



Disadvantaged Business Enterprise Program
Airport Concessions Disadvantaged Business Enterprise Program

FINAL RULE

OST • FAA • FHWA • FTA

Overview: April 9, 2024



Welcome!

- DBE/ACDBE Final Rule: <https://www.transportation.gov/dbe-rulemaking>



Irene Marion

Welcome!

- DBE/ACDBE Final: <https://www.transportation.gov/dbe-rulemaking>



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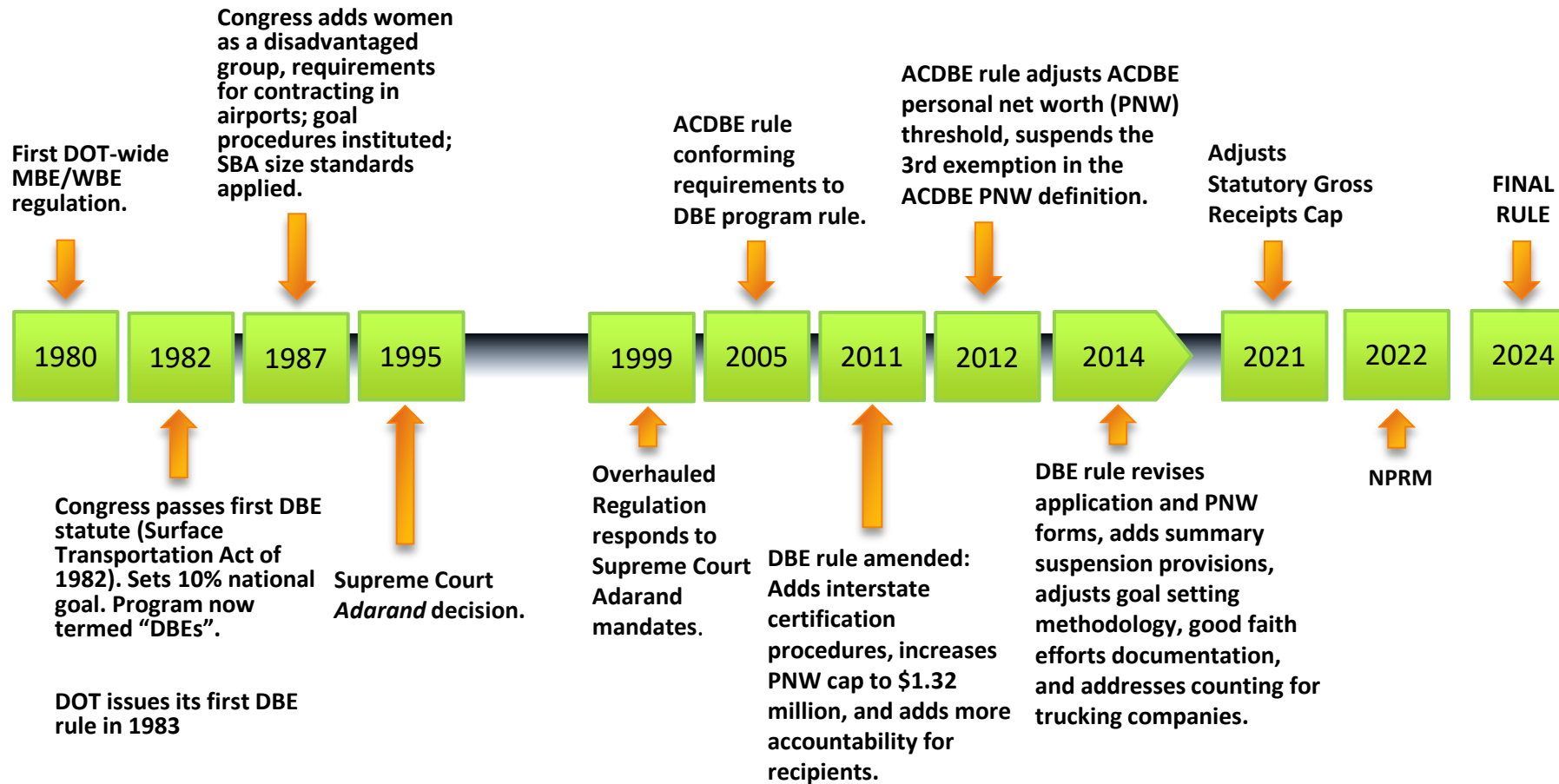
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DBE/ACDBE Rulemaking Timeline



The DBE, ACDBE, and Recipient Universe

DBE

- 43,814 DBEs nationwide and growing each year.
- States with the most DBEs: Maryland, California, Texas, Florida, and Georgia.

ACDBEs

- Over 3,500 ACDBEs operate a business on airport property and sell consumer goods or services to the traveling public through an agreement with a recipient, another concessionaire, or terminal owner; or sell goods and services to other concessionaires like car rental companies.
- All of the car rental participation are goods and service providers, not car rental operations.

Recipients and Sponsors

- 53 state DOTs, 800+ transit agencies*, and 3,200+ AIP-eligible airport sponsors, of which nearly 400 also have ACDBE programs.
- 136 entities certify firms as DBEs and ACDBEs.

April 2024 Final Rule Objectives

1

Modernize and improve provisions for the benefit of program participants

2

Reduce burdens on firms and recipients

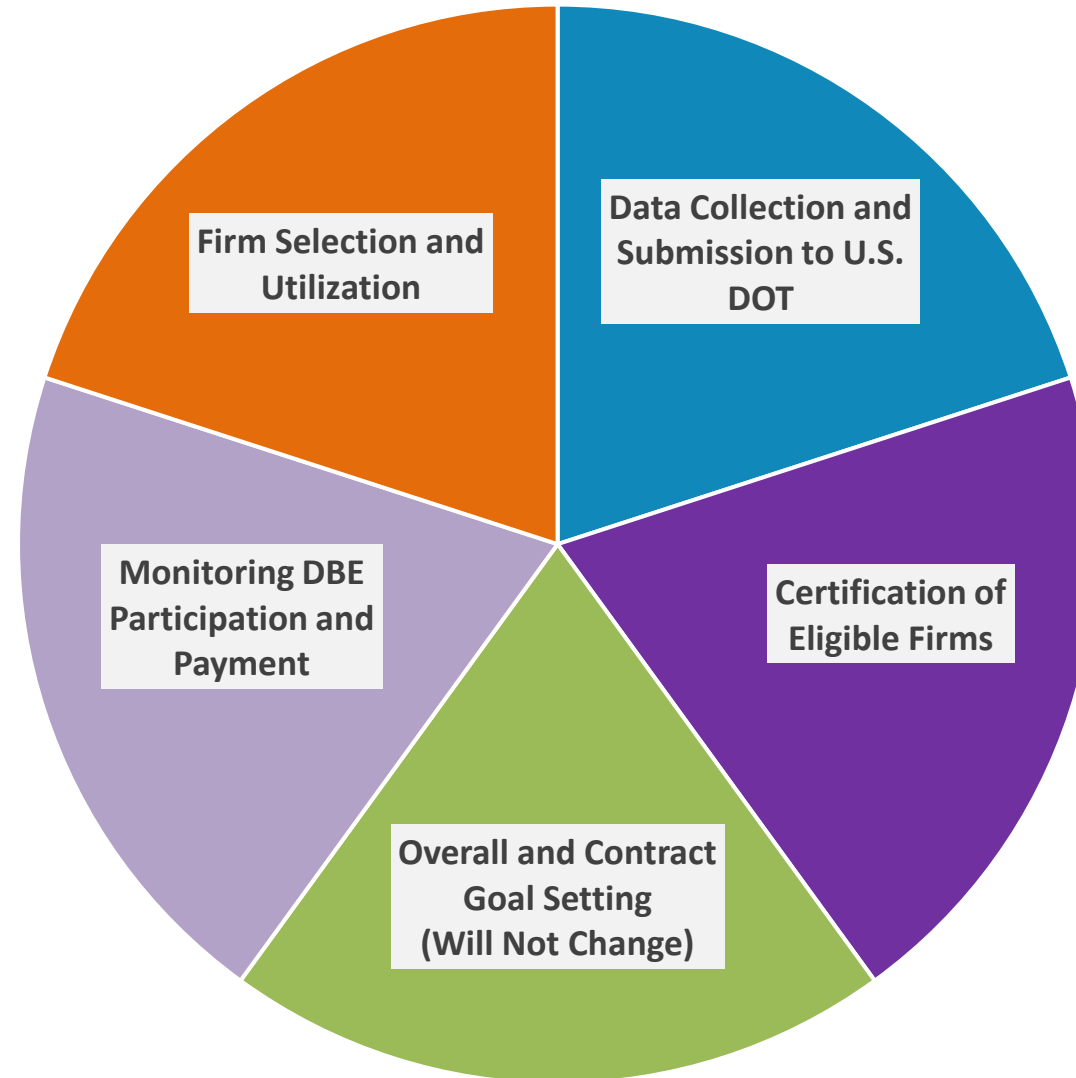
3

Grow firm capacity and owner wealth

4

Improve program integrity, visibility, and data the Department collects

ACDBE/DBE Rules



Revisions Aligned with Objectives

Modernize Provisions

- Streamline eligibility rules and certification processes.
- Change the credit allocated to DBE material suppliers, manufacturers, and regular dealers.
- Extends the definition of long-term from five to 10 years for concession agreements.

Reduce Burden on Firms and Recipients

- Alleviate administrative burdens on smaller FTA recipients.
- Remove interstate certification barriers to speed up certification for firms wishing to compete in multiple states.
- Allow virtual hearings, and on-site interviews to save recipients and firms time and money.
- Clarify recipient discretion to allow firms the opportunity to cure eligibility errors.

Grow Firm Capacity and Owner Wealth

- Increase personal net worth cap for inflation and exclude retirement assets so owners can leverage more \$ and grow their businesses.
- Help prime contractors find competitive and qualified DBEs.
- Add a DBE Performance Plan requirement for Design-Build projects.
- Adds new ACDBE small business element requirement.

Improve Program Integrity and Visibility

- Expand data collection and reporting to track program Impact.
- Expand proactive monitoring and oversight of prompt payment requirements.

New and Updated Personal Net Worth Cap and Size Calculation

Net Worth Rule Changes



- New cap of \$2.047 million based on Federal Reserve data of household income, deemed a better measure of adjustment than CPI
- Adjustment mechanism allows for future upward adjustments without the rulemaking process
- New rule excludes retirement assets
- Removes consideration of state or community property laws in determining value of primary residence and contents
- Reworked “ability to accumulate substantial wealth” rules are the backstop to excessive wealth

Business Size Rule Changes

- Codifies measurement of NAICS code size from 3-5 years as required by law

Net Worth Impact

- Adjusts from 2011 cap and levels the definition of “economically disadvantaged” to that of non-disadvantaged wealth
- Responds to industry and small business concerns that the current level hurts firms
- Fosters national interest of not penalizing for retirement

Business Size Impact

- Balances a firm’s lean and boom years and keeps DBEs in the program

Strengthen and Streamline: Certification Rules

Rule Changes

- Codified COVID-era flexibilities to allow virtual site visits and hearings, but on-site CUF reviews still required.
- Interstate certification process streamlined to remove barriers
 - DBE provides proof of certification in home state
 - Certifier must certify within 10 days of receipt
- Extensive clarifications on eligibility criteria to strengthen narrow tailoring
 - Stronger tools embedded in regulation to determine social and economic disadvantage
- Modernize ownership and control criteria (e.g., continuing contributions gifts, investments)
- Reframed summary suspension and decertification processes

Impacts

- Significantly reducing the administrative burden on DBE firms seeking interstate certification
- Flexibilities should allow for quicker and more cost-effective processing of applications
- Clarified eligibility criteria facilitates application processing and DOT oversight and enforcement (mitigates fraud risk)

New Interstate Certification Rule

1. Certified DBE applies for interstate certification with another UCP (State B)

2. State B confirms certification of firm in its "jurisdiction of original certification" (JOC) within 10 business days

3. State B certifies the firm immediately and notifies the firm. Once the new UCP certifies, then it must treat the DBE as it treats other DBEs, for all purposes.

4. State B may ask for JOC's full or partial certification file

5. If State B makes this request, State B must provide the file within 30 days

6. Annual declaration of eligibility is filed on the JOC anniversary date

Data Collection by Recipients and Submission to U.S. DOT

Rule Changes

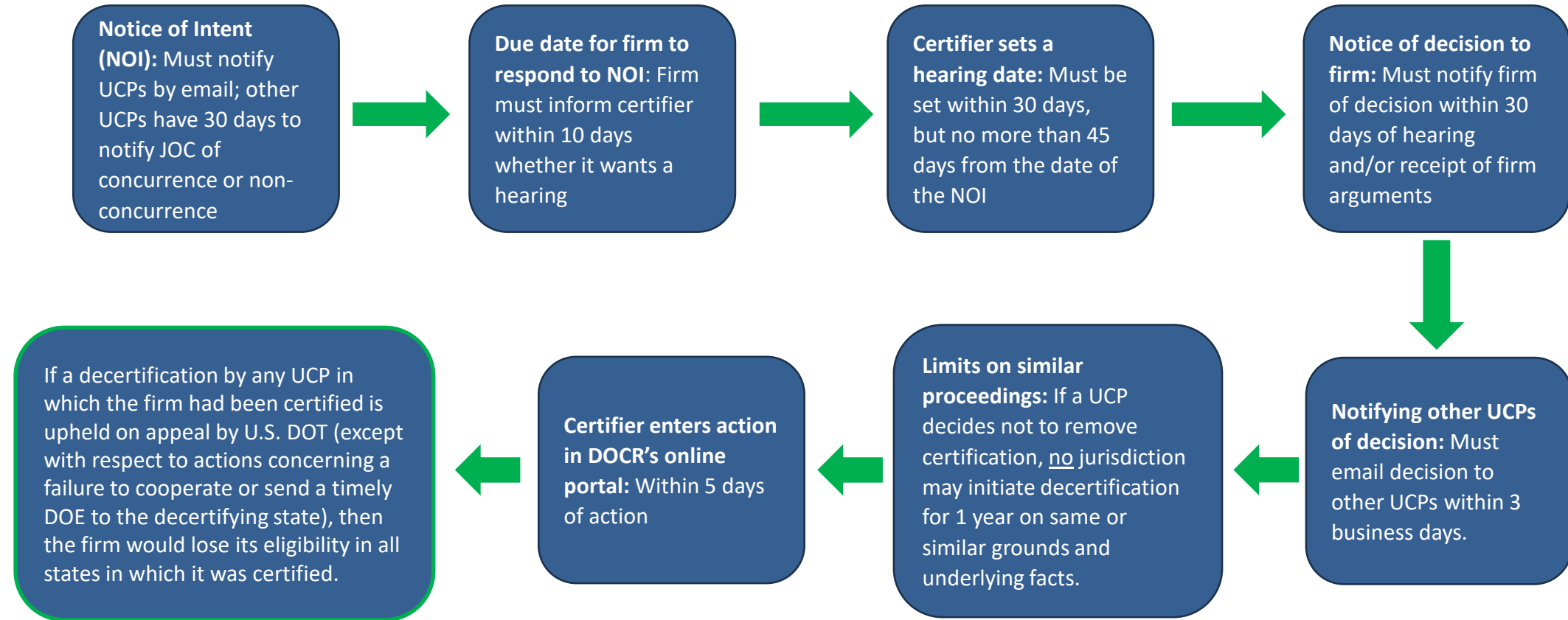


- Expand Uniform Reports data to include names of DBEs, NAICS codes performed in a contract, federally assisted contract number(s), and the dollar value of the contract.
- Require recipients to submit their “bidders list,” to a new centralized U.S. DOT database with additional data fields. (e.g., the scope/type of work DBEs bid on, whether successful).
- Require recipients to compile “active participants list” of all firms (including ACDBEs) that submit proposals or initial responses to negotiated procurements for concessions opportunities.
- Expand “MAP-21” data collection, including for ACDBEs, tracks gender and ethnicity of certified and decertified firms, whether in-state or out-of-state, number of applications received, etc.

Impacts

- Meets Administration’s Equity Plan approach that data should drive decision making and measuring program impact
- OAs and DOT can understand the universe of firms (by work type) that bid and win on contracts.
- Trends, gaps, and opportunities can be better described.

Decertification Procedures Rebuild



New and Updated: Transit-Specific Provisions

Rule Changes

- FTA Tiered Program Approach



- Basic DBE requirements apply to nearly all recipients
- Recipients awarding >\$670K develop Tier 1 programs, which retain all existing DBE requirements
 - Threshold raised from \$250K to adjust for inflation
- Recipients awarding <\$670K develop Tier 2 programs
 - Develop a limited DBE program with small business element
 - Comply with TVM requirements
 - Report contracting activity to FTA
 - Not required to:
 - Submit goal methodology
 - Submit and receive approval for program plan

- Transit Vehicle Procurement Clarifications

- Clarified TVM definition and reporting requirements
- Clarified project goal option for non-traditional vehicle manufacturers

Impacts

- Tiered Program

- Expands DBE program requirements to nearly all FTA recipients
- Reduced administrative burden for approximately 80 recipients no longer required to maintain full programs
- Over 200 additional recipients will be brought into the DBE program as Tier 2
- Improves FTA's understanding of the program's impact, especially in small/rural communities

- Transit Vehicle Procurements

- Reduces confusion around procuring vehicles
- Improves accuracy of data collected on transit vehicle procurements
- Promotes more active role for FTA when non-traditional vehicles are procured to ensure opportunities for DBEs

Updated: Status of DBE after Notification of Decertification



Rule Changes

- A Prime contractor is only permitted to add work or extend a completed contract with a previously certified firm if it receives prior written consent of the recipient.
- A DBE that is notified of its decertification after a subcontract has been executed can no longer continue to be counted toward the contract or overall goal if it loses its certification because it was purchased by a non-DBE.
- Use GFE to replace if necessary to meet the goal.

Impacts

- Is a good check on actions that could run counter to the DBE program.
- Provides additional DBE opportunities if a DBE is decertified due to its purchase by a non-DBE.

New and Updated: Counting Rules for DBE Material Suppliers



Rule Changes

- Applies to DBE suppliers and defines their roles and eligibility for goal credit
- NPRM suggested capping credit to 50% but this **was not adopted**
- Adds a definition of distributor and assigns 40% credit, and allows drop-shipping, if the DBE assumes responsibility for the items after point of origin
- Clarifies definition of “manufacturer” – a DBE that makes minor material modifications is not a manufacturer



Impacts

- Allows recipients to more accurately calculate DBE goals and measure goal attainment and remedies antiquated and inefficient business practices
- Allows for more flexibilities for DBE suppliers

Performance Plans on Design-Build Contracts

Rule Change



- Prime contractors responding to requests for proposals in design-build procurements must submit open-ended performance plans instead of committing to named DBEs.

Impacts

- Open-ended DBE performance plans (OEPP) bring in DBEs as details of work, scheduling, etc., become better known as the project progresses
- Creates opportunities for more and more meaningful DBE participation
- More real jobs, fewer DBE terminations, and good faith efforts

New Requirement: ACDBE Small Business Element

Rule Changes

- Requires airports to take all reasonable steps to eliminate obstacles, including unbundling contracts
- Requires airports to submit to FAA for approval, race-neutral strategies to implement this requirement, which may include:
 - Establishing small business set-asides for certain concession opportunities.
 - Considering concession opportunities available through all concession models
 - Identifying alternative contracting approaches to facilitate the ability of small businesses, including ACDBEs, to compete for and obtain direct leasing opportunities
 - Requiring all concession models to provide subleasing opportunities of a size that small businesses, including ACDBEs, reasonably can operate
- Requires airports to submit an annual report on small business participation obtained through this small business element.

Impacts

- Requires more race neutral efforts to facilitate race neutral ACDBE participation
- Generates more potential opportunities for all small businesses, including ACDBEs, to compete for concession-related opportunities
- Data collection requirement aligns with Administration's Equity Plan approach to data-driven decision making



Long-Term Exclusive Concession Agreements

Rule Changes

- Extends the term length from 5 years to 10 years including any combination of base term and options or holdovers to extend the term.
- Clarifies the meaning of the term "exclusive"
- Changes the requirement on when documentation is required to a two-step review process.
 - 60 days before solicitation is released
 - 45 days before contract award
- Requires submission of long-term exclusive concession agreements that become long term as a result of a holdover tenancy to FAA at least 60 days prior to the expiration of the current lease term.

Impacts

- Reduces administrative burden for smaller hub airports, approximately 80 percent of primary airports.
- Eliminates confusion around the definition of exclusive
- Facilitates review process to meet industry practice
- Adds oversight over short-term agreements that become long-term because of holdover tenancies

Other ACDBE Program Changes

Rule Changes

- Aligns ACDBE program objectives with DBE program objectives in Part 26
- Streamlines goal setting and reporting requirements
 - Align shortfall analysis submission date with Uniform Report
- Require consultation only when new opportunities exist
- Establishes framework for counting participation of ACDBE firms decertified after concession award
- Clarifies the use of goods and services concession specific goals
- Codifies the best practice for recipients, as part of their ACDBE programs, to investigate, use and encourage the use of SEDO financial institutions.

Impacts

- Enhances program administration and oversight
- Reduces barriers to capital access for ACDBEs by promoting the SEDO financial institutions
- Reduces administrative burden

Additional Changes

Rule Changes

- Expanded State directories of certified firms, (e.g., DBEs' location, website and lines of work (NAICS codes))
- Strengthened provisions for prompt payment and return of retainage (Codifies guidance requiring proactive monitoring as opposed to relying on subcontractor complaints)

Impacts

- Expanded directories will help primes find firms
- Make clear that the prompt payment requirements flow down to all lower tier subcontractors

Implementation Guidance Topics (Part 26)

- Effective data of expanded UCP directories and listing of firms
- Implementing the new running tally monitoring requirement
- When to apply the Open-Ended Performance Plan requirements
- Application of counting rules to projects undertaken after the final rule
- Pre-award form tool
- Impact of the new PNW cap on pending applications, and final decisions issued prior to the effective date
- Evaluating applications or decertification actions in progress as of rule's effective date
- Time period for firms to appeal adverse decisions to DOT, effective date, and notification to appellants

Implementation Guidance Topics (Part 26) continued

- Recording of on-site interviews
- Reporting and documenting gross receipts on an accrual basis
- Evaluating the presumption of social disadvantage groups in light of ongoing litigation
- Submission of bidders list information to U.S. DOT database
- New Uniform Report and MAP-21 data and reporting requirements
- Requirements for FTA Tier II recipients and TVMs
- Amending UCP agreements and DBE Program plans

Implementation Guidance Topics (Part 23)

- When must the new Part 23 small business element be established and implemented?
- When must the ACDBE Active Participants List be implemented?
- When must recipients begin using the amended Uniform Report and where can recipients find the overall goal submission schedule?
- What specific measures are recipients required to undertake in monitoring race-neutral participation from their small business elements?
- Will the FAA consultation concerning small business consortiums be available before or after the effective date of the Final Rule?
- Will the change from a five-year term to a ten-year term for long-term, exclusive (LTE) concessionaire agreements affect existing agreements?
- Will the change in the long-term, exclusive agreement term impact holdovers?
- What are the new oversight and compliance requirements for LTE agreements?

Implementation Guidance Topics (Part 23) continued

- When and how should recipients address the revised ACDBE stakeholder consultation requirement?
- Ongoing monitoring requirements for continued counting of ACDBEs decertified during the term of agreements
- How should recipients adhere to the new requirement that they investigate the full extent of services offered by financial institutions?
- Setting non-car rental goods and services and service concession-specific goals
- Effective date for future and pending shortfall analyses
- Are there set deadlines for the significant changes to the Final Rule to be included in ACDBE Program Plans (i.e., small business element)?
- When should FAA recipients begin to address new certification concerns?

Future FY 24 Virtual Trainings

- ACDBE Final Rule Overview (FAA) - April 23, 2024, 1:00-2:30 PM ET
- DBE/ACDBE Final Rule Changes: Certification Eligibility Requirements - April 29, 2024, 1:00-2:30 PM ET
- DBE/ACDBE Final Rule Changes: Certification Procedures – May 1, 2024, 1:00-2:30 PM ET
- DBE Supplier Definitions, CUF Performance Requirements, and Pre-Award Counting Requirements – May 8, 2024, 1:00-3:00 PM ET
- FTA's Tier II Requirements in the New DBE Rule – May 21, 2024, 3:00-4:30 PM ET
- DBE status after losing certification during contract performance – May 22, 2024, 1:00-2:00 PM ET
- DBE Final Rule Changes: DBE Open Ended Performance Plans (OEPP) for Design-Build Contracts – June 18, 2024, 1:00-3:00 PM ET
- Final Rule Prompt payment and Return of Retainage requirements with rollout of a Tool and Toolkit for optional use by recipients/subrecipients – July 24, 2024, 1:00-2:30 PM ET
- Requirements for TVMs in the New DBE Rule – July 30, 2024, 3:00-4:30 PM ET
- Counting and Compliance - TBD

Closing Remarks

- U.S. DOT Office of Small, Disadvantaged Business Utilization resources are available at: <https://www.transportation.gov/osdbu>