



Speaking With *One* Voice
Civil Rights Virtual Symposium

HONORING THE PAST, SHAPING THE FUTURE

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Interstate Certification Challenges in the DBE and ACDBE Program

Speakers:

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Purpose of the Session

The Department streamlined its certification procedures for businesses seeking certification in multiple states to decrease the burden on certified DBEs and ACDBE firms.

Known as the “interstate certification” rule or “§26.85” this session will address common misunderstandings regarding the interstate certification application process for firms and certifiers.



DBEs Seeking Work in Multiple States Is Expanding

36,979 certified DBEs

3.2% increase in total number of DBEs
from 2015 to 2016

2016 : 36,979

2015 : 35,840

32% of DBE firm certifications are interstate
certifications

13.9% increase in interstate certifications
from 2015 to 2016

2016 : 17,597

2015 : 15,452



Basic Interstate Certification Rule Mechanics

Option 1

- When a firm is certified in its home state, a UCP may accept the certification without further procedure, but must confirm the firm has a valid certification in its home state. DBEs submit a copy of its home state certification notice; and state B verifies the home state directory or obtains a written confirmation from the home state.

DBE Certification

Option 2

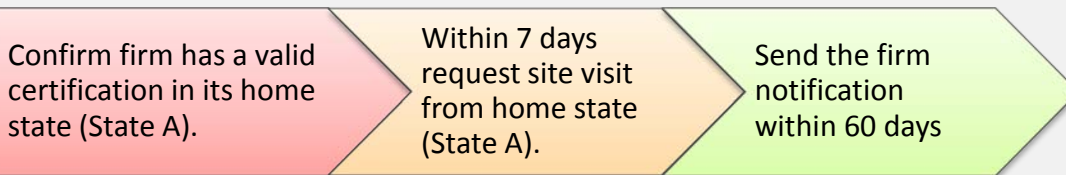
- Do not to accept a firm's home state certification, then applicant must provide §26.85(c) materials:
- 1. A complete copy of the application form, supporting documentation, and any other information submitted to the home state.
- 2. Notices and/or correspondence, including denials, from any other states where the applicant has applied for certification.
- 3. Any appeals to DOT and decisions rendered as a result of appeals.
- 4. Notarized affidavit or a declaration executed under penalty of perjury affirming that all required information has been submitted and is complete
- 5. The application and supporting documentation is an identical copy of the information submitted to the home state.

- Request a site visit report from the firm's home state within 7 days of receipt of the required information.
- Determine if you agree with the home state certification decision



Option 2, continued

- If you have not received a copy of the site visit review report from State A by a date 14 days after you timely requested it, you may hold action required in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by §26.85(c), notify the firm in writing of the delay in the process and the reason for it.
- Send the firm notice that they are certified in your state and place the firm in the directory **within 60 days** of receipt of all required information unless you have good cause to believe that the firm's certification is erroneous or shouldn't apply in your state.
- If you determine that there is good cause to believe that firm's home state certification is erroneous or should not apply in your state, you must notify the firm, in writing, **within 60 days** of receipt of all information.



Notice and Related Procedures

- The notice informing the firm that you have determined the home state certification is erroneous or does not apply in your state must include the following:
 - The specific reasons why the determination was made.
 - An opportunity for the firm to respond to the determination in person, at an informal meeting, or both.
 - The applicant firm has the burden of demonstrating that it meets the eligibility requirements with respect to the specific issues raised by the reviewer in State B.



Notice and Related Procedures, cont'd

- If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the request.
- The decision maker for this action must be an individual who is thoroughly familiar with the regulation and DBE certification standards and procedures.
- A written decision must be issued within 30 days of the firm's response to the notice or meeting with the decision maker.
- A denial in this manner is appealable to DOT in the same manner as any other denial.



Three Main Categories of Errors

REQUESTING INFORMATION	GOOD CAUSE REASONS	PROCESSING
<p><u>Only Permissible §26.85 (c) Items (Option 2)</u></p> <ul style="list-style-type: none"> • Application forms already submitted • Annual affidavits • No change notices • Correspondence with State A • Tax returns • Affidavit from firm that its submission is accurate and complete. <p><u>Impermissible (Reproving eligibility)</u></p> <ul style="list-style-type: none"> • Requesting more than is allowed • New personal net worth statements • Proof of initial capitalization • Inventory • Updated Résumés • Equipment lists • New on-site reports 	<p><u>Permissible Good Cause Grounds</u></p> <ol style="list-style-type: none"> 1. Certification obtained by fraud 2. New information, not available to State A at the time of certification, showing firm does not meet criteria. 3. State A was factually erroneous or inconsistent with the rule 4. State B law requires a different result 5. Information provided did not meet the requirements of §26.85(c) <p><u>Impermissible</u></p> <p>Substituting own judgement in place of the home state</p> <p>Interpretive disagreements about original eligibility.</p> <p>“Opportunity to cure”</p> <p>Taking steps to become eligible are not, in the majority of cases, subverting the intent of the program.</p>	<p><u>Required</u></p> <p>Certify within 60 days or specify a good cause reason and perform 2 steps:</p> <ul style="list-style-type: none"> • Notice and opportunity to be heard within 30 days of a firm’s request • Final written decision within 30 days of firm’s submission or meeting with decision maker. <p><u>Procedural Flaws</u></p> <ul style="list-style-type: none"> • Not informing firm of appeal rights • Unreasonable timeframes • Failure to issue a decision after the firm presents rebuttal arguments • Not explicitly stating a good cause reason • Applying wrong “opportunity to be heard” requirements • Listing facts without explanations related to the good cause grounds • Notice of Intent to deny certification not specific and fails to inform firm why its ineligible.

IC Case Study 1

A DBE landscaping business is certified in its home State A under NAICs Codes ABC and DEF. The DBE seeks certification in State B. State B properly asks the DBE to provide all of the certification documentation from State A and asks State A to provide a copy of the onsite report. State B reviews the information it received from the DBE and State A and is satisfied that the DBE qualifies for certification under the NAICs Code pertaining to landscaping. However, State B notices that NAICS Code DEF applies to electrical work, and there is no evidence in the file that the DBE either performs or desires to perform electrical work. State B concludes that State A listed this NAICS Code in error. What should State B do?

- a. Certify the DBE under both NAICs Codes
- b. Call State A and ask for clarification regarding its decision to certify the DBE under NAICs Code DEF before making a decision to accept or deny the request for interstate certification.
- c. Identify the erroneous NAICs Code as “good cause” to challenge home State A’s certification on one of the grounds set out in the regulation and follow the procedures under 26.85.



IC Case Study 2

A DBE is certified by its home State A. The DBE applies to State B. State B properly follows the interstate certification procedures and certifies the DBE. State B learns that the DBE has been decertified in its home State A. State B knows that under the interstate certification regulations, a DBE must be certified in its home State to be certified in State B. What should State B do?

- A. State B remove the DBE's certification since it is no longer certified in its home State A.
- B. State B must follow the decertification procedures under 49 CFR §26.87 and may use as its basis for issuing a reasonable cause notice that the DBE is no longer certified in its home State A.
- C. State B may not initiate decertification procedures based upon the fact that the DBE is no longer certified in its home State
- D. State B can ask the DBE to provide documentation to prove it still qualifies for DBE certification
- E. State B should contact the DBE's home State A to determine the basis for the decertification and, in light of the information, determine if it is appropriate to initiate decertification procedures based that same basis.



IC Case Study 3

A DBE, certified in its home State A in NAICs Codes ABE and DEF, applies for certification in State B. State B properly follows the interstate certification procedures and certifies the DBE. A year later, the DBE requests State B to add additional NAICs Code, GHI, to its certification. The DBE does is not certified under that NAICs Code in its home state, nor does it wish to be. What should State B do?

- A. Ask State A to perform an onsite to determine if the owner of the DBE has the expertise, equipment, and staffing to control the work associated with NAICs Code GHI.
- B. Deny the request and inform the DBE that it must be certified for NAICs Code GHI in its home State A before State B will take any action.
- C. Interview the DBE owner via phone or teleconference to determine if it has the expertise, equipment, and staffing to control the work associated with NAICs Code GHI
- D. Require that the DBE have a place of business in State B so that State B can perform an onsite to determine if the owner has the expertise, equipment and staffing to control the work associated with NAICs Code GHI.



Summary and Key Points

- If the DBE firm is already certified in its home state, the DBE may take advantage of the interstate certification process.
- There is no such thing as renewing DBE certification
- Certification lasts until withdraw or are decertified
- All DBEs, even those certified under §26.85, must submit in writing:
 - Annual Affidavits: affirming that there have been no changes in the firm affecting its eligibility and no material changes in the application form
 - Notices of Change: DBEs must notify the recipient of any changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control, within 30 days
- Failing to submit an annual affidavit or notify the recipient of changes constitute a failure to cooperate



Questions



Thank you very much!

Request additional information or pose questions to the following:

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