

**Revisions to 49 CFR Part 26
Effective February 28, 2011**

§26.5 What do the terms used in this part mean?

Amends §26.5 by adding a definition to read as follows: "Home State" means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business.

§26.11 What records do recipients keep and report?

Amends §26.11 by adding a paragraph regarding the Uniform Report of DBE Awards or Commitments and Payments report with semi-annual due dates of: June 1 and December 1.

§26.31 What information must you include in your DBE directory?

Revises §26.31 and the DBE directory requirements:

- ✓ *The address, phone numbers, and the type(s) of work the firm has been certified to perform as a DBE must be included in the listing.*
- ✓ *Additionally, each type of work that a firm is eligible to be certified for must be listed using the most specific NAICS code available.*

§26.37 What are the recipient's responsibilities for monitoring the performance of other program participants?

Revises §26.37 (b) for monitoring and enforcement to include:

- ✓ *A mechanism to ensure that work committed to DBEs at contract award is actually being performed by the DBEs to which the work was committed.*
- ✓ *Written certification that the contracting records and monitored work sites have been reviewed. Note: this may be done in conjunction with monitoring of contract performance for other purposes (e.g., close-out reviews for a contract).*

§26.39 Fostering small business participation.

Adds §26.39 to subpart B:

In order to promote small business participation, include to the DBE program a contracting requirement that will assist small business competition, eliminate any obstacles, including unnecessary bundling of contract requirements that may prevent their participation as prime contractors or as subcontractors.

The following may be included, but not limited to:

- *Establish a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million)*
- *For design-build or large contracts, require bidders to specify elements of the contract or specific subcontracts that a small business, including DBEs, can perform.*
- *For contracts that do not have DBE goals, require the prime contractor to provide subcontracting opportunities.*
- *Identify other ways for small businesses, including DBEs, to compete for and to perform prime contracts.*
- *In order to meet the portion of the overall race-neutral goals, ensure that small businesses, including DBEs, can perform on a reasonable number of prime contracts.*

§26.45 How do recipients set overall goals?

Revises and adds to §26.45 once the percentage of overall goals has been established, it should be conveyed as follows:

- ✓ *In some cases, the FHWA, FTA or FAA may require the overall goal to be expressed as a percentage of funds for a specific grant, contract, or groups of contracts/grants. A project goal may be adjusted to reflect circumstances. If the overall goal is based on a contract or grant basis, it must be submitted for review. A description of the method used to establish the goal, including the base figure and calculations, and the portions of the overall goal expected to be met through race-neutral and race-conscious measures must be included in the submission for review.*
 - *A contract goal is an overall goal that must meet all the requirements pertaining to overall goals that cover the entire length of the project, should include a projection of the DBE anticipated participation during each fiscal year, and the funds for the contract goal are to be separated from the base of the overall goal*
- ✓ *If the overall goal is set on a fiscal year basis, it must be submitted to DOT by August 1st at three-year intervals. Although, the three-year goal may be adjusted to the period to which it applies. This adjustment must be submitted to the operating administration for review and approval, and it may be necessary to review the goal continually.*

§26.47 Can recipients be penalized for failing to meet overall goals?

- ✓ *Adds to §26.47:*
 - *Pertaining to the Uniform Report, if the overall goals are less than what was committed, the following must be met:*
 - *Detailed reasoning for the difference between the overall goals set and the awards and commitments made.*
 - *Explanations on how to correct the problems in order to meet the goal for the next fiscal year.*
 - *Noncompliance occurs when the following is not met:*
 - *Analysis and corrective actions are not submitted in a timely manner.*
 - *FHWA, FTA, or FAA disapproves the analysis or corrective actions.*
 - *The corrective actions are not fully implemented.*
 - *If the reports state that current trends make it unlikely to achieve DBE awards and commitments, it may be required to modify the race-conscious/race-neutral measures.*

§26.51 What means do recipients use to meet overall goals?

Revises §26.51 to state:

- *(b) race-neutral means:*
 - *“Arranging solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses...”*
- *(f) assurance that the DBE program is tailored to overcome discrimination:*

- *“If you approved projection...estimates that you can meet your entire overall goals for a given year through race-neutral means, you must implement your program without setting contract goals during that year, unless it becomes necessary in order to meet your overall goal.”*

§26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

Revise and add to §26.53 to state:

- ✓ *It is required that a prime contractor not terminate a DBE subcontractor listed without prior written consent. Including work that a prime contractor can perform with its own forces, or with a non-DBE firm, or another DBE firm.*
- ✓ *Prior to the termination request, the prime contractor must notify the DBE, in writing, of the intent to terminate allowing for five days of response time in opposition of the rejection.*
- ✓ *The prime contractor must have good cause in which to terminate the DBE firm. A good cause includes:*
 - *The DBE fails or refuses to execute a written contract.*
 - *The DBE fails or refuses to perform the work consistent with normal industry standards.*
 - *The DBE fails or refuses to meet the prime contractor’s nondiscriminatory bond requirements.*
 - *The DBE becomes bankrupt or has credit unworthiness.*
 - *The DBE is ineligible to work because of suspension and debarment.*
 - *It has been determined that the DBE is not a responsible contractor.*
 - *The DBE voluntarily withdraws, with written notification, from the contract.*
 - *The DBE is ineligible to receive credit for the type of work required.*
 - *The DBE owner dies or becomes disabled resulting in the inability to perform the work on the contract.*
 - *Or other documented compelling reason.*

§26.67 What rules determine social and economic disadvantage?

Revise §26.67 (a)(2)(i) to read as follows:

- ✓ *“You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$1.32 million.”*

Revise §26.67(iv) to read as follows:

- ✓ *Notwithstanding any provision of Federal or state law, you must not release an individual’s personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter...” Although, this information must be submitted to DOT in the event of a certification appeal proceeding.*

§26.71 What rules govern determinations concerning control?

Revise §26.67(n) regarding control of DBE firms:

- ✓ *Certification must only be given for the specific types of work the DBE can perform.*
- ✓ *To become certified for additional types of work, the DBE will need to demonstrate that the owners control the firm that performs that type of work. Although, the firm does not have to be recertified, only verification is necessary.*

- ✓ *The works codes for the firm must be kept up-to-date and accurately reflect the work which the firm's owners control. The DBE firm must provide detailed information to the certifying agency needed for the appropriate work codes to be applied.*

§26.73 What are other rules affecting certification?

Revise §26.73(b):

- ✓ *Certification must be based upon the evaluation of a firm on present circumstances.*
- ✓ *A firm must not be denied certification based on the fact it is a new firm and has not completed contracts, obtained profits, or demonstrated success.*
- ✓ *A firm is eligible for certification if it meets disadvantaged, size, ownership, and control requirements.*

§26.81[Amended]

Amend §26.81(g):

- ✓ *Remove the word "section" and add in its place the word "part". Remove the period at the end of the last sentence and add the words "and shall revise the print version of the Directory at least once a year."*

§26.83 What procedures do recipients follow in making certification decisions?

Remove and reserve §26.83(e).

Revise §26.83(h) regarding DBE certification:

- ✓ *A DBE will remain certified until its certification has been removed.*
- ✓ *Currently certified DBEs are not required to reapply for certification. Although, a certification review, including on-site reviews, three years from the date of the most recent certification, or sooner if appropriate, may be conducted. If there are grounds questioning the firm's eligibility, an unannounced on-site review may also be conducted.*

Add §26.83(l) and (m):

- ✓ *As a recipient or certifying agency, each DBE applicant must be advised within 30 days whether the application is complete or what additional information is required.*
- ✓ *If the DBE has withdrawn its application before a decision has been issued, the application can be resubmitted at any time.*
- ✓ *A waiting period may not be applied, but the reapplication may be placed at the "end of the line" behind other applications. The only exception that can be placed is, if a firm has an established pattern of frequently withdrawing applications.*

§26.84 How do recipients process applications submitted pursuant to the DOT/SBA MOU?

Remove section §26.84.

§26.85 Interstate certification

Revise the entire §26.85 and apply this section to any DBE firm that is currently certified in its home state:

- ✓ *If a firm is certified in its home state (State A) and applies for certification in another state (State B), State B may certify the firm if the following is provided:*
 - *The firm must provide State B with a copy of its certification.*

- *State B must confirm the firm has a current valid certification from State A.*
- ✓ *If State B chooses not to accept State A's certification, the DBE firm must provide the following to State B:*
 - *A complete copy of the application form, including all documents, and any other information that was submitted to State A.*
 - *Any notices or correspondence with State A.*
 - *Any notices or correspondence with states other than State A regarding certification in those states.*
 - *State B must be informed if the DBE firm has filed a certification appeal with DOT.*
 - *A sworn affidavit by the DBE firm's owners affirming that all of the required information has been submitted and is complete. A copy must also be sent to State A.*
 - *If the on-site report from State A is over three years old, State B may require that the on-site report remains true and correct.*
 - *State B must contact State A within seven days to request a copy of the site visit report, any updates and the evaluation of the firm. State A must reply within seven days of receiving the request. Any failure to do so will result in noncompliance.*
 - *If State B has not received a copy of the onsite report from State A within 14 days of the request for it, State B must notify the DBE firm, within 30 days from the receipt of the application, the delay and the reason for it.*
 - *State B must determine if there is good cause to believe if State A's certification of the firm should not apply to State B by the following:*
 - *Evidence that the certification was obtained by fraud.*
 - *New information that was not available at the time of certification by State A that the firm is ineligible.*
 - *State A's certification was inconsistent with requirements.*
 - *State law from State B requires a different result.*
 - *The information provided from the DBE firm did not meet the requirements as stated by in this section.*
 - *State B must send to the applicant, within 60 days, a notification of certification with State B.*
 - *If State B has determined that the certification from State A is erroneous and the DBE's application is denied, notification with the reasons of State B's determination must be submitted to the applicant within 60 days. The following must be stated in the notification:*
 - *Specific reasons why the firm does not meet the requirements and the opportunity to respond.*
 - *The DBE firm may request to meet in person with State B to go over the reasons of denial. If so, it must take place within 30 days from the request.*
 - *The DBE bears the burden of demonstrating that it does meet the requirements of State B.*
 - *State B must issue a decision within 30 days of the meeting.*
 - *This decision may be appealed by the DOT Office of Civil Rights.*
 - *If a firm's application is denied for any reason, the DOT's Ineligibility Determination Online Database must be updated with the following information:*
 - *The name of the firm.*

- *The name(s) of the firm's owner(s).*
- *The type and date of the action.*

§26.87 What procedures does a recipient use to remove a DBE's eligibility?

Remove and reserve §26.87(h).

§26.107 What enforcement actions apply to firms participating in the DBE program?

Amend §26.107(a) and (b):

- ✓ *Remove "49 CFR part 29" and add in its place "2 CFR parts 180 and 1200".*

§26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

Revises §26.109(2) regarding the availability of records:

- ✓ *Information may not be released to any third party without written consent that may be construed as confidential business information, including application for certification and supporting documentation.*
- ✓ *Although, in any certification appeal, this information may be given to DOT or to any state in which the firm has applied for certification.*