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# Certification Best Practices – ACDBE & DBE

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# UCP Agreements

- Material Changes to Approved UCP Agreement
- Use of Supplemental Forms (§26.83)
- Approval Requirements

# ACDBE Certification

- Definition of a concession
- NAICS Code assignment & ACDBE designation
- Interstate Certification

# What is an Airport Concessions?

- Food & Beverage Concessions - Restaurants, bars, fast food facilities, snack bars and other operation located on airport that provide food and beverage to the traveling public.
- Retail and specialty shops and kiosks – News & Gifts, bookstores, electronics, duty free shops, mail and shipment services, luggage cart services, personal services (i.e. shoe shine and day spas), vending machines, etc.
- Advertising, hotels, banking & currency exchange services, web-based and electronic services (i.e. Wi-Fi), vending machines, gas stations, insurance company, etc.
- Ground transportation – car rental, taxi and limo services, and shuttle services.
- Goods/service to a business that provides a good/service to the traveling public (i.e. food wholesalers and consulting firms).

# NAICS Code Assignment

- Retail Trade – 44-45

Clothing Stores 448100; Electronics Stores 443142; **Car Dealers 441110**; Cosmetics, beauty supplies, and perfume stores 446120; **Tire Dealers 441320**; Shoe Stores 448210; Jewelry Stores 448310; Luggage and Leather Stores 448320; Book Stores 451211; Other General Merchandise Stores 452990; Gift, Novelty, and Souvenir Stores 453220, etc.

- Wholesale Trade – 42

Motor Vehicle Supplies/New Parts 423120; Tire and Tube Wholesalers 423130; Used Vehicle Parts 423140; Wholesale Petroleum 423720; Other Durable Goods 423990, etc.

# NAICS Code Assignment

- Finance and Insurance – 52

Insurance 524210

- Accommodation and food service – 72

Food Service Contractors 722310; Drinking Places 722410, Restaurants and Other Eating Places 722500, etc.

- Other Services - 81

Auto Repair 811111; Auto Body Repair; 811121; Auto Glass Repair 811122 Auto Oil Change 811191; Shoeshine (All Other Personal Services 812990; SPA (Other Personal Care Services) 812199, etc.

# Interstate Certification

- Process governed by §26.85
  - No special requirements for ACDBEs
  
- DBE firms certified via §26.85 process
  - Prior home-state ACDBE certification not required
  - Process like expansion of NAICS codes

# Interstate Certification Discussion

- Believing UCP must always choose option A or option B
- Over-reliance on Home State
- Requiring too much information from out-of-state applicant
- Asking home state to perform new onsite
- Adding additional NAICS Codes than those of Home State

# Interstate Certification Discussion

## Options A and B

- Should not be an “Option A” State or “Option B” State
- Make decision whether to choose Option A or Option B on case-by-case basis

# Interstate Certification Discussion: Let the Home State Go!

- Once State B certifies a DBE through the interstate certification process, it becomes a DBE in State B and must be treated like any other DBE on its directory of certified firms.
- State B must require DBE to submit annual affidavits of no change and notify State B of any material change in its company.
- State B must not rely on the DBE's home state to conduct a third-party complaint investigation, although it can request materials from the home state if State B opted to certify the DBE using Option A.

# Interstate Certification Discussion: Let the Home State Go!

- A DBE must be certified in its home state before State B can certify the firm through interstate certification.
- Once the DBE is certified in State B, however, State B cannot decertify the DBE merely because it has been decertified by its home state.
- State B should inquire from State A the reason for its decertification and determine if the reason would trigger a determination of reasonable cause to decertify the DBE in State B, based upon one of the criteria set forth in the Regulation.

# Adding Additional NAICS Codes Let the Home State Go!

- The DBE may seek certification in State B in additional NAICS codes that it believes apply to the work it may already perform or seek to perform in the future. UCPs should process this request for an expansion of their assigned NAICS codes pursuant to 49 C.F.R. §26.71(n).
- If a UCP determines that the firm's request for additional NAICS codes requires an onsite review, it may perform one in the most practicable means possible, taking advantage of current technology.

# NAICS Codes, Cont.

- Home State A is under no obligation to perform an additional onsite review, although it may volunteer to do so.
- Note that when a firm asks State B to assign it a new NAICS code, State B may not require State A to assign the new NAICS code prior to investigating the firm's eligibility for the new code in State B.

# Interstate Certification: Performing Regular Audits

- To perform regular audits on its certified DBEs located out-of-state, State B should perform an on-site review at any in-state facility in which the DBE operates, even if it is not its primary office.
- If the DBE has no in-state facility, State B may perform an onsite review in the most practicable means possible, taking advantage of current technology.
- Home State A is under no obligation to perform an additional onsite review, although it may volunteer to do so.
- Include regular audit process in DBE Plan.

# Interstate Certification Discussion: Why UCP Decisions Get Overturned on Appeal

- State B didn't properly follow interstate process
- State B asks for too much information, i.e., “we require this information from all applicants;” “that’s just part of our process.”
- State B substitutes judgment call of State A:
  - Control, e.g., “it’s obvious the woman has not expertise!”
  - Accumulation of Substantial Wealth

# Interstate Certification Discussion

- Good Cause to Reject
  - Evidence of fraud
  - New information
  - Certification factually erroneous or inconsistent with regulations
  - Laws of State B require different result (professional licensing)
  - Applicant does not submit documentation required under the regulations
- Must provide the interstate applicant in writing, of specific concerns and allow applicant opportunity for informal hearing or opportunity to submit written response.

# Interstate Certification Discussion: Why UCP Decisions Get Overturned on Appeal

- A DBE certified in its home state is not required to submit additional information beyond the information identified in 49 C.F.R. §26.85(c).
- UCPs may not require a DBE to supplement its home state certification package or on-site review materials with information State B thinks is missing or that State B believes State A should have collected but did not.
- Recipients must decide whether to certify a DBE from another state based on their evaluation of the information delineated in the rule.

# However. . .

- The interstate certification rule does not prohibit UCPs from conveying to the firm that the information it provided from its home state is incomplete under §26.85(c), and encouraging the firm to provide that information if it is in the firm's possession.
- In addition, the rule encourages State B to attempt to obtain the information directly from State A.

# However. . .

If a home state has lost all or part of the DBE's file, including required documents that supported its decision to certify the DBE, and the DBE has not kept its own copies, State B may ask the DBE seeking interstate certification to provide only the following new documents: a personal net worth statement, an affidavit certifying that the owner upon whom the home state's evaluation was based is socially and economically disadvantaged, and tax returns confirming business size, so that State B can properly evaluate its qualifications.

# Non-Interstate Certification Discussion: Mistakes that May Overturn UCP decision

- UCP's failure to consider firm's efforts to cure recipient's eligibility concerns. Attempts to cure are not necessarily attempts to evade program requirements.
- Regulation does not prohibit renunciation of ownership interest by a spouse at any time. Transfer of ownership interest from non disadvantaged owner to disadvantaged owner to obtain DBE certification only raises the burden of proof (clear and convincing) and is not sole factor for DBE eligibility.
- Identify and apply correct burden of proof: DBE on initial certification; UCP on questioning presumptions of social or economic disadvantage; decertification.

# Mistakes that May Overturn UCP decision

- The core of the independence rule is on applicant firm's viability and whether there is dependence on non-DBE firm.
- Lack of independence at some time in the past is not fatal if firm's present circumstances show eligibility.
- Owner may control a firm even though one or more of their immediate non-disadvantaged family members participate.
- Loan from owner to the firm is an asset from the firm and is includable for PNW purposes

# Strengthen Your Certification Denial Letter

- Poorly written denial letters. UCP efforts are not reflected in the materials.
- Must cite all relevant facts and apply specific regulation to facts.
- Analyze and probe.
- Beef up Onsite Reports: Ask owner questions; probe into owner's experience.
- Make detailed arguments, citing facts and law.

# Mistakes Made in Decertification Proceedings

- In a decertification hearing, the firm is allowed to provide new information. Is not limited to information the UCP used to determine reasonable cause.
- UCP did not have an impartial decision-maker
- UCP does not have transcript of the proceeding
- UCP does not provide transcript to UCP or other pieces of material from the file

# Ability to Accumulate Substantial Wealth

- If an individual owner's PNW is less than \$1.32 million, the individual is presumed to be economically disadvantaged. The presumption of economic disadvantage can be rebutted, however, if the PNW statement and supporting documents demonstrates that the individual is able to accumulate substantial wealth. See 49 CFR §26.67(b)(1)(ii).
- The Department did not intend for a recipient to analyze the owner's ability to accumulate substantial wealth as a matter of course in all instances in which an owner's PNW falls below \$1.32 million or to incorporate this analysis in a recipient's standard certification procedures or during regular certification reviews.

# Ability to Accumulate Substantial Wealth

- Preamble to the 2014 rule revision: the purpose of codifying existing guidance on the accumulation of substantial wealth was to give recipients “a tool to exclude from the program someone who, in terms of overall assets is what a reasonable person would consider to be a wealthy individual, even if one with liabilities sufficient to bring his or her personal net worth under \$1.32 million.”
- “[The Department] stress[es] that we are not, with this change, requiring that a recipient consider these factors for every disadvantaged owner whose PNW would be below the current regulatory cap.”

# Ability to Accumulate Substantial Wealth

- To help limit the use of this procedure, the rule provides that “a recipient can only rebut the presumption of economic disadvantage under this standard through a proceeding that follows the same procedures as those used to remove a firm’s eligibility under §26.87.” Note UCP has BOP.
- This rule should make it unlikely that a recipient would seek to rebut the presumption of economic disadvantage “in all but the most egregious cases.”

# Ability to Accumulate Substantial Wealth

To guide recipients in making a determination that an owner has the ability to accumulate substantial wealth, the regulation identifies factors that include, but are not limited to, the following:

- (1) Whether the average adjusted gross income of the owner over the most recent three- year period exceeds \$350,000;
- (2) Whether the income was unusual and not likely to occur in the future;
- (3) Whether the earnings were offset by losses;
- (4) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;
- (5) Other evidence that income is not indicative of lack of economic disadvantage; and
- (6) Whether the total fair market value of the owner's assets exceed \$6 million."

# Ability to Accumulate Substantial Wealth

- The Department included these six factors in the regulation to assist the UCP in identifying factors that it may find relevant to include in its analysis of the owner's overall wealth. The Department was clear in the Preamble to the 2014 rule that these factors are intended to be guidance about the kind of evidence that recipients can examine, and are not to be considered a checklist or a litmus test.
- Proof of single factor is insufficient. UCP must engage in a balancing of factors to support ability to accumulate substantial wealth.