



Disadvantaged Business Enterprise Program  
 Airport Concessions Disadvantaged Business Enterprise Program  
**FINAL RULE**  
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## Disadvantaged Business Enterprise (DBE) and Airport Concession DBE (ACDBE) Final Rule : 49 CFR Parts 23 and 26

TOPIC	SUMMARY OF KEY REVISIONS
Expands recipient reporting requirements to USDOT to gain greater knowledge of DBE/ACDBE characteristics, bidding/solicitation practices and utilization and overall program impact	<ul style="list-style-type: none"> <li>• Annual DBE Directory Report to USDOT (“MAP-21” Report) would collect additional information such as DBE application rates and characteristics in statewide directories (e.g., ethnicity, number of certifications, suspension, and decertification status).</li> <li>• Uniform Report would collect additional information such as names of DBE contractors that performed work and the work categories/trades performed, dollar value of contracts, number of firms that were listed at commitment but replaced (as well as an explanation for the replacement), and number of firms decertified during the reporting period.</li> <li>• DBE Bidders List—recipients would enter into an online USDOT system of data about companies bidding on contracts or subcontracts, such as company name, DBE or non-DBE status, fields of work bid and related NAICS codes, etc.</li> <li>• ACDBE Active Participant List—requires recipients to create a list that would include all firms that have participated or attempted to participate in airport concession programs in previous years. This would give a glimpse of the universe of ACDBE and non-ACDBEs who seek concession opportunities for use in helping recipients set overall goals for car rentals and concessions other than car rental.</li> </ul>
Adds and clarifies DBE program definitions	<ul style="list-style-type: none"> <li>• Disadvantaged Business Enterprise</li> <li>• Personal net worth</li> <li>• Principal place of business</li> <li>• Transit vehicle manufacturer</li> <li>• Unsworn declaration</li> </ul>

TOPIC	SUMMARY OF KEY REVISIONS
Adds, clarifies, and aligns ACDBE program definitions with DBE program definitions	<ul style="list-style-type: none"> <li>• Affiliation</li> <li>• Airport Concession Disadvantaged Business Enterprise (ACDBE)</li> <li>• Alaska Native</li> <li>• Assets</li> <li>• Concession</li> <li>• Contingent liability</li> <li>• Days</li> <li>• Liabilities</li> <li>• Operating administration or OA</li> <li>• Personal net worth</li> <li>• Recipient</li> <li>• Socially and economically disadvantaged individual</li> <li>• Sub-concession</li> <li>• Sublease</li> </ul>
Administrative rules will ease burdens and create firm opportunities	<ul style="list-style-type: none"> <li>• Reduces administrative requirements for smaller FTA recipients receiving planning, capital and/or operating assistance between \$250,000 and \$670,000.</li> <li>• Removes the documents for the Uniform Report, Uniform Certification Application, and Personal Net Worth Statement from the regulation so that USDOT can easily amend them in the future.</li> <li>• Expands existing DBE directories to enable prime contractors to identify a DBE's location, lines of work (NAICS codes), and website.</li> <li>• Streamlined interstate certification will reduce unnecessary burdens for both DBEs and certifiers (see page 3)</li> </ul>
Replicates the DBE program's small business element requirements for the ACDBE program	<ul style="list-style-type: none"> <li>• Requires airports to take steps to eliminate obstacles for participation by smaller ACDBEs. Steps include unbundling contracts and submitting a plan to the FAA that includes race-neutral strategies to support greater participation by small ACDBEs.</li> <li>• Requires airports to submit annual reports on their small business elements.</li> </ul>
Adds a DBE performance plan requirement for design-build projects	<ul style="list-style-type: none"> <li>• Requires primes responding to a Request for Proposal on a design-build procurement to submit an open-ended DBE Performance Plan (DPP) with the proposal.</li> <li>• DPPs are to detail the types of work the prime will solicit DBEs to perform and a projected timeframe in which actual subcontracts will come to fruition.</li> <li>• Recipients monitor the prime's adherence to the plan throughout the life of the contract to evaluate good faith efforts, and parties may agree to make written DPP revisions throughout life of project.</li> </ul>
Updates rules for counting participation by DBE material suppliers and clarifies terminology	<ul style="list-style-type: none"> <li>• Adds "distributor" as a new subset of DBE suppliers. Distributors are permitted to drop-ship from manufacturers if the firm has a distributorship agreement or assumes all responsibility for the materials after point of origin, allowing 40% credit for the cost of materials.</li> <li>• Requires recipients to establish pre-award procedures to determine whether a DBE supplier submitted by the contractor/bidder as a regular dealer or distributor has demonstrated the ability and intent to perform as a regular dealer or distributor during the contract, allowing 60% or 40%, respectively, of the cost of materials to count toward goal. This will ensure preliminary counting determinations and contract goal attainment decisions are based on the DBE's ability and intent to comply with the rule's commercially useful function (CUF) requirements.</li> <li>• Clarifies definition of "manufacturer" – a DBE that makes minor material modifications is not a manufacturer for goal attainment purposes.</li> </ul>

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Strengthens monitoring and prompt payment requirements	<ul style="list-style-type: none"> <li>• Rule clarifies that (1) a CUF review is necessary for every DBE that performs for credit toward a recipient's overall goal and a contract goal, (2) DBEs used race-neutrally must be monitored, and (3) recipients must keep an accounting of each contractor's progress in attaining a contract goal through progressive payments to the committed DBEs. This running tally requirement is essential so recipients can intervene in real-time if they observe a prime contractor falling short of a contract goal.</li> <li>• Clarifies that every recipient's DBE program must include mechanisms it will use for proactive monitoring and oversight of prime contractors' compliance with subcontract prompt payment and return of retainage requirements. Reliance on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is insufficient.</li> <li>• Specifies the prompt payment requirements flow down to all lower tier subcontractors.</li> </ul>
Adds flexibilities to conserve certification agency resources	<ul style="list-style-type: none"> <li>• Formalizes COVID-19 guidance to allow virtual on-site interviews, virtual certification and decertification hearings, and alternative notarization methods.</li> </ul>
Increases the personal net worth (PNW) cap for owners to be eligible for the programs; and simplifies the calculation	<ul style="list-style-type: none"> <li>• Raises the PNW cap (last adjusted in 2011) from \$1.32 to \$2.047 million.</li> <li>• Excludes retirement assets from the calculation.</li> <li>• Removes state marital laws or community property rules from the calculation.</li> <li>• Includes "household contents" of primary residence, but if owner lives with spouse or domestic partner the owner may exclude half.</li> <li>• Motor vehicles of any type belong to the person who is the primary operator.</li> <li>• USDOT will regularly adjust the PNW cap in the future without rulemaking using Federal Reserve data.</li> </ul>
Improves initial certification process	<ul style="list-style-type: none"> <li>• Requires a firm to have operations in the type of business it seeks to perform before it applies for certification. This relieves certifiers from evaluating firms that have no ability to bid. (Not applicable to ACDDBEs).</li> <li>• Disallows the certification of a firm as an ACDDBE if the applicant intends to perform activities exclusively related to the renovation, repair, or construction of a concession facility (sometimes referenced as the "build-out") for which participation cannot be counted toward an ACDDBE goal.</li> <li>• Codifies current "ability to cure" guidance regarding a firm's legitimate efforts to correct certification impediments are not necessarily evasive.</li> <li>• Reduces the time a certifier can extend a certification review from 60 to 30 days.</li> </ul>
Expedites interstate certification process through less burdensome procedures	<ul style="list-style-type: none"> <li>• A DBE would no longer have to provide additional UCPs a copy of the entire application package it submitted to the original jurisdiction of certification (OJC). It must only request certification in writing, provide evidence of certification, and submit a declaration of eligibility.</li> <li>• If the additional UCP confirms the DBE has certification, it must certify the firm within 10 business days.</li> <li>• After certifying the DBE, the additional UCP may conduct its own certification review and initiate decertification procedures if it finds there is reasonable cause for determining that the firm is ineligible for certification.</li> <li>• Additional UCP must notify the other UCPs in which the firm is certified, explain why it found reasonable cause. The other UCPs must provide their concurrence or non-concurrence (including any written explanation) within 30 days.</li> <li>• After receiving all responses from other UCPs, the UCP initiating decertification independently determines whether to issue a notice of intent (NOI) to decertify the DBE and notice of decision (NOD).</li> </ul>

TOPIC	SUMMARY OF KEY REVISIONS
Amends ownership requirements for certification eligibility	<ul style="list-style-type: none"> <li>• Clarifies that ownership investment include purchases, capital infusions, gifts, and additional investments <i>after</i> initial ownership.</li> <li>• Removes the marital property provision in the ownership rule.</li> <li>• Establishes special rules for when an individual borrows money to finance an investment to acquire ownership.</li> <li>• Permits only 1 tier of ownership above a subsidiary DBE.</li> </ul>
Amends control requirements for certification eligibility	<ul style="list-style-type: none"> <li>• General requirements--the disadvantaged majority owner(s) must “run the show,” be the ultimate decision maker, have present control of the board of directors, have an overall understanding of the firm’s operations to the extent necessary to make managerial decisions, and demonstrate a chain of command within the company.</li> <li>• Decision-making power—the disadvantaged majority owner(s) must independently make major decisions that affect the firm’s prospects after receiving information from non-decision makers and critically analyzing it based on the owner’s knowledge.</li> <li>• Independence—the firm must prove that it is independently viable, notwithstanding a relationship with another firm from which it receives or shares essential resources. A pattern of regular dealings with a single or small number of firms does not necessarily compromise a firm’s independence.</li> <li>• Removes provisions regarding family businesses, licenses, and equipment, outside employment, and disadvantaged owner’s remuneration.</li> </ul>
<p>Rebutting the presumption of economic disadvantage</p> <p>Reworks Appendix E criteria for individualized determinations of social and economic disadvantage</p>	<ul style="list-style-type: none"> <li>• Replaces ability to accumulate substantial wealth in favor of a reasonable person standard.</li> <li>• Provides less prescriptive rules so certifiers can more accurately make individualized determinations of social and economic disadvantage and applicants have more discretion about what evidence to provide.</li> </ul>
Amends rules for gross receipts calculations	<ul style="list-style-type: none"> <li>• Aligns rule text with law that makes permanent the 5-year average calculation of gross receipts to determine business size for individual NAICS codes.</li> <li>• Requires ACDBEs that are parties to a joint venture to include the proportionate share of joint venture receipts in its gross receipt calculation.</li> </ul>
Amends rules for appealing adverse certification decisions to USDOT	<ul style="list-style-type: none"> <li>• Reduces time a firm may appeal a NOD from 90 to 45 days.</li> <li>• Changes the clock for the waiting period for reapplication from the date applicant receives the denial to the date the certifier sends the decision.</li> <li>• Allows USDOT, at its discretion, to summarily dismiss an appeal.</li> </ul>
Balances procedural protections for DBEs with certifier needs in decertification actions	<ul style="list-style-type: none"> <li>• Changes the requirement for recipients to offer an informal hearing –imposes a 45-day deadline by which decertification hearings must occur but ends delays caused by firm and recipient changing dates of the hearing.</li> <li>• Clarifies what members representing the DBE may attend and answer questions during the informal hearing.</li> <li>• Imposes a 30-day deadline for a firm to render a notice of decision following a hearing or receiving written information from the DBE.</li> </ul>
Clarifies how to count DBE participation after decertification or other loss of ineligibility	<ul style="list-style-type: none"> <li>• Counting after decertification—(1) prime contractors may add work or extend a completed subcontract with a decertified firm only if it obtains prior, written consent from the recipient, and (2) continued credit toward a contract goal is disallowed if the DBE’s ineligibility after the subcontract is signed is the result of a purchase by, or merger with, a non-DBE firm (in which case the prime contractor would be required to use good faith efforts to replace the DBE if additional credit is needed to meet the contract goal).</li> </ul>

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	<ul style="list-style-type: none"> <li>Requires ongoing monitoring of ACDBEs that lose certification due to exceeding size or personal net worth criteria. ACDBEs must continue to submit declarations as a condition of continued counting.</li> </ul>
Establishes procedures for counting ACDBE participation for firms that are decertified during the contract performance period because of exceeding the business size standard or the disadvantaged owner exceeding the personal net worth limit	<ul style="list-style-type: none"> <li>Requires decertified firms to report changes regarding their ownership and control requirements by submitting a declaration of eligibility to recipients, as a condition to continue counting their participation.</li> <li>Requires recipients rather than UCPs, to actively monitor firms decertified after contract award for ownership and control to determine the eligibility of their participation for continued counting.</li> </ul>
Amends summary suspension rules	<ul style="list-style-type: none"> <li>Certifiers may only rely on a single reason if the summary suspension is based on an elective reason and limits elective suspension to once every 12 months.</li> <li>Adds procedural protections and processes to the rule (e.g., requires notice of reasons for a recipient action, the evidence, the DBE's response options, and consequences).</li> <li>Requirement for recipients to email DBEs the suspension notice.</li> <li>Mandatory suspension when clear and credible evidence of the DBE's involvement in fraud or other serious criminal activity or when OA so directs.</li> <li>A rule-compliant suspension decision will be a NOD appealable to USDOT.</li> </ul>
Enhances ACDBE goal setting and reporting requirements	<ul style="list-style-type: none"> <li>Requires recipients to investigate the full extent of services provided by SEDO financial institutions and to encourage their use amongst primes.</li> <li>Removes consultation requirement when no new concession opportunities exist.</li> <li>Clarifies when and how concession specific goals may be set on purchases by concessions from ACDBE suppliers.</li> <li>Changes due date for airports to submit ACDBE shortfall analyses to 30 days after submission of the related Uniform Report.</li> </ul>
Modifies bounds of long-term exclusive lease (LTE) agreements in the ACDBE program	<ul style="list-style-type: none"> <li>Extends the long-term definition from 5 to 10 years.</li> <li>Defines "exclusive agreement."</li> <li>Closes regulatory oversight gaps within the provision with regard to LTE agreements that result from direct negotiated procurements and holdover tenancies.</li> <li>Streamlines the information and documentation requirements for LTE agreements subject to FAA approval.</li> </ul>

This summary is not a comprehensive description of the final rule.

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