DBE Certification Requirements
Recent Changes

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6 New Terms Added to Definitions

- Assets
- Business, business concern, or business enterprise
- Contingent liability
- Days
- Liabilities
- Spouse
- Transit Vehicle Manufacturer
Size Standard

- Increased from $22.41 million to $23.98 million
- Averaged over 3 year period (last 3 years)
- Gross receipts of firm and affiliates
- Size cap for individual firms may be lower depending on Small Business Size Standard tied to NAICS Code
PNW Form

• Applicants and certifiers must use standard DOT PNW Form without modification
• Each individual whose ownership and control are relied upon for DBE certification must complete the form
• Not required for spouse who is not active in the business or other non-disadvantaged owners
• Requesting back-up documentation for assets & liabilities
• Form is available in screen-fillable format
Uniform Certification Application

- Applicants and certifiers **must use** standard application form without modification;
- Some items removed; some added;
- Federal –not State—tax returns
- Checklist revised, changing some documents from mandatory to optional.
- Form is available in screen-fillable format
Uniform Certification Application

• Added space for dates of site visits conducted by other States

• Added space for applicant to describe its primary activities, the products and services it provides and the NAICS codes it thinks are most applicable.

Civil Rights
Uniform Certification Application

• Control section asks for information concerning the tasks most commonly performed and frequency these tasks are performed to determine the amount of time owners and others devote to specific areas of a firm’s operations;

• Tool to assist in onsite review
Certification Social and Economic Disadvantage 26.67 (b) (1)

• Certifiers may rebut someone’s claim of economic disadvantage—despite the fact that liabilities bring PNW below $1.32 M— if a reasonable person would consider the owner to be a wealthy individual

• Proceeding that follows 26.87 is required and certifying entity has burden of proof
Certification 26.67(b)(2)

- May rebut individual’s claim to be **socially** disadvantaged through proceeding under procedures of 26.87 in which certifying entity has burden of proof

- If rebutted, may make individual showing under Appendix E
Certification 26.67 (c)

- Transfers within 2 years
- Must count as part of a disadvantaged individual’s PNW any assets transferred to an immediate family member or to applicant firm for less than fair market value within 2 years of the date of application or annual affidavit
- Unless transfer is for education, medical expenses, recognition of special events
Economic Disadvantage

“Ability to accumulate substantial wealth”

• Examples that certifier may consider:
  – whether the applicant has an average adjusted income over the last 3 year period of $350,000;
  – whether income is immediately invested in the firm; whether total fair market value of owner’s assets are greater than $6 M

• Used as tool for egregious circumstances
Ownership 26.69

- Emphasizes contribution of capital must be real, substantial, and continuing

- Disadvantaged owners should be entitled to profits and losses commensurate with their ownership interest and “any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm’s profits are grounds for denial”
Ownership Criteria Changes

(c)(1) The firm’s ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm’s activities as an employee, or capitalization not commensurate with the value for the firm.

Examples included in new rule
Control 26.71 (I)

- When a firm was formerly owned and controlled by a non-disadvantaged individual whether or not an immediate family member and ownership transferred to disadvantaged individual and non disadvantaged individual remains in firm, there is rebuttable presumption of control by non-disadvantaged person;

- Disadvantaged individual can rebut presumption with Clear and Convincing evidence
Control 26.71 (I) (cont.)

Disadvantaged individual must demonstrate by clear and convincing evidence that

- 1. The transfer was made for reasons other than obtaining DBE certification

- 2. the disadvantaged individual actually controls the firm
Other Rules Affecting Certification – 26.73

26.73(g) Prequalification

• **Revised** - You must not require a DBE firm to be prequalified as a condition for certification
Certification Procedures 26.83

- Onsite reviews are mandatory to principal place of business and jobsites if active;

- Must interview principal officers and resumes/work histories;

- Interviews with key personnel are discretionary;

- May rely on site visit report of other recipient (interstate certification)
Certification Procedures 26.83

• Specifies what documents to review when analyzing legal structure
• Must analyze bonding and financial capacity of firm
• Must review lease and loan agreements; bank signature cards; and payroll records
• Must review work history, contracts received, completed, payroll records
• Must request or compile list of equipment
• Must request and review relevant licenses
• Federal income tax returns for last 3 years
Certification Procedures - 26.83

• Removes any reference to “recertification” after 3 years or at any other time

• Certifying entity may not require DBEs to reapply for certification or undergo a recertification process;

• State may conduct a new on-site review;

• If onsite is due to an investigation, may perform unannounced
Removal of Eligibility 26.87

- Grounds for initiating decertification procedures:
  - Decision to certify was **clearly erroneous** (changed from “factually erroneous”)
  - Failure to cooperate
  - Exhibited pattern of conduct to subvert intent or requirements of program
Annual Affidavit 26.83(j)

- DBE must provide every year in an affidavit form
- Form must merely affirm that there have been no changes in the firm that would affect eligibility;
- Only may request Federal tax returns—not new PNW;
- Additional requests on case-by-case basis if reasonable
Annual Affidavit 26.83(j)(cont.)

• Should not include changes to DBE-separate obligation within 30 days of change 26.83(i)

• Failure to provide affidavit can be reason to initiate decertification procedures under 26.87

• Only if fails to respond to reasonable request, not if merely untimely

• Removal proceedings should not continue if DBE provides information
Summary Suspension 26.88 (cont.)

- State can immediately suspend a DBE’s certification without hearing
  - Disadvantaged owner dies or is in jail
  - There is adequate evidence of material change
  - DBE fails to notify of material change or fails to timely file an affidavit of no change
  - Is directed by Operating Administration (FHWA)
Summary Suspension 26.88

• After initiating suspension, the State must immediately notify the DBE by certified mail to last known address.

• Suspension occurs when DBE receives or is deemed to have received notice.

• State must then expedite 26.87 hearing to determine eligibility.

• While suspended DBE will not be eligible to meet goals on new contracts, but can continue to receive credit on contracts executed before suspension.
Summary Suspension 26.88 (cont.)

• When DBE receives notice it may:
  – Withdraw
  – Provide information to recipient why it remains eligible

• Recipient must lift the suspension or begin decertification proceedings within 30 days of receiving information from suspended DBE
DBE Appeals 26.89

- DBE denied certification or whose certification removed may appeal
  - Must send letter to DOCR within 90 days of date of final decision
  - Letter must include specific reasons for appeal and/or facts recipient did not consider
DBE Appeals 26.89 (cont.)

• DOCR does not make *de novo* review

• DOCR makes decision based solely on administrative record as supplemented by appeal

• DOCR may also supplement the record by adding relevant information made available to it.

• *Time it takes for appeal decision does not affect waiting period for DBE to reapply*
Conclusion

- DBE final rule made some significant changes to help certifiers make sound DBE Certification decisions;
- Revised DBE Application
- New PNW Form
- Clarified items relating to Ownership & Control
- Clarified procedures for denials, appeals, and removing DBE firms

QUESTIONS & ANSWERS

THE END