

## Alert | Government Contracts



June 2024

### U.S. Department of Transportation Updates DBE and ACDBE Regulations

**Go-To Guide:**

- U.S. Department of Transportation (DOT) announced numerous changes to the Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) Programs that went into effect May 9, 2024.
- Notable changes to the DBE regulations include updates to personal net worth and program size thresholds, certification requirements and procedural rules, and increasing flexibility for DBE firms and funding recipients.
- Any final decision by a DBE certifier issued on or after May 9, 2024, must apply the new rules; applications currently under review and decertifications in progress will be based on the new rule.

The DBE and ACDBE programs are designed to allow small businesses owned and controlled by socially and economically disadvantaged individuals to compete fairly for DOT-funded contracts led by state and local transportation agencies and in airport concession opportunities. As recipients of DOT funding, states implement the federal DBE program and transportation agencies and airports, called “Sponsors,” develop their own DBE contracting goals in accordance with DOT regulations, found at 49 C.F.R. Parts 23 and 26.<sup>1</sup>

<sup>1</sup> David Keen et al., *Compendium of Successful Practices, Strategies, and Resources in the U.S. DOT Disadvantaged Business Enterprise Program* 14, 36 (Nat’l Acad. of Sci., Eng’g, and Med., 2019).

The DOT reports nearly 50,000 certified DBEs and 3,500 certified ACDBEs.<sup>2</sup> State and local agencies that implement the DBE program—which includes 53 departments of transportation, more than 500 transit agencies, and 3,200 eligible airport sponsors<sup>3</sup>—certify these firms.

The rules governing DBE certification in every state are set in 49 C.F.R. Parts 26. For the first time in a decade, the DOT has modernized the DBE program, including streamlining the DBE and ACDBE certification and eligibility process, aligning DBE and ACDBE program definitions, implementing COVID-19 flexibilities, and expanding reporting requirements for DOT-funding recipients.

This GT Alert summarizes some of the key changes to the DBE program that DBE firms and applicants should be aware of.

### **A. Personal Net Worth**

The changes include an update to the personal net worth and program size thresholds for the DBE program. Taking into account inflation and most common forms of wealth, DOT has increased the personal net worth limit from \$1.32 million to \$2.047 million.<sup>4</sup> Furthermore, personal net worth will now exclude retirement assets and 100% of the personal property in a DBE-owner's primary residence (which is lowered to 50% if the owner lives with a spouse or domestic partner).<sup>5</sup> State marital and community property laws will also no longer have an effect on personal net worth, a change that may increase predictability and level the playing field for DBEs in every jurisdiction.<sup>6</sup>

### **B. DBE/ACDBE Size Standards**

Generally, a firm and its affiliates must be a small business, as defined by the Small Business Administration (SBA).<sup>7</sup> It must not have annual gross receipts in excess of the DBE size limits and must meet the size standard appropriate to the type of work to be performed on the specific DOT-assisted contract, which continues to be determined by the applicable NAICS Code.<sup>8</sup> Starting March 1, 2024, DOT adjusted the business size limit for applicants and certified DBEs seeking FHWA and FTA-assisted contracts for inflation from \$30.40 million to \$30.72 million.<sup>9</sup> The adjusted gross receipts cap does not apply to determining a firm's eligibility for FAA-assisted projects.<sup>10</sup>

For the ACDBE program, DOT considers a firm a small business if its gross receipts, in accordance with 13 CFR 121.104, averaged over the firm's previous five fiscal years, does not exceed \$56.42 million.<sup>11</sup> The new final rule requires ACDBEs that are parties to a joint venture to now include the proportionate share of joint venture receipts in its gross receipt calculation.<sup>12</sup>

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<sup>2</sup> *USDOT Significantly Modernizes the Disadvantaged Business Enterprise Program and Airport Concession Disadvantaged Business Enterprise Program Regulations*, U.S. Dep't of Transp. (Apr. 9, 2024).

<sup>3</sup> *Id.*

<sup>4</sup> *DBE and ACDBE Program Implementation Modifications*, 89 Fed. Reg. 24898, 24921 (Apr. 9, 2024) (to be codified at 49 C.F.R. pts. 23, 26); 49 C.F.R. § 26.68.

<sup>5</sup> 49 C.F.R. § 26.68(c)(10); *DBE and ACDBE Program Implementation Modifications*, 89 Fed. Reg. at 24922.

<sup>6</sup> 49 C.F.R. § 26.68(c); *DBE and ACDBE Program Implementation Modifications*, 89 Fed. Reg. at 24922.

<sup>7</sup> 49 C.F.R. § 26.65(a).

<sup>8</sup> 49 C.F.R. § 26.65(b); 13 C.F.R. § 121.101(a).

<sup>9</sup> *DBE/ACDBE Size Standards*, U.S. Dep't of Transp. (last visited May 9, 2024).

<sup>10</sup> *Id.*

<sup>11</sup> 49 C.F.R. § 23.33(a).

<sup>12</sup> 49 C.F.R. § 23.33(c).

### C. Ownership

Additional key updates to the DBE program include an overhaul of the ownership requirements for certification eligibility. The new DBE rules frame ownership in terms of “investments” and provide detailed guidance on which types of investments in ownership make a firm eligible for certification.<sup>13</sup> DOT considers transactions/transfers such as purchases, capital contributions, and certain gifts ownership investments.<sup>14</sup>

Notably, the final rule clarifies that contributions of time, labor, and services (also referred to as “sweat equity”) do not qualify as investments.<sup>15</sup> Purchases, capital contributions, and gifts are considered investments if they have real economic effect and meet specified standards regarding maintenance and proportionality.<sup>16</sup> The disadvantaged owner cannot withdraw their investment and must maintain its proportion relative to those of other owners.<sup>17</sup> Moreover, no owner can derive benefits and burdens disproportionate to their ownership share.<sup>18</sup> The new rule also removes the marital property provisions, previously codified at 49 C.F.R. § 26.69(i), from the determination of DBE ownership.

Lastly, the final rule addresses debt-financed investments, which have presented a practical challenge to certifiers. Borrowing to finance a disadvantaged owner’s investment in the DBE firm is acceptable and will not prevent certification, provided it does not exceed 85% of the total value of the investment, the firm itself is not the lender or guarantor, and the loan is arms-length and enforceable.<sup>19</sup>

### D. Control

The amendments related to control of a DBE firm have a dual objective of removing obstacles from applicant firms while ensuring that states and local agencies only certify those firms that are genuinely controlled by disadvantaged owners.<sup>20</sup> The primary question certifiers must now ask is: does the disadvantaged owner run the show?<sup>21</sup> The final rule puts this responsibility on the certifier, recommending more in-depth inquiries (including interviewing employees) over a simple review of an operating agreement. DOT encourages certifiers to make the following inquiries:

1. Do other key employees bring issues or problems to the disadvantaged owner?
2. Who asks good questions and then makes the decisions which others carry out?
3. Do others make decisions autonomously without involving the disadvantaged owner or disregarding their direction?
4. Can the applicant provide examples about how real-life decisions were made within the firm in the past?

The final rule includes specific governance requirements, e.g., the disadvantaged owner must hold the highest officer position, as well as prohibitions, e.g., quorum requirements for a board of directors must not block the disadvantaged owner from calling a meeting to act on business of the firm.<sup>22</sup>

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<sup>13</sup> 49 C.F.R. § 26.69(b)(1), (c).

<sup>14</sup> *Id.*

<sup>15</sup> 49 C.F.R. § 26.69(d)(3)

<sup>16</sup> 49 C.F.R. § 26.69(b)(2)-(3); DBE and ACDBE Program Implementation Modifications, 89 Fed. Reg. at 24926.

<sup>17</sup> 49 C.F.R. § 26.69(b)(3)

<sup>18</sup> *Id.*

<sup>19</sup> 49 C.F.R. §§ 26.69(d)(5), 26.70(a)

<sup>20</sup> DBE and ACDBE Program Implementation Modifications, 89 Fed. Reg. at 24929.

<sup>21</sup> *Id.*

<sup>22</sup> 49 CFR 26.71(c).

## E. Implications for DBE Firms and Applicants

The changes discussed here include only a handful of the modifications made to the DBE and ACDBE programs. Consult the [full text of the final rule](#), along with a summary, webinars, and training sessions from DOT, for more information.

While DOT believes the rule does not change the underlying programs or projects carried out with department funds, the modifications may impact who is eligible for the DBE program.<sup>23</sup> These changes may also open opportunities for more disadvantaged small businesses to take advantage of the programs and streamline the certification process. Those wishing to learn more about the full extent of changes to the DBE and ACDBE programs and how they may affect a business's certification or eligibility should consult an experienced government contract attorney.

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<sup>23</sup> DBE and ACDBE Program Implementation Modifications, 89 Fed. Reg. at 24956.