



**U.S. Department of
Transportation**

Office of the Transportation Secretary

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

Memorandum

To: Federal Aviation Administration, Federal Highway Administration, and Federal Transit Administration Recipients and Sponsors Implementing the Disadvantaged Business Enterprise (DBE) Program

From: Charles E. James, Sr.
Director, Departmental Office of Civil Rights (DOCR)

Re: Changes to the Gross Receipts Calculation in the SBA Program Regulation

Date: October 19, 2020

Recent legislation changed the method used by the Small Business Administration (SBA) to calculate business size and the eligibility criteria applicable to DBEs performing work on DOT-assisted contracts.¹ This memorandum explains how recipients of FAA, FHWA, and FTA funds should apply the changes to 13 CFR Part 121 (the SBA program regulation) when assessing a small business's eligibility as a DBE.

Background: The Two Size Standards All DBEs Must Meet

To remain classified as a small business under the DBE program, a business's gross receipts (including those of its affiliates) must satisfy two size standards. First, SBA sets a size limit for each North American Industry Classification System (NAICS) code that represents the highest amount of receipts a firm can have to be considered small. For example, an architecture firm, assigned NAICS Code 541310, cannot exceed \$8 million in average annual gross receipts (SBA's size limit for NAICS Code 541310) and still be considered small. The DBE program follows this method and applies the applicable NAICS code size standards to each eligible DBE and applicant firm. 49 CFR § 26.71(n).

Second, the DBE program applies a size standard known as the statutory gross receipts cap found at 49 CFR § 26.65(b). To qualify as a DBE, a firm cannot exceed the size cap prescribed by this regulation. Both the NAICS code standard and the statutory gross receipts cap are measured in average annual gross receipts.

¹ The Small Business Runway Extension Act of 2018 (SBREA) (Public Law 115-324) amended Section 3 of the Small Business Act (15 U.S.C. § 632a).

3-Year Measurement is Changed for the NAICS Code Size Calculations

An SBA final rule published on December 5, 2019 (84 FR 66561, effective January 6, 2020) amended the SBA regulation to modify the method by which SBA establishes business size standards.² Specifically, the new rule changed the time period for calculating average annual gross receipts under 13 CFR Part 121 from 3 years to 5 years, but provides firms with the option to use either the 3-year calculation or the 5-year calculation until the 5-year period becomes mandatory on January 6, 2022.

The SBA final rule applies to FHWA, FTA, and FAA-assisted projects because the DBE regulation requires recipients to use the current SBA business size standard(s) found in the SBA regulation.³ Thus, until January 6, 2022, DBE firms participating in FHWA, FTA, and FAA-assisted projects may choose between using a 3-year averaging period or a 5-year averaging period for the purposes of meeting the requirements of the DBE program, as described in 49 CFR § 26.65(a). After that date, the 5-year averaging period becomes mandatory.

The Measurement for the Statutory Gross Receipts Cap Remains the Same

For the statutory DOT size cap found at 49 CFR § 26.65(b), DBE firms are still subject to the 3-year averaging period because this 3-year period is specifically prescribed by the Fixing America's Surface Transportation (FAST) Act.⁴ Therefore, while a DBE firm may elect to submit its average annual gross receipts for either the last 3 years or last 5 years to show it meets the size standard for a particular NAICS code under Part 121, only the last 3 years may be considered for determining whether the firm also meets the DOT size standard prescribed by 49 CFR § 26.65(b).

If you have any questions about implementing the changes described in this memorandum, please contact your FAA, FHWA or FTA representative.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. The document represents the institutional position of the Department of Transportation and provides guidance and information for compliance with the provisions. The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 26.

² Airport Concessionaire Disadvantaged Business Enterprise (ACDBE) firms are not affected by these changes because 49 CFR § 23.33 (the ACDBE regulation), which governs size standards for ACDBEs, does not incorporate the SBA program regulation's size standards.

³ 49 CFR § 26.65(a).

⁴ Pub. L. 114-94 (Dec. 4, 2015), § 1101(b)(2)(A)(iii).