

DOT Issues NPRM Relating to DBE Requirements

On May 10, 2010, the United States Department of Transportation (DOT) issued a Notice of Proposed Rulemaking (NPRM) regarding additional proposed changes to the Disadvantaged Business Enterprise (DBE) regulations at 49 CFR Part 26 (Part 26), applicable to all recipients of federal grants through an agency within DOT, including the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). (Available at <http://tinyurl.com/28eml4y>.) DOT is soliciting comments on the NPRM through July 9, 2010. Earlier changes to the DBE program proposed by DOT were discussed in our February 9, 2010 alert, available at <http://tinyurl.com/2wfwk3x>.

The provisions of the May 10, 2010 NPRM fall into three broad categories:

- A DOT grant recipient's accountability for its failure to meet its DBE goals
- Requirements concerning termination of DBEs
- Modifications to the DBE certification process and requirements

A brief summary of each is set forth below. DOT grant recipients are encouraged to read the NPRM carefully and submit comments.

Recipient's Accountability for Failure to Meet DBE Goals

Part 26 currently provides that a recipient cannot be penalized for failing to meet its DBE goals unless it has failed to administer its DBE program in good faith. The NPRM proposes to add requirements that if a recipient fails to meet its DBE goal in any fiscal year, the recipient must: (i) analyze in detail the reasons for the difference between its goal and actual commitments; (ii) establish specific steps and milestones to correct the problems identified; (iii) for most recipients, submit the analysis and proposed corrective actions to the applicable agency (i.e., FAA, FHWA, or FTA) for approval (with the agency having the right to impose conditions on the recipients as part of its approval process). (See proposed revisions to § 26.47.) A recipient may be regarded as being in noncompliance with Part 26 and thus ineligible for further grants and subject to other remedies, if the analysis and corrective actions are not submitted, the analysis or corrective actions are disapproved, or the recipient does not fully implement the approved corrective actions. These proposed changes to Part 26 would significantly raise the stakes for a recipient of DOT grants that fails to meet its DBE goals.

In addition to making recipients accountable for failing to meet their DBE goals, the NPRM provides that a recipient's DBE program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs is actually performed by DBEs, including written certification regarding review of contracting records and monitoring work on-site.

The NPRM would add a new section 26.39 that requires a recipient's DBE program to include elements designed to facilitate competition by small businesses, including "taking all reasonable steps to eliminate obstacles to their participation." This element of the DBE program must be submitted to the applicable agency for its approval as part of the recipient's DBE program.

Requirements Concerning Termination of DBEs

Under the NPRM, DOT grant recipients also would have a heightened duty to ensure that a prime contractor does not terminate a DBE subcontractor's participation in a project except for cause. The NPRM would require that all contracts between a recipient and contractor that apply DOT funds expressly provide that a DBE cannot be terminated except for good cause and only with the recipient's written consent. The NPRM sets forth a list of 11 factors that constitute good cause, and the good cause found must be stated in the recipient's concurrence. Before requesting that a DOT grant recipient approve the termination of a DBE, the contractor must give the DBE (with a copy to the recipient) notice of its intent to terminate the DBE and the reason(s) therefor, and five days to respond to the contractor's notice by advising both the recipient and the contractor of the reasons why the DBE objects to the proposed termination. These provisions also apply to any proposed pre-award deletion or substitution of a DBE by a contractor. (See proposed revisions to § 26.53.)

Modifications to DBE Certification and DBE Qualifications

The majority of the changes proposed by the NPRM relate to the certification and qualification process for DBEs, which also will affect the

airport concessionaire DBE (ACDBE) program under 49 CFR Part 23, which incorporates large parts of the certification process under Part 26. Set forth below are summaries of the principal proposed changes to these processes:

Interstate Certification

DOT has made it clear for some time that it is seeking ways to streamline the certification process for DBEs already certified in their home state. Proposed new Section 26.84 sets up a process designed to do just that, by permitting another state to accept the home state's DBE certification without further procedures, by simply confirming the status of the applicant as a DBE with its home state. If the second state chooses not to accept the home state's certification, however, the proposed changes to Part 26 would establish an expedited process for approval that places a strong burden of proof on the second state to determine that the home state's certification was in error or is inapplicable in the second state and, otherwise, requires the second state to certify the applicant as a DBE. If the second state determines that there is good cause to believe that the applicant should not be certified, then it must provide notice to the applicant and an opportunity for a hearing, and the second state bears the burden of proving that the applicant is ineligible for DBE status. The second state also must provide notice of its determination to the DOT Office of Civil Rights through its online database. The NPRM also sets up an expedited process for approving applicants certified by the Small Business Administration under its 8(a) program as DBEs (See new § 26.85).

Presumption of Continued Eligibility

Subsection 26.83(h) would be revised to clarify that once a DBE has been certified, it remains certified as a DBE until and unless its certification is removed, in accordance with the removal provisions of Section 26.87.

Evaluation Based on Current Circumstances

Section 26.73 would be revised to emphasize that an applicant's DBE status must be evaluated based upon its current circumstances and that historical information indicating ineligibility is not germane to the process. Further, a firm cannot be denied certification on the basis that it is a newly formed firm. "If the firm meets disadvantaged, size, ownership, and control requirements, of [Part 26], the firm is eligible for certification."

Certification for Specific Types of Work

Subsection 26.71(n) would be revised to emphasize that a firm can be certified as a DBE only for a specific type or types of work, as described in terms of the North American Industry Classification System (NAICS) or a classification scheme of similar specificity and detail. However, in order to be certified to perform another type of work, the firm need not reapply for DBE status, but only need demonstrate that the disadvantaged owners are able to control the firm with respect to the additional type of work.

Personal Net Worth

DOT would revise upward the maximum personal net worth of each individual owner of a DBE applicant (other than an Airport Concessions DBE) to \$1.3 million from the current cap of \$750,000, to reflect inflation since 1989. The method of calculating personal net worth would not be changed.

Docket No. OST-2010-0118.

Robert C. Ashby, DOT Deputy Assistant General Counsel for Regulations and Enforcement, can be contacted for further information. Comments on the NPRM are due by July 9, 2010 and may be submitted electronically to www.regulations.gov.

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