



**U.S. Department of  
Transportation**

Office of the Secretary  
Of Transportation

Departmental Office of Civil Rights  
1200 New Jersey Avenue, S.E., W76-401  
Washington, DC 20590

March 9, 2022

Docket No. 21-0094

Manik K. Arora, CEO  
Arora Engineers, Inc.  
61 Wilmington West Chester Pike, Suite 100  
Chadds Ford, PA 13917

Andrea M. Jackson  
Small Business Inclusion Manager  
Office of the Director/Equity & Inclusion Division  
District of Columbia Department of Transportation  
50 M Street S.E., Washington, D. C. 20003

Dear Mr. Arora and Ms. Jackson:

The District of Columbia Unified Certification Program (DCUCP) denied the application of Arora Engineers, Inc. (AE), for DBE certification on March 15, 2021. DCUCP determined that AE's average annual gross receipts over the three previous fiscal years of approximately [REDACTED] exceeded the statutory business size limit of \$26.29 million, found in section 26.65(b) of the Department's DBE regulation.

AE appeals DCUCP's decision on the basis of a Small Business Administration (SBA) regulation, 13 CFR 121.104(c)(1). This rule provides that prior to January 6, 2022, a firm may elect to calculate its annual receipts over either a three-year or five-year period. Since section 26.65(b) references 13 CFR 121.104's definition of average annual gross receipts, AE argues, AE should have been able to average its gross receipts over five years for purposes of compliance with section 26.65(b), resulting in an average of approximately [REDACTED], under the size limit.

It is important to understand that the size caps in section 26.65(a) and (b) are different. The former provides an option of using a three- or five-year average of gross receipts for purposes of determining whether a firm meets the size cap for a given NAICS code. The latter is a cap imposed by statute. It applies regardless of the type of work performed, and it requires three-year

averaging.<sup>1</sup> Having no discretion to change the calculation prescribed, DCUCP complied with section 26.65(b) when it averaged AE's gross receipts over three years.<sup>2</sup>

We therefore affirm the denial under section 26.89(f)(1) as supported by substantial evidence and consistent with applicable certification rules with respect to Federal Highway Administration and Federal Transit Administration programs.

However, as the section 26.65(b) size limit does not apply to Federal Aviation Administration (FAA) financial assistance programs, we reverse DCUCP's decision as it applies to them. We direct DCUCP to consider AE's application to determine if the firm meets all other regulatory certification criteria. If it does, DCUCP must certify the firm *with respect to FAA financial assistance programs only*. See section 26.89(f)(2). In this event, we further direct DCUCP to make the limitation on AE's certification explicit in applicable DBE directories and databases.

This decision is final and not subject to administrative reconsideration.

Sincerely,

Samuel F. Brooks  
DBE Team Lead  
Disadvantaged Business Enterprise Division

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<sup>1</sup> The guidance issued October 19, 2020, by the Departmental Office of Civil Rights emphasizes this point, saying "For the statutory DOT size cap found at 49 CFR § 26.65(b), DBE firms are still subject to the 3-year averaging period because this 3-year period is specifically prescribed by the Fixing America's Surface Transportation (FAST) Act. Therefore, while a DBE firm may elect to submit its average annual gross receipts for either the last 3 years or last 5 years to show it meets the size standard for a particular NAICS code under Part 121, only the last 3 years may be considered for determining whether the firm also meets the DOT size standard prescribed by 49 CFR § 26.65(b)."

<sup>2</sup> The Department reiterated this point in the preamble to its December 14, 2021, rule adjusting the statutory size cap to its current \$26.29 million level, saying that "if a firm's gross receipts averaged over the firm's previous three fiscal years [emphasis added] exceeds [REDACTED], it exceeds the small business size limit for participation in FHWA and FTA assisted work under the Department's DBE program." 85 FR 84606. Section 26.65(b) cites the SBA rules with reference to the definition of gross receipts, not the period of over which they are averaged.