



Aviation Group Client Update

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DOT PROPOSES CHANGES TO DBE PROGRAM RULES

On [September 6, 2012](#), DOT proposed long-awaited changes to its disadvantaged business enterprise (DBE) program rules, set forth in 49 C.F.R. Part 26. Three areas of the DBE program are affected with the changes affecting both DBEs and recipients of federal funds: (1) personal net worth, application, and related reporting forms; (2) certification-related provisions; and (3) DBE program goals, good faith efforts, and transit vehicle manufactures. The proposed changes relate to a prior DOT rulemaking which made substantial DBE program changes in [2011](#). DOT's DBE program was recently reauthorized by Congress without substantive change on [July 6, 2012](#). DOT is accepting comments on this proposal until **November 5, 2012**.

Personal Net Worth and Related Forms:

DOT proposes a newly designed personal net worth (PNW) statement required of all applicants and those submitting annual affidavits. It requires inclusion of all assets owned by an individual, including ownership interests, personal assets, and the value of the personal residence. DOT also proposes to broaden the areas which automatically rebut a presumption of disadvantage. Presently, a PNW exceeding \$1.32 million rebuts a presumption of disadvantage. DOT proposes to add that where a person evidences an ability to accumulate or obtain access to substantial wealth, or has not had to overcome impediments to accessing financing and financial resources, the presumption of disadvantage is rebutted, even if the threshold of \$1.32 million is not exceeded. A transfer of assets within the previous two years prior to DBE certification may be calculated in the PNW. A spouse's financial situation may also be considered in determining a person's access to credit or support.

Additionally, the application form used by firms applying for DBE certification, and the Uniform Report of DBE Commitments/Awards and Payments would be revised. The existing Report did not allow DOT to break out certain categories of information, such as woman-owned DBE participation by race. It will also address inadequate and confusing instructions, the inability to respond to differing needs of differing business types, and difficulties in collecting information on payments to DBE on an ongoing basis.

Certification-Related Provisions:

DOT proposes changes to determinations of DBE ownership and control. It will require additional substantiation of a business owner's contribution and circumstances involving funding streams since the company's inception. This includes valuation of collateral, proof of ownership of highly-valued company assets, and more stringent guidelines on funds used in acquiring company ownership interests. DOT will require federal fund recipients to carefully scrutinize transactions involving financing obtained by a DBE owner's sale of interest in the company.

There are also new provisions regarding profit distributions issued to one or more DBE owners. DOT is also proposing to strengthen provisions regarding the extent to which disadvantaged individuals actually control their firm in both substance and form, including requiring federal funds recipients to look closely where non-disadvantaged individuals are involved in decision-making and controlling roles in a DBE firm.

An existing rule allowing recipients to require that applicant firms be prequalified as a condition for certification is being dropped. DOT states that requiring prequalification may impose an unnecessary barrier to DBE participation.

DOT proposes to add to recipients' requirements in determining an entity's DBE qualification. Recipients will be required to interview a DBE firm's key personnel, in addition to its principal officers, and must perform an on-site visit at the firm's principal place of business. Recipients will also be required to analyze a DBE's documentation of legal structure, ownership, and control, including but not limited to Articles of Incorporation/Organization, corporate by-laws or operating agreements, annual and board meeting records, and stock ledgers and certificates. Recipients must also analyze lease and loan agreements, bank signature cards, and payroll records. Where DBE firms apply for certification in more than one North American Industrial Classification System (NAICS) code, recipients must obtain information about the amount of work performed in the various classification codes.

Rules regarding DBE certification denials, suspensions of eligibility and certification, and appeals will also be revised and clarified.

DBE Program Goals and Good Faith Efforts:

In its proposal, DOT states that the purpose of Part 26 is "to promote the use of all types of DBEs." In doing so, DOT emphasizes that the DBE program is about more than just construction; it include such things as professional services and supplies. Eight new definitions are included, including "assets", "days", "liabilities", and "principal place of business". DOT also confirms and clarifies that all entities receiving more than \$250,000 in Federal Transit Administration (FTA) or Federal Aviation Administration (FAA) funds in the aggregate (not individual prime contracts) must have a DBE program.

DOT proposes clarifications and steps for recipients to establish their individual DBE goals. Recipients would have two options with regard to documentation of good faith efforts. First, bidders may submit documentation along with original bids. Alternatively, bidders may submit good faith documentation within one day of being notified of their winning bid. DOT states prime contractor bidders whose bid includes a promise to include DBEs after the contract award is not considered to be part of a good faith effort. Finally, DOT adds examples of good faith effort to Appendix A which recipients may use to help establish a DBE participation goal.

If you have any questions regarding the proposed rule changes, please contact our office.

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