

# FAA Civil Rights - National Airport Civil Rights Training Conference

## DBE REGULATORY UPDATE

Presented to: 2011 National Civil Rights  
Training Participants San Diego

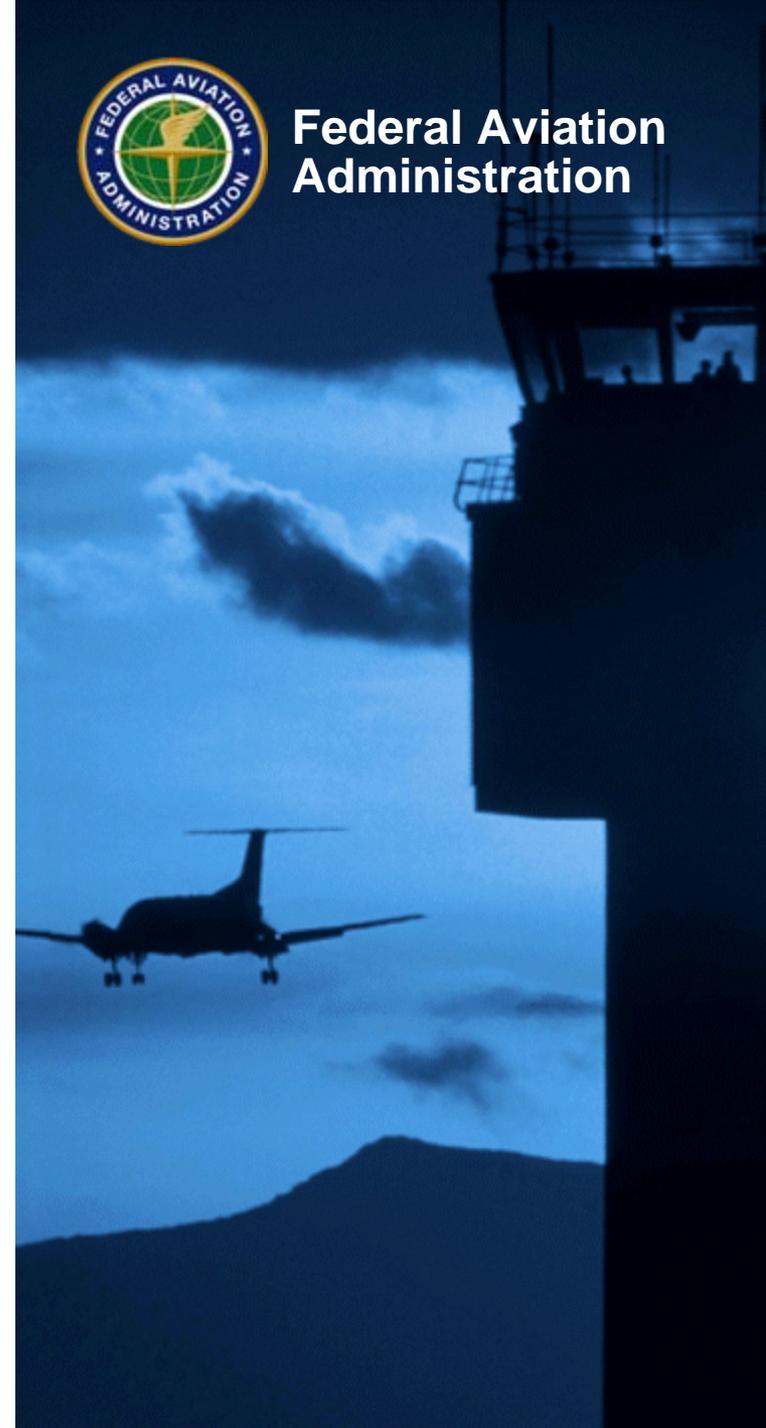
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Federal Aviation  
Administration



# New Rule

- **Published January 28, 2011**
- **Effective February 28, 2011**
- **See:**  
**<http://edocket.access.gpo.gov/2011/pdf/2011-1531.pdf>**



# Continuing Compelling Need for the DBE Program

Confirms the continuing compelling need for race and gender conscious programs such as the DOT DBE program



# New Rule Subjects

## Improves the administration of the DBE Program

- increases accountability for meeting overall goals
- modifies and updates certification requirements
- adjusts personal net worth (PNW) for inflation
- provides for expedited interstate certification
- adds provisions to foster small business participation
- improves post-award oversight



# Counting Purchases From Prime Contractors

## **No Change to general rule:**

DBE sub and its prime count for DBE credit for items that the DBE subcontractor purchases or leases from a third party

## **Exception:**

DBE and its prime can't count items DBE purchases or leases from its own prime

# Termination of DBE Firms

## No Terminations for Convenience

- Primes can't terminate DBE sub without sponsor's prior written consent
- Termination requires good cause

# Termination of DBE Firms (Cont.)

## Good Cause – 49 CFR 26.53(f)(3)

- DBE sub fails/refuses
  - to execute contract
  - perform work consistent with normal industry standards
  - to meet reasonable bond requirements.
- DBE sub ineligible
  - to work on public works projects
  - to receive DBE credit for the type of work
- DBE firm unable to complete work
- Other documented good cause
- DBE sub not a responsible contractor
- DBE sub voluntarily withdraws from the project

# Termination of DBE Firms (Cont.)

Good cause does not exist:

- if the failure/refusal of DBE sub to perform work results from bad faith or discriminatory action of prime
- if prime seeks to terminate DBE to self-perform the DBE's portion of work, or to substitute another DBE or non-DBE after contract award

# Personal Net Worth

\$1.32 million PNW

- Inflationary adjustment simply keeps things as they were originally in real dollar terms

Will examine other PNW issues in NPRM

Will propose improved PNW form in NPRM

# PNW Transition Guidance

- Pending actions on date amendment is published, but before effective date
  - Use new standards, decisions should not take effect until effective date
- All actions as of effective date must be based on the revised PNW standard, even if action pertaining to PNW began before this date

# PNW Transition Guidance (cont.)

- Appeals to UCP pending before publication date for PNW above \$750,000 but not above \$1.32 million, use new standard
  - Sponsors and UCPs may request updated information where relevant
- Appeal pending before DOCR under section 26.89, DOCR will take the same approach or remand the matter



# PNW Transition Guidance (cont.)

- If firm decertified or application denied within a year before effective date for PNW above \$750,000 but not above \$1.32 million, the UCP should permit the firm to resubmit PNW information without waiting period
- Firm recertified if PNW not over \$1.32 million and otherwise eligible



# Interstate Certification

- Revised rule enhances ability of UCP to protect integrity of DBE program and affords DBE's right to pursue business outside home state
- January 1, 2012 - new section effective
  - provides sponsors and UCPs time to train and establish administrative mechanisms
  - provides DOCR time to make database for denials and decertifications operational
- Will address improvements in certification application and PNW forms in NPRM

# Interstate Certification (cont.)

## Process

- Home State (State A) certified firm submits application to State B
- State B has 60 days to raise specific objections to firm's eligibility and advise firm
- Firm may respond to State B concerning the specific objections in writing, at an in-person meeting, or both
- Firm has burden of proof to issues raised by State B
- State B must issue a written decision within 30 days of the receipt of written response or meeting

# Interstate Certification (cont)

- UCP deny, reject or decertify must make an entry in DOOCR's Ineligibility Determination Online Database
- UCP must check DOOCR Website at least monthly



# Interstate Certification (cont.)

Good Cause determination that State A's certification is erroneous or should not apply if:

- Evidence of fraud
- New information
- Factually erroneous or inconsistent with Part 26
- State law requires different result
- Information did not meet 26.85(c)

# Interstate Certification (cont.)

## On-Site Report:

More than three years old, State B may require firm to affirm facts in on-site report

Within 7 days of application, State B requests State A's on-site report and any updates and evaluation of firm based on site visit

State A must transmit information to State B within 7 days of request

# Other Certification-Related Issues

## On-site reviews:

- No mandated particular schedule
- Sponsors and UCPs should conduct updated on-site reviews of certified firms on regular and reasonably frequent basis
- Information sharing can be done electronically to reduce costs

# Other Certification-Related Issues

## Withdrawals:

- May apply waiting period if established pattern of frequently withdrawing before decision
- May place reapplication behind other applications made since firm's previous application was withdrawn

# Other Certification-Related Issues

## REMINDER:

- Firms remain certified until and unless removed certification through 26.87 procedures

# Other Certification-Related Issues

- Evaluate eligibility on basis of present circumstances
- Firm eligible if meets disadvantaged, size, ownership, and control requirements
- Must not refuse to certify based solely on historical information
- Must not refuse to certify a firm solely on basis that it is newly formed firm, has not completed projects or contracts, has not realized profits, or has not demonstrated potential for success

# Other Certification-Related Issues

## NAICS:

- DBE work must be described in terms of most specific available NAICS code
- UCP may not limit NAICS codes to a certain number
- UCP may also apply a descriptor from a classification scheme
- DBE Directory - list DBE work using most specific NAICS code available

# Other Certification-Related Issues

## Licensing:

- Inappropriate for a sponsor or UCP to insist on professional certification as *per se* condition where state law does not impose such a requirement

## Transfer of assets:

- UCPs authorized to examine transfers from DBE personal assets to their companies

## 30 day review:

- UCP must advise applicant within 30 days from receipt

# Accountability and Goal Submissions

- No Quotas - No sanction for failing to “hit the number”
- If the awards and commitments are less than overall goal for that year, you must:
  - Analyze the reasons for difference
  - Establish specific steps and milestones to fully meet the goal for the new fiscal year
  - Operational Evolution Partnership Plan airport or other airport designated by the FAA
    - must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed to FAA DBE Team
  - All other airports
    - must retain analysis and corrective actions in records for three years and make it available to FAA on request

# Accountability and Goal Submissions

- If analysis and corrective actions approved -- compliance with DBE requirements for remainder of fiscal year
  - FAA may impose conditions as part of its approval of analysis and corrective actions
- Noncompliance with DBE requirements
  - Not submitting analysis and corrective actions to FAA
  - FAA disapproves of analysis or corrective actions
  - Not fully implementing corrective actions or conditions FAA imposed
- If unlikely for sponsor to achieve DBE awards and commitments necessary to meet overall goal, FAA may require further good faith efforts
  - Modifying race-conscious/race-neutral split
  - Introducing additional race-neutral or race-conscious measures

# Accountability and Goal Submissions

Clarifications to three year goalsetting process:

- Permits sponsor to make informational projections of expected DBE achievements during each year for three years covered by overall goal

# Program Oversight

Monitoring and enforcement mechanism:

- Must include a written certification that sponsor reviewed contracting records and monitored work sites
- May be conducted in conjunction with monitoring of contract performance for other purposes

# Small Business Provisions

DBE Program must include element to facilitate competition by small business concerns:

- Take all reasonable steps to eliminate obstacles to participation
- Must actively implement program elements to foster small business participation
- Doing so is a requirement of good faith implementation of DBE program
- Rule references these means as race-neutral measures

# Small Business Provisions (cont.)

Element must be submitted to FAA DBE Team for approval as part of DBE program by February 28, 2012, and may include:

- Establishing race-neutral small business set-aside for prime contracts under a stated amount
- In large contracts requiring bidders to specify elements that are of a size that small businesses can reasonably perform
- On prime contracts with no DBE contract goals, require prime to provide subcontracting opportunities of a size that small businesses can reasonably perform
- Structuring procurements to facilitate joint ventures consisting of small businesses to compete for prime contracts
- For race-neutral portion of goal, ensuring that a reasonable number of prime contracts are of a size that small businesses can reasonably perform

# Follow-on NPRM

- **Certification and PNW issues, including**
  - forms,
  - duplicative and excessive bonding, and
  - joint check requirements
- Part 23 NPRM



# Questions

