

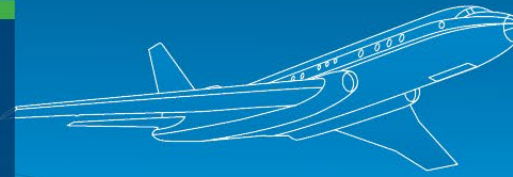


Disadvantaged Business Enterprise Program  
Airport Concessions Disadvantaged Business Enterprise Program

**FINAL RULE**

OST • FAA • FHWA • FTA

DBE Status After Losing Certification  
During Contract Performance  
**49 CFR §26.87(j)**



# 49 CFR §26.87(j) Previous Regulation

- ***Effects of removal of eligibility.*** When you remove a firm's eligibility, you must take the following action:
  - (1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in [paragraph \(g\)](#) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.
  - (2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.
  - (3) ***Exception:*** If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.
- (k) ***Availability of appeal.*** When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under [§ 26.89](#).

# 49 CFR §26.87(j) DBE Prime Contractors

## No Change!

### **Recipient Award to DBE Prime Contractor Before Contract Signed**

- When the recipient has awarded a contract to a DBE prime
- DBE prime contractor is notified of its decertification before prime contract is executed
- The decertified DBE prime contractor does not count toward the recipient's overall goal

# 49 CFR §26.87(j) DBE Prime Contractors

## No Change!

### **Recipient Award to DBE Prime Contractor After Contract Signed**

- When the recipient has awarded a contract to a DBE prime contractor
- DBE prime contractor receives notice of its decertification after the prime contract is executed (signed)
- The portion of the decertified prime contractor's performance of the contract remaining after the DBE received the notice of its decertification must not count toward the recipient's overall goal
- The DBE prime's performance of the contract may continue to count toward satisfying the contract goal (if using its own work to meet the goal, **unless exception applies**)

# 49 CFR §26.87(j) DBE Subcontractors

## No Change!

**Prime Contractor** Commitment to **DBE Subcontractor** Before Contract Signed

- The DBE receives notice of its decertification after commitment by prime contractor but before subcontract is signed
- The DBE participation cannot count toward the contract goal or the recipient's overall goal
- The recipient must direct the prime contractor to meet the contract goal with an eligible DBE or demonstrate to the recipient that it has made good faith efforts to do so

# 49 CFR §26.87(j) DBE Subcontractors

## No Change!

### **Prime Contractor** Commitment to **DBE Subcontractor** After Subcontract is Signed

- When a DBE receives notice of decertification after it has signed a subcontract with the prime contractor
- The decertified DBE's performance can continue to count toward the contract goal (if exception does not apply and if recipient concurs there is no abuse)
- However, the portion of the decertified subcontractor's continued performance of the contract must not count toward the recipient's overall goal



# 49 CFR §26.87(j) Revised Regulation

## Slight Change!

- DBE subcontract is notified of its decertification after subcontract signed so can continue to count toward the contract goal (but not the recipient's overall goal)
- DBE's subcontract with the prime is completed
- Instead of entering into a new subcontract with a currently certified DBE, prime contractor extends or adds work to the subcontract so decertified firm can continue to count toward the contract goal
- This is O.K., but only with recipient's written consent

# 49 CFR §26.87 (j): Exception One: Size Standard Exceeded

## No Change!

- If a certifier decertifies a firm solely because it exceeds the business size standard during the performance of the contract, the recipient may continue to count the portion of the decertified firm's performance of the contract remaining after it issued the notice of its decertification toward the recipient's overall goal as well as toward the contract goals



# 49 CFR §26.87 (j): Exception Two: DBE Purchase by a non-DBE

## Change!

- If the certifier decertifies the DBE because it was **acquired by or merged with a non-DBE**
- The recipient cannot count the decertified firm's continued performance toward its overall goal
- The prime contractor cannot continue to count the decertified firm's continued performance toward the contract goal
- Even if contract or subcontract is signed prior to notification of decertification
- The recipient must direct the prime contractor to subcontract to an eligible DBE to the extent needed to meet the contract goal or demonstrate good faith efforts to do so
- Does not require termination of decertified firm!

# 49 CFR §26.87 (j): Status During Appeal or Summary Suspension



**26.90(a)(4):** Certifiers decision remains in effect until DOOCR resolves appeal

## **26.88 (a):**

- A firm's certification is suspended under this part as soon as the certifier transmits electronic notice to its owner at the last known email address.
- (2) During the suspension period, the DBE may not be considered to meet a contract or participation goal on **contracts executed during the suspension period**

THANK YOU!



QUESTIONS?