

Common Certification Misunderstandings



U.S. Department
of Transportation
**Federal Aviation
Administration**

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Departmental Office of Civil Rights

6th Annual FAA National Civil Rights
Training Conference for Airports

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Office Of Civil Rights

*ACHIEVING SAFETY
THROUGH DIVERSITY*



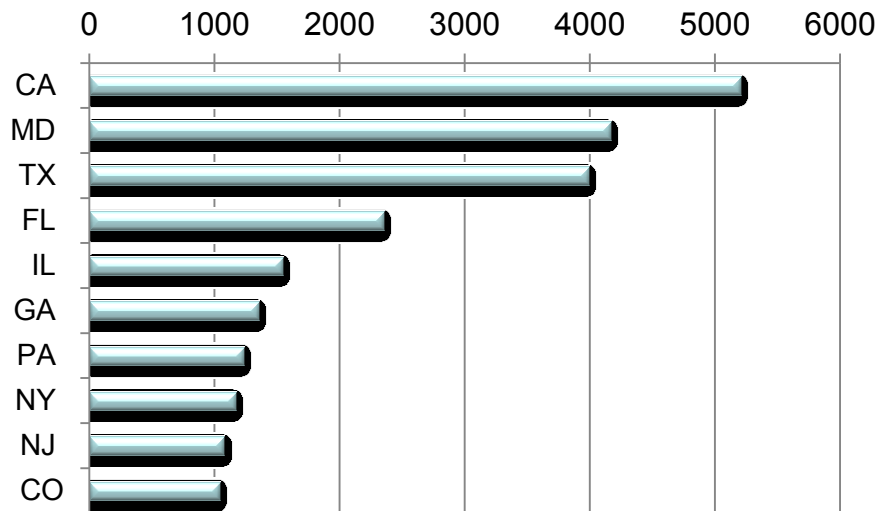
Objectives

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

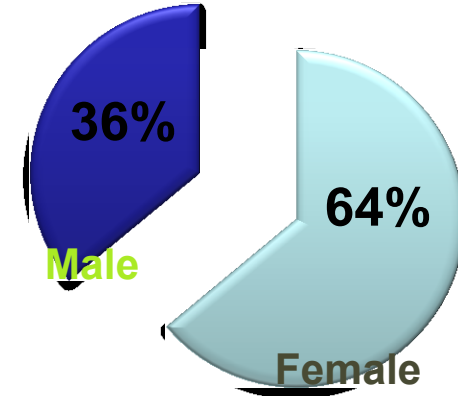
DBE Facts

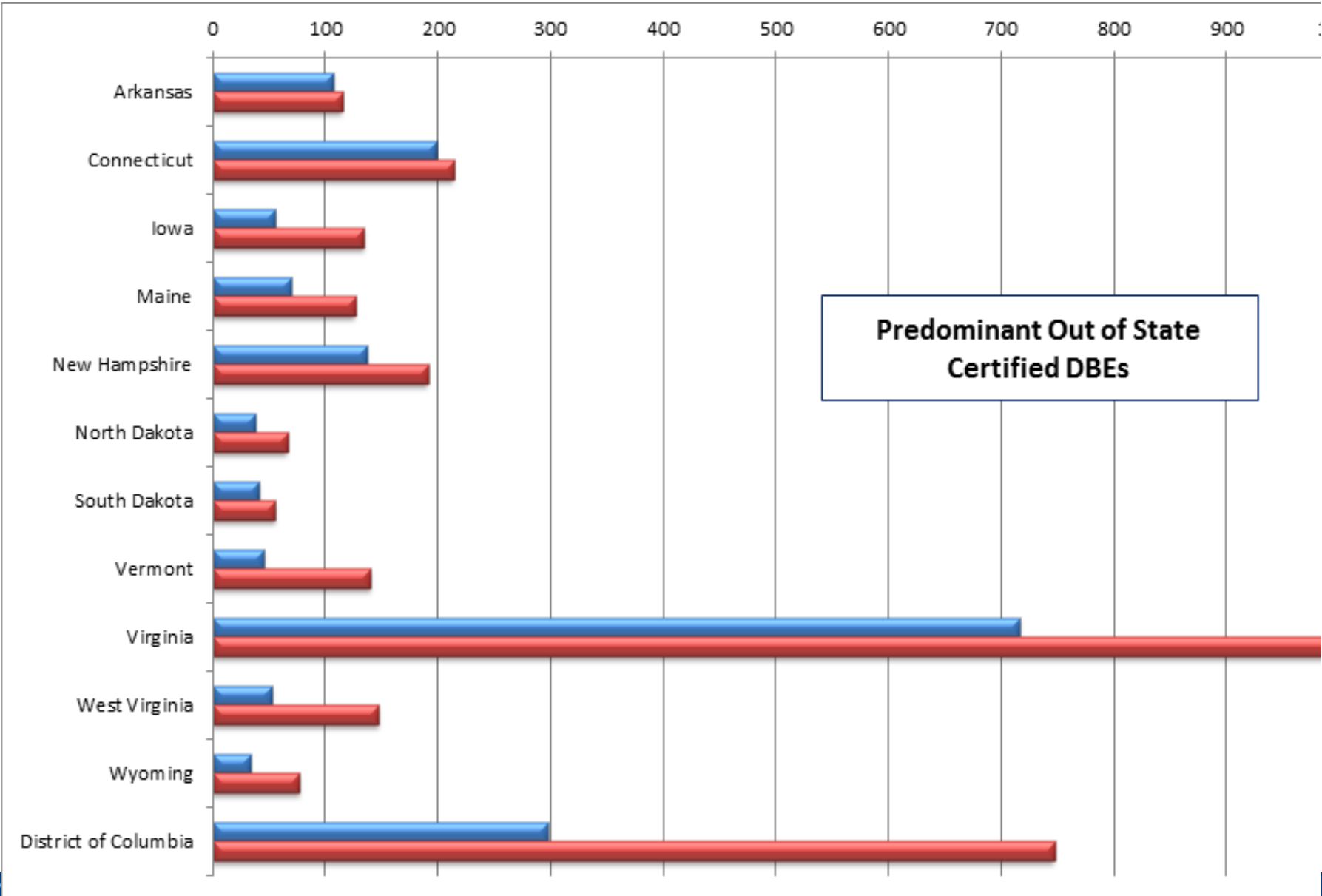
- 36,275 certified DBEs
- 39% of DBE firms are certified in multiple States
- \$4.8 billion of \$41 Billion was awarded/committed to DBE prime contractors and subcontractors (11% DBE participation, 2014)
 - FAA- \$2 Billion = \$300 Million to DBEs
 - FTA- \$5 Billion = \$699 Million to DBEs
 - FHWA- \$34 Billion = \$3 Billion to DBEs

1000+ DBEs

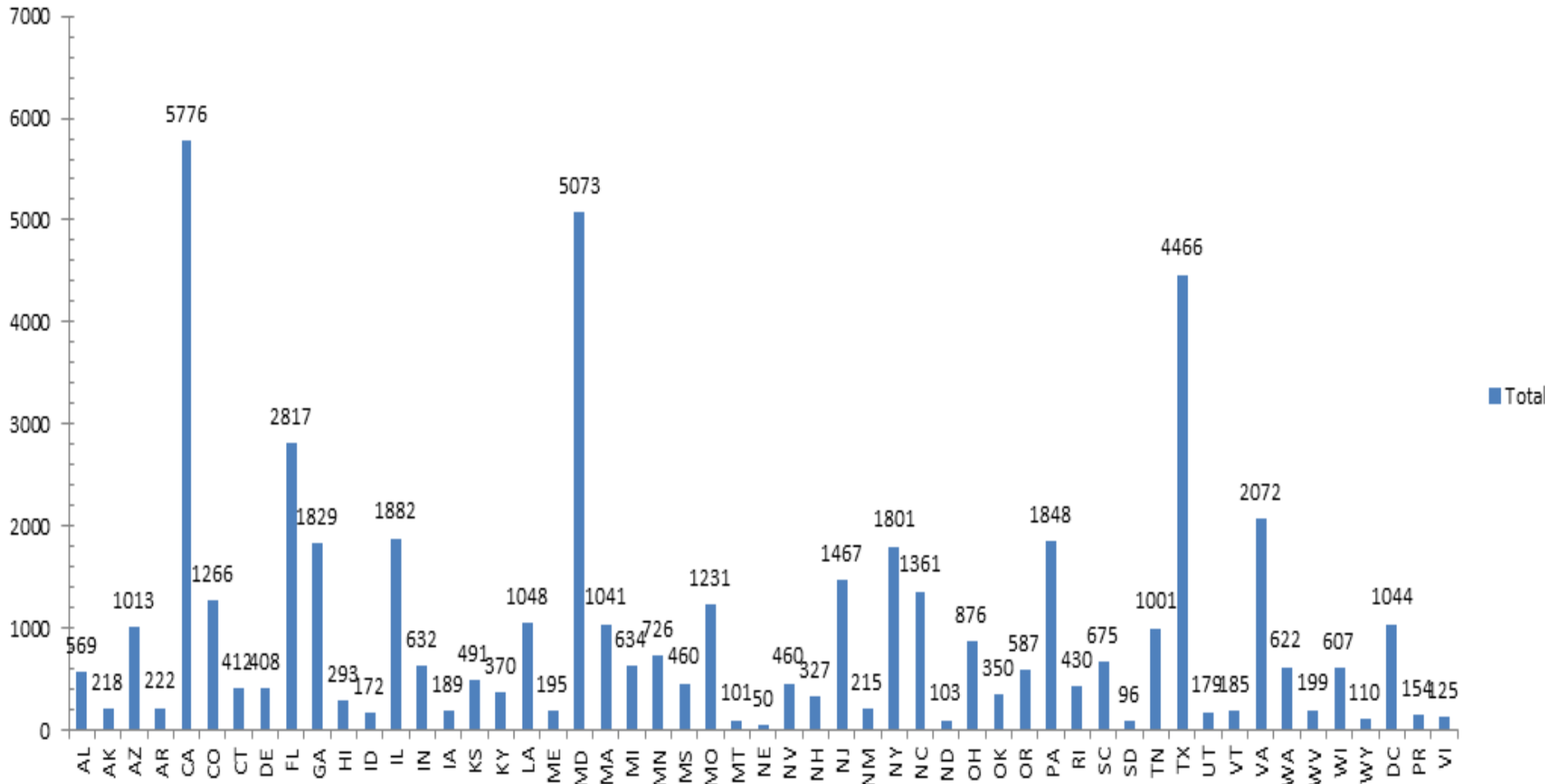


DBE National Average





MAP-21 as of 1/1/2015



Denial and decertification decisions

Obligation is the same when writing denial and decertification decisions

Initial Denials -- §26.86(a)

. . . You must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

Decertification -- §26.87(g)

. . . You must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department.

The On-Site Interview and Requesting Information

2. Complete for all Officers, Directors, Managers, and Key Personnel who control the following functions for the firm. (Attach separate sheets as needed).

A= Always F = Frequently S = Seldom N = Never	Officer/Director/Manager/Key Personnel				Officer/Director/Manager/ Key Personnel			
	Name: <u>JANE DOE</u> Title: _____ Race and Gender: <u>FEMALE</u> Percent Owned: <u>51%</u>				Name: <u>JOHN DOE</u> Title: _____ Race and Gender: <u>MALE</u> Percent Owned: <u>40%</u>			
Sets policy for company direction/scope of operations	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Bidding and estimating	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Major purchasing decisions	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Marketing and sales	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Supervises field operations	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Attend bid opening and lettings	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Perform office management (billing, accounts receivable/payable, etc.)	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Hires and fires management staff	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Hire and fire field staff or crew	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Designates profits spending or investment	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Obligates business by contract/credit	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Purchase equipment	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>
Signs business checks	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>	A <input checked="" type="checkbox"/>	F <input type="checkbox"/>	S <input type="checkbox"/>	N <input type="checkbox"/>

The On-Site Interview and Requesting Information

- Don't 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.
- We added in the November 2014 rule that “you may request clarification of information contained in the application at any time in the application process.”

Personal Net Worth Statement

Requesting backup documentation

- A standardized personal net worth form for applicants was created and is required for all owners of a firm whose eligibility is relied upon for certification. This does not mean all owners.
- Requesting backup documentation for assets and liabilities

Asking too much at annual affidavit time.

§26.83(j)

If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section.

The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, **documenting this affirmation with supporting documentation of your firm's size and gross receipts (e.g., submission of Federal tax returns).** If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under §26.109(c).

The Terms --Recertification / Expiration / Renewal do not exist

Old §26.83(h):

Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of section 26.87.

You may not require DBEs to reapply for certification or require “recertification” of currently certified firms. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, **three years** from the date of the firm's most recent certification, or sooner if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section), a complaint, or other information concerning the firm's eligibility. If you have grounds to question the firm's eligibility, you may conduct an on-site review on an unannounced basis, at the firm's offices and jobsites.

Revised §26.83(h):

(1) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of §26.87, except as provided in section §26.67 **(b)(1) of this Part.**

(2) **You may not require DBEs to reapply for certification or undergo a recertification process.**

However, you may conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section or relating to suspension of certification under §26.88), a complaint, or other information concerning the firm's eligibility.

If information comes to your attention that leads you to question the firm's eligibility, you may conduct an on-site review on an unannounced basis, at the firm's offices and job sites.

Independence and §26.71(b)

Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

Family Involvement

- Immediate family member is defined in the November final rule.
- §26.71(k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity.
- Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.
- (2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

Remuneration

26.69(c)(3) Revision

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, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

§26.71 (i)(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

Marital asset provision §26.69(i)

- You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:
- (1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.
- (2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

Outside Employment

§26.71(j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities.

For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

Equipment Owned, Leased, Projected

§26.71(m)

In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work.

However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals 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 prime contractor or other party that compromises the independence of the firm.

Licensing rule

§26.71(h):

If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential.

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, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

Further Questions?

Presenters:

U.S. DOT Departmental Office of Civil Rights

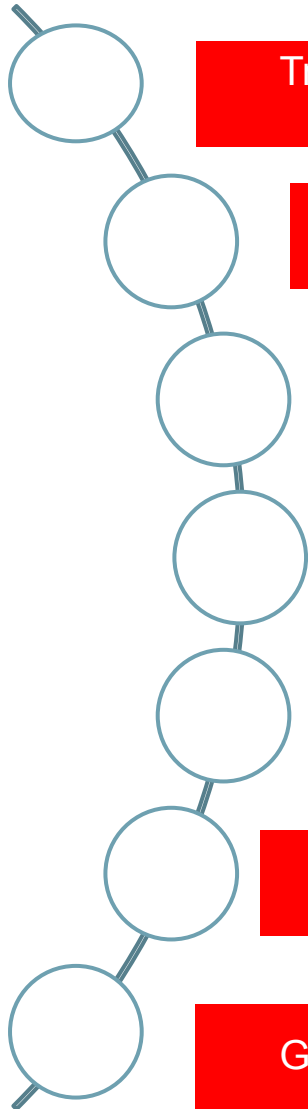
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UNITED STATES
DEPARTMENT OF TRANSPORTATION

- **INTERSTATE
CERTIFICATION**



Trends, Issues, and Problems / USDOT Guidance

Intent of the §26.85 provision

Procedures for processing applications from out of state DBEs

Requesting supporting documents

NAICS Codes / Electronic copies of application material

Procedures to challenge home state certification

Good cause and factually erroneous determinations

Intent of the provision

- - how did we get to this point?
- - what does the preamble say?
- Trends, Issues, and Problems

Interstate Certification

Option 1: When a firm is certified in its home state, a UCP may accept the certification without further procedure, but must:

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

Option 2: If a UCP chooses not to accept the firm's home state certification without further procedure, the applicant must provide:

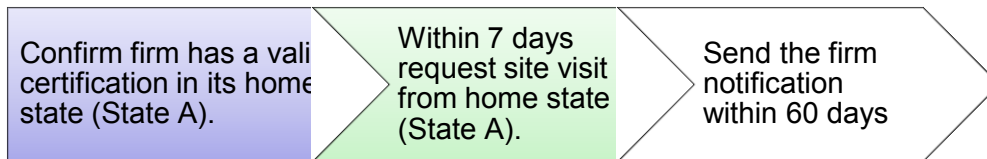
- A complete copy of the application form, supporting documentation, and any other information submitted to the home state.
- Notices and/or correspondence, including denials, from any other states where the applicant has applied for certification.
- Any appeals to DOT and decisions rendered as a result of appeals.
- A notarized affidavit or a declaration executed under penalty of perjury affirming that all required information has been submitted and is complete and, that the application and supporting documentation is an identical copy of the information submitted to the home state.

Electronic Submissions OK



Interstate Certification (cont'd)

- If you receive all of the information required, you must:
 - 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.
 - 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.



Interstate Certification (cont'd)

- Reasons for determining that there is good cause to believe that a firm's home state certification is erroneous and or should not apply in your state are generally limited to the following:
 - Evidence that the home state's certification was obtained by fraud.
 - New information showing that the firm does not meet all eligibility criteria.
 - The home state's certification was factually erroneous or was inconsistent with the requirements of the regulation.
 - State law requires a result different from that of the home state.
 - Required information provided by the applicant firm was not provided.

Interstate Certification (cont'd)

- The notice informing the firm that you have determined that the home state certification is erroneous or doesn't apply in your state must include:
 - 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.
 - 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.

Interstate Certification (cont'd)

- UCPs are required to cooperate in providing necessary information to other UCPs.
- Within 7 days of receipt of required information from an applicant firm, a UCP must request an on-site review report for the firm.
- The home state must comply with such requests in a timely manner.
- 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 that 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.

NAICS CODES and IC

- Do they travel with the DBE?
- 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

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. Should State B:

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?

- a. Certify the DBE under both NAICs Codes
- b. Call State A and ask for clarification regarding its decision to certify the DBE under NAICs Code DEF before making a decision to accept or deny the request for interstate certification.
- c. Identify the erroneous NAICs Code as “good cause” to challenge home State A’s certification on one of the grounds set out in the regulation and follow the procedures under 26.85.