



**U.S. Department of
Transportation**

Office of the Transportation Secretary

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

Memorandum

To: Federal Aviation Administration, Federal Highway Administration,
and Federal Transit Administration Recipients and Sponsors Implementing the DBE and
ACDBE Programs

From: Charles E. James, Sr. *Charles E. James, Sr.*
Director, Departmental Office of Civil Rights

Re: DBE and ACDBE Certification for Non-Transportation Industry Businesses

Date: September 1, 2020

It has come to the attention of the Department of Transportation (DOT or Department) that Unified Certification Programs (UCPs) frequently receive Disadvantaged Business Enterprise (DBE) or Airport Concession Disadvantaged Business Enterprise (ACDBE) certification applications from firms that are not engaged in transportation industries, airport concessions, or in services employed by the transportation industry. We also understand that processing applications for firms with no interest in bidding on DOT-assisted contracts or airport concessions contracts (including suppliers to concessionaries) creates an additional time and resource burden for UCPs.

Certification for purposes of the DBE and ACDBE programs should be limited to eligible DBEs and ACDBEs that intend to bid on work as prime or subcontractors on DOT-assisted contracts or airport concessions contracts, respectively.¹ This includes both construction and non-construction work in the transportation industry at large. DOT funding recipients may emphasize this information to applicant firms and State and local agencies, and may make inquiries into the nature of the firm's work and what the firm seeks to achieve with certification. Recipients may recommend that a firm not pursue certification if the firm expresses that it has no intention of participating in or bidding on DOT-assisted contracts or airport concessions contracts. If a firm withdraws its application before you have issued a decision, the firm may resubmit an application at any time.²

¹ 49 CFR § 23.37(b) of the ACDBE Program Regulation states that recipients "are not required to certify a part 26 DBE as a part 23 ACDBE if the firm does not do work relevant to the airport's concessions program." 49 CFR § 23.55(k) prohibits counting "costs incurred in connection with the renovation, repair, or construction of a concession facility (sometimes referred to as the "build-out")." Thus, you are not required to certify firms that are participating in the build-out of a concession and not countable since they are not performing work relevant to the concession program.

² 49 CFR § 26.83(m).

DOCR will add a new question to the Official FAQs on DBE Program Regulations (49 CFR Part 26), copied below, to reflect this guidance.

This guidance is not legally binding in its own right and will not be relied upon by the Department as a separate basis for affirmative enforcement action or other administrative penalty. Conformity with this guidance is voluntary only, and nonconformity will not affect rights and obligations under existing statutes and regulations. The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 26.

Thank you for your continued cooperation.

New Addition to Official FAQs on DBE Program Regulations (49 CFR 26)

When reviewing DBE and ACDBE applications, may recipients provide additional program information and advice to ACDBE and DBE applicants whose work activities appear unlikely to have any use for any DOT-assisted contracts or airport concession and concession supplier opportunities? (Sections 23.37(b), 26.1)

Yes. Certification for purposes of the DBE and ACDBE programs should be limited to eligible DBEs and ACDBEs that intend to bid on work as prime or subcontractors on DOT-assisted contracts or airport concessions contracts (including suppliers to concessionaires), respectively.¹ This includes both construction and non-construction work in the transportation industry at large. DOT funding recipients may emphasize this information to applicant firms and State and local agencies, and may make inquiries into the nature of the firm's work and what the firm seeks to achieve with certification. Recipients may recommend that a firm not pursue certification if the firm expresses that it has no intention of participating in or bidding on DOT-assisted contracts or airport concessions contracts. If a firm withdraws its application before you have issued a decision, the firm may resubmit an application at any time.²

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