



Disadvantaged Business Enterprise Program

Airport Concessions Disadvantaged Business Enterprise Program

FINAL RULE

OST • FAA • FHWA • FTA

49 CFR Parts 23 and 26

Certification Procedures
(Subpart E)



Topics Covered



**Terminology, and UCP
Agreements Requirements**



Virtual On-Site Visits



**Timely Processing of In-State
Certification Applications**



Curative Measures



Interstate Certification



**Denials of Initial Requests for
Certification and
Decertification**



Summary Suspension



**Appeals of Adverse
Decisions to US DOT**

Basic Definitions / Acronyms Amended: § 26.5

- Declaration of Eligibility – referred as “**DOE**”
- “**Home state**” is a term no longer being used and its definition is removed. New term – “**jurisdiction of original certification (JOC)**”
- On-site review – referred as “**OSR**”
- Notice of Intent “**NOI**” and Notice of Decision – “**NOD**”
- **Principal place of business** – the business location where the individuals who manage the firm’s day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business. The term **does not include construction trailers or other temporary construction sites.**
- Recipient – now “**certifier**” where appropriate
- “Socially and economically disadvantaged owner” abbreviated to “**SEDO**”

UCP Agreement Provisions (Obsolete Language Removed)

- original due date for recipients to sign agreement (March 4, 1999)
- requirement that UCP directories be available in print
- Guidance: ***Must recipients amend their UCP agreements and DBE program plans to make them consistent with Final Rule timelines, standards, and procedures? Yes!***

Uniform Certification Application and On-Site Visits § 26.83

The Uniform Certification Application (UCA)

- **Nature of Work Performed.** Firm must provide details with examples wherever possible—the type(s) of work they envision performing on DOT-assisted contracts
- Certifiers should explore this work during the on-site
- If firm suggests that it would not have opportunities to participate in, or has no intention of pursuing participation in, DOT-assisted contracts, the certifier should encourage the applicant to withdraw its UCA

On-Site Visits

- Interviews with the SEDO, officers, and key personnel can be conducted **virtually or in person**
- The certifier **must maintain a complete audio recording of the site visit interview.** The certifier must also visit one or more active job sites (if there is one). These activities comprise the “on-site review” (OSR), a written report of which the certifier must keep in its files.
- Certifiers **must ensure that the SEDO signs the DOE**
- Avoid routine questionnaires or checklists
- Evaluate eligibility based on evidence it has at the time of decision, **not based on historical or outdated information**

Processing of In-State Certification Applications

Denials of Initial Certification Applications



“Recertification” or “renewal” are not terms to be used. There is only annual declaration of eligibility.

Item	Old Rule	New Rule
Recipient notice to firm that application is complete	Within 30 days	No change
Time to render a decision on initial application once application complete:	90 days	No change
Recipient notice of time extension to render a decision:	60-day extension period	30-day extension period. Longer period allowed only with OA approval
Reapplication Period Shorter than 12 Months	With OA approval	Without OA approval

Curative Measures to Correct Ineligibility § 26.69(f), § 26.83 (m)

General Rules:

- A SEDO or firm may take curative measures, to remove, surmount, or correct defects in eligibility
- These can include legitimate transactions, alter the terms of ownership, make additional investments, or create underlying documentation in a good faith effort to remove, surmount, or correct defects in eligibility. E.g., financial transactions, bylaws, operating agreement

Notifying the Firm and Giving Time and Assistance:

- The certifier may notify the firm of eligibility concerns and give the firm time to remedy impediments to certification
- The firm may take curative action (and present evidence of such) up to the time of the certifier's decision
- The certifier may provide general assistance and guidance but not professional advice or opinions

Certification Timelines and Actions

- Certifiers may not affirmatively impede attempts to cure but *can set realistic deadlines for the applicant to fix problems, and if no response, decide on the documents received*
- The substance and not the form of transactions drives the eligibility determination
- Certifiers must deny or remove certification when the firm's efforts or submissions violate the anti-abuse rules.

Sham transactions or false representations,

Transactions or representations designed to evade or materially mislead

- Fraud renders the firm ineligible and subjects it to sanctions, suspension, debarment, criminal prosecution, civil litigation, and other consequences

Declaration of Eligibility (DOE) § 26.83j

- A DBE must provide its certifier(s), every year on the anniversary of its original certification, a new DOE, and document gross receipts for its most recently completed fiscal year
- Gross receipts are to be calculated **on a cash basis** regardless of the DBE's overall accounting method
- The sufficiency of documentation (and its probative value) may vary by business type, size, history, resources, and overall circumstances
- **Safe harbor documents:** (include all reportable receipts, properly calculated, for the full reporting period)
 - ✓ audited financial statements
 - ✓ a CPA's signed attestation of correctness and completeness, or
 - ✓ all income-related portions of one (or more when there are affiliates) signed and filed Federal income tax returns
- Noncompliance, whether full or partial, is a § 26.109(c) failure to cooperate

Interstate Certification § 26.85 General Rule

- **When a DBE applies to another UCP for certification, the new UCP must accept the DBE's certification from its jurisdiction of original certification (JOC)**
- Certifiers may still charge reasonable application fees

Interstate Certification Application Steps § 26.85

Step 1: DBEs Requesting IC Provides:

- A **cover letter** with its application that specifies that the DBE is applying for interstate certification, identifies all UCPs in which the DBE is certified (including the UCP that originally certified it)
- An **electronic image** of the UCP directory of the original UCP that shows the DBE certification and
- A new **DOE**

Step 2: Confirm Eligibility

- UCP confirms certifications after receiving firm materials
- Within **10 business days** of receiving the documents required in step 1, the additional UCP must confirm the certification of the DBE by reference to the UCP directory of the JOC

Step 3: Certify

If the DBE submits the items (step 1) and the UCP confirms the DBE's certification (step 2), the UCP must certify the DBE immediately without undergoing further procedures and provide the DBE with a letter documenting its certification

Post Interstate Certification Proceedings § 26.85(g)

Additional UCP certifies DBE

Must treat the DBE as it treats other DBEs within its directory, for all purposes.

Optional request for certification file

After the additional UCP certifies the DBE, the UCP may request a fully unredacted copy of all, or a portion of, the DBE's certification file from any other UCP in which the DBE is certified.

A UCP must provide a complete unredacted copy of the DBE's certification materials to the additional UCP within 30 days of receiving the request.
Confidentiality requirements of §§26.83(d) and 26.109(b) do not apply

ANNUAL DOE

The DBE must provide an annual DOE with documentation of gross receipts, under §26.83(j), to UCPs **on the anniversary date of the DBE's original certification by its JOC**

Interstate Certification and Licensure § 26.85

“Licensure”

An out-of-state firm and owner that lack a necessary business or professional license in an additional state, while it would be certified and listed in the directory, would not be able to conduct business there until it obtained the required license(s).

Interstate Certification, § 26.85(h)

Decertifying a firm certified in multiple states



- If any UCP has reasonable cause to remove a DBE's certification, in whole or in part (i.e., NAICS code removal), it must notify the other UCPs in which the DBE is certified via email and explain the reasons for the proposed removal
- Within 30 days of receiving the notice, the other jurisdictions must email the UCP contemplating decertification a concurrence or non-concurrence with the proposed action
- Other jurisdictions may provide written arguments and evidence and may propose additional reasons to decertify
- A jurisdiction's failure to timely respond to the reasonable cause notice will be deemed to be a concurrence
- After a UCP receives all timely responses, it must make an independent decision whether to issue a NOI
- Other UCPs may, before the hearing, submit written arguments and evidence concerning whether the firms should remain certified, but may not participate in the hearing
- **If the UCP finds the firm ineligible the firm immediately loses certification in all jurisdictions in which it is certified**
- The UCP must email a copy of its decision to the other jurisdictions within 3 business days

The rules above do not apply to attempts to decertify based upon failure to submit a DOE or failure to cooperate.

Interstate Certification § 26.85

Decertifying a firm certified in multiple states, cont'd

Anti-abuse rules

- Decertifications must provide due process to DBEs
- **If a UCP decides not to issue a NOD removing the DBE's certification, no jurisdiction may initiate decertification proceedings, within one year, on the same or similar grounds and underlying facts**
- If a DBE believes a UCP unfairly targets it with repeated decertification attempts, the DBE may file a complaint to the USDOT Operating Administration

Effect of appeal decisions

USDOT appeal decisions are binding on all UCPs unless stated otherwise

Interstate Certification Provisions Overhauled

Key takeaways

- “Home state” and “State A” terminology replaced with “jurisdiction of original certification (JOC)”
- Need for firm to submit entire original certification package eliminated
- Other UCPs are now required to accept the original certification
- Post-interstate Procedures amended – e.g., all UCPs are afforded ability to weigh in on decertification actions
- One UCP may propose decertification, and after proper notice to other jurisdictions that have certified the firm, the firm will lose its certification in all jurisdictions. (This does not apply when the grounds are failure to cooperate or file annual DOE))
- Firm must provide just a single DOE to all states on the anniversary of their original certification

Mechanics of Decertification § 26.87



Burden of proof

- The certifier bears the burden of proving, by a preponderance of the evidence, that the DBE does not meet the certification standards

Initiation of decertification proceedings

- A certifier may determine on its own that it has **reasonable cause** to decertify a DBE
- *OA directive to initiate decertification – [minor changes](#)*
- *Rules on 3rd party complaint filing – [minor changes](#)*

Notice of Intent (NOI)

- *First step must be to email a NOI to the DBE*
- The NOI must clearly and succinctly state each reason for the proposed action, and specifically identify the supporting evidence for each reason
- The NOI must notify the DBE of its right to respond in writing, at an informal hearing, or both
- The NOI must inform the DBE of the hearing scheduled on a date no fewer than 30 days and no more than 45 days
- If the ground for decertification is that the DBE has been suspended or debarred for conduct related to the DBE program, the certifier issues a NOD decertifying the DBE. In this case, there is no NOI or opportunity for a hearing or written response

Decertification § 26.87(d) Firm's Response Required if It Wants A Hearing

Response to NOI

- If the DBE wants a hearing, it must email the certifier saying so within 10 days of the NOI. If the DBE does not do so, it loses its opportunity for a hearing
- The certifier and DBE may negotiate a different hearing date from that stated in the NOI. Parties must not engage in dilatory tactics
- If the DBE does not want a hearing or does not give timely notice to the certifier that it wants one, the DBE may still provide written information and arguments to the certifier rebutting the reasons for decertification stated in the NOI

Decertification Hearings and Separation of Functions § 26.87 (e) and (f)



Hearings

- Can be virtual!
- Purpose is for the certifier to present its case and for the DBE to rebut the certifier's allegations
- The hearing is an informal proceeding with rules set by the hearing officer
- The SEDO's attorney, a non-SEDO, or other individuals involved with the DBE may attend the hearing and answer questions related to their own experience or more generally about the DBE's ownership, structure and operations

Certifiers Must

- Maintain a complete record of the hearing, either in writing, video or audio
- Provide that record to USDOT and the firm if the DBE appeals to DOT
- Ensure that the decision in a decertification case is made by an individual who did not take part in actions leading to or seeking to implement the proposal to decertify the DBE and is not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions
- Include the methods for implementing this requirement the DBE program approved by [an] OA
- Ensure the decisionmaker must be an individual who is knowledgeable about the certification requirements

Decertification Actions: NOIs, hearings, NODs, affect of appeals



Certifier finds reasonable cause and issues a NOI

Must notify UCPs by email. Other UCPs have 30 days to notify JOC of concurrence or non-concurrence



Deadline for firm to respond to NOI

Firm responds within 10 days whether it wants a hearing.



Certifier sets a hearing date

Must be set no fewer than 30 days, but no more than 45 days from the date of the NOI



Certifiers NOD to firm and other UCPs

Must issue a NOD within 30 days of hearing and/or receipt of firm arguments.

Must email decision to all other UCPs or OA that directed the proceeding within 3 business days . **A DBE remains certified until the NOD is issued..**

NOD must describe with particularity the reason(s) for the certifier's decision, including specific references to the evidence in the record that supports each reason



Decertification

If decertification: enter information to DOCR's ineligibility database within 5 calendar days.

If a UCP decides not to remove certification: no jurisdiction may initiate decertification for 1 year on same or similar grounds and underlying facts.



Affect of USDOT Upholding Appeal

If a decertification by any UCP is **upheld on appeal** by U.S. DOT (except in failure to cooperate or failure to send a timely DOE to the decertifying state), then the firm loses its eligibility in all states in which it was certified.

Denial and Decertification Decision Letters (NOD) § 26.86

NOD must

- Include reasons for the adverse decision specifically referencing the evidence in the record that supports each reason
- Provide the appeal instructions (verbatim) found on the DOCR webpage <https://www.transportation.gov/dbeappeal>
- Offer the ability to reapply to any member of the UCP that denied the application
- Specify the date when the waiting period ends

Waiting period for reapplication

- No more than 12 months
- The period begins to run the day after the date of the decision letter is emailed.
- An appeal to USDOT does not extend the waiting period

Implementation Guidance

New Q&As

How should certifiers evaluate applications under review, and decertifications in progress, as of the Final Rule's effective date?

- Any final decision issued on or after the effective date must apply the new rules.

What is the impact of the new PNW cap on final decisions based solely on PNW grounds and issued within 6 months prior to the effective date (May 9, 2024)?

- If a firm was decertified or its application was denied within 6 months before the effective date, solely because the owner's PNW was above \$1.32 million but not above \$2.047 million, the firm may submit a new PNW statement (reporting the owner's PNW as of the effective date) with any applicable waiting period waived.
- If the UCP determines that the owner's PNW does not exceed \$2.047 million, the firm should be certified

DOT Ineligibility Portal

Denial and decertification actions must be entered into the Departmental Office of Civil Rights' online portal **within 5 days**, including name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision.

See: §§26.83(k)(2), 26.87(g)(4)

If you need security credentials to access the portal email us at: DBEAppeals@dot.gov.

Summary Suspensions of Certification § 26.88

Intended to be used rarely: Situations involving serious, often rapidly developing and obvious threats to program integrity and lapses to compliance that can't be adequately resolved timely

Mandatory Suspension:

- The certifier has *clear and credible evidence* of the DBE's or its SEDO's involvement in fraud or other serious criminal activity, or
- The OA with oversight so directs

Elective Suspension

- The certifier has discretion to suspend if it has *clear and credible evidence* that the DBE's continued certification poses a substantial threat to program integrity
- An owner upon whom the firm relies for eligibility does not timely file the DOE and gross receipts documentation
- The certifier may elect to suspend the same DBE just once in any 12-month period

Coordination with other remedies.

- In most cases, a simple information request or a § 26.87 NOI is a sufficient response to events described above
- Should consider the burden to the DBE and to itself in determining whether summary suspension is a more prudent and proportionate, effective response

Steps of Summary Suspension: Notice to the firm, Hearing, Duration, and Recourse



Summary Suspension Notice

- SSN must be emailed during regular business hours and explain the reason for the action, the consequences, and the certifier's evidence
- Informs the firm to show cause why it should remain certified and provide the time/date of a virtual show-cause hearing at which the firm may present information and arguments concerning why the suspension should be lifted
- Firm only need to contest reasons cited
- Firm waives its right to a hearing if it does not confirm its attendance within 10 days of the notice and will have forfeited its certification if it does not acknowledge the SSN within 15 days



Hearing

- Occurs on a business day that is at least 15 but not more than 25 days after the SSN
- Conducted as a video conference
- Firm may respond in writing in lieu of, or in addition to, attending. Information and arguments may be submitted until the 15 day of the notice or the day of the hearing, which is later



Duration and NOD

- Firm remains suspended during the proceedings but **in no case for more than 30 days**
- If the suspension is not lifted or a rule-compliant NOD is issued by 4:30 p.m. on the 30th day, then the suspension must be lifted, and the certifier must amend certification lists by 12:00 p.m. the following business day.



Recourse (Appeal and Petition)

Appeal. The firm may appeal a final NOD grounds (26.89) , but may *not* appeal the suspension itself

Petition for Order to Vacate or Compel.

Available when

- The certifier sends a second elective SSN within 12 months, or cites multiple reasons in an elective SSN

or

- The certifier fails to lift the suspension
- See rule for contents of the petition!

Elective – no more than 1 reason.

Mandatory -multiple reasons allowed.

What if firm fails to file a DOE: decertify or summarily suspend?

- Failure to file DOE and documentation of gross receipts: SS is most effective, but certifiers have discretion whether to use the decertification process
- Interstate issues

Firms Appealing to USDOT: Contesting Adverse Determinations § 26.89



Applicants and decertified firms may appeal adverse NODs to the Department

- Firms are to send appeals to DBEAppeals@dot.gov
- Appellants must email appeals **within 45 days of the date of the certifier's decision letter**
- Appeals must at a minimum include a narrative that explains fully and specifically why the firm believes the decision is in error, what outcome-determinative facts the certifier did not consider, and/or what provisions the certifier misapplied
- **The certifier's decision remains in effect until the Department resolves the appeal or the certifier reverses itself**

Record and Department's Decision on Appeals § 26.89

Certifier's Record

- A complete administrative record **includes a video, audio, or transcript of any hearing**, which the certifier must provide within 20 days of USDOT's request
- Administrative records must be well organized, indexed, and paginated and the certifier must provide the appellant a copy of any supplemental information it provides to DOT

Decision on Appeals

- Remand, reverse, affirm

New and Revised Provisions

- 180 processing time removed
- Non-compliant or frivolous appeals may be dismissed
- USDOT may summarily dismiss an appeal. (E.g., non-compliance, abuse of process, appellant or certifier request, and failure to state a claim upon which relief can be granted)
- No advisory opinions will be issued

Upcoming Trainings, Resources

April 23	1:00-2:30 PM ET	ACDBE Final Rule Overview (FAA)
April 29	1:00-2:30 PM ET	Certification Eligibility Requirements
May 1	1:00-2:30 PM ET	Certification Procedures
May 8	1:00-3:00 PM ET	DBE Supplier Definitions, CUF Performance, Pre-Award Counting Requirements
May 21	3:00-4:30 PM ET	Tier II Requirements for FTA Sponsors
May 22	1:00-2:00 PM ET	DBE Status After Losing Certification During Contract Performance
June 18	1:00-3:00 PM ET	DBE Open Ended Performance Plans Open Ended Performance Plans in Design-Build Contracts
July 24	1:00-2:30 PM ET	Prompt Payment and Return of Retainage
July 30	3:00-4:30 PM ET	Requirements for TVMs
TBD:		Counting and Compliance

Visit: www.transportation.gov/dbe-rulemaking

Rule and preamble

Summary Sheet of Rule Changes

List of Timelines

Implementation Guidance

Email: dbe_finalrule@dot.gov

