U.S. Department of Transportation

Office of the Transportation Secretary

Departmental Office of Civil Rights

1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

Memorandum

To: State and Local Recipients Implementing the Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) Program

From: Charles E. James, Sr.
Director, Departmental Office of Civil Rights (DOCR)

Charles E. James, Sr.

Re: Supplemental Guidance: DBE and ACDBE Program Requirements During COVID-19 Public Health Emergency

Date: April 1, 2020 **[UPDATED]**

Thank you for your sustained commitment to disadvantaged businesses as the COVID-19 public health emergency continues to impact the Nation's activities. The Department's Operating Administrations (OAs) are responding as timely as possible to the novel issues that have emerged since the public health emergency began, including those affecting all businesses working on federally funded infrastructure projects and the Nation's airports.

This guidance supplements the March 24, 2020 DBE and ACDBE program guidance and addresses the following seven topics:[1] (1) steps to ensure public participation in the goal setting process; (2) DBE/ACDBE overall goal methodology due dates; (3) "commercially useful function" (CUF) reviews of contracts, agreements, and work performed; (4) in-person meetings between bidder/offerors and reconsideration officials; (5) termination/substitution of DBEs/ACDBEs or partial termination; (6) electronic submission and review of certification documents; and (7) firm owners' signed certifications of eligibility.

DBE Overall Goal Methodology Public Participation Requirements: 49 CFR 26.45(g)(1) requires recipient agencies, as part of their triennial overall goal setting process, to provide opportunities for publication, as well as consultation with stakeholder groups, prior to submitting the methodology to the relevant OA for review. This regulatory provision states that consultation with stakeholder groups must include a scheduled, direct, interactive exchange (e.g., an in-person meeting, video conference, teleconference) with as many interested stakeholders as possible.

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[1] This guidance remains in effect until **July 29, 2020**. This guidance is not legally binding in its own right. Conformity with this guidance, as distinct from existing statutes, regulations, and grant assurances, is voluntary only, and nonconformity will not affect existing rights and obligations.

- In light of the COVID-19 public health emergency, recipients may use alternative methods for carrying out required stakeholder consultation such as:

  1. Instead of holding in-person meetings, recipients may use other options allowed under the rule, such as video conference or teleconferencing, by making use of technologies such as FaceTime, Skype, GoToMeeting, Zoom, and other similar telecommunication applications.

  2. If virtual technology is not accessible, recipients should reach out to stakeholders via email or telephone to ask for their written feedback and input concerning the overall goal methodology.

DBE/ACDBE Overall Goal Methodology Due Dates: 49 CFR 26.45(f)(1)(i) and 49 CFR 23.45(a) require recipients to submit overall goals to the applicable OA by August 1 (DBE) or October 1 (ACDBE) based on the schedule established by the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), or Federal Aviation Administration (FAA), as applicable.

- In light of the COVID-19 public health emergency, the FHWA, FTA, or FAA Administrator may permit extensions to the due date to submit the overall goal methodology.

  1. Extensions for the DBE goal methodologies should only be as long in duration as needed and will not be granted past October 1, 2020 absent approval by the applicable OA.

  2. Extensions for the ACDBE goal methodologies should only be as long in duration as needed and will not be granted past December 1, 2020 absent approval by the FAA.

  3. Recipients may not advertise new opportunities covered by the new overall goal period until submission of goal methodologies has occurred or a request to continue the approved existing overall goal has been made.

  4. Any additional extensions beyond October 1, 2020 and December 1, 2020 may be approved on an individual basis or by the FHWA, FTA, or FAA Administrator.

Commercially Useful Function (CUF) Reviews: 49 CFR 26.55(c) requires recipients to count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a CUF on that contract. To ensure compliance with this requirement, 49 CFR 26.37(a) requires recipients to implement appropriate compliance mechanisms in their DBE programs. Such mechanisms must include measures to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed. See 49 CFR 26.37(b). This mechanism includes a written certification that the recipient has reviewed contracting records and monitored work sites. Similar requirements apply under 49 CFR 23.29 and 23.55.

- In light of the COVID-19 public health emergency, recipients may use alternative methods for carrying out required CUF reviews, such as:

  1. Visiting work sites to take photographs and confirm the DBE's presence and activities (if doing so does not compromise social distancing and does not conflict with COVID-19 guidance issued by State or local authorities).

  2. Asking DBE firm owners and prime contractors to electronically submit key contracting records, such as payrolls, invoices, or electronic communications, demonstrating that the DBE is carrying out a CUF. If firm owners do not have immediate access to physical records, they should submit the documents as promptly as possible within the timeframe of this guidance.

  3. Using computer, tablet, and mobile device technologies, such as FaceTime, Skype, GoToMeeting, Zoom, and other similar telecommunication applications, to interview firm owners/key personnel and take virtual tours of job sites.

  If virtual technology is not accessible, recipients should ask the DBE firm owner to electronically submit supplemental photographs (e.g., equipment, license plate numbers and any branding on vehicles/equipment).

In-Person Meetings Between Bidders/Offerors and Reconsideration Officials: 49 CFR 26.53(d)(3) requires recipients to provide bidders/offerors the opportunity to meet in person with reconsideration officials to discuss whether the bidders/offerors met the goal or made adequate good faith efforts to do so.

- In light of the COVID-19 public health emergency, recipients may utilize computer, tablet, and mobile device technologies, such as FaceTime, Skype, GoToMeeting, Zoom, and other similar telecommunication applications, as an alternate for an in-person meeting between reconsideration officials and bidders/offerors.

Termination/Substitution of DBEs and ACDBEs or Partial Termination: 49 CFR 26.53(f) and 49 CFR 23.25(e) prohibit a prime contractor from terminating a DBE subcontractor it has listed to meet a contract goal (or an approved substitute DBE firm) without good cause and the recipient's prior written consent. A prime contractor may not terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work or substitute another DBE or non-DBE contractor to perform the work after contract award.

When a DBE subcontractor is terminated in accordance with these procedures, the recipient must require the prime contractor to make good faith efforts to find a substitute DBE firm, per 49 CFR 26.53(g).

- In light of the COVID-19 public health emergency, questions may arise regarding the termination and substitution provisions at 49 CFR 26.53(f)-(g). DOT provides the following guidance:

1. Prime contractors must continue to apply the termination and replacement requirements in good faith. Recipients should not approve termination requests for committed DBEs for the sole purpose of cost savings to the prime contractor. Prime contractors must still demonstrate good cause to justify terminating a DBE with committed work on a project.

2. The following documents may be provided in electronic format: (a) prime contractor's written notification to the DBE; (b) prime contractor's request to the recipient to terminate or replace a DBE; (c) a DBE's written response; (d) a recipient's written approval or denial of a prime contractor's submission of good faith efforts documentation; and (e) a recipient's response to the contractor's request to substitute a DBE.

Electronic Submission and Review of Certification Documents (Applications, Notification of Material Change, Annual Affidavits): 49 CFR 26.83(k) requires certifiers make decisions on DBE and ACDBE certification applications within 90 days of receipt of all required information. 49 CFR 26.83(l) requires recipients to advise applicants within 30 days of receiving a certification application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

- Because of the COVID-19 public health emergency, recipients may not have access to certain documents. Recipients that do not have electronic systems for firms to submit documents should take the following steps:

  1. Establish an email address to which firms can send certification applications, notification of material changes, annual affidavits, documentation of business size, and other correspondence.

  2. Post the email address to their websites, with an explanation that the recipient does not have access to mail that would have arrived after a certain date, and urge firms to send (or resend) all correspondence to the new email address.

  3. Email existing DBEs to notify them about the temporary procedures.

- Because of the COVID-19 public health emergency, recipients may encounter difficulties obtaining certification documents and/or meeting the deadlines specified in 49 CFR 26.83(k) and (l). If this is the case, we advise the following:

  1. The 30-day deadline from which recipients must notify each applicant whether their application is complete and suitable for evaluation can be calculated by the date the recipient receives the emailed application.

  2. The rule provides that recipients may extend the time period to make decisions on certification applications once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. Pursuant to this guidance,

recipients may extend this period to 90 days after notifying the firm and the appropriate OA.

3. Recipients may extend the deadline for filing notices of material change (as required by 49 CFR 26.83(i)) and an annual affidavit and documentation of business size (as required by 49 CFR 26.83(j)) by up to 60 days. Recipients should accept email or electronic filings of the information.

4. The deadlines in 49 CFR 26.85(d)(1) and (3) for recipients to process interstate certification applications will be calculated based on the date on which the recipient receives the emailed applications.

Notarized Statements: When evaluating a firm's eligibility for DBE or ACDBE certification, 49 CFR 26.67(a)(1) requires a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged. 49 CFR 26.67(a)(2) requires a signed and notarized personal net worth statement with appropriate supporting documentation. 49 CFR 26.83 also requires applicants to submit affidavits attesting to the accuracy of the application, and that there have been no changes of circumstances affecting the firm's ability to meet DBE requirements.

- In light of the COVID-19 public health emergency, recipients may use alternative methods to meet the requirements, such as:

  1. Allowing the use of online notary public services if the recipient's State permits notarized digital signatures validated with an electronic notary seal.

  2. Allowing the use of a subscribing witness if the recipient's State permits such use permitting the document to be signed in the presence of a witness; the witness, not the signer, then appears before a notary if doing so does not compromise social distancing.

  3. Allowing the filing of unsworn declarations executed under penalty of perjury rather than sworn affidavits, including affidavits of no change.

  4. Allowing unsworn declarations as an interim measure and requiring the applicant or certified firm to follow up with a sworn version at a to-be-determined later date.

We appreciate your patience as we identify other potential effects of the COVID-19 public health emergency on small businesses, which are vital to the Nation's economy. Additional guidance may be developed as needed and posted along with the other resources provided by the Department at https://www.transportation.gov/coronavirus

Please take all necessary precautions to remain safe, continue the good work, and raise any concerns you have directly with your respective Operating Administration civil rights specialists/officers/program managers. Thank you.