

QUESTION:

WHAT OPTIONS DO RECIPIENTS HAVE FOR COUNTING THE PARTICIPATION OF DBE TRUCKING COMPANIES?

ANSWER:

- The first option is to count only the value of transportation services provided by a DBE trucking company itself, using trucks it owns, insures and operates, and using drivers it employs. As part of this first option, the DBE trucking firm can count the participation of other trucks leased from another certified DBE firm.
- In this option, if the DBE firm leases trucks from a non-DBE firm, it can count only fees or commissions it receives for arranging the participation of the non-DBE firm. No DBE credit can be awarded for the actual transportation services provided by the non-DBE firm and its trucks.
- The second option permits limited DBE credit to be obtained for the use of trucks leased from non-DBE sources. This option permits counting of credit for the use of non-DBE trucks not to exceed the value of transportation services on the contract provided by DBE trucks.
- The following example, from section 26.55(d)(5) of the DBE rule, illustrates how this second option works:

DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

- A recipient can choose either of these options. If it chooses the second option, the recipient must obtain the written consent of the appropriate DOT operating administration (e.g., the Federal Highway Administration for a state highway agency) before implementing that option. Whatever option a recipient chooses should be clearly stated in its DBE program.

QUESTION:

IF THERE IS A CHANGE IN THE OWNERSHIP OF A DBE-CERTIFIED FIRM, IS THE FIRM AUTOMATICALLY DECERTIFIED?

ANSWER:

- No. A certified DBE firm remains certified until and unless it is decertified. A recipient or UCP can decertify a firm only by using the procedures set forth in section 26.87.
- Under section 26.83(i), a certified DBE firm is required to notify the recipient or UCP in writing within 30 days of any material change in circumstances that could affect its ability to meet certification requirements, or any material change in the information provided in the firm's application form, including those pertaining to ownership and contact information (see 5th paragraph of Affidavit of Certification, in Appendix F of 49 CFR Part 26).
- The DBE must send this notice to all recipients or UCPs with which it is certified.
- If the firm fails to provide this written notice within 30 days of the occurrence of the change, the firm is subject to decertification for failure to cooperate as provided in sections §26.73(c) and 26.109(c).
- Along with the notice of change, the DBE must attach supporting documentation describing the change in detail, including documentation that supports the disadvantaged status of any new owner(s) and their ownership and control of the firm.
- The recipient or UCP may require the firm to provide additional documentation if necessary to determine whether the new owner meets disadvantage, ownership, and control requirements, and it may conduct a new on-site review of the firm.
- If the firm's notice and documentation concerning a change in ownership or other material change leads a recipient or UCP to determine that the firm has become ineligible (e.g., because the new owner is not a disadvantaged individual or does not control the business), the recipient or UCP should initiate a section 26.87 decertification proceeding. The firm remains certified pending the outcome of the proceeding.
- We urge recipients and UCPs to give priority to the review of the eligibility of firms whose circumstances have materially changed and, where appropriate, to conduct decertification proceedings expeditiously.

QUESTION:

SHOULD RECIPIENTS TREAT AS EVIDENCE OF GOOD FAITH EFFORTS TO MEET CONTRACT GOALS THE PROPOSED USE OF POTENTIAL DBE FIRMS THAT ARE NOT CERTIFIED IN THE RECIPIENT'S STATE?

ANSWER:

- No. As background, bidders or offerors on prime contracts may, on some occasions, propose the use on a contract of minority- or women-owned firms that are not currently certified in the recipient's state. In some cases, such firms might be certified as DBEs in other states.
- Good faith efforts are efforts to obtain participation by certified DBEs on the contract. Efforts to include firms not certified as DBEs in the state where the contract is being let are consequently not good faith efforts to meet a DBE contract goal. This is true even if a non-certified firm is owned by minorities or women or is certified in another state.
- We would point out, however, that it is appropriate for recipients to take potential DBEs into account when calculating overall goals.

QUESTION:

SHOULD FIRMS BE CERTIFIED AS “REGULAR DEALERS?” IS A FIRM THAT ACTS AS A REGULAR DEALER ON ONE CONTRACT NECESSARILY TREATED AS A REGULAR DEALER ON ALL CONTRACTS?

ANSWER:

- No to both questions.
- Certification and counting are separate concepts in the DBE rule. Certification and counting matters should not be conflated or confused with one another.
- Firms are certified as DBEs if they are small business concerns owned and controlled by socially and economically disadvantaged individuals. DBE firms must be certified in the most specific NAICS code(s) for the type of work they perform. While a firm may be certified in a NAICS code related to performing supplier functions, it is not appropriate to certify any firm as a “regular dealer.” In fact, there is no NAICS code for a “regular dealer.” The only appropriate use of the term “regular dealer” concerns counting participation by DBE firms that have already been certified.
- If a certified firm acts as a “regular dealer” in a given transaction, it is awarded DBE credit equivalent to 60 percent of the value of the items it supplies on that contract. This credit is awarded in recognition of the value the DBE adds to transaction and the risks that it takes. The rules provide that a firm the role of which is that of a broker or transaction expediter cannot receive DBE credit beyond the fee or commission it receives for its services. Such a firm adds less value and takes fewer risks than a regular dealer.
- Whether a DBE firm meets the criteria of §26.55(e)(2) for being treated as a regular dealer is a contract-by-contract determination to be made by the recipient. In evaluating whether a DBE firm should receive 60 percent credit for items it supplies on a particular contract, a recipient should answer two questions. If the answer to either question is “no,” then the firm should not receive 60 percent credit.
- First, does the firm “regularly” engage in the purchase and sale or lease, to the general public in the usual course of its business, of products of the general character involved in the contract and for which DBE credit is sought? Answering this question involves attention to the activities of the business over time, both within and outside the context of the DBE program. The distinction to be drawn is between the regular sale or lease of the products in question and merely occasional or *ad hoc* involvement with them.

- In answering this question, recipients should not insist that every single item the DBE firm supplies be physically present in the firm's store, warehouse, etc. before it is sold to a contractor. However, the establishment in which the firm keeps items it sells to the general public should be more than a token location. For example, a mere showroom, the existence of a hard-copy or on-line catalog, or the presence of small amounts of material that make questionable the ability of the firm to effectively supply quantities typically needed on a contract, are generally not sufficient to demonstrate that a firm regularly deals in the items.
- Second, is the role the firm plays on the specific contract in question consistent with the regular sale or lease of the products in question, as distinct from a role better understood as that of a broker, packager, manufacturer's representative, or other person who arranges or expedites a transaction? For example, a firm that regularly stocks and sells Product X may, on a particular contract, simply communicate a prime contractor's order for Product Y to the manufacturer, acting in a transaction expeditor capacity.
- This means that a firm that acts as a regular dealer on one contract does not necessarily act as a regular dealer on other contracts. For example, a firm that acts as a regular dealer on Contract #1 may act simply as a "transaction expeditor" or "broker" on Contract #2. It would receive DBE credit for 60 percent of the value of the goods supplied on Contract #1 while only receiving DBE credit for its fee or commission on Contract #2.
- In some circumstances, items are "drop-shipped" directly from a manufacturer's facility to a job site, never being in the physical possession of or transported by a supplier. In many such cases, the supplier's role may involve nothing more than contacting the manufacturer and placing a job-specific order for an item that the manufacturer then causes to be transported to the job site.
- In such a situation, the supplier's role may often be better described as that of a "broker" or "transaction expeditor" (see 26.55(e)(2)(ii)(C)) than as a "regular dealer." In such a case, DBE credit is limited to the fee or commission the firm receives for its services. If the firm does not provide any commercially useful function (i.e., it is simply inserted as an extra participant in a transaction), then no DBE credit can be counted.

QUESTION:

ARE DBE AND ACDBE FIRMS REQUIRED TO TRANSMIT NOTICES OF CHANGE AND AFFIDAVITS OF NO CHANGE TO ALL RECIPIENTS/UCPS WITH WHICH THEY ARE CERTIFIED?

ANSWER:

- Yes. A DBE or ACDBE, including one that is certified in more than one state, must always send an annual affidavit of no change or, as needed, a notice of change, to every recipient/UCP with which it is certified. For firms certified in more than one state, sending such documents only to the firm's home state is not sufficient.
- This requirement applies to ACDBEs under 49 CFR Part 23 as well as DBEs under 49 CFR Part 26.
- The fact that ACDBEs and DBEs remain certified until or unless decertified does not affect the requirement to provide annual affidavits of no change and notices of change.
- Failure to provide these documents subjects a firm to decertification proceedings for failure to cooperate (see 49 CFR 26.109(c)).
- When providing an affidavit of no change, the firm must attach documentation showing that it continues to meet applicable small business size standards. Recipients/UCPs may request additional information (e.g., concerning personal net worth or the firm's independence) where there is reason to believe that additional verification is necessary.

QUESTION:

CAN A CERTIFIED DBE FIRM VOLUNTARILY WITHDRAW FROM THE DBE PROGRAM?

ANSWER:

- Yes. Generally, a certified DBE firm remains certified until and unless it is decertified, using the procedures set forth in section 26.87.
- However, a DBE firm can voluntarily withdraw from the DBE program. It can do so by sending a notarized letter to the certifying agency and saying that it wants to cease participating in the program.
- When it receives such a letter, the recipient or UCP should send an acknowledgement letter to the firm saying that, unless the recipient or UCP hears to the contrary from the firm within a given number of days, the firm's DBE certification will be terminated.
- The recipient/UCP can then remove the firm from its Directory, and the firm would not, in the future, be eligible to participate as a DBE unless it later applied for certification through an initial application.
- If a firm takes other action conclusively demonstrating that it does not intend to continue to compete for contracts, such as filing paperwork with a state's Secretary of State or other regulatory agency terminating its ability to do business in the state, the firm has taken action equivalent to voluntarily withdrawing from the DBE program. In such a case, the recipient/UCP may remove the firm from the DBE Directory without pursuing a decertification proceeding under section 26.87.
- This is also true if the recipient/UCP has other conclusive evidence that the firm is no longer a going concern (e.g., there is documentation that the firm has been liquidated in bankruptcy).

QUESTION:

IS RELYING ONLY ON COMPLAINTS AN APPROPRIATE MEANS OF ENFORCING THE PROMPT PAYMENT AND RETAINAGE REQUIREMENTS OF THE RULE?

ANSWER:

- No. Relying only on complaints or notifications from subcontractors about a prime contractor's failure to comply with prompt payment and retainage requirements is not a sufficient mechanism to enforce the requirements of this section.
- Subcontractors are often reluctant to complain about prime contractors for fear that doing so will make it more difficult to get work in the future. This means that recipients may not receive complaints that would alert them to noncompliance by prime contractors.
- While this section does not mandate that a recipient employ a specific type of mechanism, recipients are expected to take affirmative steps to monitor and enforce prompt payment and retainage requirements of section 26.29.

QUESTION:

IF A FIRM HAS EXCEEDED THE SIZE STANDARD FOR THE MOST SPECIFIC AVAILABLE NAICS CODE FOR THE TYPE OF WORK IT DOES, IS IT APPROPRIATE FOR THE FIRM TO CONTINUE WORKING IN THAT TYPE OF WORK IN A BROADER NAICS CODE?

ANSWER:

- Generally not. Section 26.71(n)(1) provides that the types of work a firm can perform as a DBE “must be described in terms of the most specific available NAICS code for that type of work.”
- Suppose a firm’s work is in Specialty Subcontracting Field X. The most specific available NAICS code is one that describes only Field X and does not include other types of work. That is the only NAICS code that should be assigned to the firm.
- If the firm exceeds the size standard for the specific NAICS code relating to Field X, then it is no longer eligible to work as a DBE. If there is a broader NAICS code that includes not only Field X, but also Fields A, B, C, and D, and which has a higher size standard, the firm should not be assigned that broader code.
- The only exception to this principle would be in a situation where the firm actually performs all or some of the types of work in Fields A, B, C, and D and demonstrates to the certifying entity that the disadvantaged owners can control the activities of the firm in those areas.

QUESTION:

CAN A PRIME CONTRACTOR REDUCE THE AMOUNT OF WORK COMMITTED TO A DBE FIRM AT CONTRACT AWARD WITHOUT GOOD CAUSE?

ANSWER:

- No. The Department views such a reduction as a partial termination of the DBE's contract with the prime contractor. Recipients should dissuade contractors from reducing amounts of work committed to DBEs.
- Reducing the amount of work committed to a DBE at contract award, where this commitment was part of the prime contractor's good faith efforts to meet a contract goal, is subject to the requirements of section 26.53(f). This means that the prime contractor can reduce the amount of work committed to the DBE only for good cause and only with the written concurrence of the recipient.
- This is true even if the contractor continues to meet its contract goal through other means.
- For example, suppose a prime contractor commits \$500,000 to each of two DBE subcontractors, thereby meeting a 10 percent goal on a \$10 million prime contract. Part way through the performance of the contract, the prime contractor finds it necessary to expend an additional \$100,000 in the work being performed by DBE subcontractor #1. The contractor then wishes to reduce the work assigned to DBE subcontractor #2 by \$100,000, reasoning that the 10 percent goal will still be met. In such a situation, the prime contractor cannot act on its own to reduce the work assigned DBE subcontractor #2. It would have to comply with section 26.53(f).

QUESTION:

CAN RECIPIENTS AND UCPs CHARGE APPLICATION FEES TO FIRMS SEEKING DBE CERTIFICATION?

ANSWER:

- No, unless the relevant DOT operating administration approves the fee.
- An application fee may be charged only “subject to the approval of the concerned operating administration as part of your DBE program.” This means that a certifying entity is prohibited from charging such a fee unless the concerned operating administration has approved it.
- This approval concerns not only the concept of charging a fee, but the specific dollar amount of a fee.
- If a certifying entity is currently charging an application fee in the absence of the concerned operating administration’s approval, the certifying entity should immediately stop charging it.
- To be approved, a fee must be “reasonable.” In keeping with the objective of encouraging firms to apply for DBE certification, rather than deterring them from doing so, any application fee should be modest.
- Recipients are reminded that fee waivers should be made in appropriate cases.

QUESTION:

WHAT PROCEDURES SHOULD A UNIFIED CERTIFICATION PROGRAM (UCP) USE TO REMOVE OR REPLACE THE CERTIFICATION FUNCTIONS OF ONE OR MORE OF ITS MEMBERS?

ANSWER:

- If a UCP member wants to stop performing certification functions, or if a UCP wants to remove or replace the certification functions of a member, the UCP must, submit to USDOT an amendment to its UCP plan for prior approval.
- The proposed amendment should do the following things: (1) describe how the certification functions of the UCP member will be delegated to other UCP partners; (2) provide details of how the UCP will ensure that DBE firms certified by the withdrawing UCP member will remain certified; (3) describe how one or more UCP members will divide the certification workload, for both currently certified firms and pending applications; (4) designate which UCP member or members will review annual affidavits of no change for firms certified by the withdrawing member; and (5) provide assurances that the UCP will inform all firms that their certification, annual affidavits, and applications will now be processed by another UCP member.
- The Department may disapprove the proposed UCP amendment if proper protections for certified DBE firms and applicants are not adequately described.
- If the proposed amendment is not approved, disapproved, or remanded to the UCP for revisions within 180 days of its submission, it is deemed to be accepted.

QUESTION:

CAN UCPs TREAT CERTIFIED DBE FIRMS AS NEW APPLICANTS IF THE UCP MEMBER THAT ORIGINALLY CERTIFIED THE FIRM NO LONGER CERTIFIES FIRMS ON BEHALF OF THE UCP?

ANSWER

- No. Once a DBE firm is certified, it remains certified unless and until decertified by the UCP under section 26.87
- A firm does not lose its certification because the UCP member that originally certified it ceases to perform certification functions for the UCP.
- In the event that a UCP member that formerly had certification duties no longer performs certifications for the UCP, all DBE certifications issued by that member remain in effect until and unless the decertification procedures set forth in 26.87 have been completed.
- Certified firms are not considered new applicants just because a new certifying entity now has their file.

QUESTION:

MAY A RECIPIENT OR UCP REQUIRE A FIRM CERTIFIED AS A DBE UNDER PART 26 TO COMPLETE AN ENTIRE NEW APPLICATION TO BE CERTIFIED AS AN ACDBE UNDER PART 23?

ANSWER:

- No. Section 23.37 provides that as a recipient or UCP, you are required to presume that a firm certified in your State as a DBE under Part 26 meets size, disadvantage, ownership, and control requirements for certification as an ACDBE under Part 23.
- As of the date on which this Q&A is being issued, the personal net worth (PNW) cap for Part 26 (\$1.32 million) and Part 23 (\$750,000) are different. Consequently, a recipient or UCP must check to make sure a Part 23 applicant meets the Part 23 PNW cap. However, if the Part 23 PNW cap is changed to be the same as the Part 26 PNW cap, then certification under Part 26 will also mean that the firm meets the Part 23 PNW cap.
- There is only one additional determination that you need to make in order to certify such a firm as an ACDBE: whether the disadvantaged owners of the Part 26-certified firm can control the activities of the firm with respect to its participation in the ACDBE program.
- You are not required to certify a DBE firm as an ACDBE if the firm does not do work relevant to the airport concessions program (e.g., operating a concession or providing goods and services to concessions).
- In summary, when you receive an ACDBE application that has a current Part 26 DBE certification in your State, you should only seek information on two subjects: the firm owner's PNW (pending a change to Part 23 to use the same PNW cap as is used in Part 26) and the disadvantaged owner's ability to control the firm with respect to airport concession activities. You may not require the firm to file a complete new application.