



**U.S. Department of
Transportation**

Office of the Transportation Secretary

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

Memorandum

To: State and Local Recipients Implementing the Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) Program

From: Irene B. Marion
Director, Departmental Office of Civil Rights (DOCR)

Re: DBE and ACDBE Program Flexibilities

Date: June 28, 2022

Thank you for your sustained commitment to ensuring a level playing field for disadvantaged businesses. This guidance document supersedes the December 23, 2021, guidance documents titled: “Supplemental Guidance: DBE and ACDBE Program Requirements During COVID-19 Public Health Emergency” and “DBE and ACDBE Certification Procedures During COVID-19 Public health emergency.”¹

DBE OVERALL GOAL METHODOLOGY PUBLIC PARTICIPATION REQUIREMENTS:

49 CFR 26.45(g)(1) requires recipient agencies, as part of their triennial overall goal setting process, to provide opportunities for publication, as well as consultation with stakeholder groups, prior to submitting the methodology to the relevant OA for review. This regulatory provision states that consultation with stakeholder groups must include a scheduled, direct, interactive exchange (e.g., an in-person meeting, video conference, teleconference) with as many interested stakeholders as possible.

- Instead of holding in-person meetings, recipients may use other options allowed under the rule, such as video conference or teleconferencing, by making use of technologies such as FaceTime, Skype, GoToMeeting, Zoom, and other similar telecommunication applications.

GOOD FAITH EFFORTS RECONSIDERATION PROCESS:

49 CFR 26.53(d)(3) requires recipients to provide bidders/offerors the opportunity to meet in person with reconsideration officials to discuss whether the bidders/offerors met the goal or made adequate good faith efforts to do so.

- Recipients may utilize computer, tablet, and mobile device technologies, such as FaceTime, Skype, GoToMeeting, Zoom, and other similar telecommunication

¹ This guidance document is not legally binding in its own right. Conformity with this guidance document, as distinct from existing statutes, regulations, and grant assurances, is voluntary only, and nonconformity will not affect existing rights and obligations.

applications, as an alternate for an in-person meeting between reconsideration officials and bidders/offerors.

TERMINATION/SUBSTITUTION OF DBES AND ACDBES OR PARTIAL TERMINATION:

49 CFR 26.53(f) and 49 CFR 23.25(e) prohibit a prime contractor from terminating a DBE subcontractor it has listed to meet a contract goal (or an approved substitute DBE firm) without good cause and the recipient's prior written consent. A prime contractor may not terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work or substitute another DBE or non-DBE contractor to perform the work after contract award.

When a DBE subcontractor is terminated in accordance with these procedures, the recipient must require the prime contractor to make good faith efforts to find a substitute DBE firm, per 49 CFR 26.53(g).

- Questions may arise regarding the termination and substitution provisions at 49 CFR 26.53(f)-(g). DOT provides the following guidance:
 1. Prime contractors must continue to apply the termination and replacement requirements in good faith. Recipients should not approve termination requests for committed DBEs for the sole purpose of cost savings to the prime contractor. Prime contractors must still demonstrate good cause to justify terminating a DBE with committed work on a project.
 2. The following documents may be provided in electronic format: (a) a prime contractor's written notification to the DBE; (b) a prime contractor's request to the recipient to terminate or replace a DBE; (c) a DBE's written response; (d) a recipient's written approval or denial of a prime contractor's submission of good faith efforts documentation; and (e) a recipient's response to the contractor's request to substitute a DBE.

NOTARIZED STATEMENTS:

When evaluating a firm's eligibility for DBE or ACDBE certification, 49 CFR 26.67(a)(1) requires a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged. 49 CFR 26.67(a)(2) requires a signed and notarized personal net worth statement with appropriate supporting documentation. 49 CFR 26.83 also requires applicants to submit affidavits attesting to the accuracy of the application, and that there have been no changes of circumstances affecting the firm's ability to meet DBE requirements.

- Recipients may use alternative methods to meet the requirements, such as:
 1. Allowing the use of online notary public services if the recipient's State permits notarized digital signatures validated with an electronic notary seal.
 2. Allowing the use of a subscribing witness if the recipient's State permits such use permitting the document to be signed in the presence of a

witness; the witness, not the signer, then appears before a notary if doing so does not compromise social distancing.

3. Allowing the filing of unsworn declarations executed under penalty of perjury rather than sworn affidavits, including affidavits of no change.

ON-SITE VISITS:

When evaluating a firm's eligibility for DBE or ACDBE certification, 49 CFR 26.83(c)(1)(i) requires recipients to perform an on-site visit to the firm's principal place of business, interview the principal officers and other key personnel, and visit job sites where the firm is working at the time of the eligibility investigation in your jurisdiction or local area. The regulation allows recipients to rely upon the site visit report of any other recipient with respect to a firm applying for certification.

- Recipients may utilize computer, tablet, and mobile device technologies, such as FaceTime, Skype, GoToMeeting, Zoom, and other similar telecommunication applications, to interview firm owners/key personnel and take virtual tours of office space, equipment, and job sites. Recipients may use their discretion in adopting policies specific to their State and authorized by their agency leadership, such as:
 1. visiting the residence/office building to take external photographs and confirm the owner's presence;
 2. conducting drive-by visits of job sites to photograph necessary items; and
 3. asking firm owners to electronically submit supplemental and additional pictures of equipment, license plate numbers, and any branding on vehicles/equipment.

If virtual technology is not accessible and a telephone interview is conducted, we suggest agencies ask the firm owner to electronically submit supplemental photographs (e.g., office space, equipment, license plate numbers and any branding on vehicles/equipment). To the extent practicable, we also suggest recipients record virtual and telephone interviews, after first notifying the interviewees of the recording.

INTERSTATE CERTIFICATION:

The DBE regulation's interstate certification rules allow a firm certified in its home State to seek interstate certification in a new State (State B). Should State B have objections to the firm's eligibility, the DBE may respond in writing, or request an in-person meeting with State B's decision maker to discuss State B's eligibility concerns, or both (49 CFR 26.85(d)(4)(ii)). If the firm requests a meeting, State B must schedule the meeting to take place within 30 days of receiving the firm's request.

- If the DBE requests a meeting, recipients may utilize computer, tablet, and mobile device technologies such as FaceTime, Skype, GoToMeeting, Zoom, and other similar telecommunication applications, to conduct a meeting.

DECERTIFICATION HEARINGS:

In a decertification proceeding, 49 CFR 26.87(d) requires recipients to give the firm an opportunity for an in-person hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility. In lieu of a hearing, firms are permitted to submit written information, arguments, or evidence.

- Recipients may utilize computer, tablet, and mobile device technologies, such as FaceTime, Skype, GoToMeeting, Zoom, and other similar telecommunication applications, to conduct an informal hearing. However, recipients must maintain a complete record of the hearing, by any means acceptable under State law for the retention of a verbatim record of the hearing and retain the original record of the hearing. 49 CFR 26.87(d)(2).

SUMMARY SUSPENSION:

When applicable circumstances warrant, 49 CFR 26.88(d) requires a recipient to immediately notify a DBE of the recipient's decision to summarily suspend the DBE's certification by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

- Recipients are permitted to electronically notify a DBE of the decision to summarily suspend the DBE's certification in lieu of notification by certified mail. Because of the importance of accurate recordkeeping, recipients may not use telephonic notification.

APPEAL INSTRUCTIONS AND RECIPIENT RECORDS:

Recipients are required to give denied or decertified firms instructions on how to appeal to DOCR (49 CFR 26.89); recipients often instruct these firms to mail their appeal.

- We urge recipients to immediately change the appeal rights notification at the end of denial and decertification letters to read:

“You may appeal this decision to the U.S. Department of Transportation. If you want to file an appeal, you must email it to S33AppealsManagementRecords@dot.gov within 90 days of the date of this letter. The appeal must include this letter and other pertinent information and provide a *full and specific* statement as to why our decision is erroneous, what significant fact we failed to consider, or what provisions of 49 CFR Part 26 we did not properly apply. USDOT does not accept notices of intent or partial or otherwise non-complaint submissions.”

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR parts 23 and 26.