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: DBE and ACDBE Certification Procedures During COVID-19 Public health emergency

Date: March 24, 2020 **[UPDATED]**

We recognize that your offices and operations are impacted by the coronavirus disease 2019 (COVID-19) public health emergency, both at home and at work. To help ensure the safety and well-being of everyone, while also ensuring that we continue to meet our mission to disadvantaged businesses, we are providing the following guidance on the certification topics below.[1] The following guidance will remain in effect **until July 29, 2020.** Additional guidance on other program topics will be forthcoming.

- **On-Site Visits:** When evaluating a firm's eligibility for DBE or ACDBE certification, 49 CFR 26.83(c)(1)(i) requires recipients to perform an on-site visit to the firm's principal place of business, interview the principal officers and/or other key personnel, and visit job sites where the firm is working at the time of the eligibility investigation in your jurisdiction or local area. The regulation allows recipients to rely upon the site visit report of any other recipient with respect to a firm applying for certification.

  - 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, to interview firm owners/key personnel and take virtual tours of office space, equipment, and job sites. Recipients may use their discretion in adopting policies specific to their State and authorized by their agency leadership, such as:

[1] The guidance here 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.

(1) visiting the residence/office building to take external photographs and confirm the owner's presence (if doing so does not compromise social distancing);

(2) conducting drive-by visits of job sites to photograph necessary items (if doing so does not compromise social distancing); and

(3) asking firm owners to electronically submit supplemental and additional pictures of equipment, license plate numbers, and any branding on vehicles/equipment.

If virtual technology is not accessible and a telephone interview is conducted, we suggest agencies ask the firm owner to electronically submit supplemental photographs (e.g., office space, equipment, license plate numbers and any branding on vehicles/equipment). To the extent practicable, we also suggest recipients record virtual and telephone interviews, after first notifying the interviewees of the recording.

- **Interstate Certification:** The DBE regulation's interstate certification rules allow a firm certified in its home State to seek interstate certification in a new State (State B). Should State B have objections to the firm's eligibility, the DBE may respond in writing, or request an in-person meeting with State B's decision maker to discuss State B's eligibility concerns, or both (49 CFR 26.85(d)(4)(ii)). If the firm requests a meeting, State B must schedule the meeting to take place within 30 days of receiving the firm's request.

  - In light of the COVID-19 public health emergency, if the DBE requests a meeting, recipients may utilize computer, tablet, and mobile device technologies such as FaceTime, Skype, GoToMeeting, Zoom, and other similar telecommunication applications, to conduct a meeting. If an applicant firm cannot participate in a virtual meeting, the 30-day period will pause on the date that the recipient attempts to schedule the meeting. The 30-day period will not resume until an in-person meeting can be held without compromising social distancing and other public health measures. Recipients should keep accurate written records of all pertinent dates.

- **Decertification Hearings:** In a decertification proceeding, 49 CFR 26.87(d) requires recipients to give the firm an opportunity for an in-person hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility. In lieu of a hearing, firms are permitted to submit written information or arguments and/or evidence.

  - 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, to conduct an informal hearing. However, recipients <u>must</u> maintain a complete record of the hearing, by any means acceptable under State law for the retention of a verbatim record of the hearing, and <u>must</u> retain the original record of the hearing.

- **Summary Suspension:** When applicable circumstances warrant, 49 CFR 26.88(d) requires a recipient to immediately notify a DBE of the recipient's decision to summarily suspend the DBE's certification by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

  - Due to the COVID-19 public health emergency, recipients are permitted to electronically notify a DBE of the decision to summarily suspend the DBE's certification in lieu of notification by certified mail. Because of the importance of accurate recordkeeping, recipients may not use telephonic notification.

- **Appeal Instructions and Recipient Records**: Recipients are required to give denied or decertified firms instructions on how to appeal to DOCR (49 CFR 26.89); recipients often instruct these firms to mail their appeal.

  - In light of the COVID-19 public health emergency, we urge recipients to immediately change the appeal rights notification at the end of denial and decertification letters to read:

    "You may appeal this decision to the U.S. Department of Transportation. If you want to file an appeal, you must email it to S33AppealsManagementRecords@dot.gov within 90 days of the date of this letter. The appeal must include this letter and other pertinent information and provide a *full and specific* statement as to why our decision is erroneous, what significant fact we failed to consider, or what provisions of 49 CFR Part 26 we did not properly apply. USDOT does not accept notices of intent, partial, or otherwise non-complaint submissions."

    If your agency has denied or decertified firms within the last 90 days and did not notify them they may appeal electronically, please inform them they need to refile identical materials to the S33 appeal mailbox above. Upon receiving an appeal, DOCR will continue to notify recipients by email and provide a filesharing link to send the complete administrative record within 20 calendar days. Appropriate extensions may be granted upon request.

In addition to the above, I urge you to inform the small business community that the Small Business Administration (SBA) is working directly with State Governors to provide targeted, low-interest loans to small businesses and non-profits that have been severely impacted by COVID-19. The SBA's Economic Injury Disaster Loan program provides small businesses with working capital loans of up to $2 million that can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing. For more information, visit https://www.sba.gov/disaster-assistance/coronavirus-covid-19.

We will continue to communicate with you as the situation evolves. We ask for your patience as we work through these issues that affect many different aspects of the DBE program. Our priority is to maintain the well-being of everyone. Thank you again for your commitment and dedication to this effort. Please stay safe, continue the good

work, and raise any concerns you have directly with your respective Operating Administration civil rights specialists/officers/program managers.