

USDOT Significantly Modernizes the Disadvantaged Business Enterprise Program and Airport Concession Disadvantaged Business Enterprise Program Regulations

On April 9, 2024, the U.S. Department of Transportation (USDOT) issued a final rule that modernizes the Disadvantaged Business Enterprise (DBE) program and Airport Concessions DBE (ACDBE) program regulations. These Congressionally mandated programs were created over 40 years ago to address and remedy the continuing effects of past discrimination against small businesses owned and controlled by minorities, women, and other socially and economically disadvantaged individuals and continue today to prevent and address ongoing discrimination.

The major objectives of this final rule include modernizing existing principles to: improve provisions for the benefit of program participants, reduce burdens on firms and recipients, grow firm capacity and owner wealth, and improve program integrity, visibility, and data collected by the USDOT.

Nationwide, the program is implemented by 53 departments of transportation (including the District of Columbia, Puerto Rico, and U.S. Virgin Islands), over 500 transit agencies, and 3,200 eligible airport sponsors, of which nearly 400 also operate an ACDBE program. There are nearly 50,000 certified DBEs and 3,500 certified ACDBEs, and many participate on federally assisted aviation, highway, and transit projects as well as airport concession opportunities in nearly every jurisdiction.

“Our Department believes in making sure that small and disadvantaged businesses, which have historically faced discrimination, can have a fair chance to compete for federally funded transportation work. Today we are proud to announce a major package of improvements to modernize and streamline the rules around these programs, which are already vital but have the potential to do even more to level the playing field. Through this rule change, we’ve addressed many of the challenges DBEs and ACDBEs have faced over the years, and we’re excited that these businesses can now more efficiently and effectively compete for infrastructure projects and airport concessions – something that’s especially important now as President Biden leads the biggest investment in American infrastructure in generations,” said U.S. Transportation Secretary Pete Buttigieg.

The Biden-Harris Administration continues to emphasize equitable contracting to spur generational wealth, particularly for Americans who have experienced barriers or are underrepresented in the infrastructure community.

Key changes made to the DBE and ACDBE programs include several provisions that will have a direct impact on eligible firms and the contractors that hire them, such as:

- streamlining the DBE and ACDBE certification and eligibility process
- adjusting the personal net worth (PNW) cap for inflation for small business owners, including excluding retirement assets from the calculation.
- formalizing guidance establishing successful COVID-19 flexibilities such as virtual on-site visits, to conserve certification and firm resources
- modernizing the rules for counting participation by DBE material suppliers and clarifying terminology
- addressing specific distinctive issues with the ACDBE programs involving FAA recipients including holdovers in the definition of “long-term exclusive leases” in the ACDBE program,
- replicating the DBE program’s small business element requirements for the ACDBE program
- making technical corrections and other updates such as expediting interstate reciprocity.
- expanding recipient reporting requirements to USDOT to gain greater knowledge of DBE/ACDBE characteristics, bidding/solicitation practices and utilization and overall program impact
- strengthening monitoring and prompt payment requirements
- enhancing ACDBE goal setting and reporting requirements

A summary table of the final rule can be accessed at:

<https://www.transportation.gov/DBEFinalRule>

Source: USDOT

A Deeper Look

A Sample of Key Revisions

Below you will find highlights of some of the key revisions of the Final Rule going into effect May 9, 2024. Given the breadth of the changes, it is possible that other questions will be raised seeking clarification around rules and implementation.

Personal Net Worth (PNW) Rule Changes

- Raise cap from \$1.32 Million to \$2.047 Million.
- Exclude retirement assets in calculation of PNW.
- Adds adjustment mechanism allowing for automatic adjustment every three years.
- Levels the definition of “economically disadvantaged” to that of non-disadvantaged wealth.

Business Size Rule Changes

- Measurement of NAICS code size established at 5-year average.

USDOT and State DBE Directories

- Introducing an Annual Directory Report to USDOT for collecting additional DBE application data.
- Implementing a Uniform Report to gather detailed information on DBE contractors and contracts.
- Establishing a DBE Bidders List and an ACDBE Active Participant List.
- Expand State directories of certified firms to include DBE location, website url and lines of work (NAICS) to improve market visibility for DBEs.

New, Simplified Interstate Certification

- Streamlined process to remove barriers resulting in certifications in as few as ten days once proper documentation submitted demonstrating certification in home state.

And More...

- Strengthen provisions for prompt payment and return of retainage to all lower-tier subcontractors, including monitoring and oversight.
- Prime contractors responding to requests for proposals in Design-Build procurements must submit open-ended performance plans instead of committing to named DBEs.
- Allow virtual site visits and hearings to save recipients and firms time and money.
- Adjust and clarify rules in regard to credit allocated to DBE materials suppliers, distributors, manufacturers, and regular dealers.
- Clarified ownership and control requirements for certification eligibility.

Source: NMDOT STAR Program based on USDOT published information

Want To Know More?

Join us for an informative, online STAR Town Hall at 10:00am on June 26 with NMDOT representatives and Lawrence Moquino, Federal Highway Administration Program and Management Analyst (Civil Rights). Register Today at [NMDOTSTAR.com/Events/](https://nmdotstar.com/Events/)

We have also placed selected USDOT publications and links concerning the Final Rule at <https://nmdotstar.com/2024-dbe-program-rule-updates>