



Disadvantaged Business Enterprise (DBE) and Airport Concession DBE (ACDBE) Programs

Notice of Proposed Rulemaking - July 21, 2022

SUMMARY OF PROPOSED CHANGES

TOPIC	PROPOSED CHANGES
Expands recipient reporting requirements to USDOT to gain greater knowledge of DBE/ACDBE characteristics, bidding/solicitation practices and utilization and overall program Impact	<ul style="list-style-type: none">• Annual Directory Report to USDOT (“MAP-21” Report) would collect additional information such as DBE application rates and characteristics in statewide directories (e.g., ethnicity, number of certifications, suspension, and decertification status).• Uniform Report would collect additional information such as names of DBE contractors that performed work and the work categories/trades performed, dollar value of contracts, number of firms that were listed at commitment but replaced (as well as an explanation for the replacement), and number of firms decertified during the reporting period.• DBE Bidders List—recipients would enter into an online USDOT system the names of companies bidding on and winning contracts, fields of work, and NAICS codes.• ACDBE Active Participant List—proposes a list that would include all firms that have participated or attempted to participate in airport concession programs in previous years. This would give a glimpse of the universe of ACDBE and non-ACDBEs who seek concession opportunities for use in helping recipients set overall goals for car rentals and concessions other than car rental.
Adds and clarifies DBE program definitions	<ul style="list-style-type: none">• Disadvantaged Business Enterprise• Personal net worth• Principal place of business• Transit vehicle• Transit vehicle dealership• Transit vehicle manufacturer• Unsworn declaration
Adds, clarifies, and aligns ACDBE program definitions with DBE program definitions	<ul style="list-style-type: none">• Affiliation• Airport Concession Disadvantaged Business Enterprise (ACDBE)• Alaska Native• Assets• Concession• Contingent liability• Days• Home state• Liabilities• Operating administration or OA• Personal net worth• Recipient• Socially and economically disadvantaged individual• Sub-concession or subcontractor• Sublease

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Administrative rules will ease burdens and create firm opportunities	<ul style="list-style-type: none"> • Reduces reporting requirement for smaller FTA recipients receiving planning, capital and/or operating assistance between \$250,000 and \$670,000. • Removes the Uniform Report, Uniform Certification Application, and Personal Net Worth Statement from the regulation so that USDOT can easily amend them in the future. • Expands existing DBE directories to provide an opportunity for firms to market their capabilities and to enable prime contractors to identify competitive and qualified DBEs that may be available for prospective work.
Replicates the DBE program's small business element requirements for the ACDBE program	<ul style="list-style-type: none"> • Requires airports to take steps to eliminate obstacles for participation by smaller ACDBEs. Steps include unbundling contracts and submitting a plan to the FAA that includes race-neutral strategies to support greater participation by small ACDBEs. • Requires airports to submit annual reports on their small business elements.
Adds a DBE performance plan requirement for design-build projects	<ul style="list-style-type: none"> • Requires primes responding to a Request for Proposal on a design-build procurement to submit an open-ended DBE Performance Plan (DPP) with the proposal. • DPPs are to detail the types of work the prime will solicit DBEs to perform and a projected timeframe in which actual subcontracts will come to fruition. • Recipients monitor the prime's adherence to the plan throughout the life of the contract to evaluate good faith efforts, and parties may agree to make written DPP revisions throughout life of project.
Addresses drop-shipping issues	<ul style="list-style-type: none"> • Permits drop-shipping from manufacturers for an added subset of regular dealers with distributorship agreements, allowing 40% credit for the cost of materials.
Limits total DBE supplier goal credit	<ul style="list-style-type: none"> • Limits the total allowable credit for a prime contractor's expenditures with DBE suppliers (manufacturers, regular dealers, distributors, and transaction facilitators) to no more than 50% of the contract goal but allows exceptions to be granted on a contract-by-contract basis (e.g., material-intensive contracts), with the prior USDOT operating administration approval.
Clarifies regular dealer terminology	<ul style="list-style-type: none"> • Requires recipients to establish pre-award procedures to determine whether a DBE supplier submitted by the contractor/bidder as a regular dealer has demonstrated the ability and intent to perform as a regular dealer during the contract. This will ensure preliminary counting determinations and contract goal attainment decisions are based on the DBE's ability and intent to comply with the rule's commercially useful function (CUF) requirements. • Adds provisions to address DBEs that supply specialty items not typically stocked.
Expands monitoring and prompt payment requirements	<ul style="list-style-type: none"> • Rule clarifies that (1) a CUF review is necessary for every DBE that performs for credit toward a recipient's overall goal and a contract goal, (2) DBEs used race-neutrally must be monitored, and (3) recipients must keep an accounting of each contractor's progress in attaining a contract goal through progressive payments to the committed DBEs. This running tally requirement is essential so recipients can intervene in real-time if they observe a prime contractor falling short of a contract goal. • Clarifies that every recipient's DBE program must include mechanisms it will use for proactive monitoring and oversight of prime contractors' compliance with subcontract prompt payment and return of retainage requirements. Reliance on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is insufficient. • Specifies the prompt payment requirements flow down to all lower tier subcontractors.
Adds flexibilities to conserve certification agency resources	<ul style="list-style-type: none"> • Formalizes COVID-19 guidance to allow virtual on-site interviews, virtual certification and decertification hearings, and alternative notarization methods.

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Increases the personal net worth (PNW) cap and simplifies calculation	<ul style="list-style-type: none"> • Raises the PNW cap (last adjusted in 2011) from \$1.32 to \$1.60 million. • Excludes retirement assets from the calculation. • Removes state marital laws or community property rules from the calculation. • Divides “household contents” of primary residence equally but motor vehicles of any type belong to the owners who holds the title. • USDOT will regularly adjust the amount in the future without rulemaking using Federal Reserve data.
Improves initial in-state certification process	<ul style="list-style-type: none"> • Requires a firm to have operations in the type of business it seeks to perform before it applies for certification. This relieves certifiers from evaluating firms that have no ability to bid. (Not applicable to ACDBEs). • Disallows the certification of a firm as an ACDBE if the applicant intends to perform activities exclusively related to the renovation, repair, or construction of a concession facility (sometimes referenced as the “build-out”) for which participation cannot be counted toward an ACDBE goal. • Codifies current “ability to cure” guidance regarding a firm’s legitimate efforts to correct certification impediments are not necessarily evasive. • Reduces the time a certifier can extend a certification review from 60 to 30 days.
Expedites interstate certification process through less burdensome procedures	<ul style="list-style-type: none"> • A firm would no longer have to provide another state (“State B”) a copy of the entire application package it submitted to the home state (“State A”). It must only request certification in writing, provide evidence of State A’s certification, and submit a declaration of eligibility. • If State B verifies the firm has in-state certification, it must certify the firm within 10 business days. • After certifying the firm, State B may conduct its own certification review and initiate decertification procedures if it finds there is reasonable cause for determining that the firm is ineligible for certification. The “reasonable cause” standard would replace the current rule’s “good cause” grounds for questioning eligibility. • If USDOT upholds the decertification on appeal, a firm is automatically decertified in all states (except in failure to cooperate cases).
Amends ownership requirements for certification eligibility	<ul style="list-style-type: none"> • Replaces the “real, substantial, and continuing” capital contribution standard with a less-rigid standard of “reasonable economic sense.” • Clarifies that ownership investment include purchases, capital infusions, gifts, and additional investments <i>after</i> initial ownership. • Removes the marital property provision in the ownership rule and extends the renunciation and transfer remedy to all owners. • Permits only 1 tier of ownership above a subsidiary DBE.
Amends control requirements for certification eligibility	<ul style="list-style-type: none"> • General requirements—the disadvantaged majority owner(s) must “run the show,” be the ultimate decision maker, have present control of the board of directors, have an overall understanding of the firm’s operations to the extent necessary to make managerial decisions, and demonstrate a chain of command within the company. • Decision-making power—the disadvantaged majority owner(s) must independently make major decisions that affect the firm’s prospects after receiving information from non-decision makers and critically analyzing it based on the owner’s knowledge. • Independence—the firm must prove that it is independently viable, notwithstanding a relationship with another firm from which it receives or shares essential resources. A pattern of regular dealings with a single or small number of firms does not necessarily compromise a firm’s independence. • Removes provisions regarding family businesses, licenses, and equipment, outside employment, and disadvantaged owner’s remuneration.

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<p>Simplifies the “ability to accumulate substantial wealth” factors for rebutting economic disadvantage</p> <p>Replaces Appendix E criteria for individualized determinations of social and economic disadvantage</p>	<ul style="list-style-type: none"> Proposes to replace the six factors indicative of the disadvantaged owner’s ability to accumulate substantial wealth in favor of a reasonable person standard. Proposes less prescriptive rules so certifiers can more accurately make individualized determinations of social and economic disadvantage and applicants have more discretion about what evidence to provide.
<p>Amends rules for gross receipts calculations</p>	<ul style="list-style-type: none"> Aligns rule text with law that makes permanent the 5-year average calculation of gross receipts to determine business size for individual NAICS codes. Requires ACDBEs that are parties to a joint venture to include the proportionate share of joint venture receipts in its gross receipt calculation.
<p>Amends rules for appealing to USDOT</p>	<ul style="list-style-type: none"> Reduces time a firm may appeal an in-state denial from 90 to 45 days. Changes the clock for the waiting period for reapplication from the date applicant receives the denial to the date the certifier sends the decision. Allows USDOT, at its discretion, to summarily dismiss an appeal.
<p>Balances procedural protections for DBEs with certifier needs in decertification actions</p>	<ul style="list-style-type: none"> Changes the requirement for recipients to offer an informal hearing – if a firm does not provide its Declaration of Eligibility (formerly the annual affidavit) within 15 days of the notice of intent to decertify, the certifier <u>may</u> issue a final decertification notice without offering the firm a hearing. Imposes a 45-day deadline by which decertification hearings must occur but ends delays caused by firm and recipient changing dates of the hearing. Allows only disadvantaged owner(s) to answer control questions during a hearing. Imposes a 30-day deadline for a firm to render a final decision following a hearing or receiving written information from the DBE.
<p>Clarifies how to count DBE participation after decertification or other loss of ineligibility</p>	<ul style="list-style-type: none"> Counting after decertification—(1) prime contractors may add work or extend a completed subcontract with a decertified firm only if it obtains prior, written consent from the recipient, and (2) continued credit toward a contract goal is disallowed if the DBE’s ineligibility after the subcontract is signed is the result of a purchase by, or merger with, a non-DBE firm (in which case the prime contractor would be required to use good faith efforts to replace the DBE if additional credit is needed to meet the contract goal). Requires ongoing monitoring of ACDBEs that lose certification due to exceeding size or personal net worth criteria. ACDBEs must continue to submit declarations as a condition of continued counting.
<p>Establishes procedures for counting ACDBE participation for firms that are decertified during the contract performance period because of exceeding the business size standard or the disadvantaged owner exceeding the personal net worth limit</p>	<ul style="list-style-type: none"> Decertified firms would report changes regarding their ability to meet ownership and control requirements by submitting a declaration of eligibility, as is required of DBEs as a condition to continue counting their participation. Firms would report changes to recipients rather than UCPs, given that the firms’ participation is counted by airports.

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Amends summary suspension rules	<ul style="list-style-type: none"> • Certifiers may only rely on a single reason if the summary suspension is based on an elective reason, and limits elective suspension to once every 12 months. • Adds procedural protections and processes to the rule (e.g., requires notice of reasons for a recipient action, the evidence, the DBE's response options, and consequences). • Replaces certified mail requirement with a requirement for recipients to email DBEs the suspension notice. • Changes treatment of death and incarceration as suspension events and adds as a mandatory suspension condition clear and credible evidence of the DBE's involvement in fraud or other serious criminal activity. • A rule-compliant suspension decision will be a final decision appealable to USDOT.
Clarifies ACDBE goal setting and reporting requirements	<ul style="list-style-type: none"> • Reiterates that car rental companies are obligated to make good faith efforts to meet ACDBE goals. • Removes consultation requirement when no new concession opportunities exist. • Clarifies that management contracts and purchases by concessions from ACDBE suppliers may form part of an airport's ACDBE goal for concessions other than car rental. • Changes due date for airports to submit ACDBE shortfall analyses to 30 days after submission of the related Uniform Report.
Explores bounds of long-term exclusive lease agreements in the ACDBE program	<ul style="list-style-type: none"> • Seeks comment on whether to retain the existing 5-year rather than a longer period, such as a 10-year period. • Defines "exclusive agreement." • Amends the definition of long-term exclusive agreement to state that options are subject to the regulation's requirements if the options result in a lease period of more than 5 years. • Seeks comment on how to address holdover tenancies that result in short-term agreements becoming long-term without FAA oversight. • Simplifies and reduces document requirements for ACDBE participants.

This summary is not a comprehensive description of the NPRM. The [full text of the NPRM](#) was posted in the Federal Register on July 21, 2022. USDOT invites comments to the NPRM from all interested parties, including funding recipients and project sponsors, firms participating or seeking to participate in USDOT assisted contracts, and the prime contracting community at large. Written comments to the Federal Register must be submitted by using [this link](#) by September 19, 2022. We will be hosting [multiple public meetings](#) beginning July 27, 2022. Sign up for the [GovDelivery DBE listserv](#) to receive updates throughout the notice and comment period, view the [DBE/ACDBE NPRM Webpage](#) to learn more about the rulemaking process, public meetings, and other information about the NPRM.

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