACDBE size standards every two years; the preamble asked whether any change was needed at this time and, if so, what measure of inflation the Department should use. The preamble expressed concern that raising the standards could harm the chances of smaller firms trying to enter the program. It also asked whether industry-specific standards, like that for car rentals, are still needed. Finally, the NPRM added a clarification that an ACDBE that is a party to a joint venture must include in its gross receipts its proportional share of receipts generated by the joint venture.

Comments

Part 26 Standards

A significant number of commenters, from both DBEs and recipients, supported the proposal to go to a five-year calculation for NAICS code size standard compliance, though a couple of commenters would have preferred a shorter (3-year) or longer (7-year) calculation. A number of commenters, however, said that the NAICS codes limits and/or statutory size cap were themselves too low, given inflation that has particularly affected commodity prices. Several commenters advocated raising the part 26 limits to the level of the part 23 standards, or to the $39.5 million level applicable to many types of business under SBA regulations.

A few commenters recommended regional variations in the size standards. For example, in high-cost construction areas, like New York or San Francisco, size standards could be adjusted along a scale tuned to the prevailing wage rates in those areas. One commenter suggested that proceeds from COVID–19 pandemic relief legislation, like the Paycheck Protection Program, should not be counted toward a firm's gross receipts calculation. A few comments also suggested using net, rather than gross, receipts to calculate whether a firm meets size standards. One commenter said pass-through payments to subcontractors in particular should not be part of the calculation.

A smaller number of commenters stated that the regulation should eliminate size standards because they unfairly limit DBEs' growth. Several commenters recommended a mechanism that would allow mid-size DBEs to remain certified for a limited time after exceeding the size standards so that they should be able to continue their growth and success. For example, DBE credit for using a firm could be progressively reduced over a period of three years (*i.e.,* 75 percent in year 1, 50 percent in year 2, 25 percent in year 3) after it first exceeded the size limits for full DBE participation.

With respect to adjustments, commenters generally agreed with the proposal, though some pointed out that adjustment dates had been missed in the past, that stakeholders should be consulted on the subject, that industry-specific data should be used, that White-owned businesses should be omitted from the calculation, or that inflation should be used as the measure for adjustments.

Part 23 Standards

Two commenters, both from the same urban area, asked to retain a standard for pay telephone operators, lest existing contracts with such operators be adversely affected. Those commenters, who addressed the proposal that an ACDBE that is a party to a joint venture must include in its gross receipts its proportional share of receipts generated by the joint venture, approved it.

DOT Response

The Department adopts the NPRM's proposals on these issues. While we understand the objectives that supporters of regional or local standards seek to achieve, we believe that in a national program—especially one in which interstate certification reciprocity will become a reality—a single national standard is appropriate. We also do not believe that a variety of different standards would be consistent with the program's governing statutes. For example, the Department is now working under a statutory requirement for five-year averaging for NAICS code gross receipts size standard purposes, such that a different period—three or seven years—is not something we have the statutory authority to authorize.

With respect to size calculations, the final rule clarifies that certifiers should count on a cash basis, regardless of a firm's choice of accounting method. This is intended to level the accounting playing field among firms.

For part 23, because there are still some airports that have pay telephones, the final rule retains the size standard for existing pay telephone concessionaires. Similarly, the final rule retains the proposed provision that joint venture receipts be included in the ACDBE size calculation in proportion to the ACDBE's demonstrated ownership interests in the joint venture, lest the size of such firms be either overstated or understated.

14. Personal Net Worth (§ 26.68)

NPRM

The NPRM's discussion of proposed changes to the personal net worth (PNW) standard was the most complex portion of its preamble. The discussion noted the reason for having a PNW standard, namely that in its absence persons who are members of presumptively eligible groups but who in fact are not economically disadvantaged could benefit from the DBE program, undermining both the program's ability to assist persons who are truly disadvantaged and the narrow tailoring that is vital to the program's continued legal validity.

The preamble also noted the balancing act that the Department faces in setting a PNW cap. If set too high, persons who are not truly disadvantaged can participate. If set too low, socially and economically disadvantaged owners (SEDOs) whose firms have grown successful can be prematurely excluded.

PNW Cap

Since 2011, the PNW cap has been set at $1.32 million, which had been adjusted upward for inflation from the $750,000 level in its 1989 base year. As explained in the NPRM preamble, 87 FR 43636–38 (July 21, 2022), rather than make a direct inflationary adjustment, based on a measure like the Consumer Price Index (CPI), the Department employed a complex analysis based on the Federal Reserve Board's 2019 Survey of Consumer Finances (SCF), a triennial cross-sectional survey of U.S. families' balance sheets, pensions, income and demographic characteristics. The methodology accounts for differences among racial and ethnic groups (*e.g.,* White, non-Hispanic households have net worth of six to seven times that of Hispanic or Black households).

Specifically, using SCF data on household assets and liabilities allowed the Department to construct a proxy measure of PNW that is close to the how PNW is currently defined by the program but also allows consideration of the impact of removing retirement accounts from the definition of PNW accounts for the relative wealth of potential DBEs by comparing their financial position to other self-employed business owners, rather than the general public. After constructing the proxy measure of the revised PNW definition that removes retirement accounts using the 2019 SCF, the Department constructed a distribution of PNW across white, male, non-Hispanic self-employed business owners. See Table 2 of NPRM preamble. There is an apparent breakpoint between the 80th and 90th percentiles. As described in the discussion of Table 2 of the NPRM preamble, ''[t]he 90th percentile of PNW for male, White, Non-Hispanic self-employed business owners is roughly $1.60 million, which is $1.04 million higher than the 80th percentile of $0.56 million, which is in turn just $0.29 million greater than the 70th percentile.'' 87 FR at 43638. Therefore, there is a substantial jump in PNW between the 80th and 90th percentiles, making it an intuitive breakpoint between wealth groups. A 90th percentile cutoff is commonly used to describe the most wealthy group and to compare the economic position of the most wealthy group to the rest of the population.[3]

Looking to the percentile distribution of personal net worth for male, White, non-Hispanic business owners, the Department calculated that the 90th percentile PNW for persons in this category was approximately $1.60 million (in 2019 dollars). Based on this calculation, the NPRM proposed that $1.60 million be the new PNW cap for SEDOs, meaning that they could continue in the DBE program if their PNW was at the same level as a 90th percentile White, non-Hispanic, male business owner. This would mean, the preamble explained, that 92.6 percent of self-employed business owners who are women, Hispanic, or non-White would fit under the revised cap.

The NPRM proposed using changes in aggregate household net worth data published by the Federal Reserve to adjust the PNW amount in future years. Details of this approach are found at 87 FR 43639. We would make the first adjustment 180 days after the effective date of the final rule and make further adjustments at five-year intervals. The NPRM proposed that we make only upward adjustments.

[3] See Smith, Zidar, and Zwick, ''Top Wealth in America: New Estimates under Heterogeneous Returns,'' 138 Quarterly Journal of Economics 515 (2023) available at *https://economics.princeton.edu/working-papers/top-wealth-in-america-new-estimates-under-heterogenous-returns/*; Kuhn, Schularick, and Steins, ''Income and Wealth Inequality in America,'' Center for Economic and Policy Research (Aug. 9, 2017) available at *https://www.wiwi.hu-berlin.de/de/professuren/vwl/wtm2/seminar-schumpeter/hscf_cepr.pdf*; Bricker, Goodman, Moore and Volz, ''Wealth and Income Concentration in the SCF: 1989–2019'' in FEDS Notes (Sept. 28, 2020) available at *https://www.federalreserve.gov/econres/notes/feds-notes/wealth-and-income-concentration-in-the-scf-20200928.htm*; Kochar and Cilluffo, ''Income Inequality in the U.S. Is Rising Most Rapidly Among Asians,'' Pew Research Center (July 12, 2018) available at *https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/.*

Reporting

The NPRM proposed several changes affecting asset inclusion and valuation in reporting PNW. Under the proposal:

• The SEDO reports asset values without regard to community property, equitable distribution, or similar State laws. In general, title determines ownership.

• The SEDO reports assets held in qualified retirement accounts at full value but excludes them in full from the calculation of PNW.

• The SEDO may not report loans taken against retirement assets as liabilities, regardless of title.

• The SEDO continues to exclude her share of the equity in the primary residence although in some cases that share may change.

• The SEDO reports 100 percent of the value of household contents unless she and a spouse or domestic partner cohabit, in which case the SEDO reports 50 percent of total value. Total value is deemed to be a least the amount for which contents, including fixtures and appurtenances, are insured,

• The SEDO reports motor vehicle values in the proportion to which she holds title. The Department requested comments concerning how the SEDO should report, if at all, the value of leased vehicles.

• The SEDO reports at full value assets she transferred to certain related parties during the two years preceding an application for certification and in any single year following a declaration of eligibility. The NPRM clarifies which related-party transfers trigger the inclusion and adds a de minimis exception. It further clarifies which ''personal expenditures'' the SEDO may exclude.

• A natural person's signatory (not guarantor) status on a debt instrument generally determines ownership of the liability. In cases in which another party consistently makes payments on the debt, however, the certifier may determine, as it may under the current rule, that for eligibility purposes the debt does not belong to the formal obligor.

Comments

PNW Cap

Over 50 comments, not only from DBEs but recipients and other non-DBE commenters as well, supported the proposed $1.60 million PNW limit. The basic reason for their support was that the adjustment would increase opportunities for DBEs and avoid penalizing SEDOs for success. One comment suggested that, following SBA's practice, there should be separate entry and retention PNW limits for firms.

Nearly as many comments (including some of the above) said that $1.60 million was still too low a number. One common reason for this view was that the $1.60 million adjustment, based as it was on 2019 dollars, failed to keep pace with recent higher rates of inflation. Even if the proposed methodology were used, the final rule should update the number to be consistent with more recent data, they said. A commenter argued that a higher PNW number was needed to allow DBEs to compete in markets dominated by large corporations. Another noted that data from the Federal Reserve Bank of New York supported the proposition that Black and Hispanic Americans took a bigger hit from impacts on the economy of the COVID–19 pandemic and recent inflation than other persons, suggesting that this be considered in setting PNW numbers.

Other commenters' suggestions included $1.84 million (based on CPI inflation since 1989), $2 million, $2.5 or 2.6 million, $3 million, $5 million, or even $20 million. A few commenters referred to New York State's $15 million cap for its State minority and women business (M/WBE) programs. Several DBE commenters went further, advocating for the elimination of a PNW cap altogether, saying that it was ''anti-entrepreneurial'' and too limiting on firms' growth.

Using the SCF as the basis for the adjustment was problematic, a few comments said (*e.g.,* because it uses data from the male in an opposite-sex couple, the older person in a same-sex couple, or an individual, making it difficult to use the SCF to determine PNW for DBEs).

A significant number of comments advocated taking regional, or even local, differences in the cost of living and the cost of doing business into account in setting PNW limits, rather than establishing a one-size-fits-all national number. For example, one comment said, the cost of living in the New York metropolitan area was 69 percent higher than the national average. One of these made an analogy to the ''locality adjustments'' made in the salaries of Federal employees. Differences in the type of business involved (*e.g.,* have higher PNWs for types of firms, like heavy construction companies or ACDBEs) should also be taken into account.

A small number of commenters dissented from the concept of increasing the PNW number. Some said that even someone whose PNW was $1.32 million, let alone $1.60 million, should not truly be regarded as economically disadvantaged. The main reason commenters opposed the increase is that it allowed established DBEs who already get significant amounts of work to remain in the program, limiting opportunities for smaller, newer firms, especially those operated by Black or Hispanic SEDOs.

Two recipients said that they knew of few DBEs that became ineligible for their SEDOs' excess PNW, while a DBE association said that increasing the limit could risk narrow-tailoring challenges to the program. A few comments questioned the economic rationale for the NPRM's calculation or found it confusing.

Commenters generally agreed with our proposal to make future adjustments without formal rule making. While some commenters endorsed the proposed five-year adjustment intervals, others advocated more-frequent adjustments.

Several commenters questioned or opposed the 90th percentile benchmark for the adjustment. Some commenters thought that this choice was arbitrary or confusing, with no compelling rationale. Other commenters said the 90 percent level is unfair because DBEs must compete with extremely wealthy and powerful non-DBEs, and that using 95 percent might be better.

Taking the opposite point of view, some commenters thought using the 90th percentile standard could be over-inclusive, letting too-wealthy individuals into the program, undermining the concept of economic disadvantage, and risking challenges to the program based on a lack of narrow tailoring. One commenter questioned the point of having a PNW cap at all, considering the commenter's assertion that more than 90 percent of small business owners have a PNW below the current cap, and the NPRM would increase the cap and exclude retirement assets.

Reporting

Retirement assets drew well over 50 comments, with a considerably wider divergence of opinion than on the PNW number itself. Supporters of the proposal outnumbered opponents by about two to one. Supporters were primarily DBEs but included some recipients and non-DBE groups as well. Opponents were primarily recipients.

Comments supporting the proposal generally did so for the reasons stated in the NPRM. It would make SEDOs' lives fairer and the program easier to deal with, one of them said.

The most significant reason for opposition to the proposal was a concern that it would be subject to manipulation and allow wealthier SEDOs to shelter significant assets, perhaps in the millions of dollars in some cases, from the PNW calculation. This would exacerbate inequality among DBEs, disfavoring SEDOs of smaller, newer DBEs and implicitly favoring White females over minority SEDOs. The proposal would likely benefit only a few existing firms, mostly those who already get a large portion of DBE participation and open the door to firms that are not truly disadvantaged, resulting in an uneven playing field among DBEs, one recipient said.

The proposal could have unintended consequences, according to some comments, such as incentivizing transfers of assets to retirement accounts, resulting in unrealistically low PNW asset totals. In addition, comments said, the proposal could disfavor individuals who invested in real property, as distinct from financial instruments, as a means of retirement planning. Retirement savings are a part of someone's wealth, after all, another commenter noted, and should be treated as such. Excluding them dilutes the notion of economic disadvantage and could facilitate the participation in the program of people who are not genuinely economically disadvantaged. Being able to put significant sums into retirement accounts itself suggests a level of affluence that may indicate that someone is not economically disadvantaged.

Some of the opponents of the proposal, and other commenters, suggested modifications of the proposal to deal with what they saw as its problematic aspects. One suggested a $500,000 reduction in excluded retirement assets, with a 10 percent reduction of the remainder. Other comments recommended that only a portion of retirement assets be excluded, such as 10, 20, 50, or 75 percent. Another comment wanted more guidance on what constituted a retirement asset for purposes of the provision.

Commenters addressed several of the NPRM's proposed provisions regarding the SEDO's reporting of assets and liabilities for PNW purposes.

The most contentious issue in this PNW component was the proposal that SEDOs report assets without regard to State community property, equitable distribution, or similar laws or principles. The opinion among commenters was evenly divided on the subject. Supporters generally agreed with the NPRM's rationale for the proposal, some specifically citing the desirability of avoiding inconsistency among States.

A number of the opponents of the proposal were concerned that removing consideration of marital and community property laws could disproportionately favor wealthier SEDOs over less affluent SEDOs, and White female SEDOs over minority SEDOs. Opponents maintained that the proposed rule would allow a SEDO access to a spouse's wealth while artificially reducing her own reportable assets. Excluding these laws from consideration could cause problems for some States in administering the program, others said, and it would be better to retain the current rule.

If household goods are divided equally between spouses or domestic partners, a number of others asked, why should their house itself not be treated the same way? One commenter asked how the Department would treat a house that was titled in a revocable trust (which the commenter said was a common estate planning technique). The commenter suggested that it be counted in the owner's PNW calculation if the SEDO was a beneficiary of the trust for purposes of the house.

The commenters who addressed the ownership of household goods expressed a variety of concerns. Two opposed counting goods at all because doing so, or keeping the information up to date, was too complex and burdensome for applicants (*e.g.,* figuring in depreciation). Another idea was to exclude personal property up to a certain dollar limit (*e.g.,* $250,000). One said that insurance values tend to be understated, and another stated that insurance companies tend to value household goods at a certain percentage of the value of the home itself, a figure which the homeowner should be able to contest in the PNW process. Requiring a copy of the insurance policy for verification would be a good idea, two comments suggested.

Several comments suggested that leased vehicles should be treated neither as a liability or an asset, though a few other commenters thought they should be one or the other. Other comments expressed concern that vehicles, including valuable ones, could be hidden from the PNW calculation by being placed in the name of an applicant's non-disadvantaged spouse. One such comment suggested that a vehicle in a spouse's name should always be counted as part of the SEDO's assets. Two others questioned why a vehicle would be placed solely in the name of its title holder, while other personal property, like household goods, would be divided 50/50 between an applicant and a non-disadvantaged spouse.

One commenter expressed concern that attributing a debt to the signatory on a debt instrument could serve as a way for a wealthy applicant to inflate his liabilities for PNW purposes. Another asked whether a business going into default should be counted as a liability if the owner had guaranteed the loan personally, while a third asked for clarification that a firm's debt, as opposed to a personal debt, should not count as a liability for PNW purposes. Another question concerned how the rule would treat a debt entered into by a SEDO in his or her personal capacity but was being paid off by the firm. One commenter suggested that in connection with the proposal not to consider State marital property laws, having the signatory on the debt instrument determine the ownership of the liability would be a loophole that would favor applicants with non-SED spouses.

Other Comments

A number of comments propose alternative approaches. One commenter advocated not counting any of a spouse's assets for PNW purposes; another took the opposite view, suggesting that all of a spouse's assets be counted. Another said that in addition to excluding contingent liabilities, contingent assets should not be counted. Exclusions should include non-revenue producing property (*e.g.,* timeshares, vacant land) and the cash surrender value life of insurance policies should not be counted as an asset, a commenter asserted. Another comment suggested excluding encumbered assets from consideration.

One commenter suggested that the rule define the time period in which direct payments for health care, education, or celebration of significant family life events should be counted. A DBE association said, with respect to the proposed rule limiting transfers to family members or related entities, there should be an exception for transfers that were irrevocable or were pursuant to a bona fide tax planning, estate planning, family support, or similar strategy, perhaps involving a third-party professional's certification that the transfer was part of such a plan.

DOT Response

The PNW cap is an important feature, among the other eligibility criteria and standards set for the program, that helps ensure that the DBE program remains narrowly tailored. The cap prevents people who are too wealthy to be reasonably considered economically disadvantaged from participating in the program.

The PNW Cap

As explained in the NPRM, and in this final rule, the Department undertook a fresh, comprehensive approach to tailor an original analysis of wealth based on quantitative analysis. The approach in this rulemaking uses SCF data on household assets and liabilities to allow us to construct a proxy measure of PNW that is close to the how PNW is currently defined by the program and also allows us to consider the impact of removing retirement accounts from the definition of PNW. Further, it allows us to allow for the *relative* wealth of potential DBEs—by comparing their financial position to other self-employed business owners, rather than the general public. After constructing the proxy measure of the revised PNW definition that removes retirement accounts using the 2019 SCF, we then constructed a distribution of PNW across white, male, non-Hispanic self-employed business owners. See Table 2 of NPRM preamble.

In arriving at the $1.60 million proposal in the NPRM, the Department used data from the Survey of Consumer Finances (SCF), a survey conducted every three years by the Federal Reserve and U.S. Department of the Treasury. This data was specifically analyzed for business owners by race and gender to reach the proposed $1.60 million PNW threshold. The NPRM proposed to adjust that figure subsequently based on the growth in the Federal Reserve measure of total household net worth from ''Financial Accounts of the United States: Balance Sheet of Households and Nonprofit Organizations Table Z.1'' using 2019 as the base year.

Determining a threshold beyond which an individual is considered to have accumulated wealth too substantial to need the program's assistance is an exercise in judgment. Nonetheless, as explained in the NPRM and in this final rule, using the 90th percentile to identify a high level of wealth or income is a common convention used to describe economic inequality. Choosing a substantially lower threshold, such as the 80th percentile, would result in a cap that is lower than the current cap and would act to remove businesses that are currently participating in the DBE and ACDBE programs which would be an undesirable outcome for the DBE and ACDBE programs. Choosing a substantially higher threshold would risk the possibility of that the program would no longer be narrowly tailored. However, we deem the 90th percentile appropriate because based on a review of the 2019 SCF data, the mean net worth of White, Non-Hispanic households is roughly 6 to 7 times higher than for Black, Non-Hispanic and Hispanic households. Even at the highest wealth levels, the disparity exists: the wealth of the top 10 percent of White households exceeds the wealth of the top 10 percent of Black, Non-Hispanic and Hispanic households by a factor of 5.

Data from the 2019 SCF suggests that between 88.7 and 90.8 percent of self-employed business owners who are presumed to be socially and economically disadvantaged (*i.e.,* individuals who are women, Hispanic, or non-White) have PNW lower than the current PNW cap as PNW is currently defined.[4] Under the proposed cap of $1.60 million, 92.6 percent of that group would fall under the cap, an increase of 1.8 to 3.9 percentage points.

The final rule adopts a higher number than that of the proposal, not only in response to comments suggesting an increase in the cap, but also because we have modified the methodology used to establish and later adjust the PNW cap. These modifications take into account the inflation that has affected the financial situation of all Americans not only since the publication of the NPRM, but more importantly since the 2019 data on which the NPRM's calculations were based. These modifications also rely on data more recent than the data on which we based the NPRM proposal. The data, as cited in the NPRM, are a combination of households and nonprofit organizations when really only households should be considered. Additionally, by using solely the growth in net worth we are not accounting for the normal population growth. Accounting for population growth is necessary to obtain a figure that represents the average wealth per household rather than an aggregate. Consequently, for purposes of the final rule, the Department has made two adjustments. The first adjustment is a change in the dataset to the ''Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h),'' effectively removing nonprofit organizations from the net worth calculation. The second adjustment is to normalize household net worth by the number of households as calculated by the Census (Families and Households, Total Households [TTLHH].[5])

With these adjustments and using 2022 data rounded to the nearest thousand, we have set the current PNW limit at $2,047,000. This takes inflation into account and, as in the past, includes in the calculation the most common forms of wealth (*e.g.,* an owner's personal and shared assets, real estate and trust assets, cash and cash on hand, the value of outside businesses, life insurance policies). We have determined that rounding to the nearest thousand is more appropriate than rounding to the nearest ten-thousand (as we do for the statutory gross receipts cap in § 26.65(b)) because of the relative difference between these two caps (the current gross receipts cap is $30.40 million, effective March 1, 2023). It also takes into account the fact that the population of business owners has greater net worth than the overall population. PNW is now, and always has been, a relative concept: how does the wealth of business owners in presumptively economically disadvantaged groups relate to that of business owners generally? With this in mind, we believe that this number effectively meets the objectives of allowing businesses to grow; establishing a PNW limit based on current and relevant data; and ensuring that the program remains narrowly tailored by not creating eligibility criteria that are overbroad.

The Department will use the data discussed above in connection with establishing the current PNW to make future adjustments to the PNW cap, which will be made every three years. We do not believe this will result in a substantially higher amount based on our assessment of the likelihood that the datasets described above will produce large jumps in net worth. An adjustment on a more frequent basis, though favored by some commenters, will not be made because of the issues it may cause in the certification and decertification processes. The Department will post the adjustments on the Departmental Office of Civil Rights' web page. Each such adjustment will become the currently applicable PNW cap for purposes of this regulation.

Reporting

The Department adopts as final the general rule that community property,

[4] The range on this estimate is the result of lack of information in the SCF on how to appropriately adjust the current balances of retirement accounts for early withdrawal penalties and taxes. The lower end of the estimated range (88.7 percent) assumes that the entire balance of retirement accounts is counted toward the PNW cap while the upper end (90.8 percent) assumes that no portion of retirement account balances are counted toward the PNW cap. The Department believes that the true value is likely closer to 88.7 percent than 90.8 percent because the deduction for early withdrawal penalties and taxes is likely to be less than 50 percent, but a more precise estimate is not possible with the available information.

[5] *https://www.census.gov/topics/families/families-and-households.html.*

equitable distribution, and similar laws or principles have no effect on the SEDO's PNW reporting. In most cases, the new provisions either produce the same result or work in the firm's favor. The Program and its stakeholders will benefit from burden reduction and more-consistent, predictable, equitable results.

The final rule adopts the NPRM's proposal to exclude retirement assets in full. We believe that saving for retirement is crucial to wealth creation. We do not think it is appropriate to make it harder for eligible firms to become and remain certified, simply because their SEDOs are planning for their retirement.

We note this rationale mirrors SBA's 8(a) program, which eliminated the counting of these assets for PNW purposes in 2020. (91 FR 27650 (May 11, 2020)). As SBA opined, this accords with the valuable public policy of incentivizing, rather than punishing, saving for retirement; and expands the pool of potential eligible participants ''because retirement-age small business owners will no longer be ineligible solely due to their retirement savings.'' (*Id.* at 27651).

We understand the concern some commenters expressed that wealthier SEDOs could stay in the program longer by sequestering assets in retirement accounts, to the detriment of smaller, newer DBE firms. A certifier's continued ability to rebut an owner's claim of economic disadvantage will help prevent this. That backstop, reworked in revised provisions in § 26.67(c)(2), is an important mechanism to prevent wealthy individuals from gaming the PNW calculation rules and ensures that the program remains narrowly tailored. As explained below, the rebuttal provisions are meant for situations in which a reasonable person would not consider the individual to be economically disadvantaged.

Under § 26.67(c)(2), certifiers may consider assets and income, free use of them or ready access to their benefits, and any other indicators of non-disadvantage that the certifier considers relevant. The provision states that there are no asset (including retirement assets), income, equity, or other exclusions and no limitations on inclusions. Several commenters seem to have understood that the current and/or proposed rules permit the SEDO to exclude the entire value of the primary residence. They do not. Under either rule, the SEDO excludes only his share of the equity in the home. Under the proposed rule, transferring title to a spouse reduces the SEDO's PNW exclusion to zero, and that result is consistent across all States, regardless of the potential application of community property rules in some States, under the old rule. The Department adopts the rule as proposed, with modifications to clarify that the marital/community property change applies to all PNW reporting, not simply to the exclusion of equity in the primary residence. The new rule clarifies and refines but does not change the general rule that actual ownership, normally denoted by title, determines PNW reporting. We disagree with the commenters who opine that the old rule, the effect of which varied by jurisdiction, is preferable to the proposed rule. Under either regime, the SEDO may transfer title to avoid reporting all or part of an asset's value. The final rule makes the result more predictable, and it levels the playing field nationwide. Anti-abuse rules address transfers that have an evasive effect.

Other, targeted NPRM provisions attempt to resolve smaller, thornier issues with bright-line solutions that should ease administration and compliance. We finalize the rule that attributes 100 percent of personal property in a SEDO's primary residence to the SEDO unless the SEDO shares the residence with a spouse or domestic partner. Determining aggregate value is difficult enough; we do not believe it is an effective use of certifiers' or owners' time to pick through property item by item to determine individual ownership and value. In most cases, the value of personal property is not of sufficient magnitude to pierce the PNW ceiling. We adopt the 50 percent/100 percent rule for ease of administration and to curb some of the abuses that concerned commenters.

PNW reporting for leased vehicles is another case in point. We agree with the plurality of commenters that opined that a leased vehicle is neither an asset nor a liability. Thus, the final rule states that leased vehicles should not be reported at all.

We retain the ''two-year transfer'' rule and adopt as final the changes proposed, again with clarifying edits in response to comments. The broader proposition, that substance trumps form when the asserted transaction, fact, or circumstance is unreal or abusive, remains in effect. The final rule so provides in, for example, sections 26.68(c), 26.69(c)(3)(ii), and 26.69(g)(1) and (g)(2). All of these iterations are anti-abuse rules that apply across the entirety of subparts D and E. We encourage certifiers to make use of them when circumstances warrant.

15. Social and Economic Disadvantage (§ 26.67)

In this section, because the overall topic contains several important subtopics, we have organized the material around the subtopics, with discussions about the NPRM provision, comments, and DOT response pertaining to each individual subtopic.

As a general matter, the final rule notes that Congress continues to recognize present-day discrimination and the ongoing effects of past discrimination against members of certain groups who seek to participate in DOT-assisted contracting opportunities. Under the DBE regulation, members of those groups are rebuttably presumed socially and economically disadvantaged. A certifier's ability to rebut the presumption is a key ''narrow tailoring'' feature because it prevents the DBE program from being overinclusive. We make clear that questioning the owner's claim of membership in one or more of the groups whose members are presumed disadvantaged is a separate process from rebutting a presumption of social and economic disadvantage. The former requires the applicant to bear the burden of proof to demonstrate that they are a member of a presumed group. The latter requires the certifier to bear the burden of proof to demonstrate that even though the owner is a member of one or more of the presumed disadvantaged groups, they are not, in fact socially disadvantaged.

Group Membership (§§ 26.5, 26.63, 26.67)

NPRM

The general rule in the regulation is that all an applicant needs to claim membership in a group whose members are presumed socially and economically disadvantaged is to check the appropriate box or boxes on the Uniform Certification Application (UCA) and submit a signed Declaration of Eligibility (DOE). We reminded certifiers that this is the *only* evidence of membership owners must provide at the time of submitting the UCA. An exception is that owners claiming Native American status must also provide proof of enrollment in a federally or State-recognized Indian Tribe, or proof that the individual is an Alaska Native or Native Hawaiian. We explicitly stated that certifiers must not question an owner's claim of group membership as a matter of course, as doing so unduly burdens applicants and contravenes the rule itself. The NPRM retained the requirement that when questioning an individual's group membership, a certifier ''must consider whether the person has held himself out to be a member of the group *over a long period of time* prior to application for certification . . . .'' (italics added). Without that requirement, a White male (for example) could suddenly discover he has Black genetic ancestry and apply for DBE certification based on that recent discovery—even though he has never held himself out as Black, and he would likely have no evidence that the Black community regards him as a member of the Black community. Because of confusion expressed by certifiers and applicants alike, the Department proposed defining ''a long period of time'' as a period of at least five years, marking the first time the Department ever proposed a specific number.

The NPRM placed timelines/deadlines in § 26.67 to ensure that neither certifiers nor applicants unduly delay the process of questioning group membership. We also proposed allowing a firm whose owner's claim of group membership has been rebutted to submit a claim of the owner's individual social disadvantage at any time under § 26.67(d) (§ 26.67(e) in the final rule), without regard to the waiting period in § 26.86(c). A certifier would not be able to require the individual to file a new application; the individual would be permitted to simply amend the original application.

Comments

The majority of comments addressed evidence of Native American group membership and the proposed minimum 5-year time frame for ''holding oneself out.''

Given that the DOE is the only evidence of group membership an individual must submit with the UCA, some commenters asked whether, and how, certifiers could obtain proof of enrollment in a federally or State-recognized Tribe from an individual claiming Native American group membership. One commenter asked about State-recognized Tribes in the context of interstate certification, as not all States recognize the same Tribes. One commenter suggested that Native American-owned and tribally owned firms be afforded the same exceptions from some certification requirements provided to Alaska Native Corporations.

Of the 15 comments addressing the ''holding out for a long period of time'' proposal, 10 supported implementing a minimum five-year requirement. One commenter asked when the five-year period started to run (*e.g.,* from someone's first application, a current application?). Some commenters asked for clarity on how to apply the ''holding out'' provision and examples of evidence. Opponents said that five years is too short a period to meaningfully demonstrate that an individual had held themselves out to be a group member. One commenter suggested 10 years. Another suggested that ''since adulthood'' would be a better criterion.

A few commenters sought clarification about the definition of a ''well-founded reason'' for questioning an individual's claim of group membership. Two commenters asked for guidance on how to handle situations involving a transgender person or one whose gender identification is inconsistent with that on her/his/their birth certificate. One commenter noted that looking into someone's claim of disadvantage could run up against the shortened time frame for issuance of a certifier's decision on an application.

DOT Response

The regulation's general rule is that all an applicant needs to do to claim membership in a group whose members are presumed SED is to check the appropriate box(es) on the UCA and submit a signed DOE. However, an individual claiming membership in the Native American group must also provide proof of enrollment in a federally or State-recognized Indian Tribe, or proof that the individual is an Alaska Native or Native Hawaiian. Examples of proof of Tribal enrollment include, but are not limited to, a Tribal identification card, or a letter from a Tribal leader. We recognize that Alaska Natives and Native Hawaiians do not necessarily possess Tribal enrollment documents. Certifiers must verify government-recognized documentation submitted by Alaska Natives or Native Hawaiians, such as enrollment documents from the U.S. Department of the Interior or a State agency. The final rule amends § 26.67(a)(2) to reflect that requirement.

The Department continues to give certifiers latitude in determining whether there is a well-founded reason to question someone's claim of presumptive group membership. We also continue to emphasize our view that a well-founded reason must not be a mere suspicion or a bare expression of a certifier's opinion. Certifiers must continue to fully explain the basis for the well-founded reason and reference specific evidence in the record. Without that, an individual cannot meaningfully respond.

People who are members of the regulation's designated groups are presumed to be disadvantaged because members of those groups have, historically and currently, suffered from discrimination and its effects. If someone has not identified as, or been regarded as, a group member for long enough to have suffered these effects, they are not someone whose situation is intended to be remedied by participation in the program.

The final rule does not include a definition of ''long period of time'' in order for certifiers to consider the full context of an individual's claim of group membership. Specifying a rigid time period could be subject to manipulation by an applicant who continues to assert a clearly invalid claim of group membership for many years. Members of the regulation's designated groups are presumed to be disadvantaged because members of those groups have, historically and currently, suffered from discrimination and its effects. If someone has not identified as, or been regarded as, a group member for long enough to have suffered these effects, they are not someone who is intended to have the presumption of disadvantage.[6] By not including a definition of ''long period of time,'' we preserve the ability of certifiers to consider a persons' claim of group membership and to demonstrate such by a preponderance of the evidence.

Lastly, the procedures for questioning the membership of a transgender individual, or one whose gender identification is inconsistent with that on the individual's birth certificate, are the same as questioning the group membership of any other individual. If, after a proper inquiry, a certifier rebuts a transgender individual's membership in the ''female'' group, the certifier must deny the application and inform the individual of the right to apply under § 26.67(e) (individualized showing of disadvantage) at any time and of the right to appeal to the Department. This scenario differs from an instance in which a person does not check the box for ''female'' and instead writes ''transgender'' after checking the ''other'' box. In that instance, a certifier must inform the person that ''transgender'' is not a group whose members are presumed SED and explain the option of applying under § 26.67(e)

[6] The Department has acknowledged, even as far back as the 1999 final rule preamble, that commenters have wanted further definition of what ''a long period of time'' means. As we stated then, we believe ''it would be counterproductive to designate a number of years that would apply in all cases, since circumstances are likely to differ. The point is to avoid ''certification conversions'' in which an individual suddenly discovers, not long before the application process, ancestry or culture with which he previously has had little involvement.'' 84 FR 5116 (Feb. 2, 1999).

to demonstrate SED status on an individualized basis.

Evidence and Rebuttal of Economic Disadvantage

NPRM

The NPRM proposed eliminating the six ''ability to accumulate substantial wealth'' (AASW) factors by which a certifier could rebut an owner's presumed economic disadvantage, because the Department witnessed the significant extent to which certifiers and firms inappropriately treat the six factors as a checklist of required criteria and treat the examples' numbers as floors or ceilings.

We proposed bringing the ''reasonable person'' standard from the preamble to the 2014 regulation into the regulation itself, just as we moved AASW from guidance into the regulation in 2014. Via a § 26.87 proceeding, a certifier would bear the burden of proving, by a preponderance of the evidence, that a reasonable person would not consider the individual to be economically disadvantaged even though the individual's PNW did not exceed the regulation's limit. Among the evidence that could be considered are ready access to wealth, income or assets of a type or magnitude inconsistent with economic disadvantage, a lavish lifestyle, or other circumstances that economically disadvantaged people typically do not enjoy. Liabilities and the kind of asset exclusions used in PNW calculations would not be taken into account as part of this determination.

Comments

Most commenters opposed our proposal to replace the AASW factors with a ''reasonable person'' evaluation. About 30 comments, primarily from recipients but also including some DBE and non-DBE firms, said that it was too vague and subjective. It could lead to inconsistent and arbitrary results and could let in people who should not be in the program. It left too much discretion to the personal opinions of certifiers, leading to conscious or unconscious bias, or a certifier's dislike of a particular firm, being able to affect decisions.

More than 20 commenters (there was some overlap with the first group) advocated retaining either the existing six guidance factors or some other factors more concrete than a reasonable person standard. Many of these comments suggested modifications to make something like the existing provisions work better, such as more guidance. One subject suggested for guidance is how certifiers should look at situations involving S-corporations or LLCs, where business income is passed on to an individual's personal return, enlarging the SEDO's AGI. Some said, given inflation, the AGI criterion should be increased to $400,000–$500,000. Others recommended stronger language to prevent single-factor evaluations using the criteria, or that more than one factor should always be used.

A smaller number of commenters supported the proposal, favoring the ''big picture'' approach of the NPRM. One recipient said it already used a holistic approach successfully. One of the supporters commented favorably on what it regarded as the NPRM's simpler approach to the issue. Another wanted the certifier to have to prove its case under the proposed approach by the clear and convincing evidence standard. One comment was concerned about the proposal's subjectivity but said the current six factors were worse. It asked that the Department not provide guidance that made decisions on rebutting disadvantage harder for certifiers.

Two comments said that evaluations under the section exclude spouses' assets, while another thought those assets should be included.

DOT Response

The Department's final rule about rebutting economic disadvantage helps ensure that the DBE program remains narrowly tailored and strengthens current safeguards that prevent firms owned by individuals who cannot fairly be viewed as economically disadvantaged from participating in the program. Rebutting an owner's presumed economic disadvantage inevitably requires certifiers to make a judgment call about whether an owner can be reasonably considered economically disadvantaged. We make final our proposal to eliminate the AASW framework and shift the analysis from a list of specific criteria to a ''reasonable person'' evaluation.

By giving certifiers the ability to make judgment calls, we believe that we place them in the best position to achieve this objective, without needing to engage with factors that, while intended as suggestions, were too often taken as strict regulatory criteria. Retaining and/or revising some or all of the existing factors, as some commenters suggested, will not solve the problem and might inadvertently create additional complexity. We understand commenters' concern about decisions on this matter becoming too subjective. That is why, and consistent with prior final rules, certifiers must articulate, in writing, a detailed explanation and not simply make a conclusory statement.

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

NPRM

The Department proposed eliminating its guidance in Appendix E and adding flexible, less prescriptive requirements into the regulation itself. An individual seeking to demonstrate SED status on an individual basis would still have to prove, by a preponderance of the evidence, that he experienced social and economic disadvantage within American society and without regard to the individual's personal characteristics.

Comments

Of the more than 20 comments that addressed this issue, a majority opposed the NPRM's proposal, saying that it was too subjective. It gave certifiers too much discretion, left open the possibility of inconsistency and bias, and might help ineligible firms to obtain certification. Most of these commenters favored retaining the guidance or something like it. A smaller number of commenters favored the proposal for the reasons stated in the NPRM preamble, with two asking for more examples to help certifiers.

DOT Response

We adopt proposed § 26.67(d) with modifications in response to the comments. We believe that the changes provide clearer guidance to certifiers and business owners. The final rule removes the lopsided and, in some cases, insurmountable burdens that the previous rule and guidance imposed and curbs the excesses they enabled. The rule simplifies, specifies, and streamlines. It substantially levels a skewed playing field for owners, which should result in more accurate determinations and the more efficient administration of the certification process.

The final rule reunites the social and economic aspects of ''disadvantage,'' which are intrinsically linked, and explicitly identifies the three elements that the owner must demonstrate. Although the substance deviates very little from that of the superseded guidance, the final rule concisely identifies the ''what'' and the ''how'' and does it in plain language. The rule clearly specifies the criteria that an owner must satisfy, and the kind of evidence that he must present, to show that the negative effects of discrimination (social disadvantage) caused economic hardship.

The final rule, as did the previous provision, requires a degree of subjectivity because each owner presents unique facts and personalized experiences. The checklist approach of the superseded appendix was ill-suited to the evaluation. Although the final rule is less rigid, it continues to require robust proof of individual disadvantage. We are confident that certifiers will evaluate the evidence fully and objectively, in accordance with the restated, simplified criteria, and thereby ensure that only eligible firms become certified.

The reauthorization of the DBE program in successive Congressional reauthorizations, including the Bipartisan Infrastructure Law, demonstrates Congress' intent to facilitate the participation of social groups that have experienced past, and continuing, discrimination in federally assisted contracting. The final rule safeguards against certifiers imposing undue requirements on individuals that are not presumptive group members. The rule focuses solely on essential requirements, ensuring fairness and clarity in the certification process. This matches Congress' and DOT's objective to remove barriers and facilitate certification of eligible firms.

The Department's final rule adopts in full our NPRM proposal for the reasons given there. As with evaluating the SED status of an individual claiming membership in one of the groups whose members are presumed SED, evaluation of an application under § 26.67(e) inherently requires certifiers to make a judgment call. In doing so, certifiers must not simply rely on the quantity of examples of disadvantage an owner provides; rather, certifiers must focus on the *quality* of the evidence presented. Applicants have to submit a personal narrative detailing the experiences that demonstrate the social and economic disadvantages they have had to contend with. While applicants bear the burden of both production and persuasion with respect to all elements of certification, certifiers must holistically evaluate all presented evidence before making a determination.

We reiterate that an owner need not have filed a complaint of discrimination as a prerequisite of claiming social disadvantage. Nor must an owner produce corroborating evidence, as such evidence may not exist. The final rule merely levels the field by removing what amounts to a higher burden than ''preponderance of the evidence.'' [7] The owner still must make his case, and the certifier may disregard a claim of social disadvantage where the individual presents evidence of discriminatory conduct but does not connect that conduct to negatively impact on his own entry into or advancement in the business world. On this point, the Department is following SBA's guidance that individuals need to provide ''a complete picture, or additional facts that would make an individual's claim of bias or discriminatory conduct more likely than not.'' [8] Like SBA, certifiers should not intend as a matter of course, to disbelieve an applicant but should continue to rely on the affidavits and sworn statements, as long as those statements clearly establish an instance of social disadvantage.

Appendix E is modeled after several, but not all, SBA requirements. When it was first introduced by the Department, we modified our guidance to make it fit our needs because of the differences between the two programs. Appendix E was intended by the Department to be guidance only, yet recipients used it to impose rigid, prescriptive requirements that too often excluded meritorious applicants who, by any reasonable standard, proved their SED status. Nonetheless, certifiers found them ineligible because they did not produce a specific type of evidence, in sufficient volume, of each of the several ''required'' varieties. In some cases, the evidence (*e.g.,* corroboration of malign intent) does not exist; in others, it cannot be obtained. For example, researching and compiling data about other firms in the same or a similar line of business with which to compare the individual's circumstances is well beyond the means of an owner of a small business seeking DBE certification. Competitors tend not to publish information concerning capital, net worth, access to credit, etc. As stated in the NPRM preamble, we believe that this is inequitable. The rule at § 26.67(a) aligns with the Department's surface authorization requirement to follow SBA's definition of members of groups deemed socially disadvantaged; and § 26.67(d) retains SBA's regulatory requirements that a person who is not socially disadvantaged must make an individual showing of disadvantage. To do so, § 26.67(d) requires an owner to identify at least one objective distinguishing feature (ODF) that resulted in racial, ethnic, cultural, or other prejudice against him personally and describe with particularity how the ODF caused personal social disadvantage. The owner may provide evidence related to the owner's education, employment, or any other evidence the owner considers relevant.

16. Ownership (§ 26.69)

The NPRM proposed changes that would streamline the ownership rules and make them easier to understand and administer. The proposal retained the essential substantive elements of the 2014 rule but recast them in simpler language. It distilled from the multitude of prescriptive ''real, substantial, and continuing'' (RS&C) rules a few general principles and set those out as the main components of ownership. Sub-rules fleshed out the framework. The Department's overall goal was to make certification easier to obtain, maintain, and monitor.

The proposed rule employed a new term, *Reasonable Economic Sense* (RES) as its rationalizing principle. RES, like RS&C in the 2014 rule, was to be a touchstone, shorthand, and umbrella for the underlying concepts and operating rules. We intended for the term to signal flexibility, a common-sense focus, and tighter alignment with small business realities.

Reasonable Economic Sense (RES)

NPRM

The NPRM replaced the term RS&C with RES in describing the rule's unifying principle or overarching requirement. The proposal restated the 2014 rule's essential requirements and organized them more logically. At the top analytical tier, the proposed language simplified and clarified the rule's main components; it changed nomenclature and emphasized more than substance. For example, ''proportionality'' (broader, less rigid, more clearly defined) replaced the 2014 rule's ''real,'' ''substantial,'' and ''commensurate with'' language. The changes gave certifiers more latitude than they believed they had before, to encourage them to consider firm-specific facts without undue regard for technical disqualifications. Similarly, the proposal gave owners more control over how to structure their businesses' ownership. Proportionality does not require exactitude. Owners have latitude up the point at which the benefits and burdens of ownership are ''clearly disproportionate'' or ''undue.'' While the proposed rule described the

[7] SBA uses the preponderance of the evidence standard as well in its eligibility standards. In its final rule, SBA addressed the Supreme Court's decision regarding the DBE program (Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), which requires programs to provide a race-based remedy to be ''narrowly tailored.'' SBA noted that the Department of Justice recommended the ''preponderance of the evidence'' standard for government-wide disadvantaged business programs; and therefore, based its ''preponderance of the evidence'' standard accordingly. See 63 FR 35728 (June 30, 1998). The Department follows this standard.

[8] 81 FR 48569 (Jul. 25, 2016).

ownership requirements in plainer, more accessible language, the animating theory remained: substance prevails over form.

Comments

Commenters supported the NPRM's overall approach, including the rule's substantive provisions, by a wide margin. Supporters often cited increased flexibility and the likelihood of better outcomes. However, a sizable majority of all commenters specifically opposed RES. They faulted the term for vagueness, subjectivity, the potential for inconsistent results (*e.g.,* disfavoring WBEs), and the possibility that front companies could become certified more easily. While some of the commenters opposing RES wanted to retain the existing rule, most requested more definitions, guidance, and examples.

DOT Response

Our objectives in promulgating the proposed and final rules are to simplify, clarify, and modernize certification standards; give firms and certifiers more flexibility; and promote consistent, fair results. We intended for RES to capture in a single, overarching term the essence of the DBE ownership standards, as simplified and clarified. The comments, however, persuade us that RES is unhelpful, and on further reflection, we see no need for an overarching term. We therefore delete all references to RES.

The comments also prompt us to explain key concepts and rules more thoroughly and to add substantially more situational guidance and examples. We adopt proposed § 26.69, with these additions and edited for clarity.

We believe that the final rule reduces burdens, increases understanding, and promotes equity.

Investments

The regulation frames ownership in terms of ''investments'' and provides detailed guidance on which investments in ownership make a firm eligible for certification. Investments are the mechanism through which the rule applies. If the SED owner (SEDO) makes no investment, an insignificant one, or one that is disproportionately low, the firm is ineligible.

Purchases, capital contributions, and gifts are investments if they meet specified standards, including proportionality consistent with the owners' relationships and the business's circumstances. Investments must have real economic effect. The SEDO must have parted irrevocably with (her own) cash or with a combination of cash and tangible or real property. She must stand to lose the entire investment if the business folds. In colloquial terms, the SEDO must have real ''skin in the game.''

Rules for Acquisition, Proportionality, and Maintenance

Section 26.69(b) retains the proposed rules for acquiring and maintaining ownership interests. In all cases, the principle of proportionality applies. The SEDO's investment to acquire ownership must be substantial, and it must include a significant cash component.

Example 1. SEDO contributes $51 to acquire 51 percent of Newco. The cash outlay is insubstantial, and the capital contribution is therefore not an investment. Newco is ineligible for certification.

Example 2. SEDO contributes $5,100 in exchange for 51 percent of Newco, which does not yet operate any business. Regardless of whether $5,100 is a substantial outlay, Newco is ineligible under § 26.71(a), which requires that an applicant have business operations.

Example 3. SEDO purchases 60 percent of Opco for $30,000 cash. Assuming that the outlay is not clearly disproportionate to value, and the SEDO does not reap benefits or shoulder burdens clearly disproportionate to those of other owners, Opco is eligible on ownership grounds.

Example 4. SEDO contributes a truck worth $60,000 to Haulco in exchange for 100 percent ownership. Without a significant cash contribution, Haulco is ineligible.

Example 5. SEDO buys 80 percent of Opco from Founder, who is retiring, for $8,000. Opco has run at a small net loss for the last 2 years but was profitable in several preceding years. Opco has generated over $3 million of revenue in each of the last four years. Opco is probably ineligible because $8,000 is unlikely to be proportional to the value of 80 percent of Opco.

Example 6. SEDO pays $55,000 to buy 60 percent of the stock of Oldco from Founder, who was Oldco's sole owner. Oldco's book (net asset) value is $100,000. Since there are no other, recent stock sales or other persuasive evidence of fair value, Oldco is probably eligible because $55,000 is not ''clearly disproportionate'' to the value of the shares purchased.

''Proportionality'' requires that the SEDO not derive disproportionate benefits or bear disproportionate burdens of ownership. The SEDO may not make a conditional or revocable investment, and once made, the SEDO must maintain the investment. ''Maintain'' means both that the SEDO not withdraw her investment and that she keep her investment proportional to those of other owners.

Purchases and Capital Contribution

A purchase is an investment when the consideration is exclusively monetary and not a trade of property or services. A capital contribution is an investment when the owner contributes cash, tangible property, realty or a combination of these assets. Contributions of time, labor, and services (*i.e.,* called ''sweat equity'') are never investments.

We exclude as unhelpful our proposal concerning contributions of expertise, even though we received no comments about it.

Gifts

NPRM

The NPRM provides that a gift is an investment only if the transferor becomes uninvolved with the applicant or DBE in any capacity and in any other business that performs similar work or contracts with the firm other than as a lessor or supplier of standard support services. This language is a condensation and simplification of current regulation §§ 26.69 (h) and (j). The NPRM removes the prohibition on the transferor's involvement with a non-DBE firm in a similar business; adds the contracting restriction and a documentation requirement; and removes as unwieldy, unnecessary, and unfair the paragraph (h) presumption of non-ownership, two-pronged rebuttal (one wholly unrelated to ownership), and heightened burden of proof.

Comments

One commenter supported the proposal, while another opposed allowing gifts to be considered toward ownership at all. A third opposed the proposal that a non-SEDO providing a gift to a SEDO would have to become uninvolved with the company. It could be a good thing for the business if the non-SEDO could stay involved, the comment asserted. Another expressed the concern that, under the proposal, someone could acquire ownership solely on the basis of a gift.

DOT Response

Paragraph (e) of the final rule replaces paragraph (h) of the 2014 rule. The new rule eliminates the more complex two-prong test and heightened burden of proof of the former paragraph (h), which has proved confusing in practice. Under the final rule, when a non-disadvantaged person gives an ownership interest to a disadvantaged person, the gift is the donee's ''investment'' for certification purposes only if the donor becomes completely uninvolved in the business or any that contracts with it. Unless or until that happens, the firm will not be eligible for certification and will remain ineligible until the donor severs all ties. Of course, if other SEDOs own 51 percent of the firm without the donee's contribution, the firm could be certified.

We acknowledge that there are often good reasons for a former, non-disadvantaged owner and a new, disadvantaged owner to work together during a transition period, but we remain concerned that permitting such arrangements across the board presents risks to program integrity. However, we believe that the prohibition on the donor's involvement in similar businesses is unwarranted. Although removing that prohibition marginally increases risk of program abuse, other provisions of the regulation curb those risks. As this restriction may discourage transfers that benefit SEDOs and their businesses, we adopt the proposed rule but strike the ''similar business'' proviso.

Loans and Debt-Financed Investments

NPRM

Under the NPRM, a SEDO may finance all or part of an investment in the company, including a purchase from a third-party owner. In that case, the company is eligible only when the SEDO has paid at least 15 percent of her total investment from her own funds. The firm may not be a party to the loan, and its property may not serve as collateral. The firm is eligible only if the SEDO meets this requirement before the firm applies for certification.

Comments

One commenter proposed raising the 15 percent requirement to 35 percent, since the higher floor would demonstrate a greater stake in the business. Another commenter opposed the 15 percent requirement as unwarranted because it could impair the ability of younger owners to become certified. Others suggested that, instead of naming a percentage, the rule should require a ''commercially reasonable portion of total investment'' to come from a SEDO's own resources or that repayment be consistent with the terms of the loan agreement, if consistent with industry standards. Another commenter opposed prohibiting the use of a firm's property as collateral for a loan to the SEDO claiming the investment.

DOT Response

We adopt the debt financing rules as proposed, move them into a new § 26.70, and respond to comments by breaking the definitions into smaller components, reordering the rules for clarity, and adding multiple examples. We do not raise the 15 percent self-funding requirement because we believe that a higher percentage would be too exclusionary.

We move these rules to emphasize a crucial distinction that the 2014 rule did not articulate effectively. While a SEDO may make an investment using funds from a debt, meeting the requirements of this section, the *loans themselves are not investments.* This rule applies regardless of who the creditor and debtor may be. The rule is that, subject to the conditions specified in §§ 26.69 and 26.70, the owner ''invests'' only when she *contributes the loan proceeds* to the firm or uses them to purchase an ownership interest.

To further explain the distinction and the rationale for it, the SEDO's ''contribution'' of her debt to the company relieves her of the obligation to repay. Such a transaction is the opposite of an investment: the owner has parted with nothing but a liability, the firm receives no capital, and the firm must *pay out* its own capital to repay the owner's debt. A loan *from* the company is not an investment because the firm cannot contribute capital to itself or buy shares from itself for itself. (Treasury stock is already treasury stock; the asserted transaction is as fictional as it is unnecessary.) Nor may the SEDO use the company's property to secure her loan: a different rule would effectively nullify the general rule that a loan from the company is not an investment. Given this treatment of the owner's debt, a mere guarantee is not an investment.

Section 26.70 also requires regular, level payments of principal and interest over the term of the loan at least until sufficient principal has been repaid to make the owner's out-of-pocket expenditure at least 15 percent of the total investment. Related rules ensure the integrity of the rule's limitations.

Curative Measures

NPRM

Proposed revisions to § 26.69 would adopt by regulation the memorandum that the Department issued on August 7, 2019. Applicants can take curative measures to correct impediments to eligibility, as long as they are legitimate, accurately reflect relevant facts, are made in good faith, and are not prohibited in the regulation.

Comments

A strong majority of comments supported the NPRM proposal. Several commenters said this was a practice they already followed. Some of these comments suggested that the use of curative measures should be limited to minor administrative matters rather than serious issues concerning the organization or structure of a business. Opponents were concerned that the provision would allow firms to circumvent the rules or put certifiers in the position of ''coaching'' applicants on how to get certified.

DOT Response

The final rule adopts the proposal, essentially for the reasons explained in the NPRM preamble. It will encourage recipients to catch problems that often unwittingly lead particularly new, inexperienced, but otherwise potentially eligible firms into mistakes that result in denials and the application of a waiting period before the firm can try again. We believe that certifiers can exercise sound judgment concerning the kinds of matters on which they can usefully assist such firms. We do so with the safeguard that, like all actions by participants in the program, abusive or sham actions are prohibited. When part or all of a transaction or series of transactions involved with the certification or participation involving a firm have no apparent purpose other than camouflaging facts or circumstances which more likely than not render the firm ineligible, the final rule's § 26.69(g) calls for sanctions against the offending parties.

Other Ownership Issues

There were a variety of comments regarding aspects of ownership that the NPRM did not address. One suggested there should be more guidance on firms that had more complex ownership arrangements, like ''simple agreements for future equity.'' Another would delete the requirement that a SEDO own 51 percent of each class of ownership, which it found too restrictive. This commenter would instead say that a SEDO should have enough shares of any or all classes of ownership to control the firm and receive 51 percent of its profits.

Other comments requested clarification on what information an applicant is required to provide to show ownership and on the status of trusts under the proposal. Another comment expressed concern that deleting provisions concerning marital property would make it easier for applicants to circumvent the intent of the rules.

Another opined that non-SEDOs should not be able to be part owners of a DBE firm if they were involved in non-DBE firms in the same type of work, a relationship that could enable pass-throughs. A final commenter believed that certifiers should take workforce diversity as well as ownership into account in certifying firms.

DOT Response

The final rule retains the joint ownership provision as proposed, for the reasons stated in the NPRM: consistent results across jurisdictions, federalism, and expertise. Fairness, prudence, and practicability underlie the final rule.

Any issues arising from the other concerns noted by commenters can, if needed, be addressed through future guidance or on a case-by-case basis as a matter of program administration.

17. Control (§ 26.71)

In this section, because the overall topic contains several important subtopics, we have organized the material around the subsections, with discussions about the NPRM proposals, comments received, and DOT responses pertaining to each subtopic.

The thrust of the Department's final rule is to shift the focus from the actions and experience of non-disadvantaged participants in the firm to those of the SEDO, to reflect the original intent of the regulation's control requirements. A SEDO must pass the three-part test of managerial oversight, revocable delegation of authority, and critical and independent decision-making.

''**Operations**'' **Requirement**

NPRM

The NPRM proposed several changes to the current § 26.71. One proposal stated that firms (except ACDBEs) would have to have ''operations'' in the type of business in which they seek certification. The NPRM said that this would allow certifiers to make decisions based on actions the SEDO takes and avoid wasting certifier resources on firms that are not conducting business and have no ability to perform DBE contracts.

Comments

Of the nearly 40 comments that addressed this issue, a majority opposed the NPRM proposal. The principal argument of opponents was that requiring a business to have operations before being certified would be a barrier to new firms or those seeking to expand into new areas of work. The program should encourage, not discourage, firms seeking their first contract. It would create a disincentive to entrepreneurship in non-traditional types of work. It should be enough, commenters said, for the SEDO to have experience in the type of work involved with a new firm. For example, it should suffice if an engineer had work experience relevant to the field a new engineering firm wanted to work in as a DBE, even if a newly formed firm had not yet obtained a contract.

Among commenters who either supported or did not object to the proposal, some said that it made sense to prevent situations in which a certifier would be asked, in effect, to certify a business plan. The provision would save staff time, in that staff would not have to do certification workups on firms that would not be able to perform contracts. A commenter thought that an applicant should have at least a year of experience in its type of work.

Several commenters asked for clarification of what constituted ''operations'' for purposes of the proposed section, and what applicants would have to show in order to meet the requirement. Would they need to have already performed work on a contract? Others suggested that certifiers should have discretion to decide the question, given that more operational experience may be needed in some fields than others (*e.g.,* heavy highway construction vs. landscaping). A number of commenters questioned or objected to the exception to the proposed requirement for ACDBEs, asking why the same standards should not apply to an ACDBE.

DOT Response

A DBE must have business operations. Certifiers should not be involved in what amounts to certifying a business plan. It does not make sense for a certifier to engage in the certification process for a firm, which, if certified, is not in a position to work on a DOT-assisted contract. This is no less true for new businesses than for long-existing businesses. For this reason, the final rule retains the proposed requirement.

This is not to say that an applicant must have had previous contracts in order to be certified. We expect certifiers to make the necessary judgment calls to determine when an applicant firm is sufficiently ready to participate in the program if certified.

The Department explains how to apply these concepts in the context of the ACDBE program in the preamble discussion on § 26.71 regarding the operations requirement for DBEs, including ACDBEs.

Control (SEDO as the Ultimate Decision Maker) (§ 26.71)

NPRM

The NPRM would require a firm to demonstrate that, beyond formalities of business structure and governance documents, the SEDO ''runs the show,'' having the final say on all matters, regardless of the size or complexity of the business. Governance continues to matter, however, and provisions that require non-SEDO concurrence or consent for the SEDO to act, including provisions related to board of directors, quorums, and votes, would prevent the SEDO from being determined to control the firm (there would be an exception allowing non-SEDO members to block an extraordinary action, like sale or merger of the company, that would affect their ownership rights). The SEDO must hold the highest officer position and have voting authority over all other participants.

As under the former rule, a SEDO would have to understand and be competent in the substance of the firm's business. The NPRM noted that the degree of understanding the owner should have can vary with the type and complexity of the business. A SEDO would have to *actually* make major decisions, not just have the ability to do so as under the former rule. Control determinations would be based on a three-part test: (1) the firm would have to show that a SEDO gets pertinent information from subordinates, (2) a SEDO analyzes the information, and (3) a SEDO makes independent decisions. Tasks can be delegated, as long as the SEDO can revoke the delegation. Everyone in the company must recognize and abide by the chain of command, with a SEDO at the top.

Comments

By about a three-to-one majority, commenters endorsed the new control framework, saying that less prescriptive requirements would simplify the certification process. There were supportive comments on a number of the specific points in the proposal, such as the SEDO being the ultimate decision maker and having the top position in the company and the three-part test with respect to how and by whom decisions are made. Commenters asked for more guidance on what an applicant would have to show in order to carry its burden of proof on these matters.

Comments opposed to the proposal said that the proposal would lower standards and compromise program integrity. Others thought the approach too subjective. One said the three-part test was not realistic for certifiers to apply; it boiled down to whether a certifier thought what an applicant said was credible.

One commenter supported the NPRM's proposal about boards of directors, saying it would clarify matters. Another opined that firms should be able to set up their boards as they wish because boards of directors are generally not decision-making bodies. Another said that non-SEDOs should not be able to block extraordinary actions of the company and still have the SEDO regarded as controlling the firm, while another commenter supported the proposed provision concerning extraordinary actions.

One comment asked for a clarification continuing the present rule's allowance of control by any SEDO, not only the one having the largest stake in the company. Another suggested that § 26.71 be made broader and more ''big picture'' in nature. Another said that if the certifier determined that the owner does not control the firm, it should be required to state who does control it.

A few commenters expressed concern about certifiers' ability to verify the reality of decision-making power within a company. One commenter noted that anyone can be placed at the top of an organizational chart. Another commenter asked how a certifier would know whether other participants faithfully follow the SEDO's directives. Would the certifier have to interview all key participants as part of an on-site review? This commenter also was concerned that what it saw as the proposal's emphasis on formal authority could cause certifiers to overlook situations in which someone other than the SEDO had the bulk of expertise and clout within the firm. Other commenters thought the proposal's bright line approach to a company's chain of command, and the importance of the SEDO's ability to revoke delegations, would add clarity to the certification process. Commenters opposed to the proposal said that the proposal would lower standards and increase the possibility of opening the program to increased fraud. Others thought the approach was too subjective. One said the three-part test was not realistic for certifiers to apply; it boiled down to whether a certifier thought what an applicant said was credible.

DOT Response

The Department believes that the overall approach taken to control matters in the NPRM is sound and will meet the dual objective of removing unnecessary obstacles from applicant firms while ensuring that only those firms that are genuinely controlled by SEDOs are certified. It comes down to whether the SEDO in fact—not just in theory or on paper—runs the show. The SEDO must show that they possess not only the authority to make decisions, but in fact make those decisions.

With respect to control, certifiers must necessarily make a judgment call: does the SEDO, based on the complete record, including the application and the on-site interview, really ''run the show?'' The NPRM clearly stated this responsibility on the certifier's part. One of the best ways a certifier can do this is to make in-depth inquiries, during the on-site interview, to determine if SEDOs critically analyze information provided by others and make reasonable business decisions based on independent analysis. Do other key employees bring issues or problems to the SEDO, who asks good questions, and then makes the decisions, which others carry out? Or do others make decisions autonomously, without involving the SEDO, or disregarding direction from the SEDO? Interviewing not only the SEDO, but also other key employees where relevant, to get a full picture of how decisions are made is crucial to good control decisions by the certifier. To the extent possible, the certifier should ask for examples about how real-life decisions were made within the firm in the past. The Department believes this approach, as stated in the NPRM, makes sense and is consistent with the intent of the program and maintaining program integrity, and we are adopting it as final.

The NPRM discussed, in § 26.71(c), the point that governance provisions of a company must ensure that the SEDO, in addition to having the highest officer position in the company (*e.g.,* CEO), must not be constrained from fully controlling actions of the company by quorum, by-law, or other provisions. Non-SEDO consent for certain extraordinary actions (*e.g.,* sale or dissolution of the company) would be permitted. However, similar provisions in the former rule often proved to be problematic for small or inexperienced companies, who in our certification appeal practice we have found used templates for governance documents that limit SEDO actions without non-SEDO concurrence. This is a classic example of where a certifier can vindicate the intent of the program by pointing out such problems to an applicant and allowing the applicant to take curative measures.

Expertise and Delegation

NPRM

As under the current rule, the NPRM proposed that SEDOs would have to understand and be competent in the substance of the firm's business. The NPRM noted that the degree of understanding that the owner should have can vary with the type and complexity of the business. The SEDO would have to actually make major decisions, not just have the ability to do so as under the present rule. Control determinations would be based on a three-part test: the firm would have to show that the SEDO receives pertinent information from subordinates, that the SEDO analyzes the information, and that the SEDO makes independent decisions. Tasks can be delegated, as long as the SEDO can revoke the delegation. Everyone in the company must recognize and abide by the chain of command, with the SEDO at the top.

Comments

A few commenters were concerned about how certifiers would verify the reality of decision-making power within a company. Anyone can be placed at the top of an organization chart, after all, one comment noted; and another asked how a certifier would know whether other participants faithfully follow directives from the SEDO. Would the certifier have to interview all key participants as part of an on-site review? This commenter also was concerned that what it saw as the proposal's emphasis on formal authority could overlook situations in which someone other than the SEDO had the bulk of expertise and clout within the firm. Other commenters thought the proposal's bright-line approach to a company's chain of command, and the importance of the SEDO's ability to revoke delegations, would add clarity to the certification process.

Three commenters supported the proposal as written. Another said that there should be language telling certifiers not to reject a firm because a SEDO, even if clearly the decision maker, has employees who have greater experience or expertise than the SEDO. On the other hand, one commenter said that an unlicensed or non-expert person should not be viewed as controlling a firm (*e.g.,* a non-electrician in charge of an electrical services firm). One commenter said the SEDO should be qualified in the NAICS code(s) the firm is seeking, while others asked for more clarification and examples, especially in professional services firms and for ACDBEs, where the commenter expressed concern that inexperienced people were getting certified as a part of joint ventures.

DOT Response

The Department adopts the NPRM proposal without change. It emphasizes that the SEDO, while permitted to delegate authority and functions, must be able to revoke that authority. There must be a recognized chain of command within the company in reality, and not just on an organizational chart, for example. Making probing inquiries on this point, and on the recognition and acting upon this authority structure, is something certifiers should, as described above, ensure is part of the on-site interview process.

The Department emphasizes, in the final rule, that the proper focus for certifiers is the role the SEDO plays and the SEDO's being the ultimate decision maker. We have often seen that certifiers go astray by determining that a SEDO does not control a company simply because other participants have experience or expertise in a given aspect of the firm's operations. The contribution of non-SEDOs to the operation of a company is not a ground for denying eligibility to a company, so long as the SEDO runs the show in all aspects of the business, including with respect to areas of work that may be delegated to others.

While we do not believe it is necessary to include rule text language on these points, we agree with commenters that, as under the present rule, in a situation where there is more than one SEDO, control by any SEDO is sufficient to meet § 26.71 requirements. This is consistent with the definition of a DBE under § 26.5. For example, if one SEDO owns 45 percent of a company, and the other owns 10 percent, the firm can meet control requirements if the 10 percent owner runs the show.

Independence

NPRM

With respect to independence, the proposed rule (redesignated as § 26.71(g)) clarifies that a firm must prove that it is independently viable, notwithstanding a relationship with another firm from which it receives or shares essential resources. A pattern of regular dealings with a single or small number of firms would not necessarily render a firm ineligible as long as it was not operating as a front or pass-through for another firm or individual. The proposed rule clarifies that relationships and transactions between firms of which the SEDO has 51 percent ownership and control does not violate the rule, although the relationship may raise a business size issue.

Comments

While a few commenters supported this proposal as written, others asked for more clarification of what a certifier needs to know in order to determine if an applicant is independent. One request for clarification asked whether independence concerns relationships with any firms, or only relationships with non-DBEs. Another thought that the reference to "commercially reasonable terms" in the proposed § 26.71(g) was too vague, while another comment asked how a certifier should evaluate whether firms "shared essential resources." Another asked for clarification in the context of leasing trucks, suggesting that a DBE should lease trucks from leasing companies that lease trucks to the general public.

With respect to the proviso that dealings with only one or a small number of firms does not necessarily compromise independence, one commenter agreed while another asked how a certifier would determine when such a situation was problematic. Two commenters expressed concern about a situation in which, after a firm is certified, it enters into an exclusive or nearly exclusive relationship with a prime contractor. One commenter suggested that this should be prohibited.

Among other suggestions by commenters were to retain the present language because independence determinations would be harder to make under the proposed language; to substitute language from the identity of interest provision of the SBA regulation (13 CFR 121.103(f)(2) and (i)). If the Department modeled its provision after § 121.103(f)(2) the commenter argued, certifiers could presume an identity of interest based upon economic dependence if the concern in question derived 70 percent or more of its receipts from another concern over the previous three fiscal years. Likewise, adopting a similar provision as SBA had done, this presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser.

Another commenter suggested allowing prime contractors to provide specialized training to DBEs through a shared foreman or superintendent.

DOT Response

As in the NPRM, the final rule provides that a key element of meeting the control requirements of the rule is that a firm must be independent. Independence in this context refers to the relationship between the firm in question and other firms, whether those other firms be DBEs or non-DBEs. A firm cannot be independent if, absent such relationships, it would not be viable. If a firm cuts the ties that bind applicant Firm X to Firm Y—whether those ties, be sharing of facilities, resources, or personnel, common ownership or management, exclusive or nearly exclusive contracting or business relationships—would Firm X continue to be able to do business? If not, then Firm X is not independent.

The regulation does not prohibit relationships with other firms, including relationships that may create affiliation. Nor does the regulation prohibit a firm from providing services only to one business, or only a few businesses. That scenario might arise in a locale that has a limited number of potential customers. However, the DBE must not be used as a conduit or pass-through to obtain DBE credit. In any case where an applicant has relationships with other firms, the applicant must demonstrate that it is independently viable, notwithstanding relationships with another DBE or non-DBE firm.

We disagree with the commenters who suggested that the Department should adopt the Small Business Administration's 8(a) or 8(d) program rules about independence. The Department's final rule sufficiently equips certifiers to make the necessary judgment calls, without unnecessarily leaning on another agency's regulations.

It is likely that allowing a prime contractor to share experienced personnel with a DBE, especially if they have a contractual relationship, has a high probability of compromising the DBE's independence. Certifiers should carefully investigate any such relationships.

Licensing and Other Specific Sections Proposed for Deletion

NPRM

The NPRM proposed removing several control provisions from the former rule, including § 26.71(h) (licensing); § 26.71(i) (differences in remuneration); § 26.71(j) (outside employment); § 26.71(k) (family relationships); § 26.71(l) (transfer of a firm to a SEDO when the non-SEDO transferor remains involved); § 26.71(m) (ownership and leasing of equipment); § 26.71(p) (ability of non-SEDOs to bind the firm without SEDO's consent); and § 26.71(q) (use of employee leasing companies).

Comments

Supporters of the licensing proposal thought that deleting § 26.71(h) would make the certification process less onerous for applicants and less likely to lead to decisions based on a misunderstanding of the regulations. Slightly more opponents recommended retaining § 26.71(h) to prevent licensed non-SEDO participants from having *de facto* control of the firm. Others said that, especially in specialized fields, the SEDO should be the license holder. Two commenters noted that in their States, the majority owner must have a license to operate certain kinds of professional services firms. One commenter advocated that the SEDO of a trucking company should have a CDL.

Commenters also raised the question of how, in the context of reciprocal interstate certification, differing licensing requirements of different States would be handled. One recipient suggested that an additional State could deny certification to an out-of-state firm in a NAICS code for which that State required a license, but the jurisdiction of original certification (JOC) did not, while still certifying the firm in other NAICS codes.

Several commenters asked that the Department retain all or most of the other specific existing provisions in § 26.71 that the NPRM proposed to delete. Considering issues covered by these provisions was an important element of doing a good job of certification, these commenters suggested. The proposed rule would shift the burden of proof from applicants to certifiers, one commenter said. Among specific provisions mentioned by commenters were those concerning family businesses, outside employment, differences in remuneration, and leasing of equipment. In the absence of these provisions, another commenter said, DOT would need to provide more guidance on how to make control determinations when these issues arose.

DOT Response

Consistent with the NPRM, the final rule deletes §§ 26.71(h), (i), (j), (k), (l), (m), (p), and (q) as duplicative and outdated. The overhaul of the control provisions described in this final rule are more than adequate for certifiers to properly evaluate whether a SEDO controls a firm.

The proposed deletion receiving the most comment concerned licensing (§ 26.71(h) of the former rule). We wish to remind certifiers that, in many cases, it is the business as an entity, not the SEDO as an individual, who is required to have a license. For example, an engineering firm must have someone with an engineering license. The firm may still be certified if the license holder is someone other than the SEDO, as long as the SEDO meets all the "running the show" requirements of § 26.71. We also note—this is an issue that has frequently arisen in certification appeal cases—that it is not essential for the SEDO in a trucking or transportation company to personally hold a CDL (commercial driver's license); as long as the SEDO establishes control of the company as this section requires.

In the context of interstate certification, if a firm is certified in its JOC, it can obtain certification in any other State. But suppose that the firm lacks a professional license in an additional State that is not needed in the JOC or that the firm's licenses the JOC are not valid in another State? In such a case, the firm would be certified in the additional State—because it met basic size, disadvantage, ownership requirements via its certification in the JOC—but would not yet be able to do business in the additional State.

While § 26.71(l) of the existing regulation, concerning firms where a non-disadvantaged individual who formerly owned and controlled a company remains involved with the company, we note that the ownership requirements of the final rule require the former owner to immediately become uninvolved with the company or other business that performs similar work or contracts with the applicant firm other than as a lessor or provider of standard support services. We take this action in the final rule because parties have not understood how to handle the rebuttal procedurally or apply the stricter burden of proof. The crux of the rule states that the new owner needs to still show that he/she is in control, notwithstanding the presence of the old owner. The final rule preserves and emphasizes this.

While the specific outside employment provision of the existing rule is being removed, certifiers may still consider the effect on outside employment as they determine whether a SEDO is in a position to really run the show for an applicant firm. For example, when a SEDO has a full-time job for another employer, how does the SEDO find the time to analyze information and make independent decisions for the applicant firm? How does the SEDO communicate with employers and customers if the SEDO has duties for another employer that conflict, in terms of time and place, with the applicant firm's work? The applicant has the burden of proving to the certifier that the SEDO can do everything needed to control the firm, notwithstanding the SEDO's duties for another employer. Delegations by a SEDO with outside employment must meet the same requirement as other delegations; the SEDO must remain in active control of those to whom the SEDO has delegated duties.

North American Industry Classification System (NAICS) Codes

NPRM

The NPRM proposed removing material concerning NAICS codes from the control requirements to a new § 26.73, making minor technical corrections in the process.

Comments

While there were no comments on the proposal to put NAICS code provisions into a new section of the rule, as such, there were comments on the general subject of NAICS codes. A few commenters said that the ability of firms to expand into additional codes should be expanded, for example by relaxing the requirement that the narrowest applicable code be used for a firm, allowing expansion based on staff capabilities, or allowing a SEDO to be considered qualified to control a firm in a related NAICS code to that one a firm already has been assigned. One commenter suggested that a firm should be able to remain certified in a narrower NAICS code even if it exceeded the size standard for that code as long as it continued to meet the size standard for a broader NAICS code that encompassed the subject matter of the narrower code.

A few comments also asked that NAICS code assignments be made more consistent among certifiers, though they did not suggest how this would be done. Another suggested updating NAICS codes and making them more specific. Another wanted firms to be certified in State work codes, where applicable, as well as NAICS codes. Two comments said that existing NAICS codes do not work well for TVMs, and that the Department should find another way of classifying especially subcomponent manufacturers for transit vehicles.

DOT Response

The Department is adopting the NAICS code provisions of the NPRM—which are substantively identical to the those of the existing rule—without change. We continue to believe that the narrowest appropriate code should control for purposes of certification; doing otherwise would allow circumvention of the intent of small business size standards for firms. It is important for certifiers to avoid overly broad NAICS codes. For example, NAICS code 237310, concerning highway and bridge construction, has sometimes been applied to specialty contractors who perform only one or two of the functions under that code's broad umbrella. We intend that certifiers, in such a case, assign only the narrower code applicable to the specialty functions that the firm performs.

As under the present rule, states may employ State work codes or categories, but they cannot supersede NAICS codes for purposes of DBE eligibility or credit toward goals. Certifiers cannot certify firms as DBEs using State work codes, or limit opportunities for DBE credit to firms certified in a given NAICS code to types of work named under a State code that is in effect a subset of the work encompassed by the NAICS code in which the firm is certified.

Subpart E—Certification Procedures

18. Technical Corrections UCP Requirements (§ 26.81)

We did not receive any comments on our proposal to remove outdated references in § 26.81 (a)—the original due date for recipients to sign a UCP agreement (March 4, 1999) and § 26.81 (g)—the requirement that UCP directories be made available in print. The rule is revised to reflect these changes.

19. Virtual On-Site Visits and Other On-Site Comments (§§ 26.83(c)(1) and (h)(1))

NPRM

The Department proposed making an option for virtual on-site visits a regular part of the certification process based on positive experiences with permitting on-site certification visits to be conducted virtually as an accommodation to conditions during the COVID–19 pandemic. This change would reduce administrative burdens and costs for certifiers and applicants. As stated in the NPRM, the Department believed that virtual on-site visits were equally as effective as in-person visits and were a more efficient means of achieving the purpose of the visits. The software used for virtual visits would also permit recording of the conversations between applicants and certifiers, which would permit certifiers to prepare more accurate on-site visit reports and create a fuller record for cases that resulted in a certification appeal. The NPRM still gave certifiers the discretion to conduct on-site visits in person.

Comments

Almost all commenters, particularly recipients, but DBE and non-DBE contractors as well, supported the Department's proposal, citing the reasons stated in the NPRM preamble. Commenters also supported certifiers' discretion to choose whether to conduct on-site visits in person or virtually. Only one commenter, a DBE association, said that in-person on-site visits should continue to be conducted for both initial applications and subsequent certification reviews. Another commenter asked why the NPRM used the term ''on-site'' at all, given that it proposed having interviews conducted remotely rather than actually on site.

Around 10 commenters suggested that the use of virtual on-sites be somewhat limited, for example, by using in-person on-site visits for initial certification applications, with virtual on-site visits being reserved for post-certification reviews. These same commenters suggested that on-site visits for heavy construction firms or other businesses requiring specialized expertise or equipment (*e.g.,* a medical laboratory) be conducted in person.

Other Comments About On-Site Visits

Comments also addressed other subjects related to on-site visits. Several commenters urged the Department to develop a uniform on-site questionnaire for all certifiers to use. One commenter asked whether establishing a practice of periodic on-site reviews (*e.g.,* at 3, 5, or 7-year intervals) was allowed. Another commenter suggested that follow-up on-site visits be required at three-year intervals.

DOT Response

Under the current rule, recipients must take several steps in determining whether a firm meets all eligibility criteria for DBE certification. An on-site visit to a firm's principal place of business and job sites are a crucial component of this review.

The Department's experience after authorizing virtual on-site interviews during the early years of the COVID–19 pandemic has been overwhelmingly positive. Virtual on-sites are more efficient for certifiers, avoiding sometimes lengthy time periods needed to travel to an applicant's office. That said, there may be situations where an in-person visit to an applicant's office or job site will be beneficial. Particularly in the case of construction firms or others that have field operations, a job site visit can be very useful, and in such cases (as distinct, for example from the case of a professional services firm, all of the work of which is done in an office) the final rule will direct certifiers to go to the job site, if feasible. The decision belongs to the certifier. Certifiers can also set their own schedules for virtual or in-person interviews to certified DBEs in the context of periodic reviews.

There will continue to be no standard form for on-site interviews, and we strongly urge certifiers to avoid using routine questionnaires or checklists because they are not probative and ask for information that duplicates what is found in a UCA. They also miss the point of an on-site interview, which is to comprehensively investigate how the SEDO acquired ownership, how the firm actually operates, and whether the SEDO has enough knowledge to independently make daily and long-term decisions. Interviews should be a conversation tailored specifically to the circumstances of each firm. The conversation must be with the SEDO, as well as with other principals and key employees.

For example, one of the common situations we see is a firm where there is a SEDO and co-owners or key employees who work together to accomplish the firm's goals. In the interview, it would be beneficial to ask specifically how decisions are made. When an issue comes up, does a participant other than the SEDO bring the matter to the SEDO's attention, as opposed to handling the matter autonomously? Is the SEDO able to ask knowledgeable questions about the matter? Does the SEDO then decide based on information or options presented by the other participant, and does the other participant then carry out the SEDO's decision? The certifier should seek real-world examples of how this decision-making process has worked in practice.

The final rule will require certifiers to make audio recordings of interviews. In cases where certifiers have done so, the Department has found them highly useful in deciding certification appeals. They tend to provide much more thorough and nuanced information than certifier staff summaries or paraphrases of what has been said during an interview. Making these recordings will provide fuller context for the information on which certification decisions are based and will help to prevent misunderstandings or decisions based on paraphrases of what an interviewee says. Whether in a virtual or in-person interview, current technology readily permits recordings to be made with negligible additional burden.

20 and 23. Timely Processing of In-State Certification (§ 26.83(k)) Applications and Denials of Initial Certification Applications

NPRM

Currently, when a certifier receives all required information from an applicant, it has 90 days to complete review and issue a written decision. However, a certifier may, upon written notice to the applicant, extend this period for another 60 days. The NPRM proposed to reduce the extension period to 30 days, though a certifier could get approval for a further extension from an OA. One reason stated in the preamble was to give a firm the chance to cure a defect in its application. Failure by a certifier to meet the deadline would be treated as a constructive denial of the application, and the certifier could become subject for noncompliance under §§ 26.103 and 26.105.

Under the present rule, when a certifier denies an application, the certifier must establish a waiting period of no more than 12 months before the firm can reapply. The NPRM would remove a current requirement for OA approval before a certifier could establish a shorter waiting period. The date on which the waiting period would start to run would be the date of the denial letter.

Comments

Supporters of the proposed change to shorten the extension time frame from 60 to 30 days, among them both recipients and DBEs, outnumbered opponents by a 3–1 ratio. The proposal would encourage quicker and more timely decisions, supporters said. Opponents said that the shorter time frame would impose an undue burden on certifiers' staff, particularly given that staff are often small. Rushed decisions could be poor decisions, one said, suggesting that the 90-day deadline should be a target to be met, if practicable, rather than a mandate.

Some commenters suggested modifications of the proposal. One said that extensions should be for 45 days, rather than for 30 or 60. Two comments said that the process should accommodate delays in the transmission of information from the applicant to the certifier. Another idea was that, if applicant did not get complete materials to the certifier within 90 days, the certifier could return the application without deciding on the merits. Another suggestion was that, during the time that a firm was making curative changes in its application, the clock for the certifier's deadline should pause. Two commenters suggested adding specific consequences for tardy certification actions, such as being able to appeal constructive denials to the Department.

One commenter supported the ability of certifiers to have reapplication waiting periods shorter than 12 months without seeking permission from an OA.

DOT Response

Existing provisions are designed to ensure that recipients afford adequate procedural due process to DBE applicants, standardize certification practices, and develop an adequate record of certification actions. The 2014 final rule explained the Department's rationale for setting 90 days as a reasonable time for recipients to render a certification decision. We believe 90 days remains sufficient and that notifications to firms about a 60-day extension beyond that point are rare. The Department is keeping the proposal to shorten this extension period to 30 days, because this is in the best interests of firms that may be seeking contracting opportunities as a DBE and the recipient, who can assign sufficient staff to perform the certification function in an efficient manner. In our view, the ability of all certifiers to email questions and requests for information to firms and their ability to conduct virtual on-site visits will mitigate the concerns of the handful of commenters on this issue. We believe that 90 days is more than enough time.

The Department proposed adding verbatim language that recipients must include in all denial and decertification letters, essentially directing firms what to include in their appeal letter, how to appeal to DOCR, and their right to request information. This language was communicated to recipients by DOCR, and we have noticed its inclusion in most of the adverse decision letters processed since that time. This final rule references that language, which will be posted on the Departmental Office of Civil Rights website.

The Department is also finalizing the proposal to remove the current requirement for OA approval before a certifier could establish a shorter waiting period for the firm to reapply for certification to less than 12 months from the date of denial. This change to the new § 26.86(c) gives UCPs the leeway to improve wait time to certify firms without OA approval. The final change clarifies that the date on which the waiting period would start to run would be the date of the denial letter. This information, per § 26.86(a), must be included in all denial letters.

We want to call to participants attention the provisions of § 26.83(h)(2), which prohibit certifiers from requiring a DBE to reapply for certification, ''renew'' a certification, or a similar requirement. We are aware that recipients sometimes use commercial software that calls on recipients to submit information associated with an initial certification in order to complete the annual DOE process. This is contrary to the regulations, which limit the material that must be submitted with a DOE to documentation of a firm's size and gross receipts. For a recipient to, in effect, require more because a software program calls for it amounts to noncompliance with the regulation. We expect a recipient, in such a situation, to work with the vendor to conform the software to the requirements of the rule.

21. Curative Measures (§ 26.83(m))

NPRM

The NPRM proposed a new § 26.83(m) that would permit, though not require, certifiers to notify an applicant of ineligibility concerns and allow the applicant an opportunity to rectify the deficiencies in a timely manner. The NPRM cited two examples of matters that might be subject to curative measures: proof of a financial contribution meeting § 26.69 requirements and revising an operating agreement or bylaw provision to meet control requirements of § 26.71.

Proposed § 26.69(f) would create a parallel curative measures provision concerning ownership. There was not a parallel provision in § 26.71 concerning curative measures for control, though the second example in the discussion of proposed § 26.83(m) applies that provision to a control issue.

Comments

The comments below apply to the proposed curative measures sections in proposed §§ 26.83(m) and 26.69(f).

Of the over 20 comments on this subject, about two thirds, from both recipients and DBEs, supported the concept. Many of the supporters, however, asked for additional guidance or examples concerning what kinds of defects would be subject to curative measures. How much help should certifiers provide to applicants, and what should that help concern (*e.g.,* minor administrative matters, governance issues like organization of boards of directors, larger matters affecting the structure of a company)?

Opponents, most of which were recipients, expressed the concern that the proposal would allow firms to circumvent the rules and enable fraud. Certifiers should not be cast in a ''coaching'' role in which they tell applicants how to structure their firms. Applicants should be responsible for getting things right as they present companies for certification.

DOT Response

The Department contemplated curative measures as far back as 1992. We do not agree with commenters who felt that allowing a firm to take curative measures increases the possibility of fraud. Our view is that to be considered non-fraudulent, curative measures must be a legitimate effort to correct impediments to certification made in good faith. A firm bears the burden of showing that it undertook curative measures in good faith and not in an attempt to circumvent the requirements and intention of the DBE program.

The DBE program exists to facilitate participation of small, disadvantaged businesses in DOT-sponsored contracting projects and airport concession opportunities. The program is not intended for certifiers to create hurdles for firms that would be eligible but for minor deficiencies that the firm could easily rectify. As described in the Department's August 7, 2019, memorandum and in the NPRM preamble, startup firms created by inexperienced SEDOs have been particularly vulnerable to this, causing them to endure a 12-month waiting period for reapplying. Such situations can be avoided if a certifier notifies the firm of potential denial grounds and offers the firm an opportunity to address them before the certifier renders a final decision. The August 7, 2019, memorandum explicitly encourages certifiers to do so and provide a reasonable time for the issues to be resolved before the certifier renders a decision. This would result in lifting the burden on a certifier to begin the eligibility evaluation anew should the firm reapply.

The Department codifies in § 26.83(m) of today's final rule the language of the August 7, 2019, memorandum. We agree with commenters that this provision is not intended to make certifiers ''coaches'' for all aspects of the certification process or require certifiers to pause the evaluation process to allow firms to make time-consuming changes, such as major organizational restructurings. We agree with commenters who pointed out that firms bear the burden of proving that they fully meet the regulation's certification requirements, while emphasizing that we view the task of certifiers as reasonably balancing the interest in ensuring that only eligible firms participate with the interest of the program in providing opportunities for small, disadvantaged businesses, including those that may not be sophisticated in the details of the certification process.

Section § 26.83(m) amounts to ''if you see something, say something.'' While it is not a mandate, the Department believes strongly that certifiers should call situations potentially solvable through curative measures to applicants' attention, in order to better serve the program's objectives of improving opportunities for DBEs.

Doing so does not impose an unnecessary time crunch on certifiers with respect to the final rule's deadlines for action on applications. If a certifier notices a problem, notifies the applicant about it in writing, and the applicant takes, for example, 14 days to fix it, that period would be added to the certifier's timeline for completing the decision. The certifier could also set a realistic deadline for the applicant to fix a problem the certifier mentioned; if the applicant did not respond in a timely fashion, the certifier could then decide on the basis of the original documentation. In all cases, it will be important for the certifier to memorialize corrective measures, notifications, dates, and responses in its records.

The NPRM preamble mentioned two types of problems that the Department has seen frequently in certification appeals. One involves proof of a financial contribution. For example, sometimes a SEDO who is married to a non-disadvantaged individual will make an initial capital contribution from a joint bank account, not realizing that, absent a renunciation of interest in the funds by the spouse, only 50 percent of the contribution will be counted toward ownership, insufficient to support an assertion of 51 percent or greater ownership.

Similarly, a bylaw provision–often one seemingly copied from an online template–will say that a majority of the members of the board of directors is needed to form a quorum or act on behalf of the board. In a two-person company, this inadvertently can result in the possibility of a deadlock on the board, even though the SEDO clearly owns 51 percent or more of the stock and thus is able to control stockholder votes. Mere paper changes, without substantive changes, would not ''cure'' a defect.

These are not the only problems to which this provision could apply, but they exemplify the scope of the sorts of issues the Department has in mind in adopting this provision.

22. Interstate Certification (§ 26.85)

NPRM

The NPRM proposed major changes to the interstate certification provisions of § 26.85, which became effective on January 1, 2012. For the first time in the program's history, there would be nationwide reciprocity among UCPs. The NPRM would also reform the way that UCPs share information about firms certified in more than one State.

The NPRM proposed to eliminate the ''home State first'' requirement of the present rule, and instead allow a firm to apply for its initial certification to any UCP. Then, any other State would be required to accept the original UCP's certification. All the firm would have to submit to an additional State would be a short cover letter, an image of its Original State of Certification (OSC) directory entry, and a Declaration of Eligibility (DOE). Unlike under the present rule, the firm would not have to send an additional State its entire certification package.

Following the interstate certification by an additional State, that State and others that have certified the firm, could ask State A or other UCPs for information on the firm, which would need to be provided within 10 business days, as part of all program participants' obligation to cooperate. The Department said that this should not be unduly burdensome, given electronic file sharing technology.

A firm would have to submit an annual DOE to each State in which it is certified. The NPRM asked whether it would be helpful to create a centralized database to reduce the burden on firms certified in multiple States. The NPRM also would allow States to participate in oversight and enforcement activities with other States about a firm, including joint removal procedures that would be voluntary among the UCPs involved.

A proposed provision would state that if a firm certified in more than one State were decertified (for any reason except failure to cooperate with one State), the firm then appealed the decision to DOT, and DOT affirmed the decertification, the firm would then automatically be decertified in all States, without further right of appeal. That is, if one State decertifies a firm and DOCR upholds the action, then the firm would be automatically decertified in all States in which the firm was certified without the need for further process in those States.

Comments

Interstate certification proposals have long inspired input from a significant number of commenters, and the response to this NPRM was no exception. About twice as many commenters expressed general support for the NPRM's nationwide reciprocity proposal as expressed opposition, but there were also a wide variety of nuances and suggestions among commenters on the topic.

The largest number of supporters were DBEs or their associations, who cited the reduced burden on firms who have often had to submit extensive documentation to become certified in more than one State. One DBE, for example, mentioned having to submit about 3,000 pages of paperwork to become certified in another State, but was unsuccessful because it did not have its original application. Another spoke of inconsistencies in acceptance of NAICS codes from one State to another, long delays by certifiers outside of its home State, and differing paperwork requirements and regulatory interpretations among States. One DBE owner related their difficulty with tracking different deadlines for renewal each year, citing a burden in preparing and submitting materials for each State in which it was certified in. The same owner expressed that it takes some UCPs a long time to process renewals or notice of change, which results in their view of an expiration date passing without renewing paperwork. On these points, we reiterate that there is no DBE renewal process, nor does certification expire.

A significant number of recipients also supported the proposal, one citing reduced staff time demands that would allow its staff to focus on other program tasks (*e.g.,* compliance). It said that it now takes them 38 staff days to process an out-of-state certification and believed the proposal would reduce this to 10 staff days. Other recipients also cited reduced processing time or greater flexibility as potential benefits. One recipient noted that it had already been doing a good deal of reciprocity and found that it reduced their burdens.

Some of the supporters of the reciprocity proposal and other commenters, among them both DBEs and recipients, suggested going to what might be called national certification. This would involve a single national directory, with a Federal certification database. A DBE firm, for example, mentioned that it has to send annual updates to 15 different States. Sending one update to a centralized database would be far less burdensome, it said.

This group of commenters supported the concept that once a firm was certified in its original State of certification usually its home State, the firm's status would be reflected in the database, and it would automatically be certified in all States, without having to submit additional documentation elsewhere. Annual update issues or decertification actions could be handled through the centralized database or by the firm's home State. If universal certification of this kind were put into place, there would be a greatly reduced need for individual State systems and the resources needed to run them.

Generally, commenters with a variety of views on the overall question of interstate certification supported the idea of a centralized database and/or national portal, though three recipients warned that questions about control of such a database and a variety of implementation problems that could beset it might create serious risks to the program.

Recipients made up a large majority of commenters opposing reciprocity. One reason was the long-standing concern that given what they saw as the varying quality of other recipients' certification programs, unqualified firms could become certified in its OSC and then become certified in other States without further review. The proposal puts too much trust in other certifiers, one recipient said, preventing recipients from exercising due diligence for their own programs. One large recipient complained, for example, that another large recipient never looked at the personal net worth of firms following initial certification and was concerned about having to deal with other certifiers' out-of-date records.

Some certifiers wanted to vet each firm that sought certification in their jurisdictions, and doing the job right would require seeing the firm's documentation before granting eligibility. Absent that ability, questionable firms could get contracts in other States before they had adequate time to review their bona fides, and after-the-fact decertification was too little and too late as a remedy for such problems. Accordingly, some certifiers claimed that reciprocity would consequently undermine program integrity. To mitigate this problem, one recipient suggested that reciprocity be limited to five UCPs in its region.

Moreover, the proposed system would encourage DBEs to join the directories of multiple States (a ''land rush,'' one commenter called it), multiplying the workloads of certifier staffs to oversee the continued eligibility of firms (*e.g.,* with respect to annual DOEs), some of whom might never work in their jurisdictions. A DBE was concerned that if there were different DOE due dates for different States in which a firm was certified, it would be all too easy for small businesses to miss submission deadlines, resulting in decertification. DOEs should go only to the home State, not other States, some commenters said. A non-DBE contractors' association said that, in general, a home State should bear the burden of oversight to prevent increased burdens for other States. For example, it said, its State already has over 400 out-of-state firms in its directory, and reciprocity could require it to oversee many more.

One concern expressed by several commenters pertained to State licenses. For example, if the OSC does not require the person running an engineering company to personally have a professional license, but another State does, how is that other State to enforce its licensing requirement in the proposed reciprocity regime? Commenters also expressed concern about data security issues, as entries in online directories multiplied without regard to the cybersecurity protections that would guard sensitive business data and personal protected information.

A recipient association said that interstate certification should not be implemented until a robust oversight system could be established everywhere. Commenters doubting the wisdom of the proposal also said that 10 days was too short a time to exchange information among UCPs, especially because all certification records are not yet electronic. Sixty days would be more realistic, one recipient said. A DBE expressed concern that large out-of-state prime contractors would travel with their favorite DBE firms, crowding out local DBEs in other States.

A recipient and a non-DBE contractors association raised the issue of how an influx of out-of-state contractors would affect goal setting and disparity studies. Would out-of-state entries in a UCP's directory be used as a measure of the availability of ready, willing and able contractors? If so, it could distort the goal-setting process, these commenters feared.

Commenters who either favored or opposed the reciprocity proposal in general, and other commenters as well, suggested a variety of ideas that they believed would improve the certification system. One DBE suggested that States should recognize other States' business and professional licenses as well as certifications. A UCP asked DOT to create a uniform interstate application form. A non-DBE association wanted to make sure that the rule did not allow other States to second-guess State A without a ''well-founded'' reason.

Three recipients favored creating a ''challenge procedure'' to allow an additional State to prevent an out-of-state firm from immediately becoming certified immediately, if the additional State had a good reason to believe that OSC certification was based on faulty or missing data. A non-DBE firm suggested that if an OSC's certification is more than 10 years old, another State in which the firm is certified should be able to do a review of its eligibility.

A group of recipients suggested that an additional State could choose to require an out-of-state firm to provide a statement that it intended to work in that State before the firm would be certified there. They and other commenters also supported retaining the ''home State first'' provision of the existing rule, rather than the NPRM's idea that any State could become a firm's OSC. Another recipient suggested that an interstate application firm should include details about its licenses to work in that State. Two recipients suggested that, to minimize recipients' burdens, requests from one UCP to another about a firm be limited to the original application, its supporting documentation, and the most recent four years of DOEs. A similar suggestion was that it should be enough for the OSC to submit its most recent on-site report to another State.

The proposal to give nationwide effect to DOCR certification appeals decisions upholding a decertification action in one State was discussed in several comments. Two comments supported it, and three opposed it. Opponents said the proposal would deter firms from appealing and raise due process and federalism concerns for both firms and certifiers. Another commenter said that other States should be able to conduct their own decertification process. A third said that a firm should be decertified only in those States that had joined the decertification proceeding. One commenter wanted the Department to look at the other side of the coin, by imposing retraining requirements or other consequences on UCPs that had had a decertification decision overturned on appeal.

Two comments raised questions about this proposal. One asked how and when firms decertified in this manner could reapply in the States in which they were automatically decertified. A second asked what would happen if a firm decertified in one State declined to appeal.

DOT Response

In the original version of the DBE program in the 1980s, each recipient certified applicant firms independently. If there were a State highway agency, three airports, and four transit agencies in a State, then a firm wanting to work throughout the State might need to get certified by eight different agencies, each with its own certification process. This proved inefficient and burdensome. First proposed in 1992 and added to the rule in the major 1999 revision, the creation of unified certification programs (UCPs) ensured that a firm would have to be certified only once to work in any recipient's DBE program in the State.

The DBE program is a national program, and the same kinds of inefficiencies and burdens that adversely affected DBEs within States in the pre-UCP era continued to affect firms that wanted to work in more than one State. A firm certified in one State would have to go through a new certification process in another, complete with the submission of extensive documentation and having to wait for the completion of the second State's administrative process. Because certifiers' views of a given firm's *bona fides* could differ among States, a firm could be approved for participation in one State while denied in another, all based on the same facts.

The idea of nationwide reciprocity among UCPs was raised, but rejected, in the 1999 rulemaking, though the Department at that time encouraged cooperative arrangements among States to reduce certification burdens. Unfortunately, few certifiers chose to enter into such agreements. Consequently, in a 2010 NPRM, the Department proposed an interstate certification system that sought to occupy a middle ground between full-fledged nationwide reciprocity and an approach that allowed UCPs to challenge and reject DBEs certified in other States. This became the basis, in 2011, for what became § 26.85 of the current regulation.

Under this current provision, a firm certified in its home State (''State A'') would submit its certification credentials to ''State B,'' which could either accept the firm or require the firm to submit a much more extensive document package. Within 60 days, State B would either accept the firm's certification or determine that there was ''good cause'' of a kind specified in the regulation for rejecting the firm. In the latter case, the firm would then bear the burden of proof of showing State B that it was nonetheless eligible.

As documented in the preamble of the 2022 NPRM, § 26.85 has not worked well (see 87 FR 43647). Few UCPs have accepted out-of-state firms without requiring lengthy and burdensome additional certification processes. Some UCPs have effectively ignored interstate certification procedures, treating all or nearly all out-of-state applicants as if they were applying for certification for the first time. The ''good cause'' reasons for questioning an out-of-state firm's eligibility have been widely misunderstood or misapplied (*e.g.,* ''factually erroneous or inconsistent with the requirement of this part'' being used to mean a simple disagreement about a judgment call). The result is that a large majority of interstate certification cases appealed to the Department have been reversed.

As long ago as the 2010 NPRM, the Department stated that true nationwide reciprocity is a worthwhile objective, and in the 2022 NPRM we proposed to make it a reality, so that a firm in a nationwide program under a single national set of eligibility criteria could expect to be eligible throughout the country. As noted above, the comments on the proposal followed the lines of the long-term debate on the subject. Generally speaking, most DBEs favored this approach, for its value in reducing burdens, while many certifiers opposed it, out of concern about having to accept firms whose qualifications they questioned. Having found, over many years, that approaches short of nationwide reciprocity have been unsatisfactory, the Department is convinced that it is time to treat certification on a meaningfully national basis. For this reason, we are, with some modifications in detail, adopting the NPRM proposal, intending to reduce burdens on all participants while building trust, encouraging teamwork, and improving the quality of certifications. As with the adoption of UCPs in 1999 within States, we believe that the adoption of nationwide reciprocity among States, while necessitating some adjustments in current practice, will result in a system that works better for everyone concerned.

Under the final rule, a firm would initially be certified in the State in which it maintains its principal place of business. We no longer use the ''home State'' or ''State A'' terminology, instead speaking in terms of a firm's ''jurisdiction of original certification'' (JOC). The JOC would normally be the State in which the firm maintains its principal place of business, though there could be unusual cases that could lead to the JOC being a different State (*e.g.,* a situation in which a firm's principal place of business has moved to another State after it has been certified). However, the additional State may not deny a DBE's application based on questions regarding the location of the firm's JOC.

Once a firm is certified in its JOC, all it needs to submit to become certified in any other State is a short cover letter and a signed Declaration of Eligibility (DOE). The cover letter must state that the firm is applying for certification in the additional State and all other States in which the firm is certified. The cover letter may also list any licenses (*e.g.,* business or professional licenses) that the firm has in the additional State. The additional State could request the JOC's documentation concerning the firm, which the JOC would be required to provide within 30 days (modified from the NPRM's 10 business days to reduce burdens on the JOC). Ten days, in the view of a commenter that still retains paper copies of certification materials, is too short a period to scan and send these materials manually. We agree and modified the rule accordingly.

We acknowledge that implementing the revised interstate rule will require additional monitoring of businesses, and we would like to remind recipients that the current rule allows UCPs to charge reasonable application fees. These fees can help alleviate some of the burden associated with managing the increased number of businesses under reciprocity. Application fees may also deter firms that seek certification in multiple jurisdictions without any intentions of conducting significant work within each jurisdiction. As noted in the discussion of control provisions above, an out-of-state firm and owner that lack a necessary business or professional license in an additional State, while it would be certified and listed in the directory, would not be able to conduct business there until it obtained the required license(s).

When a firm is certified in its JOC, it becomes responsible for submitting a DOE to that State each year on the anniversary date of its certification. When the firm then becomes certified in other States, it also becomes responsible for submitting annual DOEs to them. We believe the most convenient way of handling this requirement is to use the JOC anniversary date as the date for submission of DOEs to all States in which the firm is certified. This will likely result in firms initially submitting a second DOE to an additional State before a year has elapsed, but after that will avoid the potential confusion of multiple submission dates. This alleviates the burden on firms certified in multiple jurisdictions.

For example, suppose a firm is certified in its JOC on September 1, one additional State on October 7, and a second additional State on the following January 8. The firm would submit its first DOEs to all three States on the next September 1, and then on every September 1 thereafter. Doing so will inform all the States involved that the firm has a continuing interest in working there. Having a single DOE date, reduces the burden on firms, some of which noted in their comments that it can be burdensome to submit paperwork to each State on different timelines. With this change, the Department also believes the annual submission requirement is not onerous. Some commenters asked that there be a national, centralized database for DBE certifications. While we understand the attractiveness of the concept, we do not believe that it is feasible at this time. In addition to budgetary limitations, concerns about ensuring that data are updated and secure would need to be addressed. Until it is possible to deal successfully with the issues involved, the program must continue to rely on UCP directories, which are responsible for treating out-of-state firms in the same way as in-state firms for directory and other program administration purposes.

Some commenters expressed a concern that having larger numbers of out-of-state firms in their directories could skew goal setting. Recipients commonly use bidders lists as a primary source of data for setting overall goals; thus, only those out-of-state firms that bid or quote on projects should be included in the methodology's base figure. Recipients using other primary data sources should review their UCP database, including the NAICS codes associated with each firm, and consider whether out-of-state firms will likely submit bids or quotes prior to including them in their base figure.

A few commenters asked to have a ''challenge procedure'' available, through which they could delay certifying an out-of-state firm for a given period (*e.g.,* 30 days), giving them an opportunity to raise issues concerning the firm's eligibility with the OSC. We believe implementing such a procedure would not facilitate the certification process but would rather introduce an additional bureaucratic step. Our goal is to streamline the interstate certification process. We view the ''challenge procedure'' as a slight modification of the old interstate rule, which was a complex and burdensome certification framework. Instead, we aim to adopt a more streamlined and transparent process that eliminates unnecessary barriers to certification. Given the procedure described below, for collective action to decertify a firm that appeared not to be eligible, we do not believe such a preemptive procedure is needed.

One of the issues considered in the NPRM was how, in the context of a firm that is certified in multiple States, a decertification process would work. Proposed § 26.85(g)(4) said that any UCP could join a decertification proceeding initiated by another State, on the same grounds and facts alleged by the initiating State. The joining UCP could present evidence at the hearing. The result of the ensuing decision would apply to all States that are parties to the action. Under paragraph (g)(6) of the proposed section, if a decertification by any UCP in which the firm had been certified is upheld on appeal by the Department (except with respect to actions concerning a failure to cooperate or send a timely DOE to the decertifying State), then the firm would lose its eligibility in all States in which it was certified.

As noted above, some commenters said that UCPs should be able to conduct their own certification proceedings, that the effect of a decertification should apply only to States that have joined a decertification proceeding in another State, and that the nationwide effect of a DOT decision upholding a decertification by one State was unfair to the firm as well as the other certifiers involved.

In considering these comments, the Department believes that a modification of the proposal would serve not only the interest of fairness to certifiers and firms but also further the Department's policy goal of encouraging cooperation and interaction among certifiers. Therefore, the final rule will establish procedures that would apply to a scenario in which a firm is certified in more than one State and one of the States believes it has a ground under proposed § 26.87(e) to decertify.

The procedures are best illustrated by an example. DBE X is certified in its JOC and in five additional States via reciprocity. One of the additional States believes that it has reason to decertify the firm. It notifies not only the firm, but also the other States in which the firm is certified, that it is considering beginning a decertification proceeding, as well as the grounds for doing so and the evidence supporting such an action. The other States have 30 days to respond. They may comment on proposed basis for its proposed actions, concur or non-concur. A certifier would be deemed to concur in the proposed action if it did not respond. If it had grounds under § 26.88, the certifier proposing decertification may impose a summary suspension without affecting the status of the firm in other States, though we encourage the certifier to notify the other States of its action so that they could take similar action if warranted.

If after considering the input from other States, the State proposing decertification decided to pursue the matter, it would then issue its formal NOI and proceed to a decision. Any of the other States could decide to file a brief or other arguments and evidence. In its final decision, the State that proposed decertification may address arguments and evidence from other States involved, as well as those made by the respondent firm. This is in effect a ''speak now or forever hold your peace'' provision. We note that the resolution of the matter is an independent decision of the UCP proposing the decertification, not dependent on the ''votes'' or views of other certifiers.

Because a decision by a UCP to decertify the firm would only be issued after soliciting views from the other States involved, the decision would represent the collective view of the UCPs involved and would take effect in all the States involved. If the firm appealed, any certifier that did not agree could submit its views to the Department. The Department's decision to affirm or reverse the decision would apply to all the States in question, since all would have had the opportunity to participate and make their views known.

23. Denials of In-State Certification Applications (§ 26.86)

See discussion above, item 20.

24. Decertification Procedures (§ 26.87)

NPRM

The NPRM emphasized that certifiers must strictly follow the regulation's procedural requirements concerning decertification proceedings, putting the certifier's burden of proof up front in the revised § 26.87 and clarifying what must be included in certifiers notices of intent (NOI) to remove the firm's certification.

If a DBE fails to submit the required annual Declaration of Eligibility (DOE) required under § 26.83(j) in a timely manner, the NPRM proposed that a certifier could initiate decertification proceedings on that basis without offering the opportunity for a hearing. If within 15 days of the issuance of a certifier's NOI to remove the firm's certification, the certifier could issue a final notice of decertification.

The NPRM would say that, if a ground for decertification is a change in DOT's certification standards or requirements, the certifier would have to offer the firm, in writing, the opportunity to cure resulting eligibility defects within 30 days.

The Department proposed authorizing, on a permanent basis, virtual hearings (*i.e.,* via video conferencing) in decertification cases. Virtual hearings are more efficient, can be more easily scheduled and better protect the health of participants. Other requirements, like those for verbatim transcripts, would remain intact. To avoid dilatory tactics, the NPRM would impose a 45-day deadline for submission of written responses to an NOI or a hearing. Once the hearing had happened, or written responses received, the certifier would have 30 days to issue a final decision.

When there is a hearing, the NPRM would require that only the SEDO be permitted to answer questions concerning the firm's control. While an attorney or other representative could be present and participate, and answer questions concerning other aspects of a firm's eligibility, only the SEDO could testify about control matters. An attorney or other representative could ask follow-up questions to the SEDO concerning control, however.

Comments

Decertifications for Lack of a Timely DOE

Almost all comments on the issue of decertifications for lack of timely submission of a DOE supported the idea that there need not be a hearing in such cases. However, several of these commenters thought that the 15-day window for response to a NOI concerning a late DOE was too short. A 21-, 30-, 45-, or 60-day time period for response before a final decertification was issued would be fairer, some commenters said, pointing to the difficulty that especially small firms may have keeping up with paperwork or potential increases in certifier workload. One comment cautioned that, because of the uncertainties of email, the time period prior to a decertification action start to run only on confirmation that the DBE received the certifier's NOI.

To avoid confusion and potential decertification actions, firms should have to submit only one DOE per year, the commenter said. Another commenter said that it did not want lack of a timely DOE to be the sole ground for removal of eligibility.

Deadlines

There were few comments about the proposed deadline in the NPRM for issuance of a final decertification decision, all of which were from recipients. One would prefer no deadline at all, but if there is one, believed 60 days for the issuance of a final decision would be appropriate. Another supported 60 days, saying that 30 days was too short a time to handle complex cases, especially for high volume certifiers. A third found the proposed 30-day deadline acceptable but wanted to allow a 15-day extension on a case-by-case basis.

With respect to the proposed deadline for conducting a hearing, a recipient suggested that the hearing should be scheduled 45 days from the firm's request for a hearing, rather than from the issuance of the NOI by the recipient.

Hearing Procedures

Concerning representation at hearings, a large majority of the comments addressing the issue supported the NPRM's proposal that only the SEDO should testify about control issues. Attorneys and other representatives should be able to speak about other matters (*e.g.,* PNW), several added. The commenters who disagreed thought that the requirement would impinge on the due process owed to DBEs in a proceeding that could remove certification, a property right, from a firm. A recipient thought that panel members at a hearing should be able to use their discretion with respect to who is allowed to testify on issues being discussed. One comment said that only owners should be able to testify about ownership and other issues, as well as control.

All the comments that addressed the proposal for allowing virtual decertification hearings supported it. One said that, however, a firm should be able to have an in-person hearing if it wanted one.

Among other comments, one thought that an ''informal hearing'' should be better defined, and that there should be additional safeguards against abusive or dilatory tactics by attorneys. This comment also said that it was important that hearing officers and decision makers in decertification actions really understood the rules well, suggesting that additional training from DOT for such persons would be useful. Another commenter thought that hearings should not be heard by staff from recipients in the same State as the certifier proposing certification, as this could lead to rubber-stamping of the proposed removal. A comment said that firms needed stronger protections in decertification actions, as they can be subject to burdensome information requirements and harassment, especially in cases involving rebuttal of the SEDO's presumption of economic disadvantage.

Other Comments

Once a firm has been decertified, a few recipients said, the certifier should notify all other States in which the firm is certified. DOT should notify States if a decertification is upheld on appeal, another said.

DOT Response

Filing a timely DOE is an affirmative obligation of certified firms. Given that all DOEs to all States would now be due on the same date—the anniversary date of certification in the JOC—firms should not be confused about the time they are supposed to send DOEs to all the States in which they are certified. We believe that summary suspension is the most efficient provision for enforcing failures in filing § 26.83(j) material. Nevertheless, the final rule allows the certifier the discretion to choose either § 26.87 or § 26.88 as the most appropriate course of action.

With respect to the date for a hearing on other decertification actions, we believe that it is prudent to require certifiers to set a hearing date that is no less than 30, but no more than 45, days from the date of the NOI. This prevents both undue delays in the process and schedules that do not allow a firm to prepare adequately. The firm must let the certifier know within 10 days whether it wants a hearing, and the parties can negotiate an agreed-upon date for the hearing. If the firm does not want a hearing or does not notify the certifier in a timely manner that it wants one, the firm can still submit written information and arguments.

In cases in which the firm elects not to go to a hearing, and rather only submits written materials, we believe that the firm should have the same amount of time to prepare as in the case where it chose to appear at a hearing. Therefore, the material would be due by what would have been the hearing date. If a firm does not show up for a hearing, or does not submit written materials, the certifier makes its decision on the basis of the information it already has.

In the interest of simplifying the procedure, we are not specifying by rule who can speak to issues at the hearing. We emphasize that, during a hearing, a SEDO or other witnesses should have a reasonable opportunity to consult with counsel, other witnesses, or experts. It is appropriate neither for a certifier to deny the firm such an opportunity, nor for the firm to unduly delay or interfere with the conduct of the proceeding. Dilatory tactics are prohibited and may be sanctioned by a certifier. It is up to the hearing officer to make sure that information presented is relevant and is provided by the most knowledgeable sources. For example, if an attorney or other witness attempts to speak to a matter affecting control, it could be appropriate for the hearing officer to say, in effect, ''I want to hear directly from the SEDO on this matter.''

It is incumbent on certifiers to conduct thorough on-site interviews—including a review of a certified firm prior to considering decertification—so that information about the roles of other key participants and the firm's decision-making process can already be part of the record before the hearing.

We agree with commenters that the decisionmaker in a decertification hearing must, in addition to complying with separation of functions requirements, have extensive familiarity with the program regulation. We urge certifiers to make sure that any officials who may be tasked with this responsibility have received thorough training concerning the regulation, such as the Department has made available. We also note that, as under the previous versions of the regulation, the deciding official must also be an individual who was not involved in the earlier stages of the proceeding or who is not supervised by anyone who was. This could be someone in another part of the certifier's agency or someone who works for another agency.

In administrative law, a ''formal'' hearing is one that involves a trial-type hearing with administrative law judge and detailed rules of evidence. At the Federal Government level, sections 554–557 of the Administrative Procedure Act (5 U.S.C. 554–557) provide a model for what such a proceeding looks like. One example of such a proceeding within the Department of Transportation is the process for aviation enforcement proceedings under 14 CFR part 300. Anything other than that is an ''informal hearing.'' The structure of informal hearing in the DBE program can vary among certifiers, but in all cases must provide reasonable administrative due process to the respondent and other participants.

Commenters agreed with the proposal to authorize virtual hearings in decertifications proceedings. While in-person hearings are also permitted, we note that in an interstate decertification case in which staff from other States are participating, a virtual component would be essential. The requirement to provide a transcript of any hearing, virtual or in-person, to the Department in the event the firm appeals remain in place.

The NPRM proposed that once a hearing had been held, or written arguments received, a certifier would have 30 days to issue a final decision. Some commenters thought that time period was too short, given certifiers' workloads. A firm remains certified until the NOD is issued, so the effect of a certifier's delay beyond that period has the effect of keeping in effect a certification that the certifier believes should be removed. A certifier that often fails to meet this deadline may be the subject of DOT compliance and enforcement action.

In the interest of simplifying the rule and avoiding disputes over the basis for a decertification, the proposed § 26.87(g), specifying the grounds on which a decertification can take place, is not included in the final rule. In our experience, these provisions have often led to confusion (*e.g.,* concerning whether a certifier's previous decision was ''clearly erroneous'' or simply change of mind). The key question in any decertification action is whether a firm meets eligibility criteria at the time of the action. If a certifier certifies a firm in September, and the following April comes to believe, on the same facts, that the firm is not eligible, it is likely to have a difficult time meeting its burden of proof in a decertification proceeding.

25. Counting DBE Participation After Decertification (§ 26.87(j))

NPRM

In addition to clarifying the effect of the removal of a firm's certification prior to a DBE obtaining a prime contract or subcontract, the NPRM proposed changes to § 26.87(j) concerning how DBE participation is counted with respect to firms that lose their certification partway through a contract. The Department proposed that a prime contractor would only be permitted to add work or extend a completed contract with a previously certified firm with the prior written consent of the recipient.

This proposal was responsive to the concern that, especially in a long-term project of the sort that is often done via a design-build contract, prime contractors had an incentive to give work to decertified firms that were already working for them, rather than find new eligible DBEs to do the work going forward. At the same time, the proposal would give recipients flexibility to permit a brief amendment to or continuation of a contract with a decertified former DBE.

Under the current rule, when a DBE is decertified in the midst of a contract, after the subcontract is executed, the prime contractor gets to count credit for its use through the end of the contract. The NPRM proposed to make an exception to that rule, saying that if the reason for the DBE's ineligibility is that it was acquired by, or merged with, a non-DBE firm, the prime contractor could no longer count the former DBE's participation for the remainder of its contract. This means that, under these circumstances, continuing to count the former DBE's work for credit would deprive other DBEs of opportunities.

Comments

A narrow majority of commenters opposed the NPRM's proposals concerning § 26.87(j). Opponents, including non-DBE contractors and recipients, but some DBEs as well, said the proposal concerning merged or purchased DBE firms would impose burdens on prime contractors who, after engaging a DBE in good faith, found that the DBE had later merged with or been purchased by a non-DBE. This would unfairly penalize the prime since the DBE's relationship with the acquiring firm was not the prime's responsibility. One of these comments suggested that the proposed exception should apply only if the non-DBE that bought or merged with the DBE was the prime contractor itself. One opponent of the proposal said that it could place DBEs in an unequal position compared to non-DBEs, who can use mergers and acquisitions for business growth purposes.

Some comments opposed to the proposals said that requiring recipients' consent to count credit for added or extended work for a decertified DBE would be an extra burden on both recipients and prime contractors. A comment said that added tasks for the DBE within its scope of work, including via change orders, should be counted. Denying DBE credit for added or extended use of decertified DBEs could disrupt projects, another comment said. Recipients should make case-by-case judgments on such matters, it added.

Proponents of the proposals, also from a variety of stakeholder types, supported them for the reasons stated in the NPRM preamble. Some of these comments specifically mentioned favoring prior recipient consent for any extension of or addition to the former DBE's work, wanting prime contractors to seek new DBE participation in the absence of such consent.

One comment that supported the proposal asked for clarification about its application in situations where a DBE had exceeded the size standard or had withdrawn from the program. Another did not want firms who had exceeded the size standard during the contract to lose credit. In the context of the ACDBE program, a DBE commenter that supported the proposal nevertheless thought it should be waived if a decertified ACDBE showed that it had made good faith efforts to sell to another ACDBE.

DOT Response

We continue to believe that in most instances, if a DBE loses its eligibility during contract performance but after execution of the subcontract and continues to perform a commercially useful function, its participation should continue to count toward contract goal credit; prime contractors should not bear the burden of finding a DBE replacement if the firm was certified at the time the subcontract was executed. However, many have raised concerns about a prime contractor's ability to continue to count toward goal credit the performance of a DBE that was certified at the time the subcontract was executed but loses its eligibility during contract performance *because it merges with, or is acquired by, a non-DBE* (at times by the prime itself). This may occur early in the performance of a multi-year contract and result in a non-DBE receiving goal credit at the expense of other ready, willing, and able, certified DBEs.

We agree that the standard rule should have an exception if a DBE loses its certification eligibility after execution of the subcontract because it merges with or is acquired by a non-DBE. In that instance only, we believe that the benefit to the DBE program of directing the prime contractor to seek DBE participation to make up the now-ineligible firm's contribution to the goal outweighs the costs to the prime contractor of doing so. Similarly, seeking the recipient's consent for a prime contractor's practice of adding work or change orders, typically in the context of a design-build project, to extend the performance of a DBE that has lost certification during project performance, is a good check on actions that could go counter to the interests of the program. Recipients should reach out to a prime contractor when it becomes apparent that the prime is repeatedly extending the work of a firm after the firm becomes ineligible to determine if the extensions are made for the purpose of avoiding soliciting other DBEs. If so, the program benefits when the recipient withholds consent to add further work to an ineligible DBE to allow room for certified DBEs to participate.

26. Summary Suspension (§ 26.88)

NPRM

The existing summary suspension rule permits or requires certifiers to immediately suspend a DBE's certification in extraordinary situations that could jeopardize program integrity or when time is otherwise of the essence. It is an extraordinary remedy that certifiers should not use lightly and to which a firm should have an adequate opportunity to respond.

The changes proposed to § 26.88 in the NPRM remedy problems in the current language that in effect converts what was intended as swift summary suspension action into a slower § 26.87 process. Notice of the suspension would be by email, rather than certified mail to ensure that the firm received immediate notice of the action and a time certain when the parties would know requisite timelines begin. Credible evidence of the firm's involvement in criminal or fraudulent activity would be added as mandatory grounds for suspension. The death or incarceration of the SEDO, on the other hand, would trigger a discretionary elective summary suspension only if there is ''clear and credible evidence'' that the DBE's continued certification poses a substantial threat to program integrity. This bar allows for more certifier discretion to determine if either event demanded immediate action. Failure to file a timely DOE, which is essential to a firm's continued eligibility, would also be elective grounds for a suspension. This change expands the ability to remove ineligible firms without invoking a § 26.87 proceeding.

Elective summary suspensions could be based on only a single ground, while mandatory suspensions could cite multiple grounds. The NRPM also provided procedural details for § 26.88 proceedings, designed to bring the proceedings to conclusion within 30 days. A new elective suspension occurring within 12 months of a previous elective suspension would be null and void, and subject to ''injunctive relief'' from the Department.

Baked into the proposed rule are balanced due process parameters framing both certifier and firm actions. This includes a certifier explaining with specificity the reasons for the actions, their consequences, and the evidence replied upon. The firm may elect to present information and arguments or explanations but is required to affirmatively respond to the certifier's scheduled hearing—opting in or responding in the timeline specified. If the firm fails to cancel or appear at the hearing, it forfeits its certification. Boundaries on what evidence the certifier may present are delineated in the proposed rule as is the applicable burdens of production and proof by both parties. Lastly, the proposed changes make suspensions immediately appealable to DOT.

Comments

The nearly 20 comments addressing this section of the NPRM had a variety of things to say about it. Several supported the proposal as written. One comment asked whether the ''clear and credible evidence'' standard for an elective suspension is the same as ''clear and convincing evidence,'' while another thought that the ''clear and credible evidence'' standard placed an undue burden on certifiers.

One commenter thought that the proposed scheduling requirements would be difficult for certifiers to meet. Two commenters asked for more detail on the timing and procedures for the process, such as who could attend and who the decision maker would be. Others believed that a certifier should be able to suspend a firm more than once in a 12-month period, if circumstances supported doing so (*e.g.,* there are two separate events in such a period that would justify a suspension).

One comment suggested adding bankruptcy, especially under Chapter 7, as a trigger for a suspension. Another suggested that, after a bankruptcy, death of a SEDO, or another basis for an elective suspension, there should be a 90-day grace period to allow a firm to deal with the issue before it could be suspended. On the other hand, another commenter thought there should be a mandatory suspension whenever ownership of a firm changes in a way that could affect its eligibility. One commenter said that certifiers should be able to cite multiple grounds for a discretionary suspension if such grounds existed.

A number of commenters said that in addition to or instead of sending an email, a certified letter should be used to provide notice of a suspension. Emails were too uncertain, these commenters thought, and a certified letter would provide evidence of receipt. Given the difficulties that small firms often have keeping track of paperwork, another commenter said, imposing a suspension for a late DOE seemed unduly harsh.

DOT Response

Summary suspension is an important tool for protecting the DBE program in situations involving serious, often rapidly developing situations that could adversely affect its integrity. It is intended to be used rarely, in situations that present an obvious threat to program integrity. It is not intended to be used in situations where a certifier merely has a suspicion or a hunch that a firm may be ineligible, or where there is uncertainty about whether the suspension is justified. It is intended to be used when the cause is certain, and when the need for action to protect the integrity of the program is time-sensitive because delay in action could lead to real harm to the program or participants in it. It is not intended to be a shortcut for removing the eligibility of firms whose status is properly addressed under the normal decertification provisions of the regulation.

The NPRM used the term ''clear and credible evidence'' to describe the proper basis for a summary suspension which, perhaps because of its seemingly similarity to the ''clear and convincing evidence'' term used in sections of the current rule and in other proceedings, raised questions for some commenters. The Department is not creating a new legal standard or a variation on an existing standard. We are simply saying that to serve as the basis for a summary suspension, the certifier's evidence must be clear. It must be credible. If not, then summary suspension is not an appropriate remedy.

The credible, clear evidence must pertain to specific types of facts. The death of a SEDO, leaving the ownership and/or control of a DBE in question, is one situation that could lead to a summary suspension. Likewise, incarceration, a medical condition (*e.g.,* a seriously disabling stroke), or a legal disability (*e.g.,* having one's affairs placed in a conservatorship) that prevents a SEDO from controlling a firm could be a basis for a summary suspension. As a commenter suggested, an event putting the viability of the firm into serious question, like a Chapter 7 bankruptcy or a merger or acquisition involving a non-DBE firm could also be a basis for action by a certifier under this section.

A DBE or its SEDO's involvement in fraud or other serious criminal activity affecting business integrity or potential to impact continued eligibility could be another basis for suspending the firm. This is not an exclusive or exhaustive list of offenses that could form a basis for a suspension; certifiers should use good judgment to invoke the provisions of this section when misconduct on the part of SEDOs or DBE firms warrants prompt action. We also note that not all criminal offenses are necessarily grounds for suspension. For example, a conviction for driving under the influence of alcohol or drug possession would not provide a basis for a suspension in most cases.

The Department is maintaining the NPRM's distinction between mandatory and discretionary grounds for suspension. If an OA directs a certifier to take suspension action, or in a case involving fraud or other serious criminal activity, then taking suspension action is mandatory. Otherwise, including cases involving the failure to file a timely DOE, the action is discretionary.

Few commenters addressed the timing and procedural provisions of the proposed summary suspension section, and we are adopting them without change. We believe that the provisions are clear and appropriate to what is intended to be a summary procedure. In a hearing under this section, we would apply the same requirements (*e.g.,* with respect to representation by attorneys, separation of functions) as applied to decertification proceedings under § 26.87. To make sure that the firm has received the notice initiating the procedure, we recommend that certifiers send emails having a ''read receipt'' feature.

We wish, however, to clarify that, once a certifier issues a notice of suspension, the firm has the burden of production. This means coming forward with evidence to argue that a suspension should not be issued. Just as in a decertification action, however, the ultimate burden of persuasion rests with the certifier that proposes the action. It is the certifier that must show, by a preponderance of the evidence, that the suspension is appropriate, and that the firm's eligibility should be removed.

What kind of evidence might a firm produce to show that a suspension should not be issued? While this evidence would necessarily vary from case to case, some examples might be that, even without the participation of a deceased or incarcerated SEDO, other SEDOs' participation is sufficient to meet ownership and control requirements. In the case of a SEDO whose affairs were placed in a conservatorship, a firm might be able to show that the conservator was a socially and economically disadvantaged individual who can maintain the required degree of ownership and control.

The NPRM proposed notifying DBEs of a notice of suspension by email.

Some commenters suggested that the requirement for certified mail be retained, in order to provide greater certainty that the notice had been received. We believe, however, that email is more prompt, important in a time-sensitive matter like a summary. DBEs have to provide email addresses to certifiers as part of the normal certification process and are responsible for updating the address as needed and reading emails when they arrive. Moreover, many email systems include features that confirm receipt of a message.

One result of a summary suspension proceeding can be the decertification of a firm. In a case where a firm is certified in more than one State through interstate certification, however, the suspension and a resulting removal of eligibility apply only in the State that took action to suspend the firm. This is unlike the regular interstate decertification procedure included in the final regulation, in which a decertification action can apply to all States in which the firm is certified.

We have noted that, with respect to firms that fails to file a timely DOE and documentation of gross receipts, the summary suspension process of § 26.88(b)(2)(ii) enables more rapid action than the decertification procedures of § 26.87. The final rule provides failure to file a timely DOE as an optional ground for summary suspension.

Where a certifier fails to follow the procedures of this section properly, the rule makes available to an affected firm a petition for an enforcement order that could vacate an improper second elective suspension within a 12-month period or require a certifier that did not take final action on a suspension within 30 days to lift the suspension and reinstate the firm's certification.

27. Appeals to the Departmental Office of Civil Rights (DOCR) (§ 26.89)

NPRM

The NPRM proposed reinserting language from the 2014 rule that was inadvertently omitted. This includes the requirement that appellants notify DOCR in its appeal decision of other certifiers that have denied or decertified the firm.

The Department proposed modifying existing procedures for certification appeals to the DOCR to improve administrative efficiency. The time for appellants to file appeals would be reduced from 90 to 45 days. Our proposals sought to streamline the process and balance the needs of firms, recipients, and DOCR. We left intact the firm's ability to demonstrate that there was good cause for a late filing and explain to the Department why it would be in the interest of justice to accept the appeal.

The requirement that records be sent from certifiers to DOCR in an indexed and organized fashion would be strengthened by allowing DOCR to reject poorly organized records, resulting in a directive to send a corrected record within 7 days. Failure by the certifier to do so would be a failure to cooperate under § 26.109(c). The NPRM proposed new language wherein DOCR could summarily dismiss an appeal if warranted, such as situations wherein the firm does not set forth a full and specific statement under § 26.89(c), if a firm withdraws its appeal request, or if a certifiers requests to reconsider its decision. The rule would explicitly state that DOCR does not issue advisory opinions and that the 180-day target for issuing an appeals decision would be met ''if practicable.''

Comments

Several comments from recipients supported the NPRM's time frames for setting the time frame for appeals at 45 days rather than the current 90 days, while a DBE organization suggested using 60 days as a middle ground. Two commenters said DOT should not have more than 180 days to decide a case once a complete record had been received. One of these also suggested that the effect of a UCP's decertification decision should be stayed until DOCR had decided the appeal. A recipient noted that, especially with respect to voluminous records in large cases, indexing and organizing the record can be a major task that may not be able to be accomplished in 45 days.

DOT Response

The final rule incorporates all the proposed changes. Forty-five days is reasonable in our view for appellants to state in their appeal the reasons why they believe the certifier's decision is erroneous, what significant facts the certifier failed to consider, or the provisions of the rule the certifier did not properly apply. On this point, we reiterate language in our 2014 preamble, that the appeal ''is not an opportunity to add new factual information that was not before the certifying agency; [H]owever, it is completely within the discretion of the Department whether to supplement the record with additional, relevant information made available to it by the appellant as provided in the existing rule.'' (79 FR 59579 (October 2, 2014).

To ensure that certifiers' records sent to the Department for certification appeal purposes are as complete and useful as possible, the final rule requires that the records include video or audio recordings, or written transcripts, of any hearings in the case. In addition, certifiers must make audio recordings of on-site interviews. This information is invaluable, particularly in cases hinging on ownership and control issues.

The NPRM sought to streamline DBE and ACDBE processes and balance the needs of firms, recipients, and DOCR. In the last several years, the number of appeals has been low compared to the number of adverse certification decisions. Also, many UCPs have transitioned to electronic application processing. We think it is rare that a UCP could not submit organized and indexed records to DOCR, even those that may be voluminous, within 45 days. This is reasonable in our view particularly considering that effort it takes for both program participants (firms and certifiers) to submit/review application material, participate in an on-site interview, craft and review denial or decertification letters, then appeal.

The Department takes seriously the appeal obligations of firms and certifiers. DOCR will dismiss firms' non-compliant appeals (as § 26.89(c) specifies) and remand matters to certifiers with instructions to augment or fix its record within a specified time, and the OAs will act upon non-compliance (*e.g.,* by conducting compliance reviews).

The Department has decided not to include in the final rule the proposed provision setting a 180-day time frame for decisions in appeal cases. The parallel provision in the current regulation has often proved confusing. It did not relate, as some have thought, to a clock that starts when an appeal letter arrives. Rather, it related to the time when a complete record is available to the Department, something that has often occurred well after the Department received an appeal letter and the precise date for what is often an iterative process can be uncertain. Moreover, the ''if practicable'' language of the proposal made the timeframe essentially aspirational. The proposal that the Department send a letter when the timeframe was exceeded would likely occupy staff time that could otherwise be more productively used in completing appeals cases. Using its resources, the Department will do its best to respond to appeals promptly. If there is a systematic delay in processing appeals (*e.g.,* because all available staff are assigned to a major project for a time), the Department intends to place a notice on its website informing the public of the situation.

28. Updates to Appendices F and G

NPRM

The NPRM proposed to remove the Uniform Certification Application and personal net worth (PNW) forms from Appendices F and G, respectively. In addition, the NPRM proposed technical and terminological changes within the appendices, most notably renaming the current affidavit of certification the ''Declaration of Eligibility'' (DOE). The DOE would be used both in initial applications and in the annual submission to certifiers. Consistent with the proposals concerning personal net worth, the ''retirement accounts'' line item would be deleted from the PNW form.

Comments

There were few comments on these proposals. One recipient supported them. Another expressed concern about how changes in the forms would be communicated to certifiers if the forms were no longer to be found in the regulation itself. It was also concerned about maintaining uniformity in the absence of a regulatory requirement. One commenter suggested changing the submission requirement of a DOE to every other year because, in their view, there is not much change between years and the change would lower the paperwork burden on certification agencies.

DOT Response

The final rule fully adopts the Department's proposed changes. The annual submission by firms of a DOE is made easier in our view by the widespread use of electronic systems that notify firms and recipients when the DOE is due.

29. Miscellaneous Program Elements and Concerns

There were a wide variety of comments that did not fit neatly within the NPRM's numbered areas of proposed change.

Legal Defensibility of DBE Program

Commenters on this issue expressed deep concern that, in the present legal climate, the DBE program was vulnerable to renewed legal challenges. Consequently, commenters said, it was important to have a discussion in the preamble to the final rule of the continuing compelling need for a race-conscious program, based on recent disparity studies and material that has been provided to Congress in the context of authorizing legislation. A recent report from the Department of Justice was mentioned as a possible source of evidence supporting a continuing compelling need.[9] Given some of the proposals in the NPRM, another comment said, it was important to demonstrate how revisions to the program would remain consistent with the narrow tailoring requirement for race-conscious programs.

Paperwork Reduction Act

Two commenters said that the Paperwork Reduction Act statement in the NPRM underestimated the burdens on airports in the ACDBE program. For the small business ACDBE program, an airport said it would take 120 staff hours rather than the estimated 5.6. For the active participants list, the commenters believed that the staff hour commitment would be 40 hours rather than the projected 42. For other proposed reporting requirements, the commenters said that the burden would be 25 or 40 hours, rather than the projected 3.2 hours. Other commenters thought proposed reporting, directory and related requirements, would increase costs beyond the Department's projections. Recipients would have to make organizational changes, hire staff, and acquire or modify software. The Department should, commenters said, retain existing flexibility and provide funding for changes that a final rule requires.

Advisory Committee

A commenter said that the Department should create a standing advisory committee under the Federal Advisory Committee Act to provide ongoing feedback and recommendations to the Department concerning implementation issues and to suggest guidance that could be helpful in the future. The committee would include representatives of all the principal interests involved in the program such as DBEs and ACDBEs, non-DBEs, recipients in various OA programs, and organizations representing them. Similarly, another commenter suggested having a national roundtable of people to share data and experiences.

Training

Several commenters suggested that the Department provide additional training to program participants, including DBEs, prospective applicants, recipients, and certifiers. The program, a commenter added, should encourage technical guidance and instruction for DBEs.

Incentives for Prime Contractors and Recipients

Several commenters suggested giving incentives to prime contractors who meet or exceed goals, analogous to incentives given for finishing a contract ahead of schedule. There could be incentives for prime contractors to form joint ventures with DBEs. Recipients could publicize good performance by prime contractors. Stipends could be provided to encourage prime contractors to enter mentor-protégé programs. Mentor-protégé programs could be made more attractive by removing some of the restrictions in the current mentor-protégé provision of the regulation (§ 26.35(b)(2)(i) and (ii)). There could be ''extra credit'' toward DBE goals on a federally assisted contract for having used DBEs on private sector work, or by giving points on the next procurement for a contractor who exceeded DBE goals on a previous one. Prime contractors could also be encouraged to set up ''one-stop shopping'' hubs to inform DBEs of opportunities. Recipients could provide incentives to prime contractors to use newer, smaller DBEs rather than old standbys.

A commenter suggested that States with excellent DBE programs receive preferences in discretionary grant programs.

Add Other Types of Firms to the Program

A letter-writing campaign resulted in numerous docket entries recommending that there be a national MBE program and goals, in addition to the DBE program and goals. Other commenters suggested allowing SBA-certified 8(a) firms into the DBE program automatically.

Term Limits

Two comments suggested either term limits—like those in SBA programs—for all DBEs/ACDBEs or ''graduation'' for firms who had been in the program for a lengthy period and received many contracts.

Miscellaneous Program Suggestions

Among ideas suggested by commenters to improve the program were set-asides, sole-source contracts for DBEs, providing surplus recipient or DOT property to DBEs, simplifying prequalification standards and requirements for responding to solicitations for small firms, making

[9] U.S. Department of Justice, ''The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence,'' (Jan. 31, 2022), See *https://www.govinfo.gov/content/pkg/FR-2022-01-31/pdf/2022-01478.pdf* and *https://www.justice.gov/crt/page/file/1463921/download.*

provisions like those concerning Alaska Native Corporation firms or SBA programs available to African-American firms, assistance with bonding and insurance requirements (*e.g.,* by reducing performance bonds for DBEs to 50 percent or having prime contractor take out subcontractor default insurance in place of requiring bonds for DBEs), increasing overall goals to more than 10 percent, maintaining a national DBE database at DOT, doing more to encourage unbundling on all types of contracts, giving DBEs the first opportunity to get contracts under $500,000, supporting greater use of mentor-protégé programs, requiring recipients to conduct updated disparity studies, adding supplier outreach and diversity programs, strengthening the role of DBE liaison office and require additional reporting from them, adding an ''ombudsman'' function to help newer firms get work, and channeling funds to ''subject matter experts'' to provide technical assistance to DBEs.

Other Program Concerns

Some comments referenced the longstanding concern that only a few established DBE firms get most of the work, limiting opportunities for the rest. One commenter said that in their State, 10 DBEs got 46 percent of the work, while 30 did 80 percent of the work. A study from a non-DBE contractors group said that DBEs had the most capacity in the smallest areas of contracting opportunity, but the lowest capacity in the most significant contracting areas (*e.g.,* heavy highway and bridge work). Commenters expressed continuing concern about fraud in the program.

DOT Response

The DBE program ''has the important responsibility of ensuring that firms competing for DBE contracts are not disadvantaged by unlawful discrimination.'' This statement, in the preamble to the Department's 1999 final DBE rule (64 FR 5096, 5096 (February 2, 1999)) encapsulates the program's longstanding purpose. That preamble discussed, at length, how the program and its regulation met the constitutional ''strict scrutiny'' requirement for programs using racial classifications, including how the part 26 provisions met each of the elements of the ''narrow tailoring'' prong of strict scrutiny articulated by the courts. *See id.* at 5101–5103. The constitutionality of the program has been challenged several times in Federal court, but in each case, the courts have upheld the program. *See Midwest Fence Corp.* v. *Dep't of Transp.,* 840 F.3d 932, 941, 935–36 (7th Cir. 2016); *W. States Paving Co.* v. *Wash. State Dep't of Transp.,* 407 F.3d 983, 995 (9th Cir. 2005); *Sherbrooke Turf, Inc.* v. *Minn. Dep't of Transp.,* 345 F.3d 964, 967–68 (8th Cir. 2003); *Adarand Constructors, Inc.* v. *Slater,* 228 F.3d 1147, 1155 (10th Cir. 2000). Courts have also relied upon these decisions' findings about the constitutionality of the program when ''as applied'' challenges have been brought. Here again, the program has withstood these strict scrutiny challenges, largely due to the fact that recipients properly following program mandates may rely upon the Congressional findings of compelling need. *See Mountain West Holding Co.* v. *Montana,* 691 F. App'x 326 (9th Cir. 2017, memorandum opinion); *Dunnet Bay Construction Co.* v. *Borggren,* 799 F. 3d 676 (7th Cir. 2015); *Northern Contracting, Inc.* v. *Illinois,* 473 F.3d 71 (7th Cir. 2007); *Associated General Contractors of America, San Diego Chapter, Inc.* v. *California Department of Transportation,* 713 F. 3d 1187 (9th Cir. 2013); *Geyer Signal, Inc.* v. *Minnesota Department of Transportation,* No. 11–321 (JRT/LIB), 2014 WL 1309092 (D. Minn. Marc. 31, 2014; *Geod Corporation* v. *New Jersey Transit Corporation,* 678 F. Supp. 2d 276 (D.N.J. 2009), and 746 F. Supp. 2d 642 (D.N.J. 2010).

Repeated reauthorizations of the program by Congress (listed in § 26.3 (a) of the rule), and extensive evidence supporting it, underscore the continuing compelling need for the program to combat discrimination and its effects.[10] These actions have been based on statistical and anecdotal evidence of the persistence of discrimination affecting firms seeking work in DOT-assisted contracts, often in the form of the numerous disparity studies that have been conducted on behalf of DOT recipients and other parties. In this important respect, the DBE program differs significantly from other programs that may use race-based classifications in order to advance worthy, but conceptually distinct, objectives such as achieving diversity.

We emphasize that the present part 26 and the revisions this final rule makes to modernize administrative provisions of the program and leave intact the mechanics of goal setting as has been the case over many decades. Part 26 does not allow quotas nor impose any penalties for failing to meet goals, and it requires that recipients use race- and gender-neutral means to the maximum extent to achieve DBE participation goals before resorting to race- and gender-conscious means. The program retains the basic narrow tailoring building blocks which, as noted above, have repeatedly been upheld by courts.

We believe there would be value in establishing a standing Federal advisory committee to provide input to the Department on the continuing implementation of the program and suggestions for guidance on issues that may arise in the future. However, this and several other suggestions for changes in the program (*e.g.,* applying term limits to firm's participation) are outside the scope of this rulemaking, beyond the Department's statutory authority, or both.

Part 23

Subpart A—General

30. Aligning Part 23 Objectives With Part 26 Objectives (§ 23.1)

NPRM

The NPRM proposed to add two new program objectives to part 23 to align it with the objectives in part 26. These objectives, similar to those in §§ 26.1(f) and (g), promote the use of ACDBEs in all types of concessions activities at airports and assist the development of firms that can compete in the marketplace outside the ACDBE program. The proposal received support from trade associations, consultants, and airport recipients, with one trade association cautioning against simply adding similar objectives due to differences in business activities between the DBE and ACDBE programs. Instead, the commenter suggested adopting the following single objective: ''To support the development of ACDBEs that can compete independently for concessions opportunities at airports receiving DOT financial assistance.''

DOT Response

The change suggested by the one commenter is not substantively different from language proposed. In addition, support for adding the two program objectives is unanimous. Therefore, the final rule retains both objectives as proposed.

[10] *See* BIL, Sec. 11101(e)(1) (''. . . testimony and documentation . . . provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination . . . .''); *Congressional Record—Senate,* S5898, S5899 (August 5, 2021); *Congressional Record—House,* H3506, H3507 (June 30, 2021); ''DRIVING EQUITY: THE U.S. DEPARTMENT OF TRANSPORTATION'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM''—Remote Hearing Before the Committee on Transportation and Infrastructure, 116th Cong. 64 (Sept. 23, 2020), available at *https://www.govinfo.gov/content/pkg/CHRG-116hhrg43413/pdf/CHRG-116hhrg43413.pdf.*

31. Definitions (§ 23.3)

NPRM

For consistency and clarity, the NPRM proposed that § 23.3 adopt existing definitions in part 26 which are also applicable to part 23. The definitions for terms such as, ''Alaska Native,'' ''Assets,'' ''Contingent liability,'' ''Days,'' ''Immediate Family Member,'' ''Liabilities,'' ''Operating Administration'' or ''OA,'' and ''Socially and economically disadvantaged individual'' were proposed to be added or amended to ensure that the definitions and terms contained in both parts aligned. Additional definitions for ''Airport Concession Disadvantaged Business Enterprise (ACDBE),'' ''Part 26,'' ''Personal Net Worth,'' ''Affiliation,'' ''Concession,'' ''Subconcession or subcontractor,'' and ''Sublease'' were either proposed to be added or amended to clarify existing requirements in part 23 or to correct errors and replace obsolete cross-references within the regulation.

Comments and DOT Response

A majority of commenters in general supported the addition or alteration of the definitions at large.

Assets

For the definition of ''assets,'' one commenter suggested that the Department clarify the requirements for demonstrating ownership of sole and separate property. For example, if ownership of property or assets were to be demonstrated by evaluating the title, this should be clarified in the ''assets'' definition.

The Department adds the part 26 definition of ''assets'' to part 23 without revision to ensure consistency in its meaning across both parts. We added other definitions from § 26.5 to § 23.3 for this same reason. The final rule does not adopt the commenter's proposed ''asset'' definition in part 23 because it would otherwise make the definition inconsistent with its counterpart in part 26.

Airport Concession Disadvantaged Business Enterprise (ACDBE)

Commenters were evenly divided in support and opposition of the NPRM's proposal to modify the definition of ''ACDBE.'' The proposed change is intended to clarify that a firm does not need to be operational or demonstrate that it previously performed contracts at the time of its application for certification. Comments in favor of the change indicated that the proposal would increase the number of available ACDBE firms and that previous experience of the firm was less important in the concessionaire industry, as long as airports are permitted to consider experience of the individual owner when selecting a firm. The commenters opposing the change expressed concern about how an unqualified firm could become competent in a particular line of work in which the firm has no experience.

The final rule adopts the definition of ACDBE as proposed. The Department acknowledges the distinction between the experience of a firm and SEDO and believes that the experience of the individual owner is more relevant for purposes of certification in the concession context. Moreover, conditioning certification on a firm's experience would present significant barriers for firms seeking ACDBE certification status. See preamble discussion on § 26.71 for discussion on the operations requirement for DBEs.

Concession

The final rule incorporates the term ''traveling public'' into the ''concession'' definition to clarify that businesses that do not primarily serve the traveling public should not be considered concessions. A majority of commenters supported this change. However, the comments in opposition expressed concern that a revision restricting the term ''concession'' to the traveling public would negatively impact an airport recipient's ability to meet its participation goals by limiting the number of businesses that may be considered an ACDBE concession. The commenters said that without additional guidance or clarity, this change would result in confusion within the industry because there is significant subjectivity involved in determining what businesses are intended to serve the traveling public.

The final rule adopts the definition of concession as proposed. The legislative and regulatory history of the concessions provision has always focused on businesses that serve the traveling public at the airport, which supports the final rule's revision. The Department does not believe that including the term ''traveling public'' in the definition will cause confusion or inhibit airport recipients' from achieving participation goals. Instead, it merely reflects the Department's longstanding interpretation of the regulation.

Personal Net Worth (PNW)

The Department received several comments on changes to the PNW definition in part 26, ranging from the PNW cap adjustment to other aspects of the PNW calculation (*e.g.,* exclusion of retirement assets, removal of community property rules, etc.). These areas are discussed at greater length in the part 26 preamble. For part 23, we are limiting the discussion of the definition of PNW to what the NPRM's preamble referred to as the ''third exemption.'' That term refers to the exclusion from the PNW calculation those assets that a SEDO can demonstrate were necessary to obtain financing for purposes of entering or expanding a concessions business subject to part 23 at an airport.

The final rule's amendments to part 23 aligns the PNW definition with that of part 26, effectively eliminating the PNW's ''third exemption.'' While one trade association supported this change, another requested that the Department consider retaining the exclusion due to significant cost increases associated with doing business as an ACDBE.

The Department recognizes the substantial cost increases associated with concessions and addresses this concern, in part, through proposed increases to the PNW cap to $2,047,000. and other changes to the PNW calculation. However, the final rule removes the ''third exemption'' language from the PNW definition in part 23. In the 2005 final rule, the Department under the third exemption allowed the exclusion to a maximum of $3 million. As noted in the current rule § 23.3, the Department suspended the effectiveness of the provision with respect to any application for ACDBE certification made or any financing or franchise agreement obtained after June 20, 2012. As proposed, the definition removes this reference entirely, and the definition of personal net worth in part 23 refers back to that found in part 26.

Sublease, Subconcession or Subcontractor

For the proposed definitions of sublease, subconcession or subcontractor, all commenters were unanimous in their support. However, several commenters requested the proposed definition of ''sublease'' be expanded to clarify the requirements to be considered a subtenant. Commenters suggested that a definition of sublease address whether a capital investment from the ACDBE is required or whether the facility development cost can be paid monthly as a ''lease cost.'' They also suggested that the definition address if the terms of the primary lease must be a direct pass-through and whether a concessionaire must manage a location with its own personnel.

This final rule adopts the term sublease as proposed to clarify how airport recipients should count direct ownership arrangement participation generated by ACDBEs in subtenant arrangements. Generally, airport recipients may credit the entire amount of gross receipts generated from a sublease completely operated and owned by an ACDBE. However, airport recipients must look beyond the agreement to evaluate the capacity the ACDBE is performing and ensure that the agreement does not improperly restrict the ACDBE's ownership and control.

Under the sublease definition, all requirements applicable to the concession under the primary lease passes on to the sublessee, including the management of personnel. The ACDBE must also be responsible for its proportionate share of facility development costs and capital investment. Facility development cost can be paid monthly as a ''lease cost''. However, the total lease costs to be paid must be proportionate to the ACDBE's responsible share of capital investment required under the primary lease.

For the definition of subconcession or subcontractor, the final rule removes the term subcontractor from the definition title and adopts the definition as proposed by the NPRM. With this change, the term subconcession is now found in the definition section, as well as in Appendix A of the regulation.

Other Definition Changes

Commenters proposed additional amendments or changes to definitions that were not addressed by the NPRM.

One commenter proposed revisions to the definition of ''joint venture.'' The commenter expressed that the current definition in which the ACDBE is ''responsible for a distinct, clearly defined portion of the work of the contract,'' places restrictions on minority joint venture partners' financing, management, and operations that would not be required of a majority joint venture partner. The commenter believed that the language unfairly restricts ACDBE joint venture partners in that it imposes conditions on their participation that are not similarly imposed on the non-ACDBE participants. To address this, the commenter proposed revising the definition to balance the one-sided conditions that the current language imposes on ACDBE joint venture partners.

The final rule retains the existing definition of joint venture. Credit toward ACDBE goals must be based on a commercially useful function. Any change to remove the requirement for an ACDBE joint venture participant to perform independently a distinct portion of the joint venture's work would adversely affect the integrity of the program.

In addition to the definitions above, another commenter suggested that the Department add a definition for ''contract award'' to clarify the term's use in other sections in Parts 23 and 26.

The Department has opted not to define contract award in the regulatory text as commenters requested. Given the wide array of contexts the term contract award appears across Parts 23 and 26, we decided against adding a definition for the term to avoid confusion.

Subpart B—ACDBE Programs

32. Socially and Economically Disadvantaged Owned Financial Institutions (§ 23.23)

A commenter suggested that the Department consider options to address capital access issues that hinder small businesses from competing for concession opportunities. The Department is sensitive to concerns regarding access to capital. The FAA's 2023 updated Best Practices for Fostering Participation from New DBEs and ACDBEs at Airports (April 11, 2023) letter recommended evaluating the availability of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in an airport recipient's community. See *https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program.* The letter recommends airport recipients make reasonable efforts to use such institutions and encourage prime concessionaires to use them, as well.

Recognizing that capital access has historically been, and continues to be, a significant barrier to ACDBE participation within the program, the final rule seeks to reduce this barrier by amending the administrative provisions under § 23.23 to add a new paragraph that applies the related requirement in § 26.27, to part 23. This change codifies best practices in the letter by requiring recipients, for their ACDBE programs, to thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in their communities and to make reasonable efforts to use these institutions. Recipients must also encourage prime concessionaires to use such institutions.

The term ''financial institution'' under this provision includes but is not limited to traditional banking institutions and Community Development Financial Institutions (CDFIs).

33. Direct Ownership, Goal Setting, and Good Faith Efforts Requirements (§ 23.25)

NPRM

The NPRM proposed changes to § 23.25 clarifying that all businesses must make good faith efforts to meet the concession-specific goals as set by recipients pursuant to this section regardless of whether a concession-specific goal is based on goods and services or direct ownership arrangements. Airport recipients may set concession-specific goals on purchases or leases of goods and services only after performing an analysis that shows there is de minimis availability for ACDBE direct ownership arrangement participation for that opportunity.

Comments

The majority of comments, which were received from trade associations, consultants, ACDBEs, and recipients, generally supported the NPRM's clarifying modifications to § 23.25. However, one commenter noted supplying evidence to support setting concession-specific goals based on goods and service purchases versus direct ownership arrangements, in some instances, would not be possible until a successful proposer is selected. The commenter explained that recipients are not able to obtain a firm's purchase commitments at the time of award. Moreover, purchase goals could be impacted by purchase requirements if the firm is a licensed or franchised operation.

Another commenter suggested that the Department add an appendix to part 23, similar to the detailed guidance in part 26 Appendix A, to reflect the differences in good faith effort requirements for DBE and ACDBE program bidders and offerors.

DOT Response

The Department adopts the changes to § 23.25 as proposed by the NPRM. The timing of when evidence may become available in order to perform the analysis required under this section should not present an issue to recipients who are determining whether to set a concession-specific goal based on goods and services purchases. In addition, airport recipients do not need a firm's actual purchase commitments at the time of award to perform the analysis in paragraph (e)(1)(i) of this section.

Recipients calculate their overall ACDBE goals for concessions other than car rental by evaluating the relative availability of ACDBEs in the categories of work that concession operations will likely entail. Because the rule at § 23.47 provides that the base of an airport's goal for concessions other than car rental is the total gross receipts of concessions, this approach is necessary when setting overall goals. Recipients may meet their overall goals through the application of concession-specific goals, as explained in § 23.25. Under the revised § 23.25 (e)(1)(i), an analysis that finds a particular concession opportunity has only de minimis availability of direct ownership arrangement participation may be used by recipients as evidence in support of setting a concession-specific goal based on goods and services for that opportunity. Such analysis would satisfy the good faith efforts requirement that recipients must make to explore, to the maximum extent practicable, opportunities for participation via direct ownership arrangements.

In response to comments, the Department will not add a separate appendix for guidance on good faith efforts to part 23. Appendix A to part 26 provides guidance on good faith efforts concerning DBE contract goals. This guidance is referenced in § 26.53(b)(2)(vi), which is made applicable to concession-specific goals through § 23.25(e)(1)(iv). Notwithstanding differences between the ACDBE and DBE program, we do not believe this issue is significant to warrant creating a new appendix on good faith efforts in part 23.

34. Fostering Small Business Participation (§ 23.26)

NPRM

The NPRM proposed to add a provision that would closely mirror the § 26.39 requirement for recipients to create an element for their ACDBE Program specifically designed to foster small business participation in concession activities. As part of the proposed element, recipients would be required to actively implement their programs through various strategies that include race- and gender-neutral small business set-asides, prime subleasing opportunities and alternative concession contracting approaches (*e.g.,* direct leasing). One feature proposed for part 23 that is distinct from part 26, is the requirement for recipients to periodically report on the implementation of race-neutral strategies under the small business element for their ACDBE programs.

Comments

ACDBE Small Business Element

Support for the proposed ACDBE small business element was expressed by several members of a trade association, who commented that part 23 needed to make the small business element (SBE) a requirement in order to achieve small business participation for airport concessions. An airport consultant believed the proposed part 23 SBE requirement would foster creativity among recipients when structuring their small business elements.

Comments opposing the proposal were concerned that the new SBE requirement would be overly burdensome and that the Department underestimated the time it would take. However, commenters' estimated range of time to complete the task varied. One airport authority estimated it would take 120 hours, not the 5.6 hours estimated by the Department; a member of a trade organization thought "at least 40." Another commenter mentioned that small hub and non-hub airports would be particularly affected, as they have limited concession opportunities and revenue streams, making it difficult for them to attract bidders.

Others opposing the new requirement expressed that SBE would not work for part 23 as it does for part 26 because the industries involved in the DBE program (federally assisted contracting) and the ACDBE program (airport concession opportunities) are different. They noted that set-asides under the small business element could unintentionally harm both small businesses and other concessionaires by forcing a choice between them for feasible concession locations. Others expressed doubt about the feasibility of subleasing opportunities for airport concessions, as such opportunities are rare, and multi-unit operations do not support subleasing. If adopted, commenters recommended that recipients should conduct a small-business analysis on opportunities without an ACDBE goal to determine the viability of a small business sublease.

Reporting on Small Business Element

The Department received some comments, both from trade associations and recipients, on the proposed requirement for recipients to periodically report on the implementation of race-neutral strategies under their small business element. These commenters viewed the requirement as unduly burdensome and costly. However, if adopted in the final rule, one commenter recommended that the Department establish a supplemental report to the Uniform Report for reporting on a recipient's small business element in order to minimize the administrative burdens.

DOT Response

The Department believes that the ACDBE SBE requirements will not impose any significant burdens on recipients because it mirrors the current DBE SBE requirements that recipients must currently implement under § 26.39. Instead, the ACDBE SBE requirement should serve as a mere extension to the SBE requirements that recipients have currently in place for their DBE programs.

Smaller hub airports may benefit from statewide small business element consortiums permitting them to pool resources with other recipients who are required to actively implement SBEs under both DBE and ACDBE programs. Upon request, FAA will engage interested recipients on the mechanics and steps needed to establish and implement statewide consortiums for SBEs.

Furthermore, distinctions may exist in how certain small business strategies apply across the DBE and ACDBE programs. The list of strategies in the proposed § 23.26 for the ACDBE program is designed to give recipients some ideas on how to accomplish the objectives of the rule. It is not an exhaustive list, nor is any strategy listed in the regulation mandatory. Airport recipients may choose one or more of the listed strategies or may develop any alternative strategy that can be effective in creating airport concession opportunities for small businesses.

In selecting SBE strategies, the Department still expects airport recipients to be forward-looking and innovative in their approaches. This means that recipients should not completely foreclose the possibility of using certain strategies (*e.g.,* subleasing opportunities for small businesses) over others because they do not appear to be viable options at the time. Rather, they should continuously explore creative ways on how to make those strategies possible.

Section 23.26(c) mandates that airport recipients incorporate certain assurances within their SBEs. These include the confirmation that their SBEs are authorized under State law, and that certified ACDBEs meeting the specified size criteria are presumptively eligible to participate. In addition, airport recipients must assure that no limitations are placed on the number of contracts awarded to participating firms and that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses.

Reporting on Small Business Element

The ACDBE SBE requirement needs a reporting feature for the Department to evaluate not only the effectiveness of each recipients' element, but also whether recipients are actively implementing their SBEs, as required by 23.26(g). In an effort to minimize burdens, the Department will adopt the recommendation that the part 23 SBE reporting requirement be added as a supplemental report to the part 23 Uniform Report. This will alleviate the time burden noted by a commenter as described above. However, as explained in the supporting statement developed by the Department in support of the rulemaking and associated information collection that has been submitted to OMB for approval, we disagree with their estimate of 120 hours. Recipients are already required to implement SBEs for DBE programs, and they also must collect and report their race neutral participation annually, so this minimal supplemental information is not burdensome. Therefore, we believe that the Department's estimate of 5.6 hours is appropriate.

35. Retaining and Reporting Information About ACDBE Program Implementation (§ 23.27) (Active Participants List)

Comments

The Department received numerous comments on the NPRM's proposal to add an active participants list requirement to part 23, with the majority opposing the proposal. Supporters believed the change would benefit the program administration and assist car rental companies in locating certified ACDBE vendors. However, many opposed the change, finding it unduly burdensome and costly, and highlighting the logistical complexities in acquiring all the data from every firm that reaches out via email, phone, or fax inquiring about concession opportunities. One trade organization member thought 60 hours was more appropriate for this task than the 42 proposed by the Department.

Commenters also raised concerns about the active participants list not meeting its intended purpose of providing accurate data on ACDBE and non-ACDBE firms seeking concession opportunities. They noted that the NAICS codes used by various concessionaires are inconsistent, and the data from proposals and responses to solicitations and negotiated procurements would not provide accurate information. Commenters argued that this approach would result in an undercount of actual active participation and lead to incorrect calculations of goals and participation. A commenter suggested that the number of firms certified in concession-operating trades would be a better indicator of the number of ACDBE firms wanting to participate.

One commenter recommended that the Department provide a clarifying definition for ''active participants'' at the end of § 23.27(c) to include individuals or firms that have submitted proposals, attended outreach events, or made inquiries about concession opportunities from the recipient.

DOT Response

The final rule is adding a requirement that recipients develop and maintain an active participants list. The ''active participant'' list adopted in this rule is parallel to the bidders list requirement in § 26.11. Similar to the bidders list requirement in part 26, creating and maintaining an ''active participants'' list gives recipients another valuable way to measure the relative availability of ready, willing and able ACDBEs when setting their overall goals. It also gives the Department data to evaluate the extent to which the objectives of § 23.1 are being achieved.

The Department has elected to adopt the proposal and require recipients to collect the data from all active participants for concession opportunities by requiring the information under this section to be submitted with their proposals, or with initial responses to negotiated procurements. The Department acknowledges that the collection of active participants data from only these sources may not capture every firm that seeks to perform work on concession opportunities. However, in absence of concession-specific NAICS codes, the Department believes that narrowing the source of this data collection to only proposals and initial responses to negotiated procurements would produce the most accurate and consistent data on firms who compete for and perform work on concession opportunities. The commenter's estimate of 60 hours to complete the task is slightly above our estimate that it would take around 42 hours to complete. We believe 42 hours would be a rough average, with small airports taking much less time.

Recipients should not rely exclusively on an active participants list that does not reflect the relative availability of ACDBEs in their local market area to the maximum extent feasible. Such reliance may result in skewed goal calculations and potentially undercounting of participation. This is not the intent, nor should such a scenario occur under the rule. The FAA will not approve a goal-setting methodology that is not rationally related to the relative availability of ACDBEs in a recipient's market. If a recipient decides to use an active participants list that is not demonstrative of all ready, willing and able ACDBEs relative to all businesses that are ready, willing and able to participate in a recipient's ACDBE program, then the active participants list must be used in combination with other data sources to ensure that it meets the standard in the existing regulations that apply to alternative methods used to derive a base figure for the ACDBE availability estimate. See § 23.51.

Subpart C—Certification and Eligibility of ACDBEs

36. Size Standards (§ 23.33)

See discussion of requirements in § 26.65.

37. Certifying Firms That Do Not Perform Work Relevant to the Airport's Concessions (§ 23.39)

NPRM

Section 23.55(k) prohibits recipients from counting costs incurred in connection with the renovation, repair, or construction of a concession facility (sometimes referred to as the ''build-out'') toward ACDBE goals. The NPRM proposed to add a paragraph to § 23.39 clarifying that certifiers may not certify applicant firms that intend to perform activities exclusively related to ''build-out'' for which participation cannot be counted.

Comments

The Department received comments from recipients, prime concessionaires, consultants and trade associations, all of whom generally supported the NPRM's proposed change. Some commenters requested that the Department ensure the change does not exclude the certification of firms that provide services such as electrical, plumbing or work to concessionaires as a maintenance service, not related to initial construction (*e.g.,* car rental offices, advertising displays). Other commenters expressed concern that the change would allow certifiers to make discretionary decisions about businesses they are unfamiliar with, unless that business has an opportunity to appeal the decision in the event they are denied.

DOT Response

The Department is not adopting its proposal to permit certifiers to refrain from certifying applicant ACDBE firms if they determine the firms intend to perform only activities exclusively related to the renovation, repair, or construction of a concession facility (''build-out''). We agree with the comments and seek to avoid a change that could result in erroneous certification denials based on subjective determinations by certifiers on whether the work an applicant firm intends to perform is exclusively related to build-out.

Notwithstanding our position, the Department shares similar concerns to comments raised above for the definition of disadvantaged business enterprise for applicant firms that cannot have their participation counted toward ACDBE goals under § 23.55(k). The Department strives to reduce wasted time and effort that UCPs encounter when processing applications from firms that seek certification in construction-related work that cannot be credited toward ACDBE goals.

To address this, we adopt a similar approach to that taken under part 26. The Department will include an item in the ACDBE portion of the Uniform Certification Application (UCA) asking applicants to detail the kinds of work that they anticipate performing on concession opportunities. Accordingly, if the applicant's response reasonably suggested to the certifier that the work it performs would be construction-related activities exclusively in connection with build-out of concession facilities that otherwise could not be counted toward ACDBE goals under § 23.55(k), we would encourage the certifier to recommend that the applicant withdraw its application, thereby avoiding certification of firms that would not be able to utilize their ACDBE status to obtain an airport concession opportunity.

38. Removing Consultation Requirement When No New Concession Opportunities Exist (§ 23.43)

NPRM

The NPRM proposed to amend § 23.43 to require consultation only when the recipient's ACDBE goal methodology includes opportunities for new concession agreements.

Comments

The majority of commenters, predominantly recipients, endorsed the NPRM's proposal to remove the requirement for recipients to perform consultation when there are no concession opportunities to evaluate or promote. They cited that the proposal would alleviate burdens on recipients and preserve the resources of ACDBEs who may attend a meeting only to learn that there are no opportunities in which they can participate.

The Department received one comment from a car rental concessionaire that disagreed with the proposed change to remove the consultation requirement even when the recipient wishes to change its ACDBE goal requirement as long as there are no new concession opportunities. They were opposed to any change that would remove the consultation requirement when recipients propose to adjust their ACDBE goal. Therefore, they recommended the Department revise the proposed amendment to § 23.43 to remove the consultation requirement only when there are no new concession opportunities and when no adjustment is being made, or is proposed to be made, to the recipient's ACDBE goal.

DOT Response

Section 23.43 requires consultation only when the ACDBE goal methodology includes opportunities for new concession agreements. The Department agrees that consultation under § 23.43 is still necessary when an adjustment is being made, or is proposed to be made, to the base figure of the recipient's ACDBE goal. However, we do not believe it is necessary to make this explicit in the regulatory text since adjustments usually arise only when there are new concession opportunities.

That aside, the Department is concerned that the text of § 23.43 references only opportunities for new concession agreements that become available during the goal period. It is silent on new goods and service purchase opportunities. This omission may be construed to mean that consultation is required only when new direct ownership opportunities become available during the goal period. This is not the case. The final rule intends for the consultation requirement to apply when there are new concession opportunities for both direct ownership arrangements and purchases of goods and services.

For this reason, the Department makes a minor revision to the § 23.43 to account for new opportunities that may arise in the form of both direct ownership arrangements and goods and service purchases. Depending on the nature of the opportunities, this revision in addition to the overall change will allow recipients to focus their consultation efforts on firms in the position to take advantage of those opportunities available.

39. Non-Car Rental Concession Goal Base (§ 23.47)

Comments

The NPRM would have amended § 23.47(a) to clarify that airport recipients may use the alternative method in § 23.51(c)(5) to supplement with goods and service purchases those portions of the base figure of their overall non-car rental goals where there is no feasible direct ownership arrangement participation available. The Department received several comments from industry trade associations, recipients, consultants, and non-ACDBE firms, who generally supported the clarifying changes to § 23.47(a) but felt that additional clarification was necessary.

One commenter sought clarification on whether the proposed changes would require setting purchasing goals for every contract without a direct ownership goal. Another commenter suggested the final rule address reporting of gross revenues for concessions in the Uniform Report.

Finally, the Department received one comment requesting clarification on the term ''substantial majority'' in § 23.51(b)(3) and asked whether it should be based on a count of the number of interested concessionaires or their size. The commenter also inquired about how a recipient should account for the relative availability of concessionaires outside its putative geographic area if the NPRM's proposed changes to interstate certification expands the number of concessionaires in a recipient's geographic area.

Although not raised in the NPRM, one commenter requested that the Department adopt a national ACDBE goal setting process for car rentals similar to Transit Vehicle Manufacturers (TVM). The commenter stated that adopting a national goal would better achieve the objectives of the ACDBE program and increase participation in the car rental industry.

DOT Response

The final rule will not adopt the proposed changes to § 23.47. As proposed, the revisions to this section would have allowed recipients to supplement with purchases and/or leases of goods and services the portion of their base where no feasible direct ownership arrangement participation is available. With few exceptions, § 23.47 is clear that the base of a recipient's overall goal for concessions other than car rentals includes only the total gross receipts of all concessions. The base does not include the dollar value of purchases and/or leases of goods and services. The Department does not intend to change that. Instead, the Department intends only to clarify when goods and services concession goals can or should be used in light of the statutory requirement for recipients to explore, to the maximum extent practicable, direct ownership arrangements.

We believe the final rule achieves this objective with its revisions to § 23.25(e)(1)(i).

The boundaries of a recipient's market area should be determined by the number of firms which seek to do concession business with that airport and their locations. The market area may be different for different types of concessions, so another factor is the area in which the firms which receive the substantial majority of concessions-related revenues are located.

We recognize that the changes to interstate certification may increase the number of interested concessionaires located outside a recipient's putative geographic area. The Department's Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program (*https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise;* June 25, 2013), however, makes clear that a recipient's local market area is not necessarily the same as the political jurisdiction in which it is geographically located. Therefore, the changes to the interstate certification provisions do not impact how airport recipients determine the relative availability of ACDBEs under § 23.51(c). Recipients still must determine their market area for goals in accordance with § 23.51(b).

The final rule will not adopt regional and national car rental goals for the ACDBE program. The recommendation to establish these goals is outside of the scope of the rule.

40. Counting ACDBE Participation After Decertification (§ 23.55)

NPRM

Sections 23.39(e) and 23.55(j) allow for participation of ACDBE firms that lost certification for exceeding size and PNW limits to count towards ACDBE goals for the remainder of a concession agreement. However, this continued participation depends on those decertified firms maintaining their eligibility in all other respects (*e.g.,* control, ownership). The current regulation does not contain any provision that instructs airport recipients on how they must monitor these decertified firms to ensure their eligibility in this regard.

The NPRM proposed requiring declarations from decertified firms to track their eligibility for continued counting purposes. Under the rule, airport recipients would be responsible for gathering declarations and monitoring eligibility, not the certifying entity. If a decertified firm becomes ineligible due to ownership or control changes, its participation will no longer count. Failure to provide a ''no-change affidavit'' also stops the continued counting of participation of these firms.

Comments

Most comments were in favor of the requirement for former ACDBE firms to submit declarations to § 23.55. However, many were opposed to making the airport recipient, rather than the certifying agency, responsible for submission and monitoring. These individuals and organizations argued that this responsibility might be too burdensome for airports and that the State UCP, as the certifier, is better equipped to monitor those firms. They also pointed out that airports are not certifiers and do not have the necessary expertise to monitor submissions.

Finally, one commenter recommended counting decertified firm participation beyond the current concession agreement term, as it is a common industry practice to extend concession agreements. They argued that an ACDBE that has secured a contract should be allowed to continue to benefit from the agreement as long as they maintain eligibility in all other respects.

DOT Response

The Department believes that the steps arising under proposed § 23.55(j) should not be burdensome since they are not significantly different or greater than those recipient obligations currently performed. Non-certifying airport recipients are already required to include the monitoring and compliance measures that they will use in their ACDBE programs, including levels of effort and resources devoted to this task. In implementing these measures, non-certifying recipients must, at a minimum, conduct annual verifications of the status of the ACDBE's certification eligibility and review records. They must also perform on-site reviews of concession workplaces to determine whether ACDBEs are actually performing the work for which credit is being claimed and that participants are not circumventing program requirements.

Section 23.55(j) does not expand these monitoring obligations. Rather, it provides non-certifying airport recipients a framework and tools to monitor former ACDBE firms that lost certification for exceeding small business size standard or PNW. This monitoring is necessary for airport recipients to determine if these firms' participation can continue to be counted towards ACDBE goals for the remainder of a concession agreement. If the non-certifying recipient finds through its monitoring efforts that the former ACDBE has relinquished an element of control or ownership during the performance of an agreement, the monitoring recipient would immediately cease counting that firm's participation toward the goal.

Counting a decertified firm's participation beyond the current concession agreement term deprives eligible ACDBE firms of opportunities. Therefore, the Department will not change the status quo under paragraph (e) of § 23.39, which prohibits a recipient from counting a former ACDBE's participation toward goals beyond the termination date for the concession agreement in effect at the time of the decertification. The regulation will continue to require recipients to ensure that prime concessionaires make up any loss of ACDBE participation with good faith efforts.

41. Shortfall Analysis Submission Date (§ 23.57)

NPRM

Section 23.57 requires recipients to submit a shortfall analysis and corrective action plan if they do not meet their ACDBE participation goal. The plan explains the reasons for the differences between their overall goal and the awards and commitments in that fiscal year and the specific steps and milestones they will take to remedy the shortfall. The Department proposed extending the due date for submitting a shortfall analysis from within 90 days of the end of the fiscal year to 30 days after submitting the Uniform Report per 49 CFR 23.27(b).

Comments

Commenters unanimously supported the proposed amendment noting the 30-day extension would allow recipients to perform a more thorough shortfall analysis using current data from the Uniform Report.

DOT Response

The final rule adopts the change to the shortfall provisions in § 23.57 and sets the due date to April 1 for the shortfall analysis, which is 30 days after Uniform Report due date on March 1.

Subpart E—Other Provisions

42. Long-Term Exclusive Agreements (§ 23.75)

Comments

Five-Year Term for Long-Term Agreements

The NPRM did not propose to redefine ''long-term'' to a longer period greater than five years because of concerns that doing such would reduce the degree of FAA's oversight to ensure that long-term concession agreements include adequate ACDBE participation. However, the NPRM did request additional comment from stakeholders on keeping the term at 5 years rather than revising it to 10 years.

Several commenters agreed on extending the term to 7 to 10 years or more. The reasons for extending the term included attracting a diverse pool of bidders/proposers, allowing for investment amortization, establishing brand recognition, improving customer service, and reducing the workload for recipient staff during concession solicitations. The Department received one comment stating that the definition of long-term agreement should be revised to State that agreements are only considered long-term if an agreement contains options that result in a lease period of more than ten years.

Options and Definition of an Exclusive Agreement

The current regulation does not define the term ''exclusive,'' nor does it include ''options'' in its definition of ''long-term'' under § 23.75(a). To ensure that these terms are addressed in the rule, the NPRM proposed to revise the definition of ''long-term exclusive agreement'', under § 23.75(a) to include the definition of ''exclusive'' and to state an agreement is long-term if it includes options that result in a lease period of more than five years.

In response to the proposal to define ''exclusive agreements'' in § 23.75(a), commenters asked why the proposal still required FAA approval for an exclusive agreement with an ACDBE. They also suggested defining ''exclusive agreement'' as a contract that does not have ACDBE participation at the airport's approved goal levels for the applicable trade. Another commenter asked for clarification on the term ''type of business activity.''

Long-Term Agreements and Holdovers

The NPRM raised concerns over holdover tenancies that may cause an exclusive agreement to become long-term and preclude potential ACDBE competitors from participating in agreements in the same manner as other agreements currently prohibited under the rule. While the NPRM did not put forth any specific proposals on how best to address holdover tenancies in the context of § 23.75, the Department sought public comment on the matter.

The few comments received in response to holdover tenancies in the NPRM recommended the Department to provide flexibility and allow holdovers up to 12 months without triggering long-term exclusive agreement requirements.

Special Local Circumstances

One comment requested the Department define the term ''special local circumstances.'' The commenter believed that without further explanation, the evaluation of ''special local circumstances'' is completely subjective for each application and may lead to unfair inconsistencies across the country and, possibly, within a single airport. Another commenter requested clarification on whether the amortization period required for investment was sufficient to be considered a ''special local circumstance.''

Amending Document Requirements

In response to stakeholder concerns about the documentation and information that recipients must submit to the FAA for approval of long-term exclusive agreements, the NPRM proposed several changes to § 23.75(c). These changes aimed to address unclear, unfeasible, or non-pertinent documentation requirements. This included removing or replacing requirements under paragraph (c)(2)(ii) to review the extent of ACDBE participation before the exercise of each renewal option and the assurances under paragraph (c)(3) that require any ACDBE participant to be in an acceptable form. The proposal also included changes that allow for certain documentation and information required for approval of long-term exclusive (LTE) agreements to be submitted prior to the release of the solicitation or request for proposals and others, prior to award of the contract.

The Department received a comment stating that the proposed revisions to the information and documentation requirements would significantly increase the time between when a solicitation is prepared and when it can be released, which could impair an airport's ability to obtain timely, market-relevant proposals. The comment explained that the timelines proposed would require airports to initiate a solicitation process about 12 months in advance of a contract's expiration in order to ensure that a new contract is in place. They noted that this was of particular concern because market conditions can change significantly over a 12-month period. They urged delaying the implementation of the proposed changes to the documentation requirements to avoid disrupting ongoing and planned procurement processes.

The Department also received a comment that recommended completely overhauling the long-term exclusive agreement approval process and adopting a two-step process. This process would require the airport recipient to submit a goal analysis to the FAA as a notification before solicitation. After the solicitation process concluded, the airport recipient would send FAA information on the level of interest and availability of ACDBEs and show that the contract was awarded to a proposer that met the goal or made good faith efforts to meet the goal. Another commenter suggested that the final rule only require a recipient to perform a goal analysis for the specific opportunity, along with the type of concession and term of the proposed long-term exclusive agreement, which would both be sent to the FAA for approval.

DOT Response

Five-Year Term for Long-Term Agreements

The Department recognizes that most concession agreements extend beyond a term of five years. Thus, the final rule extends the definition of long term to ten years to ease burdens that fall on airports required to implement LTE requirements under part 23. We note that this aids smaller hub airports that have fewer concession opportunities, increasing the likelihood of long-term exclusive agreements subject to FAA approval under § 23.75(c). Extending the definition to ten years also aims to mitigate any additional burdens placed on smaller hub airports by the new FAA approval requirements of leases that become long term as a result of holdovers as discussed below. The Department elected not to extend the term beyond ten years in order to maintain FAA oversight to ensure long-term exclusive concession agreements maintain adequate ACDBE participation.

Long-Term Agreements and Holdovers

Holdover provisions of an airport lease, agreement, or contract may permit a recipient airport to extend the terms of an existing airport lease, in the event both the airport recipient and the tenant desire to continue the relationship as it exists, without executing a new lease. The length of holdover periods is often not defined in the lease and may continue on a month-to-month basis once the lease term ends.

Notwithstanding that holdovers may bridge gaps to meet short-term needs, the Department is starting to see longer holdover periods following the end of concession lease terms. These extended holdover periods have a similar effect of precluding potential ACDBE competitors from participating in opportunities as long-term exclusive agreements that require approval by the FAA pursuant to § 23.75. If not addressed, the use of holdovers in these cases, without FAA oversight, circumvents the requirements under § 23.75. For this reason, the final rule now makes clear that exclusive leases, agreements, or contracts that become long-term as a result a holdover, absent an approved plan to release a solicitation for that opportunity or renegotiate the lease or contract, are generally prohibited.

The final rule adds an oversight mechanism in the new paragraph (e) for FAA to monitor short-term leases that become long-term as a result of holdovers. Under the rule, airport recipients must submit a ''holdover plan'' to FAA for approval at least 60 days prior to the expiration of the current contract, agreement, or lease. Holdover plans include the same information and documentation for LTE agreements under the amended paragraphs (c)(3), (c)(4), (c)(6) and (c)(7) of § 23.75, in addition to a written explanation for the holdover and the method and date the airport recipient will use to solicit or renegotiate the concession contract, agreement, or lease in holdover status.

The written explanation for a holdover is similar to the existing special local circumstance provision. Airport recipients must articulate a need for a holdover period that causes an exclusive agreement to become a long-term lease or contract. Reasons that may support a holdover are bridging operational gaps that might occur due to renegotiations and transitions of lessees or expected delays in solicitation or re-bidding processes. The requirement for airport recipients to submit the solicitation method that they intend to apply, as well as a date it will renegotiate or re-bid a concession opportunity, provides a definitive strategy and timeframe to afford an opportunity for ACDBE participation.

Under this provision, recipients are also required to submit the information and documentation required under § 23.75(c)(3), (c)(4), (c)(6) and (c)(7). This includes an ACDBE contract goal analysis, ACDBE certification documentation and investment information, and the final long-term exclusive concession agreement. These items are necessary for FAA to determine the anticipated length of the holdover period and the level of ACDBE participation precluded by the holdover. Airport recipients that are unable to produce this information or documentation must submit an explanation as to why the item is not available or cannot be submitted as part of their holdover plan.

Definition of an Exclusive Agreement

The final rule adopts the definition of ''exclusive'' as proposed. Evaluating whether an agreement is ''exclusive'' requires examining the agreement in reference to the type of business covered (*e.g.,* management contract, advertising, web-based or electronic businesses, food and beverage, parking). A determination on whether a certain business activity under a contract, lease or agreement is exclusive should be made based on the totality of the circumstances. *See* Principles for Evaluating Long-Term, Exclusive Agreements in the ACDBE Program, June 10, 2013, § 1.2, at pp. 5–6.

In response to comments, the Department will not adopt a definition of ''exclusive'' that exempts LTE agreements with ACDBE participation from the requirements of § 23.75. Such a change is inconsistent with the intent of § 23.75, which is to provide for the review of LTE agreements to ensure adequate ACDBE participation throughout the term of the agreement, irrespective of whether an ACDBE or a non-ACDBE enterprise is the prime concessionaire being considered for award of an exclusive, long-term agreement. See 57 FR 18401 (Apr. 30, 1992). Not requiring the review of a long-term concession agreement with ACDBE participation would allow low ACDBE goals set on contracts to remain in place for extended lease periods without justification, thereby precluding those opportunities from generating more meaningful ACDBE participation.

Special Local Circumstances

We are not defining ''special local circumstances'' in this final rule. The term is intended to be broad and flexible to account for a wide range of scenarios that may justify the use of a long-term exclusive agreement. Contrary to the comment's concern that without further explanation, the evaluation of ''special local circumstances'' may lead to unfair inconsistencies, to date, FAA has not disapproved any request for approval of an LTE agreement based on an inadequate special local circumstance.

In response to the comment seeking clarification on whether the amortization period required for investment was sufficient to be considered a ''special local circumstance,'' the answer is no. The LTE Guidance provides several examples of special local circumstances, which include the market size relative to the number of available vendors, reduced enplanements, an extreme act of nature, new business concepts, and severe economic factors (for instance, an airline goes out of business). The LTE Guidance makes clear that the amortization of the initial investment alone is not sufficient to justify approval of a long-term exclusive agreement, but may be a factor among others (*e.g.,* marketplace concepts and full-kitchen restaurants that require more costly development) to support the special local circumstances provision under the rule.

Amending Document Requirements

The Department is electing to amend the document requirements under § 23.75. First, paragraph (c)(2)(i) is removed from § 23.75, eliminating the requirement that an LTE agreement provide the ''number of ACDBEs that reasonably reflects their availability in a recipient's market area, . . . and account for a percentage of the estimated annual gross receipts equivalent to a level set in accordance with § 23.47 through § 23.49.'' This provision is removed since the agreement may not provide opportunities for direct ownership and is now included via the new requirement to submit an ACDBE contract goal analysis under paragraph (c)(3).

Second, paragraph (c)(2)(ii) is removed, eliminating the requirement that airport recipients ''review the extent of ACDBE participation before the exercise of each renewal option to consider whether an increase or decrease in ACDBE participation is warranted.'' Removing this provision is necessary to prevent a prime concessionaire from terminating an ACDBE from an LTE agreement after it made an investment simply because a decrease in participation may be warranted upon the exercise of an option.

Third, paragraph (c)(2)(iii) is removed, eliminating the requirement that an LTE agreement include a provision that provides for the termination of an ACDBE during the term of the LTE agreement, without the recipient's consent. This provision is redundant and unnecessary since § 26.53, which applies to part 23 by reference, already establishes the requirements for the replacement or substitution of the ACDBEs, including those that are party to an LTE agreement or contract.

Fourth, the requirement in paragraph (c)(3), which requires recipients to submit assurances that any ACDBE participant will be in an acceptable form such as a sublease, joint venture, or partnership is replaced. The new provision now requires recipients submit an ACDBE contract goal analysis which captures goals set on both direct ownership arrangements and goods and service purchases.

Next, the requirement in paragraph (c)(7) for recipients to provide information on the estimated gross receipts and net profit to be earned by the ACDBE is removed. This financial disclosure requirement applies only to the ACDBE and may be a discriminatory practice since the process does not require the same from the non-ACDBE.

Section 23.75(c) is amended to now require airport recipients to submit items in paragraphs (c)(1) through (3) of this section prior to releasing the solicitation or request for proposals (RFP) and items in paragraphs (c)(4) through (7) prior to award of the contract.

The Department agrees that the 90-day period to submit those items before the solicitation is released may be shortened to mitigate impacts to some airport recipients' planned procurement processes. The FAA does not anticipate 90 days will be required to review and approve LTE agreements. Therefore, the final rule shortens the 90-day period to submit the items in paragraphs (c)(1) through (3), to at least 60-days prior to release of the solicitation. The 45-day period to submit items in paragraphs (c)(4) through (7) before contract award will remain unchanged.

Next, the Department disagrees with comments to simplify the information and documentation requirements under § 23.75(c) to two items (*e.g.,* contract goal analysis, and evidence that goal was met, or good faith efforts were made, etc.). ACDBE participation is a key part of the information needed for approval and each item in paragraphs (c)(1) through (c)(7) is valuable for FAA to determine whether arrangements have been made for adequate ACDBE participation throughout the LTE agreement. For this reason, the final rule retains the information and documentation requirements in § 23.75(c) as proposed by the NPRM.

The final rule adds a new paragraph (d) to § 23.75 that addresses the requirements for agreements awarded through direct negotiation. Because there is no competition for awards made through direct negotiation, this provision omits the requirement under paragraph (c)(2) for airport recipients to submit a copy of the solicitation because solicitations are not used for direct negotiated procurements. Under the rule, airport recipients are still required to submit the items in paragraphs (c)(1) and (c)(3) through (7) of the updated § 23.75.

43. Local Geographic Preferences (§ 23.79)

NPRM

The current § 23.79 prohibits recipients from using local geographic preference, which is defined under the rule as any requirement that gives an ACDBE located in one place an advantage over ACDBEs from other places in obtaining business as, or with, a concession at an airport. The proposed revision to § 23.79 clarifies that regardless of a concession's certification status, any local geographic preferences that gives a concession located in a local area an advantage over concessions from other places is prohibited.

Comments

There was unanimous support for the NPRM's proposed revisions to § 23.79. Commenters agreed with the revisions to clarify that local geographic preferences are not permitted regardless of concession certification status but that recipients may request concepts that are local to a specific region when soliciting proposals.

One commenter suggested that the Department include within the regulation examples of what requirements could constitute ''advantage'' for local concessionaires over other concessionaires from other places.

DOT Response

The final rule adopts the changes to § 23.79. This clarifying change makes clear that the provision prohibiting local geographic preferences applies not just to ACDBEs but all firms, regardless of their concession certification status. The final rule also leaves the existing definition of local geographic preference unchanged. Section 23.79 defines local geographic preference as any requirement that gives a concessionaire located in one place (*e.g.,* [recipient's] local area) an advantage over concessionaires from other places in obtaining business as, or with, a concession at [recipient's] airport.

Under the definition of local geographic preference, an example of what may constitute an advantage is a preference criteria used in the evaluation of bids or proposals based on a firm's geographic location, or owner's residency. Another example of what may constitute advantage is the placement of unreasonable local requirements on firms in order for them to qualify to do business. Nothing in this section should be construed as preempting State licensing requirements or prohibiting concepts that are local to a specific region when soliciting proposals. However, airport recipients should still report to the FAA all other State or local law, regulation, or policy pertaining to minorities, women, or disadvantaged business enterprises concerning airport concessions that adds to, goes beyond, or imposes more stringent requirements than the provisions of part 23. The FAA will determine whether such a law, regulation, or policy conflicts with this part, in which case the requirements of this part will govern. See § 23.77.

44. Appendix A to Part 23: Uniform Report of ACDBE Participation Form

NPRM

Section 23.27(b) requires recipients to submit an annual report on ACDBE participation using the Uniform Report found in Appendix A. The Department proposed to remove the Uniform Report of ACDBE Participation from Appendix A to Part 23 and instead post the form on DOT's website. This is an administrative action that does not affect the public's ability to comment on any amendments to the information collections in the form.

Comments

In the NPRM, the Department estimated that it would take primary airports 3.2 hours to comply with the proposed ACDBE Annual Report of Percentages of ACDBEs in Various Categories in § 23.27(d). The commenter objected to the Department's estimate, approximating that it would take at least 40 hours.

Block #5 Instructions of Appendix A, Definition of Goods and Services

The NPRM proposed revising the definition of ''goods/services'' in the block #5 instructions to clarify that only participation in the form of goods and services purchased by concessionaires and management contractors from ACDBEs should be reported. The majority of commenters supported the proposal to revise the definition of ''goods/services.'' However, concerns were raised on the calculation of Columns A and C in block #5 of Appendix A. Some commenters inquired about why purchases were not included in the total line for Column A but included in Column C, which could lead to misrepresentation of data.

A few commenters focused on goods/services and recommended that the Department revisit the calculation, as recipients are not clear on how to utilize goods/services. One commenter noted that goods/services were not sufficiently addressed in the NPRM, and another requested clarification on reporting gross revenues if the goal is based on purchases.

Block #5 New Joint Venture Participation Category

No comments were received in response to the NPRM's proposal to amend the instructions in all blocks of the Uniform Report to include the definition of ''joint venture'' as defined in § 23.3 as a new participation category. The purpose of the change was to provide guidance to recipients on how to count ACDBE participation derived from joint ventures.

Blocks #10 and #11 Reporting of ACDBEs Owned by Members of Different Socially Disadvantaged Groups

The Department received several comments on the NPRM's proposal to amend the requirements under block #11 in the Uniform Report to allow for participation to be reported by ACDBEs owned by multiple partners who are from different groups and whose members are presumed socially and economically disadvantaged (SED).

Two stakeholders provided comments regarding the proposed change to block #11, expressing concerns about the amount of time it would take to complete the reporting and the lack of detailed information that airports may have regarding ownership demographics. As a result, neither commenter supported the proposed change to Appendix A, blocks #10 and #11. Instead, they recommended that recipients report the ethnicity and gender of the largest socially and economically disadvantaged shareholder, the owner with primary control, or the owner who holds the highest position within the business. Additionally, commenters suggested that certifying entities should make detailed information on the owners and their firms more easily accessible to non-certifying airports.

DOT Response

The final rule adopts the Department's proposal and will post the Uniform Report of ACDBE Participation on Department's website as amended below. A commenter's estimate of 40 hours to complete this task is unreasonable; based on the supporting statement DOT developed in support of this rulemaking and the information collection that has been submitted to OMB for approval, this task should take −4 hours, much less time on average.

Block #5 Instructions of Appendix A, Definition of Goods and Services

For the goods and services to be credited toward goals, goods and services must be purchased by concessionaires and management contractors from firms that meet definitions of ''concession'' and ''ACDBE'' under § 23.3. Purchases of goods and services by the airport cannot be credited toward goals. For this reason, the final rule adopts the definition of ''goods/services'' in the block #5 instructions as proposed, with the clarification that only participation in the form of goods and services purchased by concessionaires and management contractors from ACDBEs should be reported.

In response to comments, the existing Block #5 instructions are clear that recipients should enter in Column A, purchases of goods and services (ACDBE and non-ACDBE combined) at the airport.

Block #5 New Joint Venture Participation Category

The final rule will adopt the new participation category for joint ventures as proposed.

Blocks #10 and #11 Reporting of ACDBEs Owned by Members of Different Socially Disadvantaged Groups

The final rule adopts the proposed amendment to the requirements under block #11 in the Uniform Report to allow for participation to be reported by ACDBEs owned by multiple partners who are from different groups and whose members are presumed socially and economically disadvantaged (SED). The Department disagrees with comments that information on individual SEDOs would be difficult to obtain and that implementation of this new reporting requirement would be burdensome. Demographic information of individual SEDOs should be readily available to non-certifying airports since they are already obligated to collect racial and ethnic data of lessees, concessionaires and contractors under the existing Title VI nondiscrimination requirements in 49 CFR part 21.

In addition, the final rule expands the MAP–21 reporting requirements under § 26.11 to include ACDBEs and the number and percentage of in-state and out-of-state SEDOs by gender and ethnicity. Non-certifying airports will be able to more easily obtain information on individual SEDOs and their firms and report this information each year on the Uniform Report.

45. Technical Corrections

Commenters unanimously supported the Department's proposal to make the provisions in part 23 consistent with the provisions of part 26, clarify existing requirements, correct typographical errors, and revise obsolete and/or duplicative provisions, and make cross references, as appropriate. The final rule fully adopts the proposal.

46. Duration

The Department received a comment on the length of time that a certification remains in effect. The commenter suggested the Department cap the number of years that a firm may remain certified for. In their view, the indefinite nature of certification stifles outreach and implicitly closes the door to other small eligible firms. By adding a maximum duration for certification, the program could open opportunities for new and developing firms to take advantage of the program.

The final rule will not adopt the above recommendation. The authorizations and statutes governing the airport improvement program do not provide the Department flexibility to place limitations or timeframes on certification of firms.

Regulatory Analysis and Notices

A. Executive Order: 12866 (''Regulatory Planning and Review''), Executive Order 13563 (''Improving Regulation and Regulatory Review''), Executive Order 14094 (Modernizing Regulatory Review), and 49 CFR Part 5 and DOT Order 2100.6A

This final rule has been deemed significant under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review,'' as amended by Executive Order 14094 (''Modernizing Regulatory Review'') and the Department's regulations and orders (49 CFR part 5 and DOT Order 2100.6A, available at *https://www.transportation.gov/sites/dot.gov/files/2021-06/DOT-2100.6A-Rulemaking-and-Guidance-%28003%29.pdf*), because of its interest to the small business community and transportation industries. It has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

The objective of the rule is to amend reporting and eligibility requirements for the Department's Airport Concession Disadvantaged Business Enterprises (ACDBE) program and Disadvantaged Business Enterprise (DBE) program. These programs are implemented and overseen by recipients of certain Department funds. The changes in this rule would affect businesses participating in the programs, recipients of Department funds who oversee the programs, and the Department.

The Department conducted a regulatory impact analysis, available in the docket, to assess the effects of the rule. Businesses, recipients, and the Department would incur some costs due to increased reporting requirements. At the same time, they would experience overall cost savings because the rule simplifies provisions and would relax requirements—for example, by allowing recipients to conduct virtual on-site visits.

Table 1 summarizes the estimated costs and cost savings of the rule over a ten-year analysis period (non-Federal Government). The rule has annualized net cost savings of $58.7 million at a 3 percent discount rate and $6.74 million at a 7 percent discount rate.

Table 1—Summary of Costs and Cost Savings of the Rule, 10-Year Period

[Rounded to Thousands]

TABLE 1—COSTS AND COST SAVINGS, 10-YEAR PERIOD

[Dollars, rounded to the nearest 1,000]

	Undiscounted	Present value 3%	Annualized 3%	Present value 7%	Annualized 7%
Total cost savings	203,668,000	178,773,000	20,957,000	152,727,000	21,744,000
Total cost	134,030,000	120,073,000	14,075,000	105,400,000	15,005,000
Net cost savings	69,638,000	58,700,000	6,882,000	47,327,000	6,739,000

The Department determined that amending the rules is necessary because many portions of the current rules seem outdated for today's DBE and ACDBE marketplace. They might inhibit firm growth and success, and limit recipient and sponsors' ability to effectively monitor program compliance by all participants in a post-pandemic environment. The rule updates several core provisions of the regulation to maintain optimal program performance, improve operational cohesiveness, and provide contemporary solutions for program deficiencies.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended, (5 U.S.C. 601 *et seq.*) and E.O. 13272 (67 FR 53461 (Aug. 16, 2002)) requires agencies to review regulations to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if issued, would not have a significant economic impact on a substantial number of small entities. The Department prepared an IRFA as part of the Department's regulatory impact analysis (Appendix C of the regulatory impact analysis), available in the docket DOT–OST–2022–0051–008.

DOT invited all interested parties to submit data and information regarding the potential economic impact on small entities that would come from promulgating the NPRM. DOT considered the comments received in the public comment process when preparing the Final Regulatory Flexibility Analysis, and we received no comments on the preliminary finding of non-significance.

C. Executive Order 13132 (''Federalism'')

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). It would not include any provision that: (1) has substantial direct effects on the States, the relationship between the National Government and the States, or the distribution of power and the responsibilities among the various levels of government; (2) imposes substantial direct compliance costs on State and local governments; or (3) preempts State law. The DBE and ACDBE programs are governed by Federal regulations 49 CFR parts 26 and 23. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13084 (''Tribal Consultation and Coordination'')

This rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this rulemaking does not significantly or uniquely affect the communities of the Indian Tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1501, requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditures by State, local or Tribal governments, or by the private sector, of $100 million or more (adjusted annually for inflation with base year of 1995) in any one year. The 2021 threshold after adjustment for inflation is $165 million, using the Implicit Price Deflator for the Gross Domestic Product. The assessment may be included in conjunction with other assessments, as it is here. The final rule is unlikely to result in expenditures by State, local, or Tribal governments of more than $100 million annually.

F. Paperwork Reduction Act

This final rule adds 6 new collections of information and 17 existing collections being revised that require approval by OMB under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3501 *et seq.*). Under the Paperwork Reduction Act, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing notice of the proposed information collection and a 60-day comment period, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The Department met these requirements when it published a notice of the proposed information in its July 21, 2022, NPRM and accompanying submission to OIRA. Comments to these collections are described above.

G. National Environmental Policy Act

The Department has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). The purpose of this rulemaking is to amend the Department's DBE and ACDBE regulations. Paragraph 4(c)(5) of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Transit Administration's implementing procedures, ''[p]lanning and administrative activities that do not involve or lead directly to construction, such as: . . . promulgation of rules, regulations, directives . . .'' 23 CFR 771.118(c)(4) and Federal Highway Administration's implementing procedures, ''[p]romulgation of rules, regulations, and directives.'' 23 CFR 771.117(c)(20). In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS.

The purpose of this rulemaking is to make technical improvements to the Department's DBE program, including modifications to the forms used by program and certification-related changes. While this rule has implications for eligibility for the program—and therefore may change who is eligible for participation in the DBE program—it does not change the underlying programs and projects being carried out with DOT funds. Those programs and projects remain subject to separate environmental review requirements, including review under NEPA. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

List of Subjects in 49 CFR Part 23 and 26

Administrative practice and procedure, Airports, Civil Rights, Government contracts, Grant programs—transportation; Mass transportation, Minority Businesses, Reporting and recordkeeping requirements.

Issued this 27 day of February, 2024, at Washington, DC.

Peter Paul Montgomery Buttigieg,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation amends 49 CFR parts 23 and 26 as follows:

PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

■ 1. The authority citation for part 23 is revised to read as follows:

Authority: 49 U.S.C. 47107; 42 U.S.C. 2000d; 49 U.S.C. 322; E.O. 12138, 44 FR 29637, 3 CFR, 1979 Comp., p. 393.

■ 2. Amend § 23.1 by:

■ a. In paragraph (e), removing the word ''and'' at the end of the paragraph;

■ b. Redesignating paragraph (f) as paragraph (h); and

■ c. Adding new paragraph (f) and paragraph (g).

The additions read as follows:

§ 23.1 What are the objectives of this part?

* * * * *

(f) To promote the use of ACDBEs in all types of concessions activities at airports receiving DOT financial assistance;

(g) To assist the development of firms that can compete successfully in the marketplace outside the ACDBE program; and

* * * * *

■ 3. Revise § 23.3 to read as follows:

§ 23.3 What do the terms used in this part mean?

Administrator means the Administrator of the Federal Aviation Administration (FAA).

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121, except that the provisions of SBA regulations concerning affiliation in the context of joint ventures (13 CFR 121.103(h)) do not apply to this part.

(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 ACDBE program.

Airport Concession Disadvantaged Business Enterprise (ACDBE) means a firm seeking to operate as a concession that is 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 or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

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 (43 U.S.C. 1601 *et seq.*)

Assets has the same meaning the term has in 49 CFR part 26.

Car dealership means an establishment primarily engaged in the retail sale of new and/or used automobiles. Car dealerships frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pickup trucks and vans at retail. In the standard industrial classification system, car dealerships are categorized in NAICS code 441110.

Concession means one or more of the types of for-profit businesses that serve the traveling public listed in paragraph (1) or (2) of this definition:

(1) A business, located on an airport subject to this part, that is engaged in the sale of consumer goods or services

to the traveling public under an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal, if other than the recipient.

(2) A business conducting one or more of the following covered activities, even if it does not maintain an office, store, or other business location on an airport subject to this part, as long as the activities take place on the airport: Management contracts and subcontracts, a web-based or other electronic business in a terminal or which passengers can access at the terminal, an advertising business that provides advertising displays or messages to the public on the airport, or a business that provides goods and services to concessionaires.

Example 1 to paragraph (2): A supplier of goods or a management contractor maintains its office or primary place of business off the airport. However, the supplier provides goods to a retail establishment in the airport; or the management contractor operates the parking facility on the airport. These businesses are considered concessions for purposes of this part.

(3) For purposes of this subpart, a business is not considered to be ''located on the airport'' solely because it picks up and/or delivers customers under a permit, license, or other agreement. For example, providers of taxi, limousine, car rental, or hotel services are not considered to be located on the airport just because they send shuttles onto airport grounds to pick up passengers or drop them off. A business is considered to be ''located on the airport,'' however, if it has an on-airport facility. Such facilities include in the case of a taxi operator, a dispatcher; in the case of a limousine, a booth selling tickets to the public; in the case of a car rental company, a counter at which its services are sold to the public or a ready return facility; and in the case of a hotel operator, a hotel located anywhere on airport property.

(4) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the recipient, concessionaire, or airport terminal owner or lessee. A concession may be operated under various types of agreements, including but not limited to the following:

(i) Leases.

(ii) Subleases.

(iii) Permits.

(iv) Contracts or subcontracts.

(v) Other instruments or arrangements.

(5) The conduct of an aeronautical activity is not considered a concession for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators; flight schools; recreational service providers (*e.g.,* skydiving, parachute-jumping, flying guides); and air tour services.

(6) Other examples of entities that do not meet the definition of a concession include flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric service to the airport facility, holding companies, and skycap services under contract with an air carrier or airport.

Concessionaire means a firm that owns and controls a concession or a portion of a concession.

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 firm, legal claims and judgments, and provisions for Federal income tax.

Days means 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.

Direct ownership arrangement means a joint venture, partnership, sublease, licensee, franchise, or other arrangement in which a firm owns and controls a concession.

Good faith efforts means efforts to achieve an ACDBE goal or other requirement of this part that, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to meet the program requirement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, father-in-law, brother-in-law, sister-in-law, or registered domestic partner.

Indian Tribe means any Indian Tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the Tribe, band, nation, group, or community resides. See definition of ''tribally-owned concern'' in this section.

Joint venture means an association of an ACDBE 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 ACDBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest. Joint venture entities are not certified as ACDBEs.

Large hub primary airport means a commercial service airport that has a number of passenger boardings equal to at least one percent of all passenger boardings in the United States.

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.

Management contract or subcontract means an agreement with a recipient or another management contractor under which a firm directs or operates one or more business activities, the assets of which are owned, leased, or otherwise controlled by the recipient. The managing agent generally receives, as compensation, a flat fee or a percentage of the gross receipts or profit from the business activity. For purposes of this subpart, the business activity operated or directed by the managing agent must be other than an aeronautical activity, be located at an airport subject to this subpart, and be engaged in the sale of consumer goods or provision of services to the public.

Material amendment means a significant change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

Medium hub primary airport means a commercial service airport that has a number of passenger boardings equal to at least 0.25 percent of all passenger boardings in the United States but less than one percent of such passenger boardings.

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

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii that is a not-for-profit organization chartered by the State of Hawaii, and is controlled by Native Hawaiians

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

Nonhub primary airport means a commercial service airport that has more than 10,000 passenger boardings each year but less than 0.05 percent of all passenger boardings in the United States.

Operating Administration or *OA* means any of the following: Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The ''Administrator'' of an OA includes his or her designee(s).

Part 26 means 49 CFR part 26, DOT's Disadvantaged Business Enterprise Program regulation.

Personal net worth or PNW has the same meaning the term has in 49 CFR part 26.

Primary airport means a commercial service airport that the Secretary determines to have more than 10,000 passengers enplaned annually.

Primary industry classification means the North American Industrial Classification System (NAICS) code designation that best describes the primary business of a firm. The NAICS Manual is available through the U.S. Census Bureau of the U.S. Department of Commerce. The U.S. Census Bureau also makes materials available through its website (*https://www.census.gov/naics/*).

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for ACDBE program purposes.

Race-conscious means a measure or program that is focused specifically on assisting only ACDBEs, including women-owned ACDBEs. For the purposes of this part, race-conscious measures include gender-conscious measures.

Race-neutral means a measure or program that is, or can be, used to assist all small businesses, without making distinctions or classifications on the basis of race or gender.

Recipient is 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 who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

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

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

Small business concern means a for profit business that does not exceed the size standards of § 23.33.

Small hub airport means a publicly owned commercial service airport that has a number of passenger boardings equal to at least 0.05 percent of all passenger boardings in the United States but less than 0.25 percent of such passenger boardings.

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and 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 certain group and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control. Socially and economically disadvantaged individuals include:

(1) Any individual determined by a recipient 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 the certifier requires 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), the Commonwealth of the Northern Marianas Islands, 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, the Maldives Islands, 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.

Subconcession means a firm that has a sublease or other agreement with a prime concessionaire rather than with the airport itself, to operate a concession at the airport.

Sublease means a lease by a lessee (tenant) to a sublessee (subtenant). Sublease is an example of a subconcession in which the sublessee is independently responsible for the full financing and operation of the subleased concession location(s) and activities. A sublease passes on to the sublessee all requirements applicable to the concession under the primary lease, including proportionate share of the rent and capital expenditures.

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

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).

§ 23.13 [Amended]

■ 4. Amend § 23.13 by:

■ a. In paragraph (b) introductory text, in the first sentence, removing the word ''of'' appearing after the word ''interpretations''; and

■ b. In paragraph (d) introductory text, removing the phrase ''are for the purpose of authorizing'' and adding in its place the word ''authorize''.

■ 5. Revise § 23.21 to read as follows:

§ 23.21 Who must submit an ACDBE program to FAA, and when?

(a) If you are a primary airport and receive FAA financial assistance, you must submit an ACDBE program plan meeting the requirements of this part to the FAA for approval.

(1) The recipient must submit this program plan on the same schedule as provided for in 23.45(a) of this part.

(2) Timely submission and FAA approval of a recipient's ACDBE program plan is a condition of eligibility for FAA financial assistance.

(b) If you are a primary airport that does not have an ACDBE program, and you apply for a grant of FAA funds for airport planning and development under 49 U.S.C. 47107 *et seq.,* you must submit an ACDBE program plan to the FAA at the time of your application. Timely submission and FAA approval of your ACDBE program are conditions of eligibility for FAA financial assistance.

(c) If you are the owner of more than one airport that is required to have an ACDBE program, you may implement one plan for all your locations. However, you must establish a separate ACDBE goal for each airport.

(d) If a recipient makes any significant changes to their ACDBE program at any time, the recipient must provide the amended program to the FAA for approval before implementing the changes.

(e) If a recipient is a non-primary airport, non-commercial service airport, a general aviation airport, reliever airport, or any other airport that does not have scheduled commercial service, it is not required to have an ACDBE program. However, the recipient must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

■ 6. Amend § 23.23 by adding paragraph (c) to read as follows:

§ 23.23 What administrative provisions must be in a recipient's ACDBE program?

* * * * *

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

■ 7. Amend § 23.25 by revising paragraphs (d), (e), and (f) to read as follows:

§ 23.25 What measures must recipients include in their ACDBE programs to ensure nondiscriminatory participation of ACDBEs in concessions?

* * * * *

(d) Your ACDBE program must include race-neutral measures that you will take. You must maximize the use of race-neutral measures, obtaining as much as possible of the ACDBE participation needed to meet overall goals through such measures. These are responsibilities that you directly undertake as a recipient, in addition to the efforts that concessionaires make, to obtain ACDBE participation. The following are examples of race-neutral measures you can implement:

(1) Locating and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires under this part;

(2) Notifying ACDBEs of concession opportunities and encouraging them to compete, when appropriate;

(3) When practical, structuring concession activities to encourage and facilitate the participation of ACDBEs;

(4) Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain bonding or financing;

(5) Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about how the recipient's ACDBE program will affect the procurement process;

(6) Providing information concerning the availability of ACDBE firms to competitors to assist them in obtaining ACDBE participation; and

(7) Establishing a business development program (*see* § 26.35 of this chapter); technical assistance program; or taking other steps to foster ACDBE participation in concessions.

(e) Your ACDBE program must also provide for the use of race-conscious measures when race-neutral measures, standing alone, are not projected to be sufficient to meet an overall goal. The following are examples of race-conscious measures you can implement:

(1) Establishing concession-specific goals for particular concession opportunities.

(i) In setting concession-specific goals for concession opportunities other than car rental, you are required to explore, to the maximum extent practicable, all available options to set goals that concessionaires can meet through direct ownership arrangements. A concession-specific goal for any concession other than car rental may be based on purchases or leases of goods and services only when the analysis of the relative availability of ACDBEs and all relevant evidence reasonably supports that there is *de minimis* availability for direct ownership arrangement participation for that concession opportunity.

(ii) In setting car rental concession-specific goals, you cannot require a car rental company to change its corporate structure to provide for participation via direct ownership arrangement. When your overall goal for car rental concessions is based on purchases or leases of goods and services, you are not required to explore options for direct ownership arrangements prior to setting a car rental concession-specific goal based on purchases or leases of goods and services.

(iii) If the objective of the concession-specific goal is to obtain ACDBE participation through a direct ownership arrangement with an ACDBE, calculate the goal as a percentage of the total estimated annual gross receipts from the concession.

(iv) If the goal applies to purchases or leases of goods and services from ACDBEs, calculate the goal as a percentage of the total estimated dollar value of all purchases to be made by the concessionaire.

(v) To be eligible to be awarded the concession, competitors must make good faith efforts to meet this goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so.

(vi) The administrative procedures applicable to contract goals in §§ 26.51 through 26.53 of this chapter apply with respect to concession-specific goals.

(2) Negotiation with a potential concessionaire to include ACDBE participation, through direct ownership arrangements or measures, in the operation of the non-car rental concession.

(3) With the prior approval of FAA, other methods that take a competitor's ability to provide ACDBE participation into account in awarding a concession.

(f) Your ACDBE program must require businesses subject to car rental and non-car rental ACDBE goals at the airport to make good faith efforts to meet goals when set pursuant to paragraph (e) of this section.

* * * * *

■ 8. Add § 23.26 to read as follows:

§ 23.26 Fostering small business participation.

(a) Your ACDBE program must include an element to provide for the structuring of concession opportunities to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of concession opportunities that may preclude small business participation in solicitations.

(b) This element must be submitted to the FAA for approval as a part of your ACDBE program no later than October 7, 2024. As part of this program element you may include, but are not limited to including, the following strategies:

(1) Establish a race-neutral small business set-aside for certain concession opportunities. Such a strategy would include the rationale for selecting small business set-aside concession opportunities which may include consideration of size and availability of small businesses to operate the concession.

(2) Consider the concession opportunities available through all concession models.

(3) On concession opportunities that do not include ACDBE contract goals, require all concession models to provide subleasing opportunities of a size that small businesses, including ACDBEs, can reasonably operate.

(4) Identify alternative concession contracting approaches to facilitate the ability of small businesses, including ACDBEs, to compete for and obtain direct leasing opportunities.

(c) This element should include an objective, definition of small business, verification process, monitoring plan, and implementation timeline.

(d) Your element must include the following assurances:

(1) Your element is authorized under State law;

(2) Certified ACDBEs that meet the size criteria established under your element are presumptively eligible to participate in your element;

(3) There are no geographic preferences or limitations imposed on any concession opportunities included in your element;

(4) There are no limits on the number of concession opportunities awarded to firms participating in your element but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses;

(5) You will take aggressive steps to encourage those minority and women owned firms that are eligible for ACDBE certification to become certified; and

(6) Your element is open to small businesses regardless of their location (*i.e.,* that there is no local or other geographic preference).

(e) A State, local, or other program, in which eligibility requires satisfaction of race/gender or other criteria in addition to business size, may not be used to comply with the requirements of this part.

(f) This element must not include local geographic preferences per § 23.79.

(g) You must submit an annual report on small business participation obtained through the use of your small business element. This report must be submitted in a format acceptable to the FAA based on a schedule established and posted to the agency's website, available at *https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program.*

(h) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your ACDBE program.

■ 9. Amend § 23.27 by revising paragraph (b) and adding paragraphs (c) and (d) to read as follows:

§ 23.27 What information does a recipient have to retain and report about implementation of its ACDBE program?

* * * * *

(b) You must submit an annual report on ACDBE participation to the FAA by March 1 following the end of each fiscal year. This report must be submitted in the format acceptable to the FAA and contain all of the information described in the Uniform Report of ACDBE Participation.

(c) You must create and maintain active participants list information as described in paragraph (c)(2) of this section and enter it into a system designated by the FAA.

(1) The purpose of this active participants list is to ensure that you have the most accurate data possible about the universe of ACDBE and non-ACDBEs who seek work in your airport concessions program as a tool to help you set your overall goals, and to provide the Department with data for evaluating the extent to which the objectives of § 23.1 are being achieved.

(2) You must obtain the following active participants list information about ACDBE and non-ACDBEs who seek to work on each of your concession opportunities.

(i) Firm name;

(ii) Firm address including ZIP code;

(iii) Firm status as an ACDBE or non-ACDBE;

(iv) Race and gender information for the firm's majority owner;

(v) NAICS code applicable to the concession contract in which the firm is seeking to perform;

(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 active participants for your concession opportunities by requiring the information in paragraph (c)(2) of this section to be submitted with their proposals or initial responses to negotiated procurements. You must enter this data in FAA's designated system no later than March 1 following the fiscal year in which the relevant concession opportunity was awarded.

(d) The State department of transportation in each Unified Certification Program (UCP) established pursuant to § 26.81 of this chapter 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 ACDBE certifications for socially and economically disadvantaged by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);

(2) The number of ACDBE 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) Number of in-state and out-of-state ACDBEs summarily suspended;

(5) Number of in-state and out-of-state ACDBE applications received for an individualized determination of social and economic disadvantage status; and

(6) Number of in-state and out-of-state ACDBEs whose owner(s) made an individualized showing of social and economic disadvantaged status.

§ 23.31 [Amended]

■ 10. Amend § 23.31 by removing paragraph (c).

■ 11. Revise § 23.33 to read as follows:

§ 23.33 What size standards do recipients use to determine the eligibility of applicants and ACDBEs?

(a) Except as provided in paragraph (b) of this section, recipients must treat a firm as a small business eligible to be certified as an ACDBE if the gross receipts of the applicant firm and its affiliates, calculated in accordance with 13 CFR 121.104 averaged over the firm's previous five fiscal years, do not exceed $56.42 million.

(b) The following types of businesses have size standards that differ from the standard set forth in paragraph (a) of this section:

(1) *Banks and financial institutions.* $1 billion in assets;

(2) *Passenger car rental companies.* $75.23 million average annual gross receipts over the firm's previous five fiscal years;

(3) *Pay telephones.* 1,500 employees; and

(4) *New car dealers.* 350 employees.

(c) For size purposes, gross receipts (as defined in 13 CFR 121.104(a)), of affiliates should be included in a manner consistent with 13 CFR 121.104(d), except in the context of joint ventures. For gross receipts attributable to joint venture partners, a firm must include in its gross receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the firm and its joint ventures (*e.g.,* subcontracts from a joint venture entity to joint venture partners).

■ 12 Revise § 23.35 to read as follows:

§ 23.35 What is the personal net worth (PNW) limit for disadvantaged owners of ACDBEs?

(a) The Department will adjust the PNW cap by May 9, 2024 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 initial 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.

(b) The Department will use the following formula to adjust the PNW limit:

$$\text{Future Year PNW Cap} = [\$1{,}600{,}000] * \left|\frac{\text{Q1-Q4 Average Household Net Worth of Future Year / Total Households of Future Year}}{\text{Q1-Q4 Average Household Net worth of 2019 (\$106,722,704 million / Total Households of 2019 (128,579)}}\right|$$

§ 23.37 [Amended]

■ 13. Amend § 23.37 in the second sentence of paragraph (b) by removing the phrase ''does not do work relevant to the airport's concessions program'' and adding the phrase ''does not perform work or provide services relevant to the airport's concessions program'' in its place.

■ 14. Revise § 23.39 to read as follows:

§ 23.39 What are other ACDBE certification requirements?

(a) The provisions of § 26.83(c)(1) of this chapter do not apply to certifications for purposes of this part. Instead, in determining whether a firm is an eligible ACDBE, you must take the following steps:

(1) Visit the firm's principal place of business, virtually or in person, and interview the SEDO, officers, and key personnel. You must review those persons' résumés and/or work histories. You must maintain a complete audio recording of the interviews. 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.

(2) 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;

(3) Analyze the bonding and financial capacity of the firm; lease and loan agreements; and bank account signature cards;

(4) Determine the work history of the firm, including any concession contracts or other contracts it may have received; and payroll records;

(5) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive;

(6) Obtain a statement from the firm of the type(s) of concession(s) it prefers to operate or the type(s) of other contract(s) it prefers to perform;

(7) 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 5 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service; and

(8) Require applicants for ACDBE certification to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this chapter.

(b) In reviewing the Declaration of Eligibility required by § 26.83(j) of this chapter, you must ensure that the ACDBE applicant provides documentation that it meets the applicable size standard in § 23.33.

(c) For purposes of this part, the term *prime contractor* in § 26.87(j) of this chapter includes a firm holding a contract with an airport concessionaire to provide goods or services to the concessionaire or a firm holding a prime concession agreement with a recipient.

(d) With respect to firms owned by Alaska Native Corporations (ANCs), the provisions of § 26.63(c)(2) of this chapter do not apply. The eligibility of ANC-owned firms for purposes of this part is governed by § 26.63(c)(1) of this chapter.

(e) You must use the Uniform Certification Application found in part 26 of this chapter without change. However, you may provide in your ACDBE program, with the written approval of the concerned Operating Administration, for supplementing the form by requesting specified additional information consistent with this part. The applicant must state that it is applying for certification as an ACDBE and complete all of section 5.

(f) Car rental companies and private terminal owners or lessees are not authorized to certify firms as ACDBEs. As a car rental company or private terminal owner or lessee, you must obtain ACDBE participation from firms which a recipient or UCPs have certified as ACDBEs.

■ 15. Amend § 23.43 by adding paragraph (c) as to read follows:

§ 23.43 What are the consultation requirements in the development of recipients' overall goals?

* * * * *

(c) The requirements of this section do not apply if no new concession opportunities will become available during the goal period. However, recipients must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

■ 16. Amend § 23.45 by revising paragraphs (a), (b), and (h) to read as follows:

§ 23.45 What are the requirements for submitting overall goal information to the FAA?

(a) You must submit your overall goals to the appropriate FAA Regional Civil Rights Office for approval. Your overall goals meeting the requirements of this subpart are due based on a schedule established by the FAA and posted on the FAA's website.

(b) You must then submit goals every three years based on the published schedule.

* * * * *

(h) If the FAA determines that your goals have not been correctly calculated or the justification is inadequate, the FAA may, after consulting with you, adjust your overall goal or race-conscious/race-neutral ''split.'' The adjusted goal represents the FAA's determination of an appropriate overall goal for ACDBE participation in the recipient's concession program, based on relevant data and analysis. The adjusted goal is binding.

* * * * *

§ 23.51 [Amended]

■ 17. Amend § 23.51 in paragraph (c)(1) by removing ''*www.census.gov/epcd/cbp/view/cbpview.html*'' and adding in its place *https://www.census.gov/programs-surveys/cbp.html.*''

§ 23.53 [Amended]

■ 18. Amend § 23.53 in paragraph (d)(2) by removing ''a ACDBE'' and adding ''an ACDBE'' in its place.

■ 19. Amend § 23.55 by:

■ a. Revising paragraph (e);

■ b. In paragraph (g), removing ''a ACDBE'' and adding ''an ACDBE'' in its place; and

■ c. Revising paragraphs (h)(1) and (2) and (j).

The revisions read as follows:

§ 23.55 How do recipients count ACDBE participation toward goals for items other than car rentals?

* * * * *

(e) Count 100 percent of fees or commissions charged by an ACDBE firm for a bona fide service, provided that, as the recipient, you determine this amount to be reasonable and not excessive as compared with fees customarily allowed for similar services. Such services may include, but are not limited to, professional, technical, consultant, legal, security systems, advertising, building cleaning and maintenance, computer programming, or managerial.

* * * * *

(h) * * *

(1) Count 100 percent of fees or commissions charged for assistance in the procurement of the goods, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the goods themselves.

(2) Count 100 percent of fees or transportation charges for the delivery of goods required for a concession, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of goods themselves.

* * * * *

(j) When an ACDBE is decertified because one or more of its disadvantaged owners exceed the PNW cap or the firm exceeds the business size standards of this part during the performance of a contract or other agreement, the firm's participation may continue to be counted toward ACDBE goals for the remainder of the term of the contract or other agreement. However, you must verify that the firm in all other respects remains an eligible ACDBE and you must not count the concessionaire's participation toward ACDBE goals beyond the termination date for the concession agreement in effect at the time of the decertification (*e.g.,* in a case where the agreement is renewed or extended, or an option for continued participation beyond the current term of the agreement is exercised).

(1) The firm must inform the recipient in writing of any change in circumstances affecting its ability to meet ownership or control requirements of subpart C of this part or any material change. Reporting must be made as provided in § 26.83(i) of this chapter.

(2) The firm must provide to the recipient, annually on December 1, a Declaration of Eligibility, affirming that there have been no changes in the firm's circumstances affecting its ability to meet ownership or control requirements of subpart C of this part or any other material changes, other than changes regarding the firm's business size or the owner's personal net worth.

* * * * *

■ 20. Amend § 23.57 by revising paragraph (b)(3)(i) to read as follows:

§ 23.57 What happens if a recipient falls short of meeting its overall goals?

* * * * *

(b) * * *

(3) * * *

(i) If you are a CORE 30 airport or other airport designated by the FAA, you must submit, by April 1, the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval.

* * * * *

§ 23.59 [Amended]

■ 21. Amend § 23.59 in paragraph (b) by removing ''DBEs' '' and adding ''ACDBEs' '' in its place.

§ 23.71 [Amended]

■ 22. Amend § 23.71 by removing the first sentence.

■ 23. Revise § 23.75 to read as follows:

§ 23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?

(a) Except as provided in paragraph (b) of this section, you must not enter into long-term, exclusive agreements for concessions.

(1) For purposes of this section, a long-term agreement is one having a term of more than ten years, including any combination of base term and options or holdovers to extend the term of the agreement, if the effect is a term of more than ten years.

(2) For purposes of this section, an exclusive agreement is one having a type of business activity that is conducted solely by a single business entity on the entire airport, irrespective of ACDBE participation.

(b) You may enter into a long-term, exclusive concession agreement only under the following conditions:

(1) Special local circumstances exist that make it important to enter such agreement; and

(2) The responsible FAA regional office approves your plan for meeting the standards of paragraph (c) of this section.

(c) In order to obtain FAA approval of a long-term exclusive concession agreement, you must submit the following information to the FAA regional office, the items in paragraphs (c)(1) through (3) of this section must be submitted at least 60 days before the solicitation is released and items in paragraphs (c)(4) through (7) of this section must be submitted at least 45 days before contract award:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement.

(2) A copy of the solicitation.

(3) ACDBE contract goal analysis developed in accordance with this part.

(4) Documentation that ACDBE participants are certified in the appropriate NAICS code in order for the participation to count towards ACDBE goals.

(5) A general description of the type of business or businesses to be operated by the ACDBE, including location and concept of the ACDBE operation.

(6) Information on the investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and ACDBE, if applicable.

(7) Final long-term exclusive concession agreement, subleasing or other agreements.

(d) In order to obtain FAA approval of a long-term exclusive concession agreement that has been awarded through direct negotiations, you must submit the items in paragraphs (c)(1) and (3) through (7) of this section at least 45 days before contract award.

(e) In order to obtain FAA approval of an exclusive concession agreement that becomes long-term as a result of a holdover tenancy, you must submit to the responsible FAA regional office a holdover plan for FAA approval at least 60 days prior to the expiration of the current lease term. The holdover plan shall include the following information:

(1) A description of the special local circumstances that warrant the holdover.

(2) Anticipated date for renewal or re-bidding of the agreement.

(3) The method to be applied for renewal or re-bidding of the agreement.

(4) Submission of all items required under paragraphs (c)(3), (4), (6), and (7) of this section for the agreement in holdover status or an explanation as to why the item is not available or cannot be submitted.

§ 23.77 [Amended]

■ 24. Amend § 23.77 in paragraph (b) by removing the term ''disadvantaged business enterprise'' and adding in its place ''Disadvantaged Business Enterprise''.

■ 25. Revise § 23.79 to read as follows:

§ 23.79 Does this part permit recipients to use local geographic preferences?

No. As a recipient you must not use a local geographic preference. For purposes of this section, a local geographic preference is any requirement that gives a concessionaire located in one place (*e.g.,* your local area) an advantage over concessionaires from other places in obtaining business as, or with, a concession at your airport.

Appendix A to Part 23 [Removed]

■ 26. Remove appendix A to part 23.

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

■ 28. The authority citation for part 26 is revised to read as follows:

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).

§ 26.1 [Amended]

■ 29. Amend § 26.1 in paragraph (f) by removing ''federally-assisted'' and add in its place ''federally assisted''.

■ 30. Revise § 26.3 to read as follows:

§ 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.

■ 31. Amend § 26.5 by:

■ a. Revising the definitions of *Alaska Native* and *Department* or *DOT;*

■ b. Removing the definition *Disadvantaged business enterprise* or *DBE* and adding the definition *Disadvantaged Business Enterprise* or *DBE* in its place;

■ c. Adding the definitions for *FTA Tier I recipient* and *FTA Tier II recipient* in alphabetical order;

■ d. Removing the definition of *Home state;*

■ e. Removing the definition of *Indian tribe* and adding the definition of *Indian Tribe* or *Native American Tribe* in its place;

■ f. Adding the definitions for *Notice of decision* and *Notice of intent* in alphabetical order;

■ g. Removing the definition *Personal net worth* and adding the definition *Personal net worth* or *PNW* in its place;

■ h. Revising the definitions of *Primary industry classification, Principal place of business, Recipient,* and *Secretary;*

■ i. In the definition of *Socially and economically disadvantaged individual:*

■ i. In the introductory text, removing the phrase ''as a members of groups'' and adding in its place the phrase ''as a member of a group'';

■ ii. In paragraph (2)(iv), removing the locations ''Republic of the Northern Marianas Islands'' and ''Kirbati'' and adding in their place the locations ''Republic of the Northern Mariana Islands'' and ''Kiribati'', respectively;

■ iii. In paragraph (2)(v), removing the location ''the Maldives Islands'' and adding in its place the location ''Maldives'';

■ j. Removing the definition of *Transit vehicle manufacturer* and adding in its place the definition *Transit vehicle manufacturer (TVM);* and

■ k. Adding the definition of *Unsworn declaration* in alphabetical order.

The revisions and additions read as follows:

§ 26.5 Definitions

* * * * *

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.

* * * * *

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.

* * * * *

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.

* * * * *

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.

* * * * *

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

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

* * * * *

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/.*

* * * * *

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.

* * * * *

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.

* * * * *

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.

* * * * *

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

* * * * *

■ 32. Revise § 26.11 to read as follows:

§ 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.

■ 33. Revise the heading for subpart B to read as follows:

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

■ 34. Revise § 26.21 to read as follows:

§ 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.

■ 35. Amend § 26.29 by:

■ a. Revising paragraph (d);

■ b. Redesignating paragraph (e) as paragraph (g); and

■ c. Adding new paragraph (e) and paragraph (f).

The revision and additions read as follows:

§ 26.29 What prompt payment mechanisms must recipients have?

* * * * *

(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 lower-tier subcontractors.

* * * * *

■ 36. Revise § 26.31 to read as follows:

§ 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 § 26.81(n)(1) and (3), 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.

■ 37. Amend § 26.35 by revising paragraph (b)(2) introductory text to read as follows:

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

* * * * *

(b) * * *

(2) In the mentor-protégé relationship, you must:

* * * * *

■ 38. Revise § 26.37 to read as follows:

§ 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).

§ 26.39 [Amended]

■ 39. Amend § 26.39 in paragraph (b) introductory text by removing the phrase ''by February 28, 2012''.

■ 40. Amend § 26.45 by:

■ a. Revising paragraph (a);

■ b. Removing in paragraph (c)(1) ''*www.census.gov/epcd/cbp/view/cbpview.html*'' and adding in its place *https://www.census.gov/programs-surveys/cbp.html;*

■ c. Removing in paragraph (f)(1)(i) the words ''Website'' and adding in their place the word ''website''; and

■ d. Removing in paragraph (f)(3) the text ''incuding'', ''race-conscioous'', and ''26.51(c)'' and adding in their places the text ''including'', ''race-conscious'', and ''§ 26.51(c)'', respectively.

The revision reads as follows:

§ 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 or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) $670,000 or less in FTA or $250,000 or less in FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA respectively for that fiscal year.

* * * * *

§ 26.47 [Amended]

■ 41. Amend § 26.47 in paragraph (c)(3)(i) by removing the words ''Operational Evolution Partnership Plan'' and adding in their place the term ''CORE 30''.

■ 42. Revise § 26.49 to read as follows:

§ 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.

§ 26.51 [Amended]

■ 43. Amend § 26.51 in paragraph (f)(4) introductory text by removing the words ''through the use of'' and adding in their place the word ''using''.

■ 44. Amend § 26.53 by:

■ a. Revising paragraphs (b)(2)(v) and (b)(3)(ii);

■ b. Adding paragraph (c)(1) and a reserved paragraph (c)(2); and

■ c. Revising paragraphs (e), (f), and (g).

The revisions and addition read as follows:

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

* * * * *

(b) * * *

(2) * * *

(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.

(3) * * *

(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) * * *

(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]

* * * * *

(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 if work committed to a DBE is 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.

* * * * *

■ 45. Amend § 26.55 by:

■ a. Removing the word ''actually'' in paragraph (a) introductory text and twice in paragraph (c)(1);

■ b. In paragraph (c)(2), removing the words ''in order'';

■ c. In paragraph (c)(3), removing the words ''on the basis of'' and adding in their place the word ''within'';

■ d. Revising paragraph (e);

■ e. In paragraph (f), removing the cross-reference ''§ 26.87(i)'' and adding in its place the cross-reference ''§ 26.87(j)''; and

■ f. Revising paragraph (h).

The revisions read as follows:

§ 26.55 How is DBE participation counted toward goals?

* * * * *

(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, operating, or maintaining 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 descried 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.

* * * * *

(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.

■ 46. Revise § 26.61 to read as follows:

§ 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.

■ 47. Revise § 26.63 to read as follows:

§ 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.

■ 48. Revise § 26.65 to read as follows:

§ 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, over the firm's previous three fiscal years exceed $30.40 million (as of March 1, 2023). The Department will adjust this amount annually and post the adjusted amount on its website available at *https://www.transportation.gov/DBEsizestandards.* 50.

■ 49. Revise § 26.67 to read as follows:

§ 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 (e) 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.

■ 50. Add § 26.68 to read as follows:

§ 26.68 Personal net worth.

(a) *General.* An owner whose PNW exceeds the regulation's currently applicable PNW limit is not presumed economically disadvantaged.

(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, 2024 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 initial 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 the following formula to adjust the PNW limit:

$$\text{Future Year PNW Cap} = [\$1{,}600{,}000] * \left| \frac{\text{Q1-Q4 Average Household Net Worth of Future Year / Total Households of Future Year}}{\text{Q1-Q4 Average Household Net worth of 2019 (\$106,722,704 million / Total Households of 2019 (128,579)}} \right|$$

(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.

■ 51. Revise § 26.69 to read as follows:

§ 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-SEDO's investment.

(A) *Example 1 to paragraph (b)(3)(ii).* SEDO and non-SEDO 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-SEDO contributes a $2 million asset to the business. The SEDO, 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 SEDO increases her investment significantly, it is clearly disproportionate to the non-SEDO'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 SEDO maintains her investment because it remains in proportion to the non-SEDO'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-SEDO, not a bank, is the DBE's creditor. The SEDO has not maintained her investment because the benefits and burdens of her ownership are clearly disproportionate to those of the non-SEDO. 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 SEDO and the non-SEDO 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.

■ 52. Add § 26.70 to read as follows:

§ 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).

■ 53. Revise § 26.71 to read as follows:

§ 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 licenser 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.

■ 54. Revise § 26.73 to read as follows:

§ 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]

■ 55. Amend § 26.81 by:
■ a. Revising paragraph (a)(1);
■ b. Removing paragraph (a)(5);
■ b. In paragraph (e), removing the word ''the'' from the first sentence; and
■ c. Revising paragraph (g).

The revisions read as follows:

§ 26.81 Unified Certification Programs.

(a) * * *

(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.

* * * * *

(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.

* * * * *

■ 56. Amend § 26.83 by revising the section heading and paragraphs (c)(1)(i), (c)(3), (h), (i)(3), (j), (k), (l), and (m) and adding paragraph (n) to read as follows:

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

* * * * *

(c)(1) * * *

(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.

* * * * *

(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.

* * * * *

(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) * * *

(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) 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) The certifier must make an entry in DOCR's Online Portal within 5 days of a denial. 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.

(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.

■ 57. Revise § 26.85 to read as follows:

§ 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 with its application 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 this paragraph (h)(6) do not apply to attempts to decertify based upon a DBE's actions or inactions pertaining to §§ 26.83(j) (Declaration of Eligibility) and 26.87(e)(6) (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.

■ 58. Revise § 26.86 to read as follows:

§ 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.

■ 59. Revise § 26.87 to read as follows:

§ 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.* (1) 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 the decertified firm, but a subcontract has not been executed before the certifier issues the NOD, the certified 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 the certifier 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 a decertification notice provided for in paragraph (g) of this section is issued, the decertified firm does not count toward the recipient's overall DBE goal.

(3) If a prime contractor has executed a subcontract with the firm before the certifier has notified the firm of its decertification, the prime contractor may continue to use the firm and may continue to receive credit toward the DBE goal for the firm's work. In this case, however, the prime contractor may not extend or add work to the contract after the firm was notified of its decertification without prior written consent from the recipient.

(4) If a prime contractor has executed a subcontract with the firm before the certifier has notified the firm of its decertification, the prime contractor may continue to use the firm 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 notice of its decertification must not count toward an overall goal, but the DBE's performance of the contract may continue to count toward satisfying the 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 it issued the notice of its decertification toward the recipient's overall goal as well as toward the contract goals.

(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 decertified it 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.

■ 60. Revise § 26.88 to read as follows:

§ 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 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.

(6) *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 (c)(5)(iv) of this section, as provided in § 26.89(a), but may *not* appeal the suspension itself, unless paragraph (d)(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 (c)(6) 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).

■ 61. Revise § 26.89 to read as follows:

§ 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*.

§ 26.91 [Amended]

■ 62. Amend § 26.91 by:

■ a. Removing the words ''recipients'' and ''recipient'' wherever they appear and adding in their places the words ''certifiers'' and ''certifier'', respectively; and

■ b. In paragraph (b)(1), removing the cross-reference ''§ 26.87(i)'' and adding in its place the cross-reference ''§ 26.87(j)''.

§ 26.103 [Amended]

■ 63. Amend § 26.103 in paragraph (d)(2) by removing the words ''being in compliance'' and adding in their place the word ''complying''.

Appendix A to Part 26 [Amended]

■ 64. Amend appendix A by:

■ a. Removing the word ''Conducing'' in paragraph IV.A.(1) and adding in its place the word ''Conducting''; and

■ b. Adding at the end of paragraph VI after the word ''efforts'' the phrase ''except in design-build procurement''.

Appendix B to Part 26 [Removed and Reserved]

■ 66. Remove and reserve appendix B to part 26.

Appendices E Through G to Part 26 [Removed]

■ 67. Remove appendices E through G to part 26.

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