DBE/ACDBE Program Guidance (Fall 2024)[1]

DBE PROGRAM PLAN SUBMISSION

1. Does the DBE final rule (Apr. 9, 2024, 89 FR 24898) require recipients of FAA, FHWA, and FTA funds to update their DBE and/or ACDBE program plans and, if so, by what date? (§ 26.21; § 23.21)

Yes. The final rule constitutes a significant change to the DBE program, requiring recipients to submit to the respective Operating Administration for approval an updated DBE program plan that conforms to the rule.

As outlined in § 26.21, all FHWA primary recipients receiving funds authorized under § 26.3 must submit a program. All FTA Tier I recipients (those that will award prime contracts with a cumulative total value of which exceeds $670,000 in FTA funds in a Federal fiscal year) must submit a program. FAA recipients receiving grants for airport planning or development that will award prime contracts the cumulative total value of which exceeds $250,000 in FAA funds in a Federal fiscal year must also submit a program. Additionally, FAA recipients who are primary airports must submit an updated ACDBE program to FAA. The updated programs must reflect changes, including but not limited to, the new rule provisions on prompt payment, monitoring, counting DBE participation, reporting, bidders list collections, active participants list collections, ACDBE small business element, and program definitions. USDOT has published a Summary of Rule Changes.

Recipients are encouraged to complete their program updates by December 1, 2024. The FAA, FHWA, and FTA will provide further instructions to their recipients on the program submission process and deadlines.

CERTIFICATION

1. May a UCP rely upon another UCP's periodic review of a certified DBE in lieu of conducting its own review of the firm?

Yes. UCPs may also informally agree to share certification review documentation.

2. Is a firm's refusal to permit a recording of its on-site interview a failure to cooperate under § 26.109(c)? (§ 26.83(c)(1)(i))

Yes.

3. Must UCPs reassess under § 26.69 the eligibility of any or all DBEs certified in their UCPs before May 9, 2024?

No.

[1] The contents of the document do not have the force and effect of law and are not meant to bind the public in any way. The document is intended only to provide information to the public regarding existing requirements under the law or agency policies. 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.

4. May a certifier challenge a SEDO's initial acquisition of ownership in a DBE certified before May 9, 2024? (§ 26.69(b)(1))

No.

5. May a certifier examine proportionality and maintenance? (§ 26.69(b)(2)-(3))

Yes.

6. Does the 15-percent rule in § 26.70 apply to a SEDO's pre-May 9, 2024, debt-financed investment in a DBE certified in the applicable UCP before May 9, 2024?

No.

INTERSTATE CERTIFICATION ISSUES

1. May a certifier require DBE or ACDBE firms to apply for interstate certification using a portal or similar platform? (§ 26.85)

Yes. Firms may be asked to use a portal to upload their § 26.85(c) documents. If a certifier uses the same portal or platform for non-interstate applicants, then the certifier must specify that the only items an interstate firm must provide are the three items in § 26.85(c) and the minimum basic information necessary for portal registration. The certifying agency must adhere to the timelines in the rule.

2. How may a certifier determine the date of original certification? (§ 26.85(d))

The subsequent certifier may contact the DBE to obtain the original certification date if it is not identified within the § 26.85(c) documents.

3. How should certifiers confirm a DBE's current NAICS code designations? (§ 26.85)

UCPs processing an interstate certification application must grant certification to DBEs in the same NAICS codes the firm has received in its Jurisdiction of Original Certification (JOC). The DBE must provide a complete list of JOC NAICS codes to the UCP processing the interstate certification to confirm this information. Certifiers should further confirm this information by looking at the firm's NAICS code assignments in the other UCP directories as applicable. The JOC's directory is definitive proof of the DBE's certification within a specific NAICS code(s).

4. If a firm that is certified as a DBE or ACDBE in multiple states obtains certification in additional NAICS codes from one UCP, must the firm apply for those codes in every other UCP where it is certified? (§ 26.73)

No. A firm that obtains certification in additional NAICS code(s) should notify any other UCPs where it seeks to perform the additional type(s) of work. Those UCPs should accept the other jurisdiction's determination that a DBE qualifies in additional NAICS codes without further processing, in the same manner as an interstate certification.

DECLARATION OF ELIGIBILITY

1. What gross receipts documentation must a DBE submit to a subsequent certifier in the *first* annual Declaration of Eligibility (DOE) under § 26.83(j)? May the certifier request gross receipts documentation from preceding years? (§§ 26.83(j), 26.83(g)(4))

Section 26.83(j) requires that the DBE submit gross receipts documentation for the most recent completed fiscal year, including that of its affiliates last completed fiscal year. The subsequent certifier may also request documentation of gross receipts from the preceding 4 years.

2. What information may DBEs and ACDBEs submit with their annual Declaration of Eligibility (DOE) to document business size based on the number of employees? (§§ 26.65, 26.83, 26.85(g)(4))

If a DBE's SBA size limit is based on the number of employees (see 13 CFR § 121.106), one way the firm may document its employee count is by providing IRS Form 941. However, it is not the only accepted method; an accountant statement or firm report of employees would suffice. Firms should not submit Form 941 annually with the DOE. The recipient may request documentation of size whenever there is reason to believe the firm has exceeded the employee size limit.

DECERTIFICATION

1. Must a Notice of Decertification (NOD) be issued by an independent decisionmaker? (§ 26.87(f), (g))

No. While an independent decisionmaker must make the final decertification decision, the certifier can issue the notice of decision on the decisionmaker's behalf. This holds true even in cases where a firm does not request a hearing.

2. If a DBE is decertified in its JOC, what is the firm's date of original certification for purposes of §§ 26.83(j), 26.85(g)(4)?

If the DBE remains certified in other UCPs through the interstate process, it must continue to provide an annual DOE with documentation of gross receipts to the certifying UCPs on the anniversary date of its original certification.

3. What notification procedures must UCPs follow when they have reasonable cause to remove the DBE or ACDBE certification, in whole or in part, from a firm that is certified in multiple jurisdictions? (§ 26.87(h))

A UCP must notify by email all other UCPs in which the firm is certified. The notice must explain the UCP's reasons for believing the firm's certification should be removed. The other UCPs must email their concurrence or non-concurrence back to the UCP originating the decertification. If the UCP proceeds to issue a Notice of Intent (NOI) to the firm notifying it of the proposed decertification and explaining the firm's options to respond, the UCP must also inform the other UCPs of the hearing date (i.e., by emailing them a copy of the NOI when it is sent to the firm). Before the hearing, the other UCPs may submit written arguments and evidence concerning whether the firm should remain certified. These procedural requirements are also applicable to partial decertifications, such as decertification in one or more NAICS codes, decertification as a DBE but not as an ACDBE (or vice versa), etc. When the initiating UCP issues a Notice of Decision (NOD) to remove a firm's certification, the UCP must email a copy of its decision to the other jurisdictions where the firm is certified within 3 business days. The other jurisdictions then remove the firm from their directories without additional procedures.

TERMINATION

1. Absent a material change to the prime contract affecting a DBE's listed work, if a prime contractor submits a DBE commitment in the amount of $500,000 and, subsequently, the DBE only performs $250,000 of its work, can the prime contractor claim that the underrun occurred solely due to a lack of work or available quantities (e.g., trucking or flagging hours)? (§ 26.53(f)(1)(i))

No. Any reduction or underrun in work not caused by a material change to the prime contract, by itself, is a termination. The type and quantity of work submitted under a bidder's commitment is binding. Therefore, it is the prime contractor's responsibility to ensure the type and amount of work listed is available. The prime contractor must also avoid unnecessary delays or interruptions to the DBE's work, including scheduling delays that may prevent the DBE from completing its work.

2. Can a contractor replace or substitute a listed DBE in lieu of termination? (§ 26.53(f))

No. A prime contractor is required to use the specific DBEs listed to perform the work and supply the materials conditioned to the award of its contract. When the prime contractor has good cause to terminate a DBE, it must provide proper notification, demonstrate good cause per § 26.53(f)(3), and obtain written consent from the recipient before it terminates the DBE or any portion of its work. These requirements afford due process, and they are set forth in § 26.53(f). As a subsequent step following the termination of a listed DBE per paragraph (f), the prime contractor must demonstrate good faith efforts to replace or include additional DBE participation according to the requirements of § 26.53(g).

<u>DBE SUPPLIERS</u>

1. Does the determination that a DBE supplier has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer need to be based on an evaluation that occurs systematically regardless of a DBE's scheduled participation on a specific contract? (§ 26.55(e)(2)(iv))

Yes. The system required by § 26.55(e)(2)(iv) should result in an evaluation of all DBE suppliers that may seek to participate as regular dealers on future contracts. It is anticipated that each recipient will develop and maintain an internal list of DBE suppliers along with information about their capacity limits relative to the key products they sell. Having information about each DBE supplier in advance provides the recipient with the ability to determine if a DBE supplier has the capacity to perform a CUF on a particular contract and serves to avoid overcounting the DBE's participation prior to its performance. Furthermore, the system established by each recipient should not create a barrier to participation. Instead, it serves as a programmatic safeguard to ensure that the preliminary counting of the DBE's participation (contingent upon the performance of a CUF) is based on the recipient's previous evaluation of the DBE's capacity to perform a CUF, as compared to the scope of its participation on the contract at issue. This requirement is distinct from the requirement found in § 26.53(c)(1), which only seeks to affirm counting of race-conscious participation based on the DBE's intent.

2. Can recipients exclusively use a questionnaire to determine the capacity of a DBE supplier to perform a CUF as a regular dealer? (§ 26.55(e)(2)(iv))

Yes, provided that the questionnaire is supported by sufficient evidence or documentation that allows the recipient to verify the DBE's capacity. For example, DBE X completes a questionnaire stating that it keeps and regularly sells certain products, and it provides photos and an inventory summary showing that it actually kept and sold those products over a reasonable period of time, (e.g., one year). In the case of a DBE bulk item supplier, the recipient may require a list of distribution equipment it

owns/leases and operates, along with copies of vehicle registrations, existing lease agreements, and the names of employees who are licensed to operate that equipment.

Without supporting documentation, the recipient would be relying solely on the DBE's affirmation, rather than its own evaluation and determination of the DBE's demonstrated capacity. In addition to requiring sufficient evidence or documentation of the DBE's capacity, recipients should require the DBE's signature on questionnaires or statements used in the evaluation process, attesting to the accuracy of the DBE's responses, including the authenticity of the supporting documentation required by the recipient.

3. How should recipients count DBE supplier participation (prior to performance) in cases where there has been no previous evaluation or determination that the DBE has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer? (§ 26.55(e)(2)(iv))

The system established by a recipient to determine that each DBE supplier has the demonstrated capacity to perform a CUF as a regular dealer (per § 26.55(e)(2)(iv)) should include a method that allows the recipient to make a provisional determination on short notice or under exceptional circumstances (e.g., a new supplier that has no record of keeping sufficient inventory over a reasonable period of time). Such determinations may involve an abridged process requiring less documentation or evidence than typically required. When such a provisional determination is made, the recipient must conduct, as soon as practical, the evaluation described under its regular process.

When a recipient determines that the DBE supplier does not have the demonstrated capacity to perform a CUF as a regular dealer on the contract at issue, it must limit counting according to the DBE supplier's demonstrated capacity and intended method of performance. This may require asking the DBE more questions concerning its capacity and method of providing the materials/supplies on the contract.

4. Should recipients ensure that each DBE distributor has freight insurance to determine that the DBE is liable for loss or damage to the products in transit? (§ 26.55(e)(3))

No. When a DBE distributor demonstrates that it has assumed responsibility for the items at the point of origin (e.g., manufacturer's facility), the DBE is at risk for loss or damage to those items, regardless of whether it purchases freight insurance.

5. Can deliveries be made or arranged by manufacturers or other sellers if it is made a condition or term of an agreement? (§ 26.55(e)(3))

No. DBE distributor participation cannot be counted at 40 percent when delivery is made or arranged by the manufacturer or other seller. In order for a DBE distributor to receive 40 percent credit for the cost of materials or supplies, it must arrange delivery through a third party, such as a contracted carrier. The terms or conditions of any agreement entered into by the DBE and the seller have no impact on this requirement.

6. How are NAICS code designations and index descriptions distinguished from how a recipient is required to count DBE participation for materials or supplies from a manufacturer? (§ 26.55(e)(1)(ii)).

DBEs may be assigned NAICS codes denoting the business as a manufacturer of a product. The program's counting rules, however, do not rely on the NAICS code descriptions. Rather, under the rule, the term manufacturing "includes blending or modifying raw materials or assembling components to

create the product to meet contract specifications," but notes that "[w]hen a DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE is not a manufacturer." (§ 26.55(e)(1)(ii)). However, to be entitled to 100% credit for manufacturing any product, that same provision requires a manufacturer to own or lease and operate a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described in the specifications.

This provision is designed as a safeguard to ensure that only the entity in the supply chain owning or leasing and operating a factory or establishment where the raw materials enter the process is considered the manufacturer, irrespective of NAICS terminology that may suggest that products can be modified in a different manner than the DBE rule provides.

PROMPT PAYMENT & RETURN OF RETAINAGE

1. Do the prompt payment and return of retainage monitoring requirements apply to ALL subcontractors, regardless of tier, on federally assisted contracts? (§ 26.29)

Yes. Prompt payment requirements apply to all subcontractors, DBE and non-DBE, at all tiers, performing work on federally assisted contracts. The requirements of § 26.29 only apply to contracts that receive federal funding assistance.

2. What type of "proactive" monitoring mechanisms does USDOT consider appropriate? (§ 26.29(d))

Although there is no exhaustive list of mechanisms that may be considered appropriate, USDOT interprets this requirement to include the use of procedures that serve to verify that subcontractors, including lower-tier subcontractors, have been paid promptly for all work satisfactorily performed and to ensure any retainage withheld is returned upon the completion of their subcontract work according to the option selected by the recipient. The monitoring mechanisms chosen must be detailed in the recipient's DBE Program Plan, as well as included in the contractual documentation between the prime contractor and the Recipient.

Examples of proactive monitoring mechanisms can include, but are not limited to, the following activities:

- Reviewing payments from prime contractors to subcontractors, in addition to payments made to all lower-tier subcontractors, with supporting documentation to determine the amount and timeliness of payments.
- Reviewing contract and subcontract documents for inclusion of appropriate prompt payment clauses.
- Reviewing the specifications contained in the contractual clause that may address any measures of performance in prompt payment and return of retainage.

Examples of proactive monitoring mechanisms for the return of retainage would depend on which of the three methods provided at § 26.29(b) is chosen by the State DOT and can include, but are not limited to, the following:

- Comparing invoices to cancelled checks under statistically randomized audits or taking a risk-based approach to the selection of projects.
- Reviewing contractual clauses and other specifications to ensure that retainage is released promptly, even though it is not held by the recipient.

- Ensuring that written policies and SOPs exist to monitor incremental releases of retainage based upon satisfactory completion of work after the prime contractor has received payment from the Recipient.

3. When a project is funded with both direct USDOT financial assistance and funds from a primary recipient, can a subrecipient adopt and implement a different retainage option than the primary recipient? (§ 26.29(d))

When a project is USDOT funded through a primary recipient (e.g., State DOT), the subrecipient is normally required to adopt and implement the primary recipient's DBE Program Plan in its entirety, and any method that varies from what the primary recipient has set forth in its DBE Program Plan is not authorized. Each primary recipient must ensure that the selected retainage option and monitoring mechanism(s) set forth in its approved DBE Program Plan are effectively and consistently administered by all subrecipients.

If a subrecipient has been authorized to have its own approved DBE Program Plan, it may implement the retainage option identified in that program plan only in the rare case that the majority of the project's funding assistance comes directly from USDOT rather than another primary recipient.

OPEN-ENDED PERFORMANCE PLANS (§ 26.53)

1. Why is a DBE Open-Ended Performance Plan (OEPP) only required for design-build (DB) contracting?

A DBE Open-Ended Performance Plan (OEPP) is a plan a proposer submits on design-build (D-B) contracts documenting their commitment to attain the DBE goal (or goals if the sponsor elects to assign a DBE goal to professional services, and another to construction). This plan is a modification from the requirements of § 26.53(b). OEPPs are only required on D-B contracts with DBE contract goals. The OEPP addresses the lack of contract details at time of proposal on D-B contracts, making it difficult for proposers to name DBEs for specific subcontracted work since details about the project, such as final design, quantities, materials, and scheduling are mostly unknown until the work is designed.

2. What information must be included in an OEPP to verify that a proposer has submitted a responsive proposal on a design-build contract with a DBE goal?

An OEPP must include the following to be considered responsive:

- A list of work types or items that the contractor plans to solicit DBEs to perform to meet the goal(s). The anticipated work must align with the type of work needed on the project. The State's DBE database must show that DBEs are available for this type of work.
- An anticipated timeframe for when the listed work opportunities will be executed.
- A projected dollar value for each work opportunity.
- A stated commitment by the proposer to make good faith efforts to meet the goal(s).

The OEPP dollar value of anticipated work must equal the dollar value of the DBE goal(s) percentage.

3. Can the OEPP be revised during the project?

Yes, the OEPP is designed to be flexible and can be revised as project details and subcontracting opportunities evolve. Any changes to the OEPP must be approved by the project sponsor. This flexibility helps contractors adapt to changes in project scope, timing, or other factors that may impact DBE participation.

4. Is a DBE Open-Ended Performance Plan (OEPP) required for all Design-Build Contracts that have a DBE goal?

Yes. If the design-build project has a DBE goal(s), proposers must document how they intend to meet the DBE goal(s) by submitting a DBE OEPP for each goal with their proposal. The OEPP is the proposer's first step in demonstrating its GFE to achieve the goal(s).

5. How should project owners monitor the DBE Open-Ended Performance Plan (OEPP) throughout the project?

Project owners should monitor the OEPP frequently to verify that the design builder is making good faith efforts to achieve the OEPP and the DBE goal(s). For example, some sponsors meet as frequently as weekly, especially at the beginning of the project. Monitoring includes maintaining a running tally of payments made on DBE subcontracts and preparing for upcoming work opportunities as defined by the OEPP. Monitoring ensures that the OEPP, as defined by the projected type of work, timeframes, and dollar value, is coming to fruition with signed subcontracts with DBEs.

6. At time of proposal, can a proposer on a D-B project requiring an OEPP submit documentation of their unsuccessful efforts to achieve the DBE goal(s)?

No. The OEPP is the first step of the proposer's efforts to achieve the DBE goal(s). At time of proposal, to ensure that the plan is considered responsive, the total dollar value of the anticipated work opportunities must equal the dollar value of the contract's DBE goal percentage. As the project progresses and the sponsor has continually verified the contractor's efforts to achieve the goal(s), and once no subcontracting opportunities remain on the project, the design-builder will then submit documentation detailing their good faith efforts to the sponsor. This documentation serves to verify that they cannot achieve the DBE goal.

7. Can a proposer on a design-build project requiring an OEPP submit named DBE subcontracts as per § 26.53(b), in conjunction with their OEPP?

If the proposer can execute a contract with a DBE that has the necessary details, such as a subcontract for initial design work or a type of work that is needed in the beginning of the contract, then those subcontracts can be added to the total projected dollar value of the OEPP. The combined amount would equal the dollar value of the DBE goal(s) percentage of the contract. It is preferred for the proposers to name DBEs for design or early pre-construction work if the contract details are available. If DBEs are named in the proposer's commitment plan, the requirements of 49 CFR § 26.53 apply.

8. Do all the remaining requirements under § 26.53 (parts a, c, d, and f) apply to an OEPP?

Yes, except for the option in § 26.53(b)(3)(B) to submit documents 5 days after bid opening. The OEPP must be submitted with every proposal at time of submittal.

PART 23

1. Does the "distributor" category in § 26.55(c) apply to Part 23 in reference to how to count ACDBE supplier participation? (§ 23.55)

No. Section 23.55(a) explicitly states that the requirements of § 26.55(c)(3) for distributors do not apply to concessions. Section 23.55(h) clarifies how to count credit toward ACDBE goals for goods purchased from an ACDBE which is neither a manufacturer nor a regular dealer. Therefore, §§ 23.53 and 23.55 do not create a distinction for counting purchases from distributors versus regular dealers and manufacturer.

2. Should a recipient continue to count the participation of an ACDBE who is decertified because it was acquired by or merged with a non-ACDBE? (§§ 23.55(j) and 26.87(j)(6)(ii))

No. If an ACDBE is decertified due to its acquisition by or merger with a non-ACDBE firm, the recipient must stop counting the participation of that ACDBE toward its goals from the date of the decertification. See §§ 23,55(j), 23.31, and 26.87(j)(6)(ii).

Under § 23.55(j)(1), the ACDBE must notify the recipient in writing within 30 days of any changes affecting its ability to meet ownership or control requirements. This aligns with § 26.83(i), which mandates reporting of material changes. Additionally, under § 23.55(j)(2), the firm must submit an annual Declaration of Eligibility by December 1, confirming that no material changes have occurred. If the firm fails to submit either the notification of changes or the annual declaration, the recipient must cease counting the firm's participation toward its goals.

3. Can recipients establish an ACDBE mentor-protégé program?

Yes. Part 23 explicitly permits recipients to establish mentor-protégé programs as a part of their ACDBE programs via § 26.35(b) as made applicable to the ACDBE program via § 23.25(d)(7). Besides providing important experience and training to emerging concession operators, such a program may be an additional source of race-neutral ACDBE participation to the recipient.

To establish such a program, recipients must seek and obtain approval from the FAA, ensuring that the mentor-protégé arrangements comply with federal regulations. The mentor-protégé relationship can be incorporated into a recipient's existing business development program or be structured as a standalone initiative focused on ACDBE development. Regardless of the structure, the program must be designed to foster the protégé's growth while preserving their independence and ACDBE eligibility. However, the FAA does not review or approve mentor-protégé or similar programs created by contractors or concessionaires.

4. Are recipients required to set ACDBE small business goals as part of their small business element? (§ 23.26)

No. However, we recommend that recipients who elect to use race-neutral small business goals refrain from doing so on the same contracts that have race-conscious, ACDBE concession specific goals because they can be difficult to administer.

Nevertheless, recipients are required to track and report small business participation achieved through their small business element similar to the way they report race-neutral ACDBE participation obtained through other methods (see § 23.26(g)). This includes reporting of gross revenues generated by ACDBEs

and goods or service expenditures with ACDBEs that result directly from the implementation of the small business element under § 23.26.

5. Does the limitation on the use of set-asides apply to race-neutral small business set-asides under the small business element?

No. The Department has long recognized that race- and gender-neutral small business set-aside programs (i.e., in which a recipient sets aside certain contracts for competition only among small business, regardless of race and gender) may be an acceptable means of achieving the objective of § 23.25(a) without running afoul of the prohibition in § 23.25(g) against the use of set-asides or quotas.

6. Is an airport required to create a concessions opportunity to implement its Small Business Element Program? (§ 23.26)

No. However, airports must create a small business element for their ACDBE program. The element describes how the airport will create opportunities for small businesses, including ACDBEs. 49 CFR § 23.26 provides some examples of approaches airports may take, but it does not require an airport to create a concession opportunity that is not viable. If a particular concession opportunity is not feasible for race- and gender-neutral small business participation, then a different approach may be needed for that opportunity.