

## **Interstate Certification 49 C.F.R. §26.85**

### **What is the purpose of the interstate certification rule?**

In response to longstanding concerns of DBEs, the interstate certification provision is designed to make the certification process easier on recipients and certified DBEs. The DBE program is a national program, and administrative obstacles to certification undermine important program objectives.

The rule furthers several fundamental objectives of the DBE program—(1) facilitating the ability of DBE firms to compete for DOT-assisted contracting, (2) reducing administrative burdens and costs on the small businesses that seek to pursue contracting opportunities in other states, and (3) fostering greater consistency and uniformity in the application of certification requirements—while maintaining program integrity.

The Department strongly reiterates that the ultimate purpose of the interstate certification rule is to *facilitate* certification of currently certified firms in other jurisdictions. Accordingly, interstate certification is not automatic reciprocity in the sense that each state must honor the other states' certification decisions without review. Rather, the rule creates a rebuttable presumption such that a firm certified in its home state (State A) is eligible to be certified in other states in which it applies. Thus, the subsequent certifier's review is limited to specifically enumerated items in the rule. The rule creates a bright-line distinction between applications for interstate certification and applications for initial certification. For further discussion of the Department's general views on the interstate certification provisions, please see the preamble to the final rule establishing this regulation: Office of the Secretary, "Disadvantaged Business Enterprise: Program Improvements," 76 Fed. Reg. 5083, 5087-89 (Jan. 28, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/pdf/2011-1531.pdf>

### **What is a DBE firm required to do when it wishes to be certified as a DBE in another state?**

Firms must be certified in their home state (State A) before seeking certification in another state under the rule. A DBE firm must present a copy of its certification notice from its home state to the second state (State B) and request interstate certification. State B may not require the certified DBE to submit a new uniform certification application as if it were seeking certification for the first time.

### **How should recipients process requests for certification from an out-of-state DBE?**

The recipient receiving a request for interstate certification (State B) must respond in one of two ways.

One: Accept the certification afforded to a DBE from its home state and certify the firm after confirming that the firm's certification is valid in its home state. Verification can be done by reviewing State A's electronic DBE/ACDBE directory or by obtaining written confirmation from State A. It is not appropriate for a certifier to ask the DBE to produce its home state on-site report or additional information when the certifier chooses to accept the firm's home state certification under this option.

Two: Ask the DBE to provide all of the information required by 49 C.F.R. §26.85(c)(1–4). State B may only require the DBE to submit its application form and supporting documentation it submitted to its home state. State B may not require the applicant to submit all application material it may have submitted to other states it is certified in. The rule permits State B however, to request affidavits of no change and notices of changes that were submitted to State A and other jurisdictions. The rule further permits State B to request notices or other correspondence from states other than State A related to the firm's status as an applicant or certified DBE in those states.

Under this option, once the recipient receives the required information from the DBE, the recipient must contact the DBE's home state within seven days and request a copy of the site visit report for the firm, any updates to the site visit review, and any evaluation of the firm based on the site visit. State A must transmit the information to State B within seven days of receiving the request. The Department encourages States A and B to speak with each other (if for no other reason than to verify that State B received all of the State A materials to which it is entitled).

Based on the information provided by the DBE and by the home state, the recipient has 60 days to notify the DBE that the request for interstate certification is granted or that there is good cause to believe the home state's certification of the firm is erroneous or should not apply in its state. The notice of denial must conform to the requirements of 49 C.F.R. §26.85(d)(4).

*The two options described in 49 C.F.R. §26.85(b) and (c) are State B's **only** authorized responses to an application for interstate certification.*

**May recipients choose one of the above options to apply to all interstate certification applications it receives from a particular state(s) or recipient(s)?**

Yes, in cases where a reciprocity agreement exists between two or more recipients. Otherwise, each application for interstate certification should be carefully reviewed so that a recipient is making a choice on a case-by-case basis whether to exercise one of the two options listed above. We reiterate that the Department believes that regional certification consortia or reciprocity agreements among states is a good step toward fostering trust among certification agencies.

**Is it acceptable to ask a DBE applying for interstate certification to provide additional items not listed in 49 C.F.R. §26.85(c)**

No. A firm should not be required to submit additional information beyond the information identified in the rule. Stated differently, recipients may not require a DBE to supplement its home state certification package or on-site materials with information State B thinks is missing or that State B believes State A should have collected but did not. Recipients must make decisions on whether to certify a DBE from another state based on their evaluation of the information delineated in the rule. In the context of interstate certification, requests for information is limited to those items listed in §26.85(c). Section 26.109(c)'s duty to cooperate provision should not be used to request additional information from the firm beyond what is required by §26.85(c).

### **What is meant by the phrase “all supporting documents”?**

Section 26.85(c) permits a recipient (State B) to choose not to accept State A's certification of a firm. In this instance, the firm must provide to State B a copy of its certification letter from the home state, a complete copy of its application form with all supporting documents actually provided to State A, and any other, nonduplicative information it has submitted to any other state related to its certification. The term “supporting documents” is not a reference to the Uniform Certification Checklist. Instead, it refers to those supporting documents that the DBE previously submitted to State A as part of its initial certification application package including its current annual affidavit. For example, tax returns provided with a DBE's initial application to State A must be provided, but State B may not request from the DBE more recent tax returns than those in State A's (or another state's) files.

### **If a recipient accepts another state's certification, are they required to recognize an out-of-state DBE's NAICS Codes that were granted to the DBE by their home state?**

Yes. By granting DBE interstate certification to an out-of-state DBE pursuant to §26.85, State B recognizes all aspects of that certification. Since part of a DBE firm's State A certification includes that DBE being recognized under one or more NAICS codes, State B must, therefore, recognize the out-of-state DBE's NAICS Codes that were assigned to the DBE by its home state. There is no such thing as “partial” interstate certification wherein State B grants interstate certification to an out-of-state DBE in some, but not all the NAICS codes assigned to it by the home state.

### **How should recipients treat requests for additional NAICS Codes from DBEs not certified in those codes in their home state?**

The DBE may seek certification in State B in additional NAICS codes it believes apply to the work it may perform already or seek to perform in the future. Recipients should process this request for an expansion or augmentation of their assigned NAICS codes as 49 C.F.R. §26.71(n) provides.

### **May DBE firms provide electronic copies of information when applying to another state for certification?**

Yes. A DBE firm may submit electronically the information that §26.85(c) requires it to provide. State B certifiers should not require paper copies of all documents or original signatures previously filed with State A or another state and should not require firms applying for interstate certification to generate new documents (beyond those provided to State A or another state).

### **What is meant by good cause under §26.85(d)(2)?**

The interstate certification rule creates a rebuttable presumption that a firm certified in its home state (State A) is eligible to be certified in other states in which it applies. In situations where State B chooses to ask the DBE to provide all of the information required by §26.85(c)(1-4), the intent is that State B will use this information to make sure nothing submitted by the firm raises a good cause reason for denial.

State B may only deny a DBE applying for interstate certification if State B has good cause to believe that State A's certification of the firm is erroneous or should not apply in State B. There are five reasons set out in the rule that may constitute good cause to deny a request for interstate certification. Based on the regulatory record and the purpose and intent of the interstate certification provision, we interpret the words "may include" in section 26.85(d)(2) as words of containment (not open ended) that limit the basis for denial to one or more of the delineated reasons. These are the only five reasons on which State B may base its good cause determination.

In its denial, State B must articulate the specific reason or reasons that are enumerated in the rule and provide its rationale for specifying such reason or reasons for denying the firm's request for interstate certification, which must be communicated to the firm. The firm has the opportunity to respond as spelled out in the rule. A recipient's reasons for denial must be specific enough so that the firm can respond with information and arguments focused clearly on the particular issues identified. The reasons should not be conclusory or broad but rather, specific, fact-based reasons.

### **What is meant by §26.85(d)(2) factually erroneous certification decisions and inconsistent with the requirements of 49 C.F.R. Part 26?**

The rule permits a recipient to deny a request for interstate certification based on a determination that the home state's certification was factually erroneous or inconsistent with the requirements of 49 C.F.R. Part 26. Mere interpretive disagreements about the meaning of a regulatory provision or a factual conclusion or inferences do not form a ground for denial. Rather, State B would have to cite information in the home state's certification material or other material submitted by the DBE that directly contradicts a provision in the regulatory text or simply gets wrong a critical fact. For example, suppose State B reviews the documentation used by State A to certify the firm and finds a fact about the firm that renders it ineligible, or State B notices or finds that the home state based its decision on what is clearly a misapplication by the home state of Part 26. In these cases, State B could find good cause to begin a proceeding to deny interstate certification. For example, a mathematical mistake the correction of which results in disadvantaged owners who claimed collective 51% ownership actually owning under 51% of the firm constitutes good cause to find the State A certification factually erroneous.

The phrases factually erroneous and inconsistent with the requirements of the regulation do not mean that State B, had it been the home state, would have explored certain eligibility determinative facts differently and reached a different conclusion. In other words, an opinion by State B that a home state did not adequately investigate a firm's eligibility is not a reason to deem the decision factually erroneous. For example, suppose a DBE's place of business is co-located at a non-DBE facility and there is no evidence that the firm's home state explored the details of this arrangement for possible independence concerns. This does not mean that the home state's determination is factually erroneous or inconsistent with the requirements of the regulation. Similarly, when, for example, there is no balance sheet in the State A materials, that fact alone

does not mean that the State A certification is inconsistent with the requirements of the regulation.

A failure of the State A materials to contain a recent (i.e., less than three years old) on-site report, or items that State B normally requests for *initial* certification applications, does not make the State A determination "factually erroneous" or "inconsistent with the requirements" of the Regulation. For instance, a firm that applies to be certified as a DBE in its home state is required to include a current personal financial statement. Once this firm becomes certified in its home state, State B cannot (several years later) ask the firm to provide a more up-to-date statement, provided that the DBE is up-to-date on its annual affidavits of no change and notifications of changed status. DBE owners are required to attest to the accuracy of the information in their home state file and that they remain economically disadvantaged when they submit their information to State B as required by §26.85(c)(4).

**What is the process for a DBE to challenge State B's determination that there is good cause to believe that a DBE's home state certification should not apply in State B?**

Once appropriate notice has been afforded to the firm, the DBE bears the burden, under §§26.61(b) and 26.85(d)(4)(iii), of demonstrating that it meets the certification requirements with respect to the particularized issues in the notice. The firm may elect to respond in writing, request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If a meeting is requested, as State B, you must schedule a meeting within 30 days of receiving the DBE's request. The DBE may agree to have its in-person meeting conducted by telephone. The Department encourages, but does not require, states to keep a record of either the in-person meeting or telephone discussions with the firm.

If the recipient finds the DBE has not met its burden of proof with respect to the issues clearly identified in the notice of denial, the recipient must then issue a written decision under §26.85(d)(4)(v), *one that also complies with the requirements of §26.86(a)*, which the DBE may appeal to the Department under §§26.85(d)(4)(vii) and 26.89.

**May a recipient set a time by which an out-of-state DBE must exercise its right to respond in writing or request an in-person meeting (or both) to discuss the recipient's objections to recognizing the DBE's home state certification?**

Yes. It is acceptable and prudent to provide in the notice required by 49 C.F.R. §26.85(d)(4) a reasonable time by which the DBE must submit to you a written response to your determination and/or request a meeting. A reasonable time period may vary depending on the circumstances and complexity of each case, but generally the response time should not be less than 21 calendar days. Your notice should set forth the consequences if the DBE does not act within the time period you set (e.g., your determination will become final and the DBE may appeal to the Department).

**Are recipients required to enter interstate certification denial and decertification data in DOT's Departmental Office of Civil Rights database and how should this information be used?**

Yes. All recipients performing certification functions are required to enter the details concerning a firm's certification or decertification into the database maintained by the Departmental Office of Civil Rights as required by §26.85(f)(1) so that colleagues in other jurisdictions can use this information as specified in the rule. This data entry should be done as promptly as possible and in any case within 30 days of the action. As a certifying agency, you must check the database at least once every month to determine whether any firm that is applying to you for certification or that you have already certified is on the list. You must then consider the information to determine what, if any, action should be taken with respect to the DBE or applicant.

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The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 C.F.R. part 26.