Ohio UCP Certification Training
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Learning Objectives

- Certification Standards
- Certification Procedures
- Onsite Reviews
- Annual Affidavits/Notice of Material Change
- Denials and Revocations
- Appeals
- Complaints
A Disadvantaged Business Enterprise (DBE) is a for-profit, small business that is:

- At least 51% owned by one or more individuals who are socially and economically disadvantaged

- Managed, operated and controlled by one or more of the socially and economically disadvantaged owners
DBE Certification

- DBE Certification
  - Unified Certification Programs (UCPs)
  - Receive and review applications and supporting documentation
  - Perform onsite reviews and investigations
DBE Certification Standards

- Social Disadvantage
- Economic Disadvantage
- Business Size
- Ownership
- Control (Includes Expertise and Independence)
Definitions

- **Spouse** now includes domestic partnership or civil union recognized under State law
- **Social and economically disadvantaged individual:** adds: “who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups … The social disadvantage must stem from circumstances beyond the individual’s control.”
Social Disadvantage 26.5

Groups with Presumed Social Disadvantage:
- African-American
- Hispanic American
- Native American (if they are enrolled in a federally or state recognized Indian tribe)
- Asian Pacific American
- Subcontinent Asian American
- Women
Social Disadvantage

- Signed, notarized statement of membership in a presumptively disadvantaged group
Group Membership

- If UCP has reasonable basis for doubting group membership may ask for additional documentations
  - Letter from community group, educational institution, religious leader, government agency
  - Letter from individual with specific reasons for believing himself/herself to be a member of the designated group
Individual Disadvantage

- Not in presumptively disadvantaged class, or group membership not proven, applicant required to prove individual social disadvantaged status

- Appendix E— Must include the following
  - One distinguishing feature
  - Personal experiences
  - Barriers to entry in business world
    - Education - Employment - Business History
Personal Net Worth 49 CFR (a) (2)

You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed $1.32 million.

You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation.
Economic Disadvantage

- Owner Relied Upon for Disadvantaged Status Must Have PNW Less than $1.32M
  - Exclude equity in primary residence and ownership interest in DBE at issue
  - Present value of retirement assets
  - Fair Market Value—not assessed value—of property
Married Applicants

- Confirm whether or not PNW statement is reporting marital assets
- If an asset is held as community property, or jointly between two people, 50% of the value of the asset is normally attributed to each person
PNW Form

- Applicants and certifiers **must use** standard DOT PNW Form without modification
- Each individual whose ownership and control are relied upon for DBE certification must complete the form
- Not required for spouse who is not active in the business or other non-disadvantaged owners
PNW Review

- No “one-size-fits-all”
- May ask some applicants for back up documentation if necessary to serve a useful purpose that addresses a specific question
- Exercise judgment and restraint
Transfers within 2 years
Must count as part of a disadvantaged individual’s PNW any assets transferred to an immediate family member or to applicant firm for less than fair market value within 2 years of the date of application or annual affidavit
Unless transfer is for education, medical expenses, recognition of special events
Certifiers may rebut someone’s claim of *economic* disadvantage—despite the fact that liabilities bring PNW below $1.32 M— if a reasonable person would consider the owner to be a wealthy individual

“Ability to accumulate substantial wealth”

Specific factors that certifier may consider

**Used as tool for egregious circumstances**

Proceeding that follows 26.87 is required and certifying entity has burden of proof
Size Standard 26.65(a)

- Must exist as a small business under SBA standards (13 CFR 121)
- Cap increased from $22.41 million to $23.98 million averaged over 3 year period (last 3 years)
- Size standard applied must be for type of work firm seeks to perform in DOT-assisted contracts
- Receipts of affiliates must be included
Business Size

Size standards by NAICS Code website:

http://www.sba.gov/content/small-business-size-standards
NAICS Codes

- **NAICS Code.** *Work performed by DBE must be described in terms of most specific NAICS Code that best describes type of work DBE owners can control and will perform on State DOT contracts*
  - May have multiple NAICS Codes
  - State DOTs may also add a narrative description of work—clear and specific
  - Ensure NAICS Codes are current and accurate
  - Denial of NAICS Code requested by DBE is appealable
NAICS Codes

- Website
- http://www.naics.com/search.htm
Ownership 26.69 (a)

- Consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm.

- All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.
Ownership 26.69(c)

- Revision emphasizes contribution of capital must be **real, substantial, and continuing**
- Disadvantaged owners should be entitled to profits and losses commensurate with their ownership interest and “any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm’s profits are grounds for denial”
Ownership

- Not acceptable:
  - Promise to contribute capital
  - Unsecured note payable to firm or owner not disadvantaged
  - Participation as an employee

- Loans from financial institutions preferred

- Examine loans from family or friends
Ownership 26.69(h)

- Presumed not acceptable:
  - **Gifts or transfers for less than fair market value** from any non-disadvantaged individual or non-DBE firm who is
    - Involved in the applicant firm
    - Involved in same or similar line of business
    - Engaged in an ongoing business relationship with the applicant firm.
To overcome presumption applicant has burden of proof to demonstrate by clear and convincing evidence:

- Gift or transfer was made for reasons other than DBE certification
- Disadvantaged individual actually controls the applicant firm
DBE Ownership 26.73

- Applicant must be owned (51%) by individuals.
- Cannot be owned by another firm, even if DBE.
- Except:
  - Disadvantaged individual owns and controls applicant firm through parent or holding company, e.g. for tax purposes (26.69(d))
    - Parent or holding company owns and controls subsidiary.
    - Certify the subsidiary if cumulatively 51% ownership by disadvantaged individuals.
  - Trusts.
  - Alaskan Native Corporations (ANCs).
Expertise as Contribution

- Indispensable to firm’s success
- **Individual must have significant financial stake in firm also**
  - No financial risk, no ownership on basis of expertise
- Specific to type of work firm performs
- Documented in firm’s records
  - Reflect contribution & value to firm
Control 26.71

- Consider all facts in record viewed as a whole
- “You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm” – 49 CFR §26.71(n)
Control

- DBE owners must control the day-to-day operations of the firm
- Have the power to make policy, personnel (hire/fire), decisions
- Delegations permitted/must be revocable
- Disadvantaged Owner(s) Must:
  - Hold highest officer positions
  - Control board of directors
  - Control all partnership decisions
Control

- Licensing as a requirement must be consistent with State law
  - If State law requires person running firm to be licensed
  - If license not legal requirement, presence or absence of license may be considered in determining control not rejected out of hand
  - Interstate certifications—may not make State BUSINESS license condition of control
Control 26.71(e)

- Family-owned firm
  - Firm controlled by family as group not eligible
  - Non-disadvantaged family members may participate
  - Is disadvantaged owner really in charge?
Control

- **Outside Employment**
  - When DBE is full-time operation, disadvantaged owner cannot have full-time job elsewhere
  - No absentee ownership by disadvantaged owner
  - Look at part time work outside of firm carefully, cannot conflict with ability to operate DBE full time
Control (Independence) 26.71(b)

- State DOT (or UCP) must only certify **independent firms** as DBEs.
- An independent firm does not depend on another firm for viability.
Expertise

Disadvantaged owner must have

- Overall understanding of type of business
- Managerial and technical competence
- Relevant experience and education
- Ability to intelligently and critically evaluate information from others in firm
- Administrative functions insufficient
When a firm was formerly owned and controlled by a non-disadvantaged individual whether or not an immediate family member and ownership transferred to disadvantaged individual and non-disadvantaged individual remains in firm, there is rebuttable presumption of control by non-disadvantaged person.
Disadvantaged individual must demonstrate by clear and convincing evidence that:

1. The transfer was made for reasons other than obtaining DBE certification
2. the disadvantaged individual actually controls the firm
Receive an application
- New rule says certifying entity must request additional information within 30 days after receipt of the application
- 90 days from complete application
- Extend once for no more than 60 days with written notice and explanation with specific reasons for extension
- Failure to timely process is constructive denial appealable to DOCR
Confidentiality 26.109

- Keep files confidential notwithstanding State law
- Safeguard from disclosure to unauthorized persons information that may reasonably be regarded as proprietary or confidential
Applicants and certifiers **must use** standard application form without modification

- Some items removed; some added
- Checklist revised, changing some documents from mandatory to optional
Federal—not State—tax returns
No “one size fits all”
You may request clarification of information contained in application
Notarized or signed under penalty of perjury
Request and collect only information necessary
Removes any reference to “recertification” after 3 years or at any other time

Certifying entity may not require DBEs to reapply for certification or undergo a recertification process

State may conduct a new on-site review

If onsite is due to an investigation, may perform unannounced
Certification Procedures 26.83(h)

- **deleted** DOT/SBE
  MOU lapsed; SBA allows self-certification
- DOCR database of DBE decertifications and denials
- A DBE stays certified until its certification is removed through due process procedures in 49 CFR §26.87
- No such thing as “recertification” or “expiration”
Newly Developed Firms
26.73(b)(2)

- Newly developed firms may be certified
  - Need not have been operating for certain period of time
  - Need not have contracts in place

- BUT must have expertise, financing, location (ACDBE exception)
Certification Procedures 26.83

- Specifies what documents to review when analyzing legal structure
- Must review lease and loan agreements; bank signature cards; and payroll records
- Must review work history, contracts received, completed, payroll records
- Must request or compile list of equipment
- Must request and review relevant licenses
- Federal income tax returns for last 3 years
Business Structures

- Sole Proprietorships
- Partnerships
- Corporations (C, S, Close)
- Limited Liability Corporations
- Limited Partnerships
- LLPs/Professional Corps.
- Trusts
Partnerships

Examine:

Partnership Agreement

- Can significant decisions be made when disadvantaged owner is not present?
- Do decisions require concurrence by non-disadvantaged individual?
- Who has signature authority?
- Personal tax returns for business size
C Corporations

- Articles of Incorporation and bylaws filed with State
- Stockholders are owners—elect the Directors.
- May have different classes of stock
- Directors manage overall strategy of the business, appoint officers.
- Officers are under the direction of the directors and manage day-to-day business operations.
- Corporations are required to have annual meetings with record keeping (minutes).
C Corporations

- Must own at least 51% of each class of voting stock and 51% of aggregate of all stock outstanding
- Held directly by disadvantaged persons
- Must hold highest officer position
- Must control Board of Directors
C Corporations

- Examine
  - Identify officers and board members, include gender/ethnicity, date appointed, whether they are involved in or have ownership in other business
  - Trace firm’s ownership history
  - Corporate tax returns to confirm business size requirements
C Corporations

- Examine Bylaws; Meeting Minutes
  - Who’s on the board? What constitutes a quorum?
  - Can significant decisions be made when disadvantaged owner is not present?
  - Do decisions require concurrence by non-disadvantaged individual?
  - Who has signature authority?
  - Who’s running the meetings?
S Corporations

- Term for owner is shareholder.
- Single class of stock
- Limitations on number of owners.
- Files Certificate of Incorporation and Bylaws
- Fewer formalities--annual meetings with record keeping (minutes).
“Pass through” corporation
Earnings are distributed to owners who may report corporate profits on personal tax returns.

Avoid “Double Taxation”
Often one person owns all stock and acts as only employee
S Corporations

- Examine
  - Bylaws
  - Certificate of formation Sometimes called Articles of Incorporation/Charter of Incorporation/Articles of Association
  - Annual Report
  - Personal tax returns to determine gross receipts
Onsite reviews are mandatory to principal place of business and jobsites if active
Must interview principal officers and resumes/work histories
Interviews with key personnel are discretionary
May rely on site visit report of other recipient (interstate certification)
Onsite Reviews

- What/When/Why Onsite Reviews Are Required
- Objectives for On-site Review
- What to look for/ask for
- Conducting Interviews
When?

- Original Application--26.83(1)
- DBE notification of material change
- Additional NAICS Code requested
- 3rd Party Complaint, etc.
- As a matter of procedure at certain intervals of time—including in DBE Program Plan
Onsite reviews are the most effective means of corroborating document review/confirming representations that:

- The Disadvantaged Owner controls firm has expertise for each NAICS Code requested
- The firm operates independently
- Owns what it says it owns
- Has sufficient staff to perform work
- Contracts with more than one prime
Why?

- If plan to operate as a regular dealer, determine it has warehouse and/or distribution equipment
- If manufacturer, determine if it has plant
- If hauler, it owns an appropriate truck
- Is firm dependent on another for viability? Are all, or most of its contracts, with one prime?
Come Prepared

Know before you go:
- Business Structure
- Owner or Owners
- Percentage Ownership
- PNW
- Gross Receipts
- Become Familiar with Business Documents
Control Independence

Look at

- Co-location with other firm
- Shared personnel/equipment
- Who signs contracts?
- Does the DBE own the equipment?
- Is the applicant firm identified on outside?
- Observe disadvantaged owner’s office, does it look like an office of someone in charge?
Onsite Review

- Develop Questionnaire
- Type out answers
- Print out onsite
- Signature
Onsite Reviews

- Interview Disadvantaged Owner Alone
  - Find out what an owner of this type of business should know and ask the tough questions—ask an expert to go with you
- Interview Principal Officers
- Key Personnel (Optional)
- Let them talk…
- Review recent contracts—who signed
Onsite Reviews

- On-site Visit to Job Site if Active
  - Is the applicant’s equipment in use?
  - Do the worker’s know who they work for?
Interstate Certification 26.83

Time Frames

- Applicant sends Home State A certification letter to State B, requests certification
- State B confirms with State A or on-line

State B may accept State A’s certification without further action
If State B does not choose to accept

- Applicant sends all documents to State B
  - Copy of State A application and all other supporting documents, affidavits of no change, correspondence
  - Copy of notices from other States about application status, denials, decertifications
  - Copy of any certification appeals with DOT
  - Affidavit that all information is true and correct
- State B has 7 days to request onsite from State A
- State A has 7 days to provide onsite to State B
Interstate Certification

- State B has 60 days from receipt of all applicant materials to certify firm.
- If, within 60 days of receipt of all applicant information State B finds good cause to object to State A certification must send notice to applicant of specific reasons for determination and offer applicant opportunity to respond via writing or in person.
- State B must have meeting within 30 days of applicant’s request.
Interstate Certification

- Applicant firm has Burden of Proof—
- Applicant need only address issues raised by State B
- State B must issue written decision within 30 days of applicant’s written response or meeting with decision maker (later of the two)
- Applicant may appeal to DOCR
Interstate Certification

- Good Cause to Reject
  - Evidence of fraud
  - New information
  - Certification factually erroneous or inconsistent with regulations
  - Laws of State B require different result
  - Applicant does not submit required documentation
Annual Affidavit 26.83(j)

- DBE must provide every year in an affidavit form.
- Form must merely affirm that there have been no changes in the firm that would affect eligibility.
- Only may request Federal tax returns—not new PNW.
- Additional requests on case-by-case basis if reasonable.
Annual Affidavit 26.83(j)(cont.)

- Should not include changes to DBE-separate obligation within 30 days of change 26.83(i)
- Failure to provide affidavit can be reason to initiate decertification procedures under 26.87
- Only if fails to respond to reasonable request, not if merely untimely
- Removal proceedings should not continue if DBE provides information
DBE must inform UCP in writing of any change affecting size, disadvantaged status, ownership or control

- Changes in management
- Attach supporting documentation
- Notification in form of affidavit
- Within 30 days of the change
Summary Suspension 26.88

- State can immediately suspend a DBE’s certification without hearing
  - Disadvantaged owner dies or is in jail
  - There is adequate evidence of material change
  - DBE fails to notify of material change or fails to timely file an affidavit of no change
  - Is directed by Operating Administration (FHWA)
After initiating suspension, the State must immediately notify the DBE by certified mail to last known address.

Suspension occurs when DBE receives or is deemed to have received notice.

State must then expedite 26.87 hearing to determine eligibility.

While suspended DBE will not be eligible to meet goals on new contracts, but can continue to receive credit on contracts executed before suspension.
When DBE receives notice it may:
- Withdraw
- Provide information to recipient why it remains eligible

Recipient must lift the suspension or begin decertification proceedings within 30 days of receiving information from suspended DBE
Certification Denials 26.86

- UCP must provide written explanation with reasons for denial
  - Specific evidence in record leading to denial
  - Specific portions of the regulations upon which denial is based—make your case!
  - Include information of appeal rights under 26.89, including address and 90 day time frame
  - UCP must provide entire record to USDOT within 20 days of request
Certification Denial 26.86

- Establish time period of no more than one year (from time firm receives letter of denial) before firm may reapply for certification
- Less than one year with FHWA Division approval
- Time it takes for appeal decision does not affect waiting period for DBE to reapply
DBE Appeals 26.89

- DBE denied certification or whose certification removed may appeal
  - Must send letter to DOCR within 90 days of date of final decision
  - Letter must include specific reasons for appeal and/or facts recipient did not consider
DBE Appeals 26.89 (cont.)

- DOCR does not make *de novo* review
- DOCR makes decision based solely on administrative record as supplemented by appeal
- DOCR may also supplement the record by adding relevant information made available to it.
Certification Appeals--DOCR

- USDOT decision based upon status of firm as of date of appeal
- USDOT affirms UCP decision unless it is not supported by evidence in the record
- USDOT may remand for additional investigation if record incomplete or unclear
- If USDOT reverses denial, UCP must take immediate action to certify firm
- USDOT will not uphold denial based on grounds not specified in UCP decision
Normal re-application waiting period does not apply to firms that withdraw—but can go to “end of line” when issue corrected. Unless abuse of withdrawal is determined.
Removing DBE Certification 26.87

- Grounds for decision
  - Change in firm since certification
  - Information not available at time of cert
  - Information concealed or misrepresented
  - Change in federal regulations
  - Decision to certify was **clearly erroneous**
    (changed from “factually erroneous”)
  - Failure to cooperate
  - Exhibited pattern of conduct to subvert intent or requirements of program
Removing DBE Certification 26.87

- Written notification that there is “reasonable cause to believe that a certified firm is ineligible”
- Specific reasons, evidence, regulations
- Opportunity for informal hearing to respond and provide supporting evidence—firm could choose to submit writing
- UCP has burden of proof
- Decision-maker not involved in original decision
- Maintain complete record of hearing
Removing DBE Certification

- Firm remains certified until internal decision is rendered
- Removal of NAICS Code, or partial decertification requires same process
- Written notice of decision
  - Specific record evidence, regulations
  - Appeal information
FHWA finds reasonable cause to believe certified firm is ineligible
- Direct UCP to initiate removal proceedings
- FHWA must provide UCP and DBE with notice, including reasons
- UCP must immediately start removal proceedings
Third Party Complaints 26.87

- Written complaint may be filed by any person alleging DBE ineligible
- Not required to accept general allegations or anonymous complaint
- Complainant’s identity must be kept confidential
- Must review records; may request additional information and investigate