

HIGHLIGHTS OF MAJOR CHANGES IN THE 2014 DBE FINAL RULE

The Department of Transportation's (DOT) disadvantaged business enterprise (DBE) program is an affirmative action program designed to combat discrimination and its continuing effects by providing contracting opportunities on Federally-funded highway, transit, and airport projects for small businesses owned and controlled by socially and economically disadvantaged individuals. Over the years, the Department has met or exceeded the national aspirational goal established by Congress in the statutes authorizing the program since 1983 and has made continuous program improvements.

The Department's 2014 final rule contains important improvements to the implementation and administration of the DBE program regulations. This fact sheet highlights the major changes.

Certification Standards

- ❖ Size – The cap on statutory gross receipts (i.e., the average annual gross receipts over the previous three fiscal years) applicable to small businesses eligible to participate in the program is increased from \$22.41 million to \$23.98 million.
- ❖ Economic Disadvantage – The socially disadvantaged owner may be disqualified if there is evidence that he or she is not economically disadvantaged due to assets and resources that indicate an ability to accumulate substantial wealth based on specific factors, similar to those used by the Small Business Administration (SBA), that are set out in the rule.
- ❖ Ownership – In evaluating whether the ownership of a firm by disadvantaged individuals is real and substantial, the new rule examines whether there are any agreements or practices in place that give a non-disadvantaged individual or firm a priority or superior right to a DBE's profits. If so, these agreements or practices constitute grounds for denial of certification or removal from the program. Examples of what constitutes real, substantial, and continuing ownership are included in the rule.
- ❖ Control – An assumption of control is created when a non-disadvantaged individual who is a former owner of the firm remains involved in the operation of the firm unless a determination is made by the recipient (the entity receiving financial assistance from FAA, FHWA, or FTA) that the disadvantaged owner is in control.

Forms and Data Collection

- ❖ Uniform Certification Application – The application removes unnecessary details (e.g., the phone number and address of applicant's bank) but includes new items useful to certifiers such as State departments of transportation, transit authorities, and airports.

- ❖ New DOT Personal Net Worth (PNW) Form – The DOT form is an adaptation of the SBA Form 413 tailored to DBE program requirements. All applicants must use the simplified form to document the economic status of the disadvantaged owner(s). The spouse of a disadvantaged owner who is involved in the operation of the firm must also submit a PNW form with the application.
- ❖ Uniform Report of DBE Awards or Commitments and Payments – The new form captures data on minority women-owned DBEs and actual payments to DBEs during the reporting period. Recipients must begin to use the new Uniform Report when they submit activity reports in Fiscal Year 2015.
- ❖ MAP-21 Report – Beginning January 1, 2015, State departments of transportation, on behalf of the Unified Certification Program, must submit to the DOT Office of Civil Rights information required by MAP-21 on the percentage of DBEs in the state owned by non-minority women, minority women, and men.

Certification Procedures

- ❖ Prequalification – The new rule disconnects the prequalification requirements from the requirements for certification (size, disadvantage, ownership, and control).
- ❖ Summary Suspension – A DBE’s certification will be suspended without a hearing for 30 days if the recipient has evidence that the disadvantaged owner(s) has died or is incarcerated. At the discretion of the recipient, evidence of other material changes affecting the certification eligibility of the DBE also may result in summary suspension. The recipient has 30 days to determine whether to reinstate certification or initiate removal proceedings.
- ❖ Grounds for Removal – A DBE that is suspended or debarred for conduct related to the DBE program will automatically be removed from the program.
- ❖ Certification Appeals – An applicant who appeals the denial of its application for certification to the Department is not prohibited from reapplying at the end of the waiting period if the appeal has not been decided.

Goal Setting and Good Faith Efforts

- ❖ Overall Goal Setting Methodology and Process – A bidders list must meet the requirements of the rule if it is used to establish an overall goal. If it does not, additional data sources must be used to determine the relative availability of DBEs in the recipient’s contracting market. Additional data sources must also supplement the use of prequalification and similar lists. Further, any adjustments by the recipient to the base figure must be supported by the evidence. The public participation process may, but is not required to, include a 45-day comment period.

- ❖ Transit Vehicle Manufacturers (TVM) – This section clarifies the goal setting, reporting, and other requirements that apply to TVMs. A TVM that is noncompliant will be removed from the FTA’s certified TVM list, and will be deemed ineligible to bid. A recipient that is noncompliant may be subject to a formal enforcement action or other appropriate sanctions.
- ❖ Submission of Good Faith Efforts – Bidders/offerors that are required to submit DBE information for a DOT-assisted contract that contains a DBE goal must provide the information at the time of bid (as a matter of responsiveness) or no later than 7 days after bid opening (as a matter of responsibility). The 7 days shall be reduced to 5 days beginning January 1, 2017. The DBE information submitted includes the North American Industry Classification System (NAICS) code applicable to the kind of work the DBE will perform on the contract, and, when a non-DBE subcontractor is selected over a DBE, copies of the quotes from each DBE and non-DBE subcontractor. The bidder/offerors shall make copies of DBE subcontracts available upon request.
- ❖ Guidance on Good Faith Efforts – The guidance includes additional examples of the kinds of actions taken by bidders/offerors that recipients may consider when evaluating good faith efforts. A bidder/offeror will not be deemed to demonstrate good faith if it rejects a DBE simply because it is not the low bidder, or if it is unable to find a replacement DBE at the original price, without more. When evaluating the efforts of the low bidder to meet the contract goal, recipients should review the performance of other bidders.

Program Administration

- ❖ Domestic Partnerships and Civil Unions – Domestic partnerships and civil unions recognized under state law are included in the definitions of “immediate family members” and “spouse.”
- ❖ Record Retention – All records documenting a DBE’s compliance with the eligibility requirements must be retained. These include the complete application package, change notices, all affidavits of no-change, and the on-site review report.
- ❖ Contract assurance – The contract clause included in each DOT-assisted contract obligates the contractor to comply with the DBE program regulations in the administration of the contract. Failure to do so may result in termination of the contract or other remedies that the recipient deems appropriate, including withholding monthly progress payments, assessing sanctions, liquidated damages, and disqualifying the contractor from future bidding as non-responsible.