

DBE Certification Highlights

FAA National Civil Rights Conference
Washington, D.C.
September 2016

Marc Pentino
Departmental Office of Civil Rights



Overview

- Federal structure of the DBE program
- Key DBE certification statistics





USDOT DBE PROGRAM

**Departmental
Office of Civil Rights**

**Office of the
General Counsel**

**Office of Small &
Disadvantaged
Business
Utilization**

**Federal Aviation
Administration**

**Federal Highway
Administration**

**Federal Transit
Administration**





DOCR's Role



**Departmental
Office of Civil Rights**

- Ensures compliance with external civil rights programs
- Lead office in OST for the DBE program
- Oversees and provides guidance to OAs
- Enforces administration of recipient program
- Adjudicates final decisions





OGC's Role

**Office of the
General Counsel**

- Final authority on legal questions
- Creates Departmental regulations implementing the program, ensuring compliance with constitutional standards
- Litigation and administrative enforcement of the program





OSDBU's Role

**Office of Small &
Disadvantaged
Business
Utilization**

- Ensures DBE policies and programs are developed in a fair, efficient, and effective manner
- Financial Assistance Division
 - Short Term Lending Program (STLP)
 - Bonding Education program (BEP)





OAs' Roles (FAA, FHWA and FTA)

**Federal Aviation
Administration**

**Federal Highway
Administration**

**Federal Transit
Administration**

- Providing training, technical assistance, and maintaining DBE Websites on OA webpages
- Reviews
 - DBE Program Plans
 - Strategies
 - Project goal setting methodology
 - Contract goals from recipients
 - Accountability reports
 - Small Business Elements



OAs' Roles (FAA, FHWA and FTA) cont'd.

- Approves
 - Race-neutral and race conscious projections
 - Business development and Mentor Protégé plans
- Collects data from recipients
- Processes Applications for exemptions or waivers
- Monitors compliance with DBE program requirements
- Investigates complaints of noncompliance with DBE program requirements
- First point of contact for recipient questions and day-to-day administration of programs





Moving Ahead for Progress in the 21st Century Act (MAP-21)

- 2014 DBE rule adds new requirement.
- Reports **due January 1, 2017**
- Each State Department of Transportation to submit the number of firms controlled by:
 - white women,
 - minority or other men, and
 - minority women
- Then convert to percentages
- Also report location of firms in the state (home state or interstate certified).
- Email information to: DBE@dot.gov



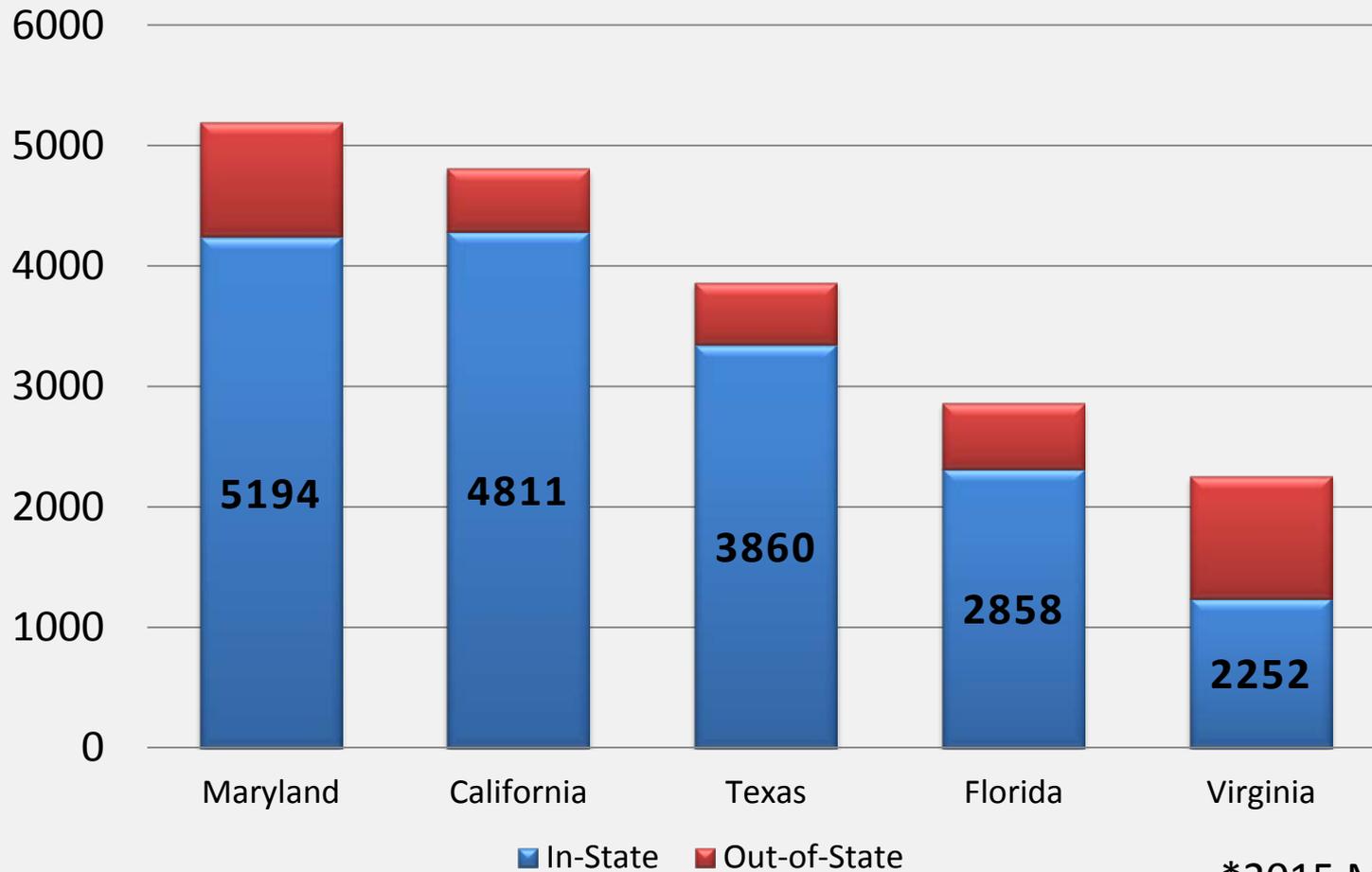
DBE Facts*

- 35,840 certified DBEs
- 30% of DBE firm certifications are interstate certifications
- **1.31% increase in total number of DBEs from 2014 to 2015**
 - 2015-35,840
 - 2014-35,378
- **9.31% increase in interstate certifications from 2014 to 2015**
 - 2015 - 15,452
 - 2014 - 14,136
- \$4.8 billion of \$39 Billion was awarded/committed to DBE prime contractors and subcontractors (12% DBE participation, 2015)

*2015 MAP-21 Data



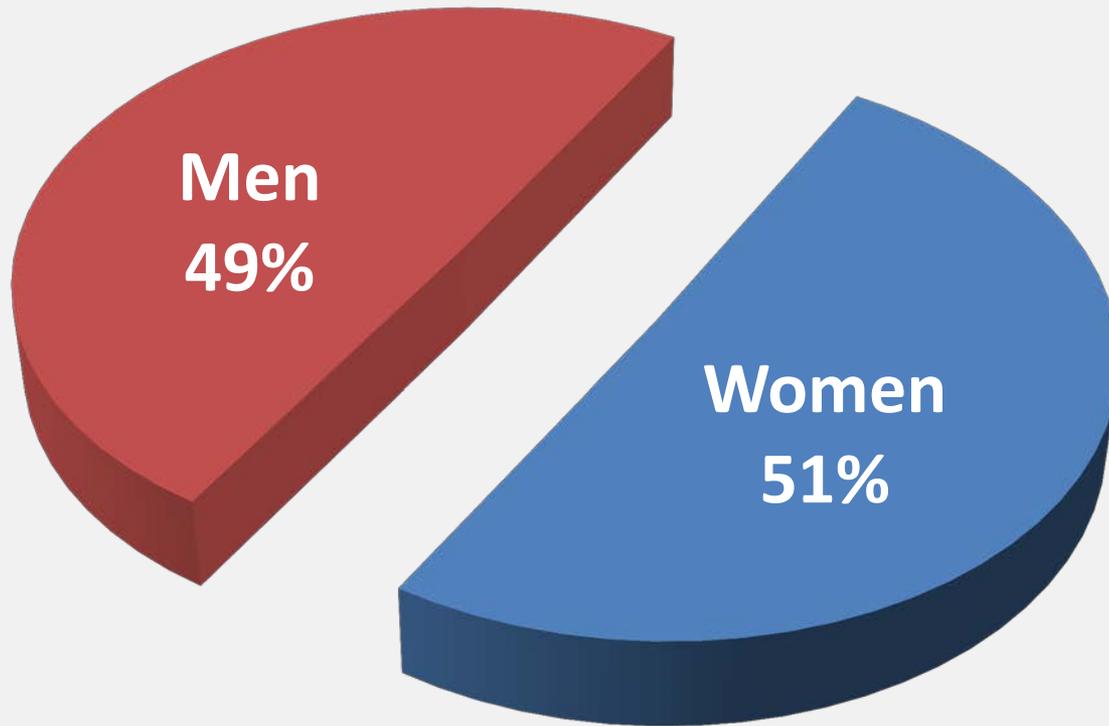
Top Five States with Most Certified Firms*



*2015 MAP-21 Data



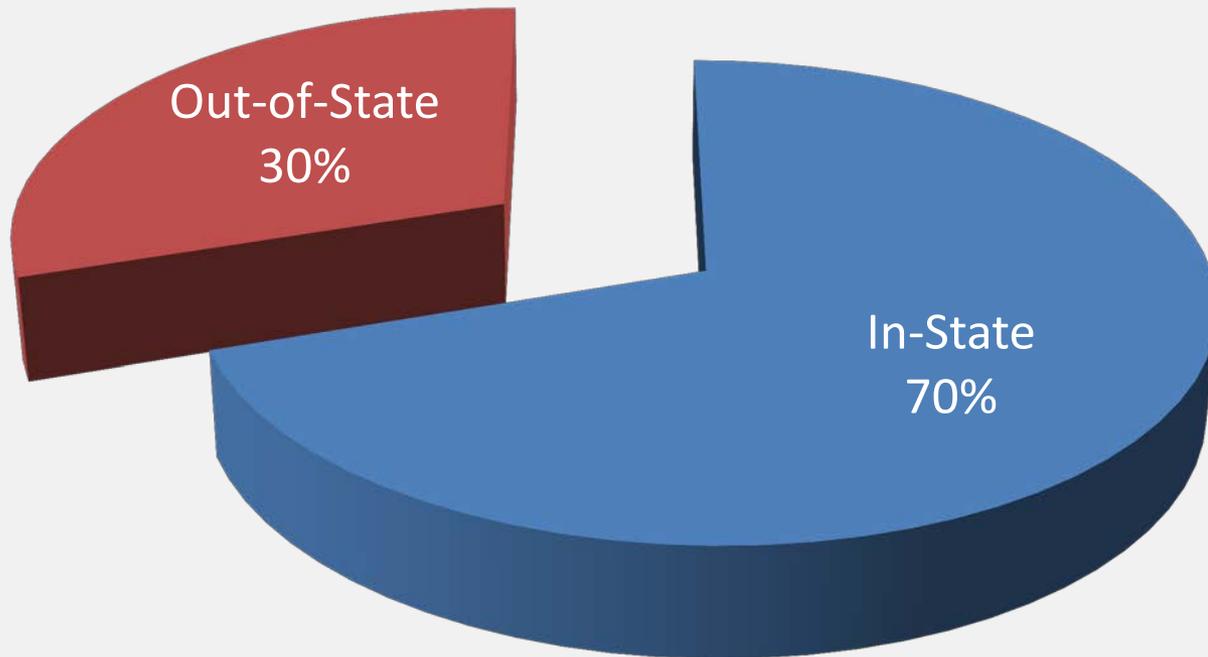
DBE Certifications by Gender*



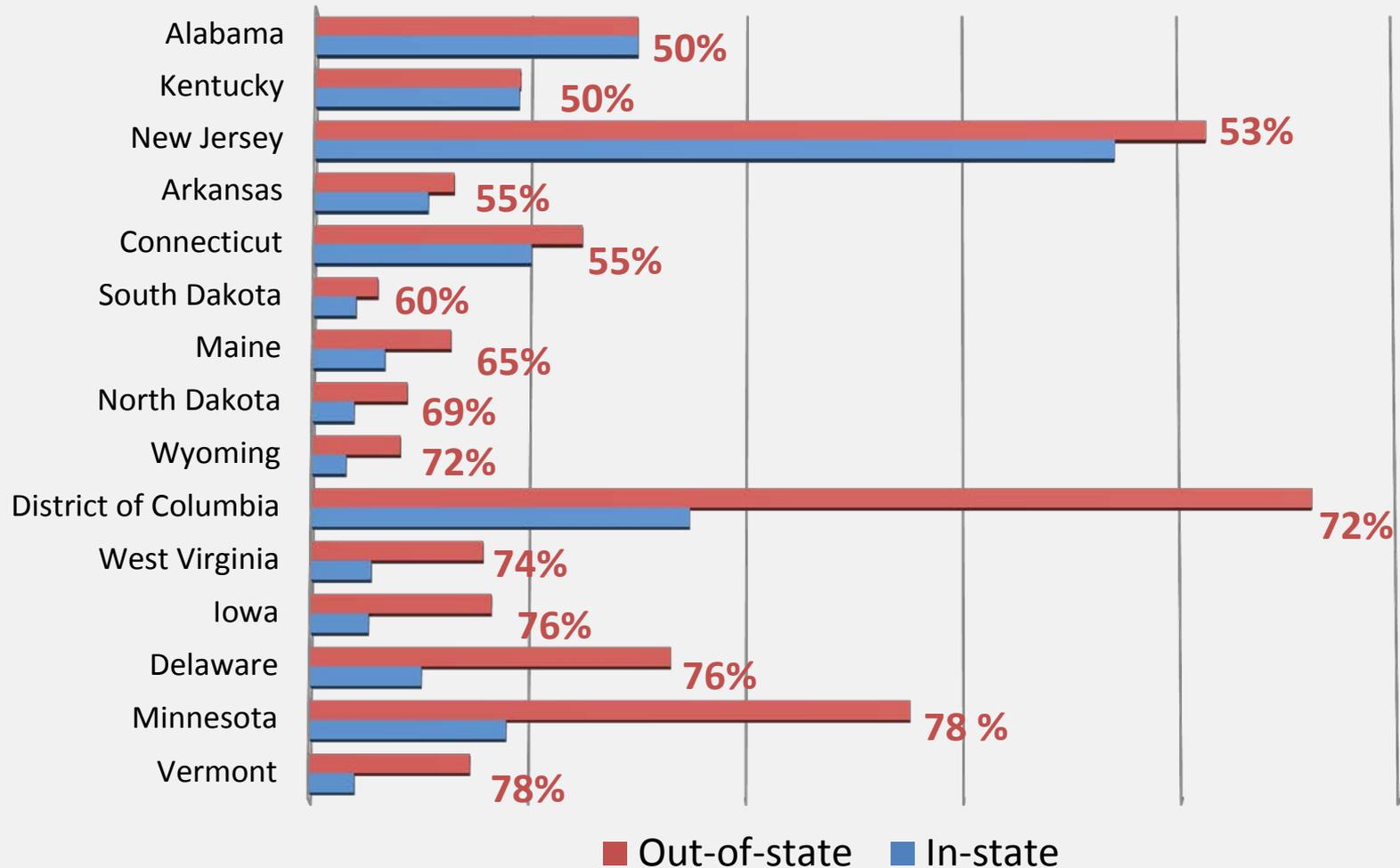
*2015 MAP-21 Data



Percentage of Interstate Certifications



Highest Percentage of Out of State Firms



■ Out-of-state ■ In-state



Summary

- Aware of the Federal structure of the DBE program
- Discussed key DBE certification statistics



Thank you very much!

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Denial Letter Basics

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Learning Objectives

- To identify and discuss key practices to improve certifier decisions
- To improve compliance with the Regulation procedurally and substantively



Overview

- Introductory Paragraph
- Identify Issues
 - Facts
- Regulation
- Analysis
 - Burden of Proof
 - Standard of Review
- Conclusion
 - Appeal Procedures



Introductory Paragraph

- Include grounds for denial
 - DBE/ACDBE Regulation 49 CFR Parts 23 and 26
- Key facts
- Issues
- Firm name and work activity
- Nature of denial/decertification



Issues and Facts

- Identify issues and supporting facts from the record:
 - On-Site Review Report
 - Investigation
 - Discussion with the applicant
 - Uniform Certification Application
 - Correspondence/e-mail
 - Outside research



Regulation

- Make sure correct provisions are cited
Example: §26.69(c)(3) v. § 26.71(i)(1)
- Explain reasons for denial with *specificity* and *particularity*
See §26.86(a)
- Follow correct procedures
See §26.87(b); and §26.89(f)(6).



Example: Specificity and Particularity

✓ “Jane Doe is not the majority owner of the firm because she did not provide consideration for her husband’s 1% transfer of ownership to her. The Uniform Certification Application (page 2) and On-Site Review Report (page 3) confirm this fact. *See* §26.69(c)(3).”

✗ “She does not own the firm pursuant to §26.69(c).”



Analysis

- Reasons supported by facts (look to the record)
- Explain why the firm failed to meet the specified eligibility requirements



Example: Use “Because”

✓ “Jane Doe is not the majority owner of the firm **because** she did not provide consideration for her husband’s 1% transfer of ownership to her.

✗ “You do not control the firm. *See* §26.71(e).”

Conclusory



Burden of Proof

- Preponderance of the Evidence Standard
- Clear and Convincing Evidence Standard



Conclusion

- Summarize
 - Recap of objections, issues, and pertinent facts
- Appeal Rights and Procedures
 - Instructions
 - Provisions
 - §26.85
 - §26.87
 - §26.89



Appeals to DOT

- Required to submit the entire record to DOT and materials to the firm on request
- Certifier may respond to appeal



Summary

- Identified and discussed key practices to improve certifier decisions
- Discussed ways to avoid common compliance procedural and substantive issues



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Common Certification Misunderstandings

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Learning Objectives

- Identify and correct common certification misunderstandings
- Clarify commonly misused terms (e.g., recertification, expiration, renewal)
- Correct procedural certification processing errors



The On-Site Interview and Requesting Information

- Do not treat the interview as pro-forma.
- You must review all information on the application form prior to making a decision about the eligibility of the firm.
- **§26.83(c)(4)**: The November 2014 rule added that “you may request clarification of information contained in the application at any time in the application process.”





Gifts and Transfers

- **§26.69(h):** Presumption of nondisadvantaged control when non-SED transfers ownership without adequate consideration
 - Involved in the same firm or affiliate;
 - Involved in the same or a similar line of business; or
 - Engaged in an ongoing business relationship with the firm, or an affiliate of the firm



Gifts and Transfers: Rebuttal of Presumption

- (2) Presumption may be rebutted with **clear and convincing evidence**, that
 - the gift or transfer was made for reasons other than obtaining certification as a DBE **and**
 - the disadvantaged individual actually controls the firm notwithstanding the nondisadvantaged individual's presence.



Marital Assets

- §26.69(i)



- (1) **Marital assets**: If joint funds are used to acquire a firm, you must deem that the spouse also owns the firm due to use of his or her own individual resources, unless the spouse irrevocably renounces his or her interest.

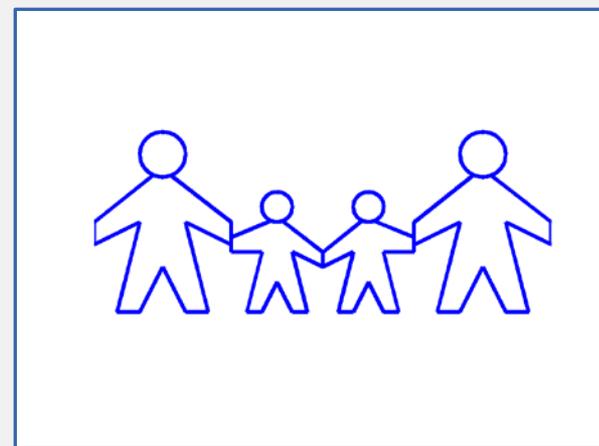
- (2) **Legal Renunciation**

Timing



Family Involvement

- **§26.71(k):** Family involvement is acceptable at a DBE firm, so long as the disadvantaged owner *controls*.
- Definition of a Family Member





Profit vs. Remuneration

§26.69(c)(3) (*Ownership Profits*)

- The disadvantaged owners must enjoy the customary incidents of ownership, and *share in the risks and be entitled to the profits and loss commensurate with their ownership interests. . .*

§26.71(i)(1) (*Control Remuneration*)

- Differences in remuneration
 - Example: salary, bonuses





Independence: Viability

§26.71(b): DBE applicant firm's viability does not depend on its relationship with a non-DBE firm(s).

1. Must scrutinize

- non-DBE firm relationships with regard to personnel, facilities, equipment, financial and/or bonding support, and other resources.

2. Must consider

- present or recent employer/employee relationships between the DBE applicant firm and non-DBE firms.

3. Must examine

- the firm's relationships with prime contractors with regard to a pattern of exclusive dealings.

4. Must consider

- the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.



Independence: Franchise and Large Prime Contractors

- **§26.71(b)(1):** Franchise Relationships
- **§26.71(b)(3):** Large Prime Contractors Relationships (carefully examine)





Equipment Owned, Leased, Projected

- **§26.71(m) (FACTOR)**
 - You may consider whether the firm owns equipment necessary to perform its work.
 - **BUT**, you must not determine that a firm is not controlled by SEDs solely because the firm leases, rather than owns, such equipment, where
 - leasing equipment is a normal industry practice and
 - the lease does not involve a relationship with a party that compromises the independence of the firm.





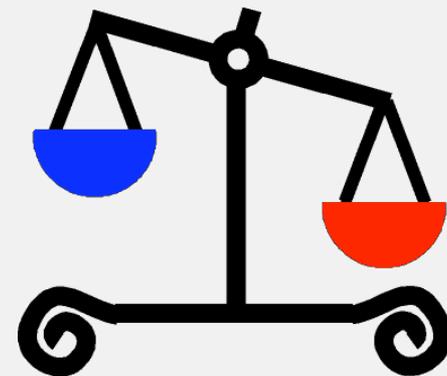
Licensing Rule

- **§26.71(h): Requirement vs. Factor**
 - If state or local law requires the persons to have a particular license/credential in order to own and/or control a certain type of firm (**requirement**)
 - If state or local law does not require such a person to have such a license or credential to own and/or control a firm (**factor**)



Outside Employment

- **§26.71(j)**: Must examine whether disadvantaged owner has conflicting employment
 - ACDBEs often operate 24/7
 - Weigh whether outside employment conflicts with the ability to control the firm





Denial and Decertification

§26.86(a)(Initial Denials)/§26.87(g)(Decertification)

- Explain with specificity
- Reference evidence in the record
- Provide notice





Annual Affidavits

- **§26.83(j)**: DBEs must provide recipients, a **no-change affidavit** every year on the anniversary of the date of certification.
- **§26.109(c)**: If the DBE firm/applicant fails to provide this affidavit in a timely manner, they will be deemed to have failed to cooperate.





Recertification/Expiration/Renewal

- No such thing as *Recertification, Expiration, or Renewal*
- **§26.83(h)**
 - **Old provision, created misconception:** Recipients must conduct a new Certification Review, including a new On-Site Review Report, every 3 years.
 - **New provision, provides clarity:** A certifier may conduct a Certification Review anytime should there be a need. Not limited to 3 years.



Summary Suspension: Immediate Actions

- **§26.88: Certifier suspension without a §26.87(d) hearing:**
 - **must suspend if**
 - the disadvantaged owner dies or is in jail
 - there is direction by the Operating Administration
 - **may suspend if**
 - there is adequate evidence of material change
 - the DBE fails to notify of material change or fails to timely file an affidavit of no change



Summary Suspension: Post-suspension Actions

- After initiating suspension, the Certifier must immediately notify the DBE by certified mail to last known address
- Suspension occurs when DBE receives or is deemed to have received notice
- Certifier must then expedite §26.87 hearing to determine eligibility
- While suspended, DBE will not be eligible to meet goals on new contracts, but can continue to receive credit on contracts executed before suspension



Summary Suspension: DBE Response

- When DBE receives notice, it may
 - Withdraw
 - Provide information to recipient why it remains eligible
- Recipient must lift the suspension or begin decertification proceedings within 30 days of receiving information from suspended DBE





Summary

- Identified and corrected common certification misunderstandings
- Clarified commonly misused terms (e.g., recertification, expiration, renewal)
- Corrected procedural certification processing errors



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Interstate Certification

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Overview

- Intent of the Provision
- Procedural Aspects of Interstate Certification
- 5 Good Cause Reasons for Denial
- NAICS Codes
- Case Studies



Learning Objectives

- To understand the intent of the provision
- To identify and correct procedural certification processing errors
- To identify and discuss trends and issues within interstate certification



Background

- Intent of the provision
 - How did we get to this point?
 - What does the preamble say?



Option 1

When a firm is certified in its home state, a UCP may accept the certification without further procedure, but must

- confirm the firm has a valid certification in its home state.



Option 2 (a)

- If a UCP chooses not to accept the firm's home state certification without further procedure, the applicant must provide:
 - A complete copy of the application form, supporting documentation, and any other information submitted to the home state.
 - Notices and/or correspondence, including denials, from any other states where the applicant has applied for certification...



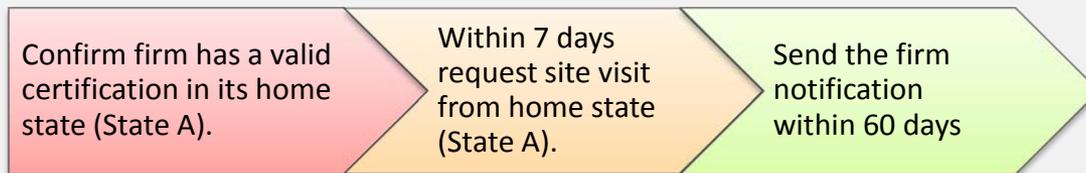
Option 2 (b)

- Any appeals to DOT and decisions rendered as a result of appeals.
- A notarized affidavit or a declaration executed under penalty of perjury affirming that
 - All required information has been submitted and is complete
 - The application and supporting documentation is an identical copy of the information submitted to the home state.
- Electronic submissions OK



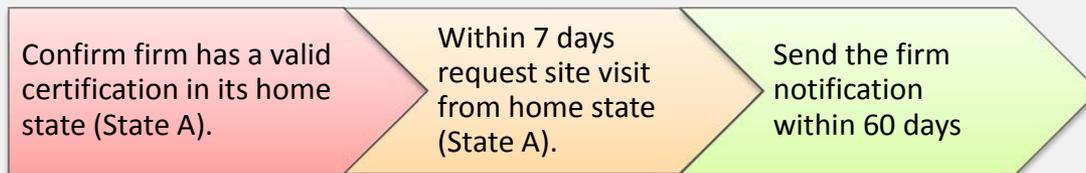
UCP Process After Receipt of Required Information (a)

- Request a site visit report from the firm's home state within 7 days of receipt of the required information.
- Determine if you agree with the home state certification decision.



UCP Process After Receipt of Required Information (b)

- Send the firm notice that they are certified in your state and place the firm in the directory **within 60 days** of receipt of all required information unless you have good cause to believe that the firm's certification is erroneous or shouldn't apply in your state.
- If you determine that there is good cause to believe that firm's home state certification is erroneous or should not apply in your state, you must notify the firm, in writing, **within 60 days** of receipt of all information.



UCP Process After Receipt of Required Information (c)

- UCPs are required to cooperate in providing necessary information to other UCPs
- The home state must comply with such requests in a timely manner



UCP Process After Receipt of Required Information (d)

- Failure by the requesting UCP to make the request within 7 days or the home state UCP to provide the information in a timely manner constitutes non-compliance.
- In the event the home state UCP has not provided a copy of the on-site review report within 14 days after requesting to do so
 - The requesting UCP may hold its decision in abeyance pending receipt of the on-site report.
 - The firm must be notified, in writing, within 30 days of receipt of all required information that the decision has been delayed.
 - The written notice must include the reason for the delay.



Good Cause Reasons for Not Accepting Home State Certification

1. Evidence the home state's certification was obtained by fraud.
2. New information showing the firm does not meet all eligibility criteria.
3. The home state's certification was factually erroneous or was inconsistent with requirements of the regulation.
4. State law requires a result different from that of the home state.
5. Required information provided by the applicant firm was not provided.



Notice and Related Procedures (a)

- The notice informing the firm that you have determined the home state certification is erroneous or does not apply in your state must include the following:
 - The specific reasons why the determination was made.
 - An opportunity for the firm to respond to the determination.
 - The applicant firm has the burden of demonstrating that it meets the eligibility requirements with respect to the specific issues raised by the reviewer.



Notice and Related Procedures (b)

- The decision maker for this action must be an individual who is thoroughly familiar with the regulation and DBE certification standards and procedures.
- A written decision must be issued within 30 days of the firm's response to the notice or meeting with the decision maker.
- A denial in this manner is appealable to DOT in the same manner as any other denial.



NAICS Codes and IC

- Can out-of-state firms ask for more codes?
 - Yes. DBEs may seek certification in State B in additional NAICS codes it believes apply to the work it may perform already or seek to perform in the future.
 - Recipients should process this request for an expansion or augmentation of their assigned codes as §26.71(n) requires
- Do they travel with the DBE?



NAICS Codes and Out-of-State Firms

- Guidance: If a recipient accepts another state's certification, are they required to recognize an out-of-state DBE's NAICS codes that were granted to the DBE by their home state?
 - Yes. By granting DBE interstate certification to an out-of-state DBE pursuant to §26.85, state B recognizes all aspects of that certification.
 - Since part of a DBE firm's state A certification includes that DBE being recognized under one or more NAICS codes, State B must, therefore recognize the out-of-state DBE's NAICS codes that were assigned to the DBE by its home state.
 - There is no such thing as partial interstate certification wherein State B grants interstate certification to an out-of-state DBE in some, but not all the NAICS codes assigned to it by the home state.



IC Case Study 1

A DBE in its home State A is unaware of the interstate certification regulations and submits a completed application to State B. What should State B do?

- a. Proceed as if the DBE submitted a new application and follow its own certification procedures?
- b. Return the completed application to the DBE and explain that it must follow the interstate certification procedures?
- c. Accept the application and let the DBE know that you will process the application under the interstate certification procedures unless the DBE wishes have the application processed as a new application?





IC Case Study 2

A DBE landscaping business is certified in its home State A under NAICs Codes ABC and DEF. The DBE seeks certification in State B. State B properly asks the DBE to provide all of the certification documentation from State A and asks State A to provide a copy of the onsite report. State B reviews the information it received from the DBE and State A and is satisfied that the DBE qualifies for certification under the NAICs Code pertaining to landscaping. However, State B notices that NAICS Code DEF applies to electrical work, and there is no evidence in the file that the DBE either performs or desires to perform electrical work. State B concludes that State A listed this NAICs Code in error. What should State B do?



Summary

- Intent of the Provision
- Procedural Certification Processing Errors
- Trends and Issues within Interstate Certification



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