

# DBE Certification

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Missouri Department of Transportation  
Civil Rights Compliance/DBE Training  
Symposium  
2017



# Overview

Introduction

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# Introduction

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- **What is the purpose of DBE certification?**

# DBE Certification Purpose

- To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law
- To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs
- To help remove barriers to the participation of DBEs in DOT-assisted contracts
- To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.

# DBE Certification Components

- Unified Certification Program (UCP)
- Application
- Verification of social and economic disadvantage
- Verification of ownership and control
- Verification of technical expertise
- Processing and maintaining certification records

## Slide 5

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**MLB1**

Each of these components could be a slide

Melissa Boyles, 10/15/2016

# Regulations

49 CFR Part 26

Rules Affecting Certification

Recent Changes

Subpart E – Certification Procedures

## § 26.73 Rules Affecting Certification

- Affiliation
- Commercially useful function
- Patterns of conduct
- Present circumstances
- Arbitrary constraints for newly formed firms
- Cooperation of applicant
- For profit
- Social and economic disadvantage
- Subsidiaries
- Prequalification
- Alaska Native Corporations

**Slide 7**

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**MLB [3]1** Each of these components could be a slide  
Melissa Boyles, 10/15/2016

# Presumption of Affiliation

Effective **June 30, 2016**: Under the revised rule a rebuttable presumption of affiliation exists for firms that conduct business with each other and are owned and controlled by persons who are:

- 1.married couples,
- 2.parties to a civil union,
- 3.parents and children, and siblings

Similarly, a rebuttable presumption of affiliation exists based on economic dependence if a firm derives 70% or more of its revenue from another firm over the previous fiscal year.

Affiliation issues continue to be problematic when certifying DBEs... Look closely at a firm's relationships (both personally and professionally) when processing applications.

# Gross Receipts Update

- *Receipts* means all revenue in whatever form received or accrued from whatever source.
- Generally, receipts are considered “total income” (or in the case of a sole proprietorship “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms
- Receipts do not include:
  - net capital gains or losses;
  - taxes collected for and remitted to a taxing authority if included in gross or total income,
  - proceeds from transactions between a concern and its domestic or foreign affiliates;
  - amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker.

## § 26.83 Certification Procedures

- Ensure that only eligible firms participate
- Ensure that eligibility determinations are consistent with subpart D
- Must take the following steps:
  - Perform an onsite visit
  - Analyze documentation related to legal structure, ownership, etc.
  - Analyze bonding/financial capacity
  - Determine work history
  - Obtain a statement from firm stating the type of work it wants to perform as part of the program
  - Obtain a list of equipment
  - Obtain Federal Income Tax Returns

## § 26.83 Certification Procedures (cont.)

- Steps continued:
  - Require completion of Uniform DBE Application
  - Make sure that the applicant attests to the accuracy and truthfulness of the information on the application form
  - Review all information prior to making decision
  - Promptly make information requested by other recipients available
  - May impose reasonable application fee
  - Safeguard confidential/proprietary information from unauthorized persons
  - Once a DBE is certified, they remain certified until and unless recipient removes certification

## § 26.83 Certification Procedures (cont.)

- Steps continued:
    - You may not require DBEs to recertify but you can conduct certification reviews
    - DBEs must notify the UCP in-writing of changes that impact its eligibility
      - Includes management responsibility changes for LLCs
      - Supporting documentation required
      - Must be in form of an affidavit
    - DBEs must provide annual updates
    - Certification decisions must be made in 90 days from receipt of completed application (may be extended 60 days once)
    - Applicants must be notified within 30 days of receipt of application whether or not application is complete
    - Applicants may withdraw prior to decision and reapply
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## § 26.85 Interstate Certification

Effective January 1, 2012

- DBE must be certified in home state (State A)
- State B may accept State A's certification without further procedures
  - State B must obtain copy of State A's certification notice
  - State B must confirm current, valid certification from State A
- If State B does not accept State A's certification, applicant must:
  - Provide a complete copy of application and support documents
  - All notices and correspondence related to certification
  - If you filed certification appeal to DOT, provide copy of letter and DOT's response

## § 26.85 Interstate Certification (cont.)

- If State B does not accept State A's certification, applicant must also:
  - Submit an affidavit sworn to by firm owners that:
    - You have submitted all information required by regulations
    - If on-site on file with State A is more than three years old, affirm that facts of onsite remain true and correct
- State B must take following actions:
  - Contact State A within seven days to request applicant firm's certification file
  - Determine whether there is good cause to believe State A's certification is erroneous

## § 26.85 Interstate Certification (cont.)

- Must notify State A of good cause determination of erroneous certification within 60 days
  - Notification must state specific reasons
  - Applicant firm may request meeting with State B, State B must meet with applicant within 30 days of receiving request
  - Firm bears burden, by preponderance of evidence, that it meets requirements
  - State B decision-maker must be thoroughly versed in DBE certification
  - State B must issue written decision within 30 days of meeting
  - Certification is stayed pending outcome
  - Decisions may be appealed to DOT

## § 26.85 Interstate Certification (cont.)

- If State B hasn't received information from initial request from State A within 14 days, may go through previous steps in lieu of collecting information from State A
- If certification is denied, log Ineligibility Determination in DOT's online database and include:
  - Name of firm
  - Name of owners
  - Type and date of action
  - Reason for action
- Must check online database monthly to determine if any current applicants are listed
- If a firm is listed, immediately request copy of decision from denying UCP (must be provided within 7 days)

## § 26.86 Denials of Initial Requests for Certification

- Denials must be provided in-writing, including specific reference to evidence that supports each reason for the denial
- Denied firms may not apply again for 12 months
- Denied firms may appeal to USDOT

## § 26.87 Removing Eligibility

- Complaints: Any person may file a complaint of potential ineligibility but complaint must include specific reasons and complainant's identify must be kept confidential
  - Complaints must be investigated
  - Findings of reasonable cause for ineligibility must be provided in writing, findings of no cause must be provided to complainant and certified firm
- Recipient-Initiated: Based on changed circumstances or other information, must provide written notice with specific evidence regarding proposed determination
- DOT-Directed: DOT may direct a recipient to initiate proceedings
  - Administration must provide reasons and proceedings must be initiated immediately

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## § 26.87 Removing Eligibility

- Hearing: Must provide opportunity for informal hearing, during hearing
  - UCP bears burden of proof
  - Must maintain a complete record, if finding is appealed record must be provided to DOT
  - Firm may elect to present information in-writing rather than via a hearing, UCP still bears burden of proof
- Separation of functions: Decision in proceeding to remove eligibility must be made by an office and personnel not involved in proceedings leading to proposed removal
  - Implementation of this is part of your DBE Program
  - Decision-maker must be knowledgeable about certification program and regulation

## § 26.87 Removing Eligibility

- Grounds for decision: Decisions may be based only on one or more of the following
  - Changes in firm's circumstances since certification
  - Information or evidence not available at time of certification
  - Information that was concealed or misrepresented
  - A change in certification standards
  - Clearly erroneous initial decision to certify
  - Firm fails to cooperate
  - Firms has exhibited pattern of conduct indicating involvement in attempts to subvert the intent or requirements of the DBE program
  - The firm has been suspended or debarred for DBE program related conduct

## § 26.87 Removing Eligibility

- Notice of decision: Provide written notice with details regarding decision, including specific references to evidence. Explain consequences of decision and availability of appeal to DOT. Copies, excluding confidential or proprietary information, must be sent to complainant.
  - Firm remains certified pending outcome of proceedings
  - When removing eligibility
    - If a prime contractor has made a commitment, or agency is awarding a DBE prime, but a contract hasn't been executed, make Good Faith Effort to replace ineligible firm
    - If a contract has been awarded, count toward project goal for prime contractor and count work performed while certified for DBE prime but do not count toward overall goal
  - If ineligibility is caused solely by exceeding size standard, participation may count toward project and overall goals
  - Decision for removal may be appealed to DO
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## § 26.88 Summary Suspension

- Immediately suspend without following requirements in previous section if the qualifying owner dies or is incarcerated
- Summary suspension allowed if there is adequate evidence that a material change has occurred that affects eligibility
  - Careful review of all factors and information is required
- Operating administration may direct recipient to issue summary suspension
- Must notify DBE via certified mail
- Suspension is a temporary status, beginning when the DBE receives notice, pending an expedited hearing
- Work contracted after notice of suspension does not count toward project or overall goals

## § 26.88 Summary Suspension (cont.)

- DBE may voluntarily withdraw from program
- Recipient has 30 days to lift suspension and reinstate the DBE or commence with decertification proceedings
- Suspension is not appealable to DOT
- Failure of the recipient to lift suspension or commence with decertification proceedings within 30 days is appealable to DOT

## § 26.89 DOT Certification Appeals

- Firms denied certification or whose eligibility is removed can appeal to DOT
- Complainants in ineligibility complaints may appeal to DOT if recipient does not find reasonable cause to remove eligibility
- Complaints are filed with USDOT, Department of Civil Rights, in Washington DC
- Appeals must be sent within 90 days of recipient's decision
- Recipient must provide administrative record to DOT within 20 of receiving the request for the records
- DOT determinations based on administrative record and appeal information only; no hearing is held

## § 26.89 DOT Certification Appeals (cont.)

- Supplementary information must be made available to the firm and any third-party involved in appeal (both from recipient and DOT)
- DOT may
  - Affirm your decision
  - Reverse your decision; recipient must take immediate action upon receipt of written notice from DOT
  - DOT is not required to reverse a decision if it determines that a procedural error did not result in fundamental unfairness
  - DOT may remand record to recipient for further clarification or action
  - DOT does not uphold recipient decisions based on grounds not specified in recipient's decision

# § 26.89 DOT Certification Appeals (cont.)

- DOT may (cont.)
  - DOT decision is based on status and circumstances of firm as of the date of the decision being appealed
  - DOT provides written notice to recipient, firm, and complainants
  - Decisions are made within 180 days, if not, a written explanation is provided to all parties
  - All decisions are administratively final and not subject to petitions for reconsideration

# § 26.91 Actions following USDOT Appeal Decisions

- The decision is binding for recipients
- Erroneous certification determination; remove firm's eligibility, without further proceedings on your part, effective date you received notice from DOT
- Erroneous decline of certification; certify firm effective date you received USDOT notice
- Recipient is required to take action

# Onsite Visits

- Required
  - Help Determine
    - Ownership & Control
    - Nature of Potential Affiliations
    - Verification of Expertise
  - Critical to Interstate Certification Process
  - Potential Onsite Visit Components:
    - Observations of Physical Environment
    - Observations of Staff Interactions
    - Observations regarding comfort in discussing Business Documentation (i.e. Articles of Incorporation, Profit & Loss Statements, etc.)
    - Observations of Technical Expertise
    - Others
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# Common Themes for DBE Site Visits

Compliant	Non- Compliant
Employees clearly report to Qualifying Owner	Employees did not know Qualifying Owner
Qualifying owner is hands-on in day-to-day operations; demonstrates technical expertise in the business field/trade	Employees do not interact with Qualifying Owner; Qualifying Owner does not possess business expertise
Office and field personnel are familiar with Qualifying Owner and recognized Qualifying Owner's hiring/firing authority	Qualifying Owner is not recognized as having hiring/firing authority
Office and field personnel know who they work for (i.e. applicant firm)	Office and field personnel do not recognize the applicant firm as their employer
Office environment, documentation, and interaction with personnel all support assertion of ownership and control	Office environment, documentation, and interaction with personnel fail to support assertion of ownership and control

# Case Study: Ownership & Control

Firm A DBE Application & Review



# Case Study

- Firm A applied for DBE certification.
- Firm A conducts business in the areas of welding, general contracting, and construction.
- Firm A was formed four years earlier by a minority woman, the DBE applicant.
- She submitted a signed Affidavit of Certification with the DBE Application, stating that she is a Hispanic-American female (presumptively socially disadvantaged).
- According to the PNW submitted by applicant, her PNW is \$216,514 (does not exceed PNW threshold).

# Case Study

- Firm A is an existing small business as documented by an average of its 2008, 2009, 2010 federal tax returns
- Annual gross receipts over the previous 3 years total \$315,000
- She demonstrated 51% ownership of voting stock outstanding and aggregate of all stock outstanding in Firm A by the following:
  - DBE Application
  - 2010 Personal Tax return
  - PNW Statement
  - Corporate Stock Certificates & Ledger

# Case Study

- She stated that she contributed \$51,000 towards the start-up of the firm
- The firm was established on 10/16/2007
- Her check was dated 4/18/2008
- Firm A's shares personnel and office space with Firm B
- Firm B is owned by applicant's husband
- Her resume states she worked as bookkeeper prior to Firm A
- She signed a consultant and non-compete agreement on 8/2/2011
- Applicant and her husband own Firm C and consult for Firm A

# Case Study

- The Shareholder Agreement states:
  - “Any dispute arising among two or more shareholders that cannot be resolved by discussion within a 30 day time period will be resolved by mediation...”
  - In addition, “...The By-Laws will not be amended or repealed except by written agreement of all shareholders.”
- Applicant’s resume indicates:
  - That she has an Associates Degree in Secretarial Science
  - Worked as a bookkeeper
  - No education, work experience, or credentials as a welder or in the welding field

# Case Study

- Applicant did not demonstrate that she has the ability to control a Welding Tools Manufacturing and Specialty Services Business
  - Independence issues
  - Restrictions on control
  - Power to direct
  - Managerial and technical competence
- Recommend that Firm A is denied on the basis of the following:
  - 49 CFR 26.69 (e) - contribution
  - 49 CFR 26.69 (b) - independence
  - 49 CFR 26.71 (d) - power to direct
  - 49 CFR 26.71 (g) – managerial & technical competence



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