

## 49 CFR Part 26, SUBPART D

### CERTIFICATION ELIGIBILITY & STANDARDS

#### 26.61 Burdens of Proof

- (a) USA certification eligibility determinations for participation as a DBE will be applied to the standards of this subpart.
  - (b) Any firm seeking certification has the burden in
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## **26.67 Social and Economic Disadvantage Determinations**

- (a)(1) USA rebuttably presumes that citizens of the United States (or lawfully admitted permanent residents) who are Women, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals.

All applicants must attest via signature and notarization that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

- (2)(i) Each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification must also submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.
- (ii) Net worth determinations exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residency,. No contingency liabilities will be considered in reducing an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation:
- Cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2000 per individual, per annum; Stock (including stock issued or distributed by an ANC as a dividend or distribution on stock);
  - Stock (including stock issued or distributed by an ANC as a dividend or distribution on stock);
  - Land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock);
  - An interest in a settlement trust.
- (b)(1) Rebuttal of Presumption of Disadvantage. In cases evidencing that an individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted and no proceeding under paragraph (b)(2) of this section is required.
- (b)(2) In cases where there is a reasonable basis to believe that an individual who is a member of one of the designated groups is not socially and/or economically disadvantaged, USA may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Such proceedings will follow the process outlined in section 26.87.
- (3) In such a proceeding, USA has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. USA may require the individual to provide additional information relevant to the determination of his or her disadvantage
- (4) In cases where an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility, unless he or she makes an individual showing of social and/or economic disadvantage. In cases where the rebutting of presumption is being applied to the individual's personal net worth exceeding the \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

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- (t) USA will only consider contributions of expertise by the socially and economically disadvantaged owners if they demonstrate the following:
  - (i) A specialized field;
  - (ii) Outstanding quality;
  - (iii) Critical to the firm's operations;
  - (iv) Indispensable to the firm's potential success;
  - (v) Specific to the firm's principal business activities;
  - (vi) Documented in the records of the firm, clearly identifying the contribution of expertise and its relative value to the firm;
  - (vii) The individual whose expertise is being relied upon must have a significant financial investment in the firm.
  
- (g) USA will only deem as held by a socially and economically disadvantaged individual, in determining ownership, all interests in a business or other assets obtained by the individual if they demonstrate the following:
  - 1) A final property settlement or court order in a divorce or legal separation, provided that no term conditions are inconsistent with this requirement;
  - 2) An inheritance due to the death of the former owner;
  
- (h)(1) USA will not consider as being held by socially and economically disadvantaged ownership, interests or assets in a business obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is:
  - (i) Involved in the same firm for which the individual is seeking certification or an affiliate of that firm;
  - (ii) Involved in the same or similar business or industry; (iii) Engaged in an ongoing business relationship with the firm or its affiliate;
  - (2) USA will consider the interests or assets to be counted only if the disadvantaged owner can demonstrate by clear and convincing evidence that:
    - (i) The gift or transfer was made for reasons other than obtaining certification;
    - (ii) The disadvantaged individual actually controls the management, policy and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift.
  
- (I) USA will apply the following rules when considering marital assets as a basis or ownership of a firm:
  - 1) When marital assets held jointly or as community property are used to acquire the ownership interest asserted by one spouse, the ownership interest will be deemed to have been acquired by that spouse with his or her individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state domiciled by the spouse or firm;
  - 2) The document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire ownership interest in the firm must be included as part of the firm's DBE application.
  
- (J) USA, in determining ownership, will not regard a contribution of capital as failing to be real and substantial or find a firm ineligible solely because:

- 1) The socially and economically disadvantaged individual acquired ownership interest as the result of a gift, or transfer without adequate consideration other than the types set forth in paragraph (h) of this section;
  - 2) There is a co-signature provision for a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real personal property, bank signature cards, or other documents;
  - 3) Ownership of the firm or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. However, USA will give particularly close and care
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- (e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm. However, such individuals must not possess or exercise the power to control the firm or be disproportionately responsible for the operation of the firm.

- (o) USA will consider DBE eligibility for franchisees if they meet the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee.
- (p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, non-disadvantaged partners must not have the power to contractually bind the partnership or subject the partnership to contract liability without the specific written concurrence of the socially and economically disadvantaged partner(s).
- (q) USA recognizes the use of employee leasing companies provided that the use of such leasing companies does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees.

**26.73 Other Rules Affecting Certification**

- (a)(1) USA does not consider commercially useful function issues with respect to DBE certification eligibility standards. USA recognizes that commercially useful functions pertain solely to counting DBE participation and goals.
- (a)(2) USA will consider whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements



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- (a) (1) USA will review any complaints, either written or anonymously filed, alleging that a currently certified firm is ineligible. Complaint reviews will be initiated only when specific reasons why the firm is ineligible have been identified. Confidentiality of complainants' identities is protected as provided in section 26.109(b).
- (2) USA will review any material provided by the firm and the complainant, and any other available information. USA may request additional information from the firm or c.9 (al id[ ]-10955c6[ ])w 22.1b3ously file1oll

(b) All firms notified of reasonable cause to remove eligibility will be provided an opportunity for an informal hearing at which the firm may respond to the proposed removal of eligibility. A firm may provide information and arguments concerning why it should remain certified either in person or elect to present information and arguments in writing without going to the hearing.

(1) USA will bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of part 26.

(2) USA will maintain a complete record of the hearing, acceptable under state law for the retention of a verbatim record of an administrative hearing. DOT appeals if there is an appeal to DOT under 26.89, DOT will receive a transcript of the hearing. USA will retain the original record of the hearing and only provide a copy of the transcript to the firm when requested. A charge for only the cost of copying the record will be imposed upon all firms in informal hearings.

(3) Firms may opt to present information and arguments in writing, without going to a hearing.

(c) USA will ensure that a decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject to direction from the office or personnel who did take part in these actions.

The decision maker will be an individual who is knowledgeable in the certification requirements of USA's DBE

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(f) When USA is required to provide supplemental information to USDOT, it will also make this information available to the firm and any third-party complainant consistent with Federal or applicable state laws concerning; freedom of information and privacy.

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## 49 CFR PART 26, SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING

### 26.55 HOW IS DBE PARTICIPATION COUNTED TOWARD GOALS?

- (a) When a DBE participates in a contract, USA counts only the value of the work actually performed by the DBE toward DBE goals.
  - (1) USA counts the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Included is the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
  - (2) USA counts the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided it determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
  - (3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
- (b) When a DBE performs as a participant in a joint venture, USA counts a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
- (c) USA counts expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

- (5) USA decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.
- (d) USA will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
- (1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
  - (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
  - (3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
  - (4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
  - (5) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
  - (6) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.
- (e) USA counts expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
- (1)(i) If the materials or supplies are obtained from a DBE manufacturer, USA counts 100 percent of the cost of the materials or supplies toward DBE goals.
  - (ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
  - (2)(i) If the materials or supplies are purchased from a DBE regular dealer, USA counts 60 percent of the cost of the materials or supplies toward DBE goals.
  - (ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
    - (A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
    - (B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

