



Civil Rights

Disadvantaged Business Enterprise Program

July 2016

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| 3. Federal Register/Vol. 76, No. 19/ Friday, January 28, 2011 | 209 |
| 4. Federal Register/Vol. 79, No. 191/ Thursday, October 2, 2014 | 229 |



COMMONWEALTH of VIRGINIA

DEPARTMENT OF TRANSPORTATION
1401 EAST BROAD STREET
RICHMOND, VIRGINIA 23219 2000

Charles A. Kilpatrick, P.E.
Commissioner

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM STATEMENT OF COMMITMENT

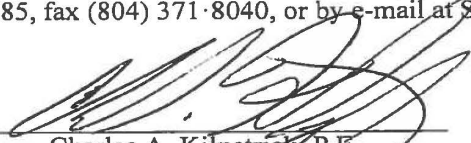
The Virginia Department of Transportation (VDOT) is committed to a Civil Rights Program for the participation of Disadvantaged Business Enterprises (DBEs) in VDOT contracting opportunities in accordance with 49 Code of Federal Regulations (CFR) Part 26. The VDOT has received Federal financial assistance from the United States Department of Transportation (USDOT) and, as condition of receiving this assistance, the VDOT has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of VDOT to ensure that DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in USDOT federally-funded contracts. The VDOT adopts the following objectives:

- To ensure nondiscrimination in the award and administration of FHWA assisted contracts;
- To create a level playing field on which DBEs can compete fairly for FHWA assisted contracts;
- To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
- To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
- To help remove barriers to the participation of DBEs in FHWA assisted contracts; marketplace outside of the DBE Program; and
- To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The Division Administrator of Civil Rights, Sandra Norman, has been designated as the DBE Liaison Officer, with the responsibility of overseeing all aspects of the DBE Program. The Civil Rights Division Administrator, in coordination with other VDOT personnel, has been delegated the authority for the development, implementation and monitoring of the DBE Program for contracts in accordance with VDOT's nondiscrimination policy. It is the expectation that all VDOT personnel shall adhere to the intent, as well as the provisions and procedures of the DBE Program. Implementation of the DBE Program is accorded the same priority as compliance with all other legal obligations incurred by the VDOT in its financial assistance agreements with the Department of Transportation.

Questions regarding this policy or implementation of this DBE Program should be addressed to Sandra D. Norman, Civil Rights Division Administrator, Virginia Department of Transportation, 1401 East Broad Street, Richmond, Virginia 23219; telephone number (804) 786-2085, fax (804) 371-8040, or by e-mail at Sandra.Norman@vdot.virginia.gov.



Charles A. Kilpatrick, P.E.
Commissioner of Highways

6/18/15

Date

Subpart A – General Information

Section 26.1 Program Objectives

The Virginia Department of Transportation has established a DBE Program in accordance with requirements prescribed by USDOT regulations (49 CFR Part 26) for highway financial assistance programs. The program seeks to achieve the following objectives:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts;
- To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- To ensure that the DBE program is narrowly tailored in accordance with applicable law;
- To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients;
- To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- To provide appropriate flexibility in establishing and providing opportunities for DBEs.

Section 26.3 Federal Funding Regulations and Applicability

The Virginia Department of Transportation (VDOT), as a recipient of federal-aid highway funds, is required to administer a DBE program in compliance with all laws, regulations, Executive Orders, and guidance.”

Section 26.5 Definitions and Terms

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

1. Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:
 - a. One concern controls or has the power to control the other; or
 - b. A third party or parties controls or has the power to control both; or
 - c. An identity of interest between or among parties exists such that affiliation may be found.
2. In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community),

Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

Assets mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

Business, Business Concern or Business Enterprise means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

Compliance means that a recipient has correctly implemented the requirements of this part.

Contingent Liability means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

Department or DOT means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA)

Disadvantaged Business Enterprise or DBE means a for-profit small business concern—

1. That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
2. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-Assisted Contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Good Faith Efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Home State means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business.

Immediate Family Member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

Indian Tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in this section.

Joint Venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Liabilities mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Operating Administration or *OA* means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The “Administrator” of an operating administration includes his or her designees.

Personal Net Worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary Industry Classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is

available on the Internet at the U.S. Census Bureau Web site:
<http://www.census.gov/eos/www/naics/>.

Primary Recipient means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

Principal Place of Business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-Conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-Neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or *SBA* means the United States Small Business Administration.

SBA Certified Firm refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

Small Business Concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b).

Socially and Economically Disadvantaged Individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

1. Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.
2. Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - a. "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

- b. “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - c. “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
 - d. “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - e. “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - f. Women; and
 - g. Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
3. Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

Spouse means a married person, including a person in a domestic partnership or a civil union recognized under State law.

Transit Vehicle Manufacturer means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.

Tribally-owned Concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

Section 26.7 Non-discrimination Requirements

The Virginia Department of Transportation shall not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

Section 26.11 Record Keeping Requirements

- A. VDOT commits to submitting the Uniform Report semi-annually June 1 and December 1 of the first and second half of the federal fiscal year in the format included in 49 CFR 26, Appendix B.
- B. VDOT creates a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the bidders list approach to help calculate overall goals. The bidders list will include the firm's name, address, DBE or Non-DBE status, age, and annual gross receipts. Bidders list information is compiled from bidder data collected by VDOT's Construction and Civil Rights Divisions, and through business surveys. Three categories of information are updated regularly:
 1. Contractors that have submitted bids for DOT-assisted contracts.
 2. Subcontractors that have attempted to participate as subcontractors on VDOT contracts and were identified as having submitted bids/quotes to prime contractors bidding on VDOT contracts.
 3. Gross receipt information requested of DBE and non-DBE firms that perform work or seek to perform work on Department contracts.
- C. VDOT will ensure that the UCP Certifying Members maintain a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. Certification or compliance related records shall be retained for a minimum of three (3) years.
- D. VDOT will submit to the USDOT Office of Civil Rights by January 1 of each year the number of firms controlled by:
 1. White women;
 2. Minority or other men; and
 3. Minority women

The number of the firms above will be converted as a percentage of all certified DBE firms.

Section 26.13 Recipient and Contractor Agreement Assurances

VDOT has signed the following assurances, applicable to all USDOT-assisted contracts and their administration:

Assurance:

VDOT shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any FHWA-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of FHWA assisted contracts. The recipient's DBE Program, as

required by 49 CFR Part 26 and as approved by FHWA, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of the project agreement. Upon notification to the **VDOT** of its failure to carry out its approved program, the **FHWA** may impose sanctions as provided under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et. seq).

Contract Assurance:

VDOT will ensure that the following clause is placed in every USDOT- assisted contract and subcontract:

The contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of FHWA-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

Subpart B – Administrative Requirements

Section 26.21 DBE Program Updates

The Virginia Department of Transportation, as a recipient of federal-aid highway funds authorized by the statute for which this part applies, will continue to carry out this program until all funds from US DOT financial assistance have been expended. Any updates representing significant changes in the program will be provided by the Department to FHWA for approval. VDOT subrecipients of FHWA funds must comply with the VDOT DBE Program Plan and may not have a plan independent from VDOT.

Section 26.23 Policy Statement

The Policy Statement is elaborated on the third page of this program.

Local public agencies (LPAs) and subrecipients of FHWA federal aid transportation funds must adopt the VDOT DBE Program Plan.

Section 26.25 DBE Liaison Officer

The Virginia Department of Transportation (VDOT) has designated the following individual as the Disadvantaged Business Enterprise (DBE) Liaison Officer:

Sandra D. Norman
Civil Rights Division Administrator
1401 East Broad Street
Richmond, Virginia 23219
Phone: (804) 786-4552
Fax: (804) 371-8040
Email: Sandra.norman@vdot.virginia.gov

As DBE Liaison Officer (DBELO), Ms. Norman is responsible for implementing all aspects of the DBE Program and ensuring that VDOT complies with all provisions of 49 CFR Part 26. The Civil Rights Division Administrator has direct, independent access to the Commissioner of Highways concerning DBE program matters. The Civil Rights Division Administrator also works closely with various Department administrators and has 37 full-time staff positions in the Civil Rights Division who assist in the implementation and monitoring of DBE requirements. An organization chart displaying the Civil Rights Division Administrator's position in the organization is found in Appendix A.

The Civil Rights Division Administrator is assisted by nine (9) District Civil Rights Managers (DCRM), who have the responsibility for coordinating and monitoring the DBE Program within his/her respective districts. They also advise the Civil Rights Division Administrator and DBELO regarding modifications needed to achieve the objectives of the program.

In addition, an advisory body, the Transportation DBE Advisory Committee (TDAC), [formerly known as the Construction Coordinating Group (CCG)], has been established to provide recommendations and feedback to the liaison officer on the DBE program. The TDAC members

are appointed by the Commissioner, and include membership from the prime contracting industry, DBE firms, supportive services, VDOT and FHWA.

The specific duties and responsibilities of the DBELO include the following:

1. Advises the Commissioner and senior management on DBE Program matters and achievements;
2. Promotes the DBE Program through business communication and public outreach;
3. Serves as a small business advocate for the Department;
4. Oversees the gathering and reporting of statistical data and other information as required by USDOT.
5. Work with all divisions to set overall annual goals;
6. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner;
7. Identifies contracts and procurements, so that DBE goals are included in solicitations (both race-neutral and contract specific goals), and monitor results;
8. Analyze VDOT's progress toward goal attainment, and identify ways to improve progress;
9. Advise the Commissioner/governing body on DBE matters and achievement;
10. Establish responsibility and guidance for TDAC;
11. Monitor contractor compliance and good faith effort panel hearings;
12. Ensure DBEs have access to available VDOT resources to assist in preparing bids, obtaining bonding, financing, and insurance;
13. Plan and participate in DBE business development initiatives;
14. Certify DBEs according to the criteria set by FHWA, and act as liaison to the Uniform Certification Process in the Virginia Department of Transportation;
15. Provide outreach to DBEs and community organizations to advise them of opportunities; and
16. Maintain the VDOT updated directory of certified DBEs.

Section 26.27 DBE Financial Institutions

It is the policy of VDOT to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community; to make reasonable efforts to use these institutions; and to encourage prime contractors participating in FHWA-assisted contracts to make use of these institutions. Effective April 2016 based upon the Federal Reserve Statistical Release, the following are minority and women-owned depository institutions:

BBCN Bank

Annandale Branch
7410-A Little River Turnpike
Annandale, VA 22003

Hanmi Bank

Annandale Branch
7140 Little River Turnpike, Stat. 749
Annandale, VA 22003

Metro City Bank

Centreville Office
5900 Centreville Crest Lane Unit B
Centreville, VA 20121

First State Bank

201 North Union Street
Danville, VA
Centreville Office

Old Dominion National Bank

North Garden Office
4916 Plank Road
North Garden, VA 22959

Old Dominion National Bank

Scottsville Branch
110 Scottsville Rd.
Scottsville, VA 24590

DBE participation credit is not given for utilization of banks and savings and loan associations; however, their utilization is still encouraged in the Special Provision (incorporated in contracts).

26.29 Prompt Payment and Retainage

VDOT will include language regarding prompt payment and retainage in each federally-assisted contracts in accordance with the VDOT Road and Bridge Specification Book, Code of Virginia 2.2-4354 and 2.2-4355, and the Special Provision 107.15 - Use of Disadvantaged Business Enterprises.

- A. The Contractor shall take one of the following two actions within 7 days after receipt of payment from the Department for the subcontractor’s portion of the Work as shown on the monthly progress estimate:
 - 1. Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the Work performed by the subcontractor; or

2. Notify the Department and subcontractor, in writing, of his intention to withhold all or a Part of the subcontractor's payment with the reason for nonpayment.

B. When the Department provides payment for work completed and detailed on the monthly progress estimate, the Contractor shall fully compensate any subcontractors for that portion of the work for which they were responsible within seven (7) days after receipt of payment. If the Contractor withholds any funds as part of his agreement with the subcontractor to ensure satisfactory compliance and completion of the specified work and the subcontractor achieves specified work as verified by payment from the Department to the Contractor, the Contractor shall make full payment (including retainage, etc.) to the subcontractor or supplier within seven (7) days. Payment to the subcontractors by the prime Contractor in no way relieves the Contractor of his responsibility for the work in accordance with 108.01 of the Road and Bridge Specifications.

C. Retainage

If the Engineer determines the Contractor's progress is unsatisfactory according to Section 108.03 or other applicable Contract documents, the Engineer will send a notice of unsatisfactory progress to the Contractor advising him of such determination. This notification will also advise the Contractor that five percent retainage of the monthly progress estimate is being withheld and will continue to be withheld for each month the Contractor's actual progress is determined to be unsatisfactory. When the Engineer determines that the Contractor's progress is satisfactory in accordance with these requirements, the 5 percent retainage previously withheld because of unsatisfactory progress will be released in the next monthly progress estimate, and the remaining monthly progress estimates will be paid in full provided the Contractor's progress continues to be satisfactory.

D. To address the barriers created by delays in payment to subcontractors, subcontractors have access to the VDOT Prime Contractor Payment History Report. This report provides information pertaining to contract ID, Prime Contractor, voucher amount, payment date, and payment amount.

E. Should a DBE contractor be involved in a payment issue, both the Construction Division and the Civil Rights Division shall be notified so as to investigate the reason for non-payment.

1. If the Contractor fails to make payment of the subcontractor's portion of the work within the timeframe specified herein, the subcontractor shall contact the Engineer and the Contractor's bonding company in writing. The bonding company and VDOT will investigate the cause for non-payment and, barring mitigating circumstances that would make the subcontractor ineligible for payment in accordance with the requirements of Section 109.10 of the Road and Bridge Specifications.

2. The Department will withhold payment of the Contractor's monthly progress estimate until the Contractor ensures that the subcontractors have been promptly paid for the work

that they have performed successfully and for which the Department has accepted and paid the Contractor.

- a. When bidding, and by accepting and executing a contract, the Contractor agrees to assume these contractual obligations, and to bind the Contractor's subcontractors contractually to prompt payment requirements.
- b. Nothing contained herein shall preclude the Contractor from withholding payment to the subcontractor in accordance with the terms of the subcontract in order to protect the Contractor from loss or cost of damage due to a breach of agreement by the subcontractor.

26.31 Directory

The Virginia Department of Transportation is responsible and accountable to USDOT including the Federal Highway Administration (FHWA) for all Disadvantaged Business Enterprise (DBE) certification related activities identified in 49 CFR Parts 23 and 26; however, the Metropolitan Washington Airports Authority (MWAA) and the Virginia Department of Small Business and Supplier Diversity (SBSD) has been delegated the authority through the Virginia Unified Certification Program (Virginia UCP) as Certifying Members to make all certification and decertification decisions on DBE certification matters in accordance with 49 CFR Parts 23 and 26 and the Virginia UCP Memorandum of Agreement.

The SBSBD, shall be responsible for maintaining the DBE Directory for all DBE firms certified by MWAA and SBSBD in Virginia and out-of-state firms certified through the interstate certification process. VDOT has taken a proactive role in monitoring the entire certification process housed at SBSBD including the DBE directory. The directory lists the firm's name, address, telephone number, contact, fax number, email address, vendor number and VDOT work codes and classes, and disadvantage designation. The Certifying Members have responsibility for updating the directory on a daily basis and is posted on their websites at www.sbsd.virginia.gov and/or www.mwaa.com.

Section 26.33 Overconcentration

VDOT has not concluded that overconcentration exists in the types of work that DBE firms perform. VDOT will continue to review DBE participation and statistical reports each year for signs of overconcentration.

If VDOT does determine that overconcentration exists in any work type, the agency will devise appropriate measures to address the overconcentration and shall forward the proposed steps to FHWA Virginia Division for consultation. Measures considered may include the use of incentives, technical assistance, mentor-protégé programs, and other appropriate tools designed to assist DBEs in performing work outside of their specific field.

26.35 Business Development Program

VDOT has a business development program to ensure increased participation of DBE firms in federal-aid highway contracts for the Virginia Department of Transportation (VDOT) and its sub-recipients. VDOT is committed to providing supportive services that are designed to (1) increase the number of certified and qualified DBE firms active in the highway program and (2) contribute to the growth and eventual self-sufficiency of DBE firms so that they may achieve proficiency in competing for contracts and subcontracts. The development of DBE firms, include but is not limited to assisting them into non-traditional areas of work and/or to compete in the marketplace outside the DBE program through training and assistance from VDOT.

The focus of the program is to provide the following key program elements throughout the state:

1. Recruitment and certification assistance to increase the availability of DBE firms in highway related activities;
2. Business development services to enhance management skills;
3. Financial and bonding assistance to increase capacity;
4. Technical assistance to utilize emerging technology and conduct business through electronic media;
5. Technology assistance to support operating systems, E-Commerce and Internet development;
6. Training to develop technical and managerial skills to ensure success in the highway program;
7. Training to move into non-traditional areas of work; and
8. Training to compete in the marketplace outside the DBE Program.

DBE firms interested in participating in the Business Development Program utilizing DBE supportive services funding must:

1. Be certified as a DBE firm with the Virginia Department of Small Business and Supplier Diversity;
2. Have Virginia as the home state for DBE certification;
3. Be in good standing with all Virginia tax obligations; and
4. Have a demonstrated interest in bidding or submitting proposals as a prime contractor/consultant or subcontractor/subconsultant, supplier, or hauler on VDOT federally funded projects.

Interested DBE owners with firms that meet these standards must complete a DBE Business Profile, Business Assessment, and participate in developing a Business Work Plan to include the development or updating of the firm's business plan if they do not have one or if the business plan needs to be updated.

The DBE/Supportive Services Program furnishes the foundation for increased participation of DBEs in federal-aid highway contracts. The DBE/Supportive Services Program is a performance-based program that measures the accomplishments of the program initiatives. Quantitative measures, survey tools, evaluations and customer feedback will be utilized to

determine the effectiveness and quality of the services provided. Supportive services available through these programs will include, but are not limited to:

- Bond Packaging
- Business Assessment
- Business Plan Development
- Computerized Accounting and Finances
- Construction Estimating and Bidding
- Contract Review
- CPR
- Financial Analysis
- Flagging Certification
- How To Do Business with VDOT
- Human Resources
- Leadership
- Marketing
- Mentor/Protégé Program
- OSHA 10 • OSHA 30
- Plan Reading
- Proposal Preparation
- Risk Management
- Technical Assistance on Construction
- Transportation Construction Mgmt. Institute
- Transportation Project Mgmt. Institute
- Technical Field Support
- Website Development

The VDOT Civil Rights Division will be responsible for monitoring and evaluating the DBE/Supportive Services Program to ensure the quality of the program and to assist DBE firms to develop, grow and become self-sufficient that they may achieve proficiency in competing for contracts and subcontracts. Performance Measures will be assessed through the monitoring and evaluation of the program by analyzing statistics of DBE activity of supportive services and trainings, questionnaires sent to DBE firms, evaluation forms of trainings/workshops, and one-on-one technical assistance.

26.37 Monitoring and Enforcement Mechanisms

VDOT will bring to the attention of the Department of Transportation (DOT) any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109. VDOT also will consider similar action under our own legal authorities, including responsibility determinations in future contracts. The mechanisms, methodology and structure to monitor and enforce our policies under 26.37 are outlined as follows:

DBE Compliance Program

The DBE Compliance Program ensures accurate administrative oversight of DOT-assisted contract participation as required by 49 CFR §26.55. The Program provides for early identification of concerns regarding credit allowances, timely notification of findings, implementation of corrective actions to ensure compliance with implementing guidelines, and verification that credit is received for the maximum participation allowable.

The primary objectives of the DBE Compliance Program are to:

- A. Determine whether the DBE firm is performing a commercially useful function as stated in appropriate guidelines;
- B. Determine the amount of expenditures that can be credited toward the contractor's DBE project requirements based on the performance of a commercially useful function by the DBE firm(s); and
- C. Identify areas where technical assistance is needed and provide information on sources available to provide such assistance.

To assure a thorough review of all the responsibilities of the DBE firm, the compliance review process is designed to collect relevant data from all available sources, including, but not limited to; the project inspector, the DBE firm, and the prime contractor.

The following Compliance Instructional Guide has been developed as a means of providing the necessary guidelines for conducting DBE compliance reviews. The following provides an outline of individual and division responsibility in administering and monitoring the DBE Compliance Program, and an overview of the forms used in the compliance review process.

District Civil Rights Manager's Responsibilities

The DCRMs are responsible for assuring compliance with Department DBE policies within their respective districts. Their responsibilities include, but are not limited to, the following:

- A. Coordinate and direct all monitoring and reporting functions related to the implementation of Department DBE policies for all DOT-assisted contracts within their district. Manage the filing of DBE Compliance Reviews based on direct observations of work activities and a review of any necessary and related documents.
- B. Visit each project to observe DBE activity and record information on the Schedule B of the DBE Compliance Review. The DCRM will assess the work activities and related administrative features of the DBE's performance throughout the duration of the project for compliance with the DBE program regulations. Report any critical issues to Central Office for their information.

- C. Immediately notify the prime contractor of any problems identified with a DBE firm. The DCRM will work cooperatively with the prime contractor for possible resolution and corrective action.
- D. Schedule and conduct compliance reviews on 100% of projects with DBE requirements, and develop reports in an appropriate format.
- E. Represent accurate and recent project information in DBE Compliance Reviews. These must be completed, signed and dated no more than 30 days from the date of the Schedule B on-site observation by the DCRM.

Project Inspector Responsibilities

The role of the project inspector in this program cannot be overemphasized. An inspector serves as the initial and first line observer of the DBE's work activities. The project inspector should inform the DCRM promptly of any problems or concerns involving the DBE firm or the prime contractor's use of the DBE firm.

Civil Rights Division Responsibilities

The Civil Rights Division Administrator is responsible for monitoring the DBE compliance program and implementing policies and procedures that will enable the Department to achieve its compliance program objectives.

- A. The Civil Rights Division will have oversight responsibility for compliance reviews, and may request such reviews be scheduled when deemed appropriate.
- B. The Civil Rights Division will provide assistance to DCROs in conducting reviews, gathering data, and other compliance activities on an as-needed basis.
- C. The Civil Rights Division Compliance Coordinator, or their designee, will provide the final review, and sign all compliance reviews.
- D. The Civil Rights Division is responsible for training and assisting District staff in carrying out the policies and procedures established for conducting compliance reviews.

Compliance Determinations & Notifications

A compliance determination will be rendered based on all the information obtained through the review process. An In-compliance determination requires the submittal of the cover sheet, Schedules A, B, C, and the signature page. A Non-compliance determination requires the submittal of the cover sheet, Schedules A, B, C, F, and the signature page. Schedules D and E may be submitted to support the determination. The amount of participation credit disallowed must be indicated on the Schedule C Form.

In potential non-compliance situations, any concerns must be communicated to the prime contractor. Verbal notification should be given during the review process that concerns have arisen, and that the need for clarification exists. At this time, a meeting will be scheduled and any additional information requested. Notification of the scheduled meeting must be copied to the Civil Rights Division Administrator and the Scheduling and Contract Division Administrator.

Any additional information requested must be submitted within fifteen (15) calendar days. The District may, upon receipt of a written request giving sufficient justification, grant a one (1)-time extension not to exceed seven (7) calendar days. If the requested information is not submitted within the established time limit, the compliance determination will be based on the information available. If such information is not sufficient to allow a conclusive determination of compliance, then a finding of non-compliance will be automatically invoked.

When required, the interview process is a major part of the compliance determination. The District may, upon written request giving sufficient justification, grant a one (1) time, seven (7) day, extension of the scheduled interview date. Should the prime contractor and/or DBE fail to appear for the interview, the compliance determination will be based on the information available. If such information is not sufficient to allow a conclusive determination of compliance, then a finding of non-compliance will be automatically invoked.

Any failure to submit requested information and/or failure to appear for an interview should merit serious consideration in making a determination. Such failure demonstrates, at a minimum, a lack of cooperation on the part of the contractor(s) involved.

The compliance determination is rendered based on information obtained, project site monitoring, and interviews with appropriate individuals. The contractor must be notified in writing within three (3) working days of the compliance determination being made, with copies to the Resident Administrator and the Civil Rights Division Administrator. When applicable, the letter of notification must address the items or portions of work for which credit is being disallowed and the dollar amount involved. The regulations supporting the disallowance must be referenced in the letter. Also, any corrective actions that have been implemented should be included.

Completing Review Report and Submittal

Upon completion of the compliance review, the DCRM will, within seven (7) working days, submit the report to the Civil Rights Division Administrator. The Civil Rights Division Administrator will review the report and, if appropriate, sign within three (3) days of receipt. If discrepancies or concerns arise, the Civil Rights Division Administrator will contact the DCRM for clarification. The Civil Rights Division Administrator will decide to make any corrections, return the review to the DCRM, or finalize the review by signing.

Complete compliance reviews will be forwarded to the appropriate DCRM with a copy to the Scheduling and Contract Division Administrator.

Compliance Review Format

The Compliance Review Report consists of a cover sheet, six (6) schedules (see Appendix E, page 217), and a signature page. The following is a brief description of the reporting forms:

Cover Sheet

The purpose of the cover sheet is to give the reader general information at a glance. All sections of the cover sheet will be completed and submitted with each report.

Schedule A: Compliance Review Checklist

Schedule A is used to show the documentation evaluated in the compliance review process. This schedule must be included in all reviews submitted. It is not necessary to submit the documents identified on the form. This information should be maintained in the District's project files.

Schedule B: DBE Compliance Review Report

District Civil Rights Office personnel will complete a Schedule B for each DBE firm through which participation credit is being sought. This report is to be submitted to the DCRM as soon as the DBE begins work on the project. Additional or revised Schedule B forms may be submitted upon request, or as deemed necessary. Copies of all Schedule Bs are to be retained as part of the permanent project records.

Schedule B must be included with all compliance reviews submitted. The Schedule B submitted with the review must have been completed within thirty (30) days of the submittal date.

Schedule C: Compliance Review Recap Sheet

Schedule C is to be completed by the DCRM, and must be included in all compliance review reports submitted. The compliance determination and credit allowance must be stated on the schedule.

Schedule D: Prime Contractor's Report

Schedule D is used to obtain additional information from the prime contractor. This form is to be completed by the prime contractor in situations where concerns arise which may result in non-compliance. This schedule may be submitted in support of a non-compliance determination. Any Schedule D completed but not submitted with the compliance review must be maintained in the District's project files.

If an approved non-DBE subcontractor has secured the participation of a DBE firm for which the prime is seeking DBE participation, the prime contractor may be required to secure a Schedule D from the non-DBE subcontractor.

Schedule E: DBE Subcontractor Reports

Schedule E is used to obtain additional information from a DBE subcontractor. A separate Schedule E has been developed for a DBE Supplier/Manufacturer (Schedule E1) and DBE Hauling Firm (Schedule E2). Completion of the appropriate Schedule E may be required when concerns arise which could result in non-compliance. Any Schedule E completed but not submitted with the compliance review must be maintained in the District's project files.

Schedule F: Non Compliance Summary

This Schedule must be submitted when a non-compliance determination has been rendered, or when DBE participation credit is disallowed. This schedule details the specifics surrounding the determination. It is essential that the act(s) of commission or omission, which resulted in the non-compliance determination, and/or disallowance of credit be covered.

Signature Page

The signature page is signed by the DCRM, or his/her appointed representative responsible for conducting the compliance review. The Civil Rights Division Administrator's signature finalizes the review.

Conclusion

The submittal of the Compliance Review Report does not complete the monitoring of DBE participation on the project. An on-going effort must be maintained to ensure compliance with program guidelines throughout the performance period.

In addition, recipients are required to have a mechanism to verify that work committed to DBEs at contract award is actually performed by the DBEs. VDOT must maintain a running tally of actual DBE commitments and a means of comparing the commitments to attainments. Both awards or commitments and attainments must be contained in reports of DBE participation to FHWA.

In order to fulfill this responsibility, VDOT has developed an interim database, DBE Tracking System (DTS). This system is designed to capture all payment information for DBEs that have been active on VDOT construction projects or VDOT professional service contracts. The DBE tracking system will enable the Civil Rights Division to track and report DBE commitments and attainments. The DTS will be used as an interim database until the AASHTO Civil Rights Labor Management System has been fully implemented.

Subpart C – Goals, Good Faith Efforts, and Counting

26.43 Set-Asides or Quotas

VDOT does not use quotas in any way in the administration of this DBE program.

26.45 Overall Goal

In accordance with Section 26.45, VDOT will submit its overall goal to FHWA triennially on August 1 for the following federal fiscal years: 2018, 2021, and 2024.

26.47 Shortfall Analysis

If the awards and commitments shown on VDOT's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, VDOT is committed to analyze the reason the DBE participation fell short for that year. To implement the program in good faith, VDOT will do the following:

- A. Analyze in detail the reasons for the difference between the overall goal and VDOT's awards and commitments in that fiscal year;
- B. Establish specific steps and milestones to correct the problems VDOT has identified in the analysis to fully meet the goal for the new fiscal year;
- C. Submit within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (a) and (b) of this section to FHWA for approval.

VDOT will not be penalized, or treated by the USDOT as being in noncompliance because DBE participation falls short of the overall goal, unless VDOT has failed to administer the program in good faith.

26.51 Contract Goals

VDOT will use contract goals to meet any portion of the overall goal that is not projected to be met through race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of the overall goal that is not met through the use of race-neutral means. VDOT will establish contract goals only on those USDOT-assisted contracts that have subcontracting possibilities. VDOT will review USDOT-assisted contracts to determine if contract goals will be established based upon the circumstances of each contract such as type and location of work, and the availability of DBE firms to perform the particular type of work.

26.53 Good Faith Efforts

- A. VDOT treats bidder/offeror's compliance with good faith efforts requirements as a matter of contract compliance. The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. VDOT will ensure that all information is complete and

accurate and adequately documents the bidder/offeror's good faith efforts before VDOT commits to the performance of the contract by the bidder/offeror.

B. Each solicitation for which a contract goal has been established will require the bidders/offerors to submit the following information:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm participating;
4. Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment; and
6. If the contract goal is not met, evidence of good faith efforts.

C. Design-Bid-Build

1. The VDOT Civil Rights Division reviews the documents submitted by the bidder/offeror to determine if the bidder/offeror has committed to meeting the DBE goal or upon initial review has demonstrated adequate good faith efforts. Upon review, the Civil Rights Division provides a written recommendation to the Construction Division as to whether the bidder/offeror should be approved for award or not, if not, the bidder/offeror is notified that they can request an administrative reconsideration panel hearing.

D. Design-Build

1. The VDOT Civil Rights Division received approval from FHWA in February 2014 to utilize Special Provision 107.15 - Use of Disadvantaged Business Enterprises on Design-Build Projects. This Special Provision provides design-build contractors the flexibility of identifying subconsultants during the design phase and subcontractors during the construction phase of the project.
2. Design Phase: Thirty (30) days after the Notice to Proceed for Design, the Design-Builder shall submit to Department for review and approval Forms C-111 and C-112 for each DBE firm to be utilized during the design phase to meet the DBE minimum requirement and Form C-48. Failure to submit the required documentation within the specified timeframe shall be cause to deny credit for any work performed by a DBE firm and delay approval of the Design-Builder's monthly payment.
3. **Construction Phase:** No later than thirty (30) days prior to the DBE firm undertaking any work, Design-Builder shall submit to Department for review and approval Forms C-111, C-112, and C-48. Failure to submit the required documentation within the specified timeframe shall result in disallowed credit of any work performed prior to approval of Forms C-111 and C-112 and delay approval of monthly payment.

The District Civil Rights Office (DCRO) will monitor good faith effort documentation quarterly to determine progress being made toward meeting the DBE minimum requirement established for the contract.

Administrative Reconsideration of Good Faith Efforts

- A. **During Bidding:** If the VDOT Civil Rights Division has determined that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, VDOT will, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

Within five (5) days of being informed by VDOT that the bidder/offeror is not responsive or responsible because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the procurement official. The Administrative Reconsideration Panel members will not have played any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with the Administrative Reconsideration Panel to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. A written decision will be sent to the bidder/offeror explaining the basis for the finding that the bidder/offeror did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

Where VDOT upon initial review of the bid results determines the apparent low bidder has failed or appears to have failed to meet the requirements of the contract DBE goal, the firm upon notification of VDOT's initial determination will be offered the opportunity for administrative reconsideration before VDOT rejects the bid as non-responsive.

1. The bidder shall address such request for reconsideration in writing to the Contract Engineer within five (5) business days of receipt of notification by the Department and shall be given the opportunity to discuss the issue and present its evidence in person to the Administrative Reconsideration Panel.
2. The Administrative Reconsideration Panel will be made up of VDOT Division Administrators or their designees, none of who took part in the initial determination that the bidder failed to make the goal or make adequate good faith efforts to do so.
3. After reconsideration, VDOT shall notify the bidder in writing of its decision and explain the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

4. If after the reconsideration, VDOT determines the bidder has failed to meet the requirements of the contract goal and has failed to make adequate good faith efforts to achieve the level of DBE participation as specified in the bid proposal, the bidder's bid will be rejected.
 5. If sufficient documented evidence is presented to demonstrate that the apparent low bidder made reasonable good faith efforts, the Department will award the contract and reduce the DBE requirement to the actual commitment identified by the lowest successful bidder at the time of its bid. The Contractor is still encouraged to seek additional DBE participation during the life of the contract.
- B. During the Contract:** If a DBE, through no fault of the Contractor, is unable or unwilling to fulfill his agreement with the Contractor, the Contractor shall immediately notify VDOT and provide all relevant facts. If a Contractor relieves a DBE subcontractor of the responsibility to perform work under their subcontract, the Contractor is encouraged to take the appropriate steps to obtain a DBE to perform an equal dollar value of the remaining subcontracted work. In such instances the Contractor is expected to seek DBE participation towards meeting the goal during the performance of the contract.
- C. Project Completion:** If the Contractor fails upon completion of the project to meet the required participation, the Contractor and any prime contractual affiliates, as in the case of a joint venture, may be enjoined from bidding as a prime Contractor, or participating as a subcontractor on VDOT projects for a period of 90 days.
1. Prior to enjoinder from bidding or denial to participate as a subcontractor for failure to comply with participation requirements, the Contractor may submit documentation to the State Construction Engineer to substantiate that failure was due solely to quantitative underrun(s), elimination of items subcontracted to DBEs, or to circumstances beyond their control, and that all feasible means have been used to obtain the required participation. The State Construction Engineer upon verification of such documentation shall make a determination whether or not the Contractor has met the requirements of the contract.
 2. If it is determined that the aforementioned documentation is insufficient or the failure to meet required participation is due to other reasons, the Contractor may request an appearance before the Administrative Reconsideration Panel to establish that all feasible means were used to meet such participation requirements. The decision of the Administration Reconsideration Panel shall be administratively final. If the decision is made to enjoin the Contractor from bidding on other VDOT work as described herein, the enjoinder period will begin upon the Contractor's failure to request a hearing within the designated time frame or upon the Administrative Reconsideration Panel's decision to enjoin, as applicable.

Good Faith Efforts When a DBE is Terminated, Substituted, or Replaced on a Contract

A. VDOT requires a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete his/her work on a contract with another certified DBE to the extent needed to meet the contract goal. Also, VDOT will require the prime contractor to notify the District Civil Rights Office of the DBE's inability or unwillingness to perform and provide reasonable documentation. In this situation, VDOT will require the prime contractor to obtain prior approval of the substitute DBE, and to provide copies of new or amended subcontracts or documentation of good faith efforts.

1. If a certified DBE subcontractor is terminated, or fails, refuses, or is unable to complete the work on the contract for any reason, the Contractor must promptly request approval to substitute or replace that firm in accordance with this section of this Special Provision.
 - a. The Contractor shall notify VDOT in writing before terminating and/or replacing the DBE that was committed as a condition of contract award or that is otherwise being used or represented to fulfill DBE contract obligations during the performance period.
 - b. Written consent from the Department for terminating the performance of any DBE shall be granted only when the Contractor can demonstrate that the DBE is unable, unwilling, or ineligible to perform its obligations for which the Contractor sought credit toward the contract DBE goal. Such written consent by the Department to terminate any DBE shall concurrently constitute written consent to substitute or replace the terminated DBE with another DBE. Consent to terminate a DBE shall not be based on the Contractor's ability to negotiate a more advantageous contract with another subcontractor whether that subcontractor is, or is not, a certified DBE.
2. All Contractor requests to terminate, substitute, or replace a certified DBE shall be in writing, and shall include the following information:
 - a. The date the Contractor determined the DBE to be unwilling, unable, or ineligible to perform.
 - b. The projected date that the Contractor shall require a substitution or replacement DBE to commence work if consent is granted to the request.
 - c. A brief statement of facts describing and citing specific actions or inaction by the DBE giving rise to the Contractor's assertion that the DBE is unwilling, unable, or ineligible to perform;
 - d. A brief statement of the affected DBE's capacity and ability to perform the work as determined by the Contractor;
 - e. A brief statement of facts regarding actions taken by the Contractor which are believed to constitute good faith efforts toward enabling the DBE to perform;
 - f. The current percentage of work completed on each bid item by the DBE;

- g. The total dollar amount currently paid per bid item for work performed by the DBE;
 - h. The total dollar amount per bid item remaining to be paid to the DBE for work completed, but for which the DBE has not received payment, and with which the Contractor has no dispute;
 - i. The total dollar amount per bid item remaining to be paid to the DBE for work completed, but for which the DBE has not received payment, and over which the Contractor and/or the DBE have a dispute.
3. Contractor's Written Notice to DBE of Pending Request to Terminate and Substitute with another DBE.
- a. The Contractor shall send a copy of the "request to terminate and substitute" letter to the affected committed DBE firm, in conjunction with submitting the request to the DCRO. The affected DBE firm may submit a response letter to the Department within two (2) business days of receiving the notice to terminate from the Contractor. The affected DBE firm shall explain its position concerning performance on the committed work.
 - b. The Department will consider both the Contractor's request and the DBE's response and explanation before approving the Contractor's termination and substitution request, or determining if any action should be taken against the Contractor.
 - c. If, after making its best efforts to deliver a copy of the "request to terminate and substitute" letter, the Contractor is unsuccessful in notifying the affected DBE firm, the Department will verify that the affected, committed DBE firm is unable or unwilling to continue the contract. The Department will immediately approve the Contractor's request for a substitution.
4. Proposed Substitution of Another Certified DBE
- a. Upon termination of a DBE, the Contractor shall use reasonable good faith efforts to replace the terminated DBE. The termination of such DBE shall not relieve the Contractor of its obligations pursuant to this section, and the unpaid portion of the terminated DBE's contract will not be counted toward the contract goal.
 - b. When a DBE substitution is necessary, the Contractor shall submit an amended Form C-111 with the name of another DBE firm, the proposed work to be performed by that firm, and the dollar amount of the work to replace the unfulfilled portion of the work of the originally committed DBE firm. The Contractor shall furnish all pertinent information including the contract I.D. number, project number, bid item, item description, bid unit and bid quantity, unit price, and total price. In addition, the

Contractor shall submit documentation for the requested substitute DBE as described in this section of this Special Provision.

- c. Should the Contractor be unable to commit the remaining required dollar value to the substitute DBE, the Contractor shall provide written evidence of good faith efforts made to obtain the substitute value requirement. The Department will review the quality, thoroughness, and intensity of those efforts. Efforts that are viewed by VDOT as merely superficial or pro-forma will not be considered good faith efforts to meet the contract goal for DBE participation. The Contractor must document the steps taken that demonstrated its good faith efforts to obtain participation.
- B. If a change order is issued and it alters the scope of work to be performed by DBEs, the DCRO will be notified and shall determine whether the change order impacts the contractor's ability to meet the project goal and/or changes the DBEs' level of participation on the project. The DCRM will recommend any remedial steps necessary to ensure compliance with the contractor's commitment to DBE participation.
- C. Prime contracts must include the following provisions:
1. That the contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains VDOT's written consent;
 2. Unless prior approval is provided by VDOT, the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.
- D. VDOT requires the contractor awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with 49 CFR Part 26.

26.55 Counting DBE Participation

- A. VDOT counts DBE participation toward overall and contract goals on federally-assisted State and locally administered transportation projects as provided in 49 CFR 26.55.
1. When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward the DBE goal, including the cost of supplies and materials obtained by the DBE for work on the contract (except supplies and equipment purchases or leases from the prime contractor or their affiliate).
 2. Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive compared with fees customarily allowed for similar services.

3. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward the DBE goal only if the DBE's subcontractor itself is a DBE; work contracted to a non-DBE firm does not count toward the goal
4. Credit toward DBE goals varies with the type of DBE firm:
 - a. Construction Firms (supply labor and materials to perform a distinct element of the work) Credit – 100%.
 - b. Professional, Technical, Consultant, or Managerial, Bonding or Financial Services Credit – 100%.
 - c. Manufacturers (must operate a factory that produces, on the premises, the materials, supplies, articles or equipment required under the contract and of the general character described in the specifications Credit – 100%).
 - d. Regular Dealer (must own, operate or maintain a store or warehouse that regularly sells materials to the general public. Credit – 60%. A regular dealer in bulk products (petroleum, steel, etc.) does not need to maintain a place of business, but must own and operate distribution equipment for the products. Packagers, Brokers, Manufacturers' Representatives (no credit for materials or supplies themselves), Brokerage Fee (if reasonable).
 - e. Trucking Firm: As detailed in Section 26.55 D.1), trucking participation credit is granted for hauling costs associated with trucks owned and operated by the DBE trucking firm.

When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

The VDOT DCRO is responsible for monitoring and overseeing DBE performance on projects in its district to determine the DBE participation that will be used for DBE credit. The DBE Program Compliance Review Report (Appendix D) is utilized to determine if a commercially useful function (CUF) is being performed. The compliance review report determines if the DBE firm actually performs, manages, and supervises the work involved. The DBE firm must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. The DCRO determines if the DBE firm is performing a CUF and the report is reviewed by the VDOT Civil Rights Division Central Office. All noncompliant reviews are sent to the FHWA Virginia Division for review. Determinations of CUF reviews are not administratively appealable to the USDOT.

B. VDOT utilizes the following factors in determining whether a DBE trucking company is performing a CUF:

1. Trucking company must own at least one truck of its own (which is insured and operable).

2. Count only the value of transportation services provided by a DBE trucking company itself, using trucks it owns, insures and operates, and using drivers it employs. A DBE trucking firm can count the participation of other trucks leased from another certified DBE firm.
 3. Limited DBE credit can also be obtained for the use of trucks leased from non-DBE sources. The counting of credit for the use of non-DBE trucks shall not exceed the value of transportation services on the contract provided by DBE trucks.
 - a. Contractors must identify the DBE trucking firm(s) responsible for the transportation of materials at the time of commitment for design-bid-build projects and prior to performance on design-build projects.
 - b. Trucking participation is monitored through the Trucking Reporting and Verification Form and a matching amount of hauling by non-DBE trucks. Fees collected by the DBE also count toward participation. See Appendix B, Part N for details.
- C. If a firm is not currently certified as a DBE in accordance with the Certification Standards at the time of execution of the contract, no DBE credit can be given towards the DBE goal.
- D. If a firm ceases to be certified while under contract the dollar value of the work performed may be counted toward the project DBE goal; however, is not to be counted toward the overall goal.
- E. Credit for DBE subcontractor participation toward a contractor's final compliance for its DBE obligations will not be counted until the DBE subcontractor has actually been paid.

Subpart D – Certification Standards

VDOT is ultimately responsible and accountable to USDOT including the Federal Highway Administration (FHWA) for all Disadvantaged Business Enterprise (DBE) certification related activities identified in 49 CFR Parts 23 and 26. The Certifying Members of the Virginia UCP, Metropolitan Washington Airports Authority (MWAA) and the Virginia Department of Small Business and Supplier Diversity (DSBSD), are required to use the certification standards of Subpart D of 49 CFR Part 26 and the certification procedures of Subpart E of Part 26 to determine the eligibility of firms to participate as DBEs in USDOT-assisted contracts. VDOT will monitor the certification decisions made by the Certifying Members. To be certified as a DBE, a firm must meet all certification eligibility standards. The certification decisions will be based on the facts as a whole.

For information about how a firm can be certified as a DBE in the Commonwealth of Virginia and access to certification application forms and documentation requirements, contact:

Virginia Department of Small Business and Supplier Diversity
101 N. 14th Street, 11th Floor
Richmond, VA 23219
Attn: Certification Unit
804-786-6585
www.sbsd.virginia.gov

Metropolitan Washington Airports Authority
Equal Opportunity Programs Department
1 Aviation Circle
Washington, DC 20001-6000
Contact: Certification Unit
703-417-8625
www.metwashairports.com

26.61 Burdens of Proof for Certification and Group Membership

The Virginia UCP Certifying Members have the responsibility of making a determination concerning whether individuals and firms have met their burden of demonstrating group membership, business size, ownership, control, and social and economic disadvantage by considering all the facts in the record.

A. Virginia UCP Certifying Members review the applicant's file to include a signed and notarized Affidavit of Certification for each owner of the firm stating that they are socially and economically disadvantaged and are a member of one or more of the following group: women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the Small Business Administration.

1. Upon review of the signed notarized statement of membership in a presumptively

disadvantaged group, there is a well-founded reason to question the individual's claim of membership to that group, the individual seeking DBE certification must present additional evidence that he or she is a member of the group.

2. The Virginia UCP must provide the individual a written explanation of its reasons for questioning his or her group membership and a written request for additional evidence.
 - a. In making a determination about the owner's group membership, the Virginia UCP Certifying Members must consider whether the person has held out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. The Virginia UCP Certifying Members may require the applicant to produce appropriate documentation of group membership.
 - b. If the Virginia UCP Certifying Members determine that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantaged on an individual basis.

26.65 Business Size

- A. VDOT, as a recipient, must apply current Small Business Administration (SBA) business size standard(s) found in 13 CFR part 121 for firms to be eligible as DBEs. To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by SBA standards appropriate to the type(s) of work the firm seeks to perform in USDOT-assisted contracts, including the primary industry classification of the applicant.
- B. A firm is not an eligible DBE in any federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations, over the firm's previous three fiscal years, in excess of \$23.98 million.

26.67 Social and Economic Disadvantage

- A. Certifying Members must rebuttably presume that citizens of the United States (or lawfully permitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged. The Certifying Members must require applicants to submit a signed, notarized statement that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.
- B. The Certifying Members 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.

1. The Certifying Members must require each individual who makes the certification that their personal net worth does not exceed \$1.32 million to support it with a signed, notarized statement of personal worth, with appropriate supporting documentation. In determining an individual's net worth, you must observe the following requirements.
 - a. Exclude an individual's ownership interest in the applicant firm.
 - b. Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm.)
 - c. Do not use a contingent liability to reduce an individual's net worth.
 - d. With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time.

C. An individual's presumption of economic disadvantage may be rebutted in two ways.

1. If the statement of personal net worth and supporting documentation that an individual submits shows the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted.
2. If the statement of personal net worth and supporting documentation that an individual submits demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, as a certifying agency, you may consider factors that include, but are not limited to, the following:
 - a. Whether the average adjusted gross income of the owner over the most recent three year period exceeds \$350,000;
 - b. Whether the income was unusual and not likely to occur in the future;
 - c. Whether the earnings were offset by losses;
 - d. Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;
 - e. Other evidence that income is not indicative of lack of economic disadvantage; and
 - f. Whether the total fair market value of the owner's assets exceed \$6 million.

If the Certifying Members have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged, a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. The proceeding must follow the procedures of Section 26.87.

- D. Certifying Members must attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, to a trust of which the beneficiary is an immediate family member, or to the applicant firm for less than fair market value within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's annual affidavit. Exceptions to this, is if the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or

some other form of essential support.

26.69 Determining Ownership

- A. In determining whether the socially and economically disadvantaged participants in a firm own the firm, all facts in the record must be viewed 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.
1. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.
 2. The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.
 3. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.
 4. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.
- B. The following are required documents that must be submitted by applicants and analyzed in order for Certifying Members to make the determination of ownership.
1. Required Documents for All Applicants
 - a. Resumes (that include places of employment with corresponding dates), for all owners, officers, and key personnel of the applicant firm.
 - b. Personal Net Worth Statement for each socially and economically disadvantaged owners comprising 51% or more of the ownership percentage of the applicant firm.
 - c. Personal Federal tax returns for the past 3 years, if applicable, for each disadvantaged owner.
 - d. Federal tax returns (and requests for extensions) filed by the firm and its affiliates with related schedules, for the past 3 years.
 - e. Documented proof of contributions used to acquire ownership for each owner (e.g., both sides of cancelled checks)
 - f. Signed loan and security agreements, and bonding forms.
 - g. List of equipment and/or vehicles owned and leased including VIN numbers, copy of titles, proof of ownership, insurance cards for each vehicle.

- h. Title(s), registration certificate(s), and U.S. DOT numbers for each truck owned or operated by firm.
- i. Licenses, license renewal forms, permits, and haul authority forms.
- j. Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases
- k. Documented proof of any transfers of assets to/from firm and/or to/from any of its owners over the past 2 years
- l. DBE/ACDBE and SBE 8a (SDB, MBE/WBE) certifications, denials, and/or decertifications, if applicable; and any U.S. DOT appeal decision on these actions.
- m. Schedule of salaries (or other remuneration) paid to all officers, managers, owners, and/or directors of the firm
- n. List of all employees, job titles, and dates of employment
- o. Proof of warehouse/storage facility ownership or lease arrangements

Partnership or Joint Venture

- p. Original and any amended Partnership or Joint Venture Agreements

Corporation or LLC

- q. Official Articles of Incorporation (signed by state official)
- r. Both sides of all corporate stock certificates and firm's stock transfer ledger
- s. Shareholders' Agreement(s)
- t. Minutes of all stockholders and board of directors meetings
- u. Corporate by-laws and any amendments
- v. Corporate bank resolution and bank signature cards
- w. Official Certificate of Formation and Operating Agreement with any amendments (for LLCs)

26.71 Determining Control

- A. Only an independent business may be certified as a DBE. An independent business is one that does not depend on its relationship with another firm or firms for its viability. The Virginia UCP Certifying Members must consider all of the facts to determine whether socially and economically disadvantaged owners control a firm.
 - 1. Scrutinize relationships with non-DBE firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - 2. Consider present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms to determine if the independence of the potential DBE firm has been compromised.
 - 3. Examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.
- B. A DBE firm must not be subject to any formal or informal restrictions through corporate

charter provisions, by-law provisions, contracts or any other formal or informal devices that prevent the socially and economically disadvantaged owners from making any business decision of the firm.

- C. The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decision on matters of management, policy and operations.
- D. All securities that constitute ownership of a firm shall be held directly by disadvantaged Persons.
- E. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial.
- F. Situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership, the owner's expertise must be:
 - 1. In a specialized field;
 - 2. Of outstanding quality;
 - 3. In areas critical to the firm's operations;
 - 4. Indispensable to the firm's potential success;
 - 5. Specific to the type of work the firm performs;
 - 6. Documented records to show the contribution of expertise and its value to the firm;
 - 7. The individual whose expertise is relied upon must have a significant financial investment in the firm.
 - 8. Architects, Professional Engineers, Land Surveyors, Surveyor Photogrammetrist, and Landscape Architects must be licensed in the Commonwealth of Virginia to perform work on VDOT projects.

G. NAICS Codes

Certification will only be granted to a firm for specific types of work in which the disadvantaged owner(s) have the ability to control and perform on federally-assisted contracts. The types of work a firm can perform must be described in terms of the most specific available NAICS code to include a descriptor from the classification scheme of equivalent detail and specificity.

- 1. Virginia UCP Certifying Members determine the appropriate NAICS code to certify DBE applicants by reviewing Section 2: General Information of the Uniform Certification Application and specifically the information pertaining to the description of the firm's primary activities and the products and services it provides. The self-reported NAICS codes are also reviewed along with the largest contracts completed and active work currently being performed. Certification will only be granted to a firm for specific types of work in which the disadvantaged owners have the ability to control and perform on federally-assisted contracts.

2. For a DBE firm to become certified in an additional type of work, the firm needs to demonstrate that its disadvantaged owners are able to control the firm with respect to that type of work.

26.73 Other Certification Rules

- A. Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. CUF issues are not appealable to the USDOT. Commercially useful function is not a certification issue and must not be considered in any way in making decisions about whether to certify a firm as a DBE. Certification determinations will be based on looking at the certification standards as a whole.
- B. When making certification decisions, consider whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE Program.
- C. Evaluation of the eligibility of a firm must be made on the basis of present circumstances. A firm must not be refused certification based solely on historical information indicating a lack of ownership or control by disadvantaged individuals.
- D. Failure or refusal for a firm seeking DBE certification to cooperate fully with Virginia UCP Certifying Members (and DOT) requests for information is ground for denial or removal of certification.
- E. Only firms organized for profit may be eligible DBEs.
- F. An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged.
- G. VDOT will cooperate in any way possible with requests for information pertaining to §26.73.

Subpart E – Certification Procedures

26.81 Unified Certification Program (UCP)

Parties to the Virginia UCP include the Virginia Department of Aviation, Virginia Port Authority, Virginia Department of Rail and Public Transportation (DRPT), Virginia Department of Small Business and Supplier Diversity (DSBSD), Washington Metropolitan Airports Authority (MWAA), and the Virginia Department of Transportation. The Certifying Members of the UCP are MWAA and DSBSD with VDOT having oversight responsibility for decisions made by SBSB.

MWAA and DSBSD, UCP Certifying Members, will certify eligible DBEs in accordance with the criteria set forth in 49 CFR 26 consistent with the standards of Subpart D to ensure that the Virginia UCP program benefits only those firms owned and controlled by disadvantaged individuals. The UCP Certifying Members makes all certification decisions on behalf of all DOT recipients in Virginia with respect to participation in the DBE Program. Certification decisions by the UCP shall be binding on all DOT recipients within Virginia.

The Certifying Members do not charge a fee for firms applying for DBE certification.

- A. New DBE applications will be processed by the Certifying Member that receives the application, unless one Certifying Member determines that its workload is such that it may not be able to review the application within the required time frame. If such a situation occurs, the Certifying Member may transfer the DBE application to the other Certifying Member if the other Certifying Member consents to the transfer. Applicants in highway or aviation services may be better served by the Certifying Member most familiar with those types of work. An applicant's certification application and any changes, updates, denials, appeals, decertification and/or reapplication will be handled by the initial Certifying Member, unless transferred to the other Certifying Member.
- B. The Certifying Members will make an on-site visit to each firm's principal place of business, interview the principal officers, and review their resumes and/or work histories. The Certifying Members must also conduct on-site visits to job sites, if there are such sites, in the Certifying Member's jurisdiction or local area, on which the firm is working at the time of the eligibility investigation to further verify that the firm seeking DBE certification meets certification standards. MWAA will make every effort to take photographs, to include in the firm's file, during these on-site visits to include pictures of (if available):
 1. The businesses exterior and interior;
 2. Equipment owned by the firm, including signage on the equipment;
 3. Signage on the business exterior, or lack thereof;
 4. Business staff, if present; and
 5. Pictures of nearby or co-located firms (e.g. sharing the same property, neighboring companies, etc.).

- C. The Certifying Members shall make a determination regarding DBE certification reviews within 90 calendar days once a completed application has been received. If the Certifying Members are unable to complete a certification application within 90 calendar days, they shall notify the firm and VDOT in writing of the reasons for the delay. The Certifying Members shall only extend the 90 calendar day deadline for each firm once (for an additional 60 calendar days,) and shall only request extensions that are permitted by the provisions of 49 CFR Parts 23 and 26.
- D. Decertification proceedings may be commenced against any DBE at the request of any Virginia UCP Member, Certifying Member, third party, or at the request of USDOT, under the conditions stated in, and in accordance with, the procedures set out in 49 CFR Part 26.87. The Certifying Member undertaking decertification proceedings must ensure that the employees who participated in the initial decision to seek decertification do not make the final determination regarding decertification. The Certifying Member is responsible for processing the decertification.
- E. DBEs are required to inform the certifying entity immediately, in a written affidavit, of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR Part 26 or of any material changes in the information provided with the application for certification.
- F. Also, all owners of certified DBE firms will be required to submit, on the anniversary date of their certification, a sworn affidavit (see Appendix K, page 288) attesting to the fact that there has been no change in the firm's ownership, control, or size, in accordance with 26.83(j). DBEs will be required to submit, with this affidavit, documentation of the firm's size and gross receipts and the owner's personal net worth. The Certifying Members will notify all currently certified DBE firms of these obligations by letter 90 days in advance of the due date of the required continued participation information. This notification will inform DBEs that in order to submit the affidavit, their owners must swear or affirm that they meet all regulatory requirements of Part 26, including personal net worth. Likewise, if a firm's owner knows or should know that he or she, or the firm, fails to meet a Part 26 eligibility requirement, (e.g., personal net worth), the obligation to submit a complete application documenting changes applies.
- G. Certifying Members of the UCP may only require the firm to provide federal taxes to confirm business size with its Annual Affidavit submission.
- H. VDOT shall conduct an annual review of the Certifying Members' certification of DBE firms to ensure compliance with various federal regulations. The review shall be conducted on a date mutually agreed upon between VDOT and MWAA and VDOT and SBSB. VDOT will prepare a written report with a copy to the respective Certifying Member that clearly identifies concerns, issues, technical or procedural errors and a time frame for such to be corrected. The Certifying Member will have the opportunity to provide a response to the report. The report prepared by VDOT and the response, if any, from the Certifying Members will be submitted to FHWA Division Office for review.

26.85 Interstate Certification

The Certifying Members process for interstate certification is as follows:

- A. When a firm is currently certified in its home state and applies to the Commonwealth of Virginia, the Certifying Members, at its discretion, may accept the firm's certification from its home state and certify the firm without further procedures.
 1. The firm must provide the Virginia Certifying Member a copy of its certification notice from the firm's home state.
 2. Virginia must confirm that the firm has a current valid certification from its home State.
 3. If Virginia Certifying Members choose not to accept a firm's home state Certification:
 - a. The firm must provide to Virginia a complete copy of the application form, all supporting documents, and any other information that was submitted to the home state. This includes affidavits of no change and any notices of changes that were submitted to the home state, as well as, any correspondence the firm has had with the home state concerning the application or status as a DBE firm.
 - b. The firm must also provide to the Virginia Certifying Member any notices or correspondence from states other than the home state related to the firm's status as an applicant or certified DBE in those states.
 - c. The firm must disclose to the Virginia UCP if it has filed a certification appeal with the DOT.
 - d. The firm must submit a notarized affidavit sworn to by the firm's owners that all the information required by 49 CFR 26.85(c) has been submitted and the information is complete and is an identical copy of the information submitted to the home state.
 - e. If the on-site report from the home state is more than three years old, as of the date of the application to the Virginia, the Virginia Certifying Member may require that the affidavit also affirm that the facts in the on-site report remain true and correct.

26.86 Denial of Initial Request for Certification

- A. Upon determining that a firm seeking initial certification is ineligible to participate in the Program, a written explanation is sent by certified mail in accordance with 49 CFR Part 26.85. The firm is offered an opportunity for a hearing to elaborate upon the issues raised **in the letter** of denial. Any firm or complainant that is issued a final denial of certification may appeal **the** decision to the USDOT. Such appeals may be sent to:

U.S. Department of Transportation
Office of Civil Rights, Certification Appeal
400 7th Street, SW, Room 2401
Washington, DC 20590

Any DOT certification appeal decisions affecting the eligibility of DBEs for FHWA-assisted contracting (e.g., certify a firm if DOT has determined that our denial of its application was erroneous) will be implemented promptly.

- B. When a firm is denied certification, its owners or officers, affiliates of the firm or officers or owners of an affiliated firm must wait nine (9) months after the date of the denial before submitting a new application for DBE certification. Following the required nine (9) month waiting period, an applicant who has been denied certification will be required to reapply at the same agency which issued the denial of certification.
- C. If an applicant for DBE certification withdraws its application before a decision has been issued on the application, the applicant can resubmit the application at any time. The Virginia Certifying Members may not apply the waiting period before allowing the applicant to resubmit its application. The reapplication, however, can be placed at the end of the line behind other applications.
- D. When a firm is denied certification, the Virginia Certifying Members post the denial information on the U.S. DOT's Civil Rights web-based database.

26.87 Removal of Eligibility

- A. Any person may file a written complaint alleging that a currently-certified firm is ineligible and specify the alleged reasons why the firm is ineligible. General allegations are not acceptable and the confidentiality of the complainant must be protected.
 - 1. The Certifying Member must review records concerning the firm, material provided by the firm and the complainant, and other available information. Additional information may be requested from the firm as needed.
 - 2. Based upon the review, if there is reasonable cause to believe the firm is ineligible, the Certifying Member must provide written notice to the firm that they propose to find the firm ineligible and setting forth the reasons for the proposed determination.
- B. When a recipient of the Virginia UCP is notified by a firm of a change of its circumstances or other information comes to the attention of a Virginia UCP recipient and it is determined that there is reasonable cause to believe that the currently certified firm is ineligible, written notice to the firm by the Certifying Member is required with the reasons for the proposed determination.
- C. VDOT and the Certifying Members will work collaboratively to investigate any allegations of a firm being ineligible for the DBE Program.
 - 1. When a firm is notified that there is reasonable cause to remove its eligibility, the firm must be given an opportunity for an informal hearing, at which time the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.
 - 2. VDOT will provide assistance to MWAA and DSBSD in the investigation of third PARTY complaints relating to federal certification requirements. All decertification

proceedings will be scheduled, coordinated, reviewed, and determined by a panel consisting of representatives from VDOT, MWAA, and DSBSD in accordance with the informal hearing process.

3. All investigations will be conducted within 90 calendar days of a complaint being filed and a written summary of the findings will be provided to the Certifying Members and the Virginia FHWA.
4. A written transcript of the hearing will be maintained and provided to the USDOT and the DBE firm upon request. The firm may be charged the cost of copying the record.
5. If it is determined that there is reasonable cause to believe that a firm is no longer eligible for certification, the firm will be provided a written notice of removal of its eligibility. If it is determined, that the eligibility remains, the complainant and the firm will be notified in writing of that determination.
6. When the firm is notified that there is reasonable cause to remove its eligibility, the firm will be given the opportunity for a hearing, at which time the firm may respond to the reasons for the removal of its eligibility and provide information and arguments concerning why it should remain certified. The hearing will be conducted by the DBE Panel (an entity that is separate from and does not involve anyone from the certification section).
7. A firm remains an eligible DBE during the pendency of the proceeding to remove its eligibility.
8. Any firm receiving a final denial of certification may appeal to the USDOT in writing within 90 days of the denial.

26.88 Suspension of Certification

- A. A DBE's certification shall be suspended immediately when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.
- B. The Certifying Members may immediately suspend a DBE's certification when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by §26.83(i) or fails to timely file an affidavit of no change.
- C. In determining the adequacy of the evidence to issue a suspension the Certifying Members shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

- D. When a firm is suspended, the Certifying Members shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.
- E. Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.
- F. While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward a recipient's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.
- G. Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to the recipient information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the recipient must either lift the suspension and reinstate the firm's certification or commence a decertification action.
- H. The decision to immediately suspend a DBE is not appealable to the US Department of Transportation. The failure of a Certifying Member to either lift the suspension and reinstate the firm or commence a decertification proceeding is appealable to the U.S. Department of Transportation under §26.89 of this part, as a constructive decertification.

Section 26.91 DOT Certification Appeal Decisions

A firm that has been denied certification or whose eligibility has been removed by a Virginia UCP Certifying Member may make an administrative appeal to the USDOT, Departmental Office of Civil Rights, 1200 New Jersey Avenue SE., Washington, DC 20590.

- A. Appeal decisions made by the USDOT are binding and the Virginia UCP Certifying Members must take the following:
 - 1. If the USDOT determines that the Virginia UCP Certifying Member erroneously certified a firm, the Virginia UCP Certifying Member must remove the firm's eligibility on receipt of the determination.
 - 2. If the USDOT determines that the Virginia UCP Certifying Member erroneously failed to find reasonable cause to remove the firm's eligibility, the Virginia UCP Certifying Member must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed.

3. If the USDOT determines that you erroneously declined to certify or removed the eligibility of the firm, the Certifying Member must certify the firm, effective on the date that the written notice of determination was received from the USDOT.
4. If the USDOT affirms the Certifying Member's determination, no further action is required.

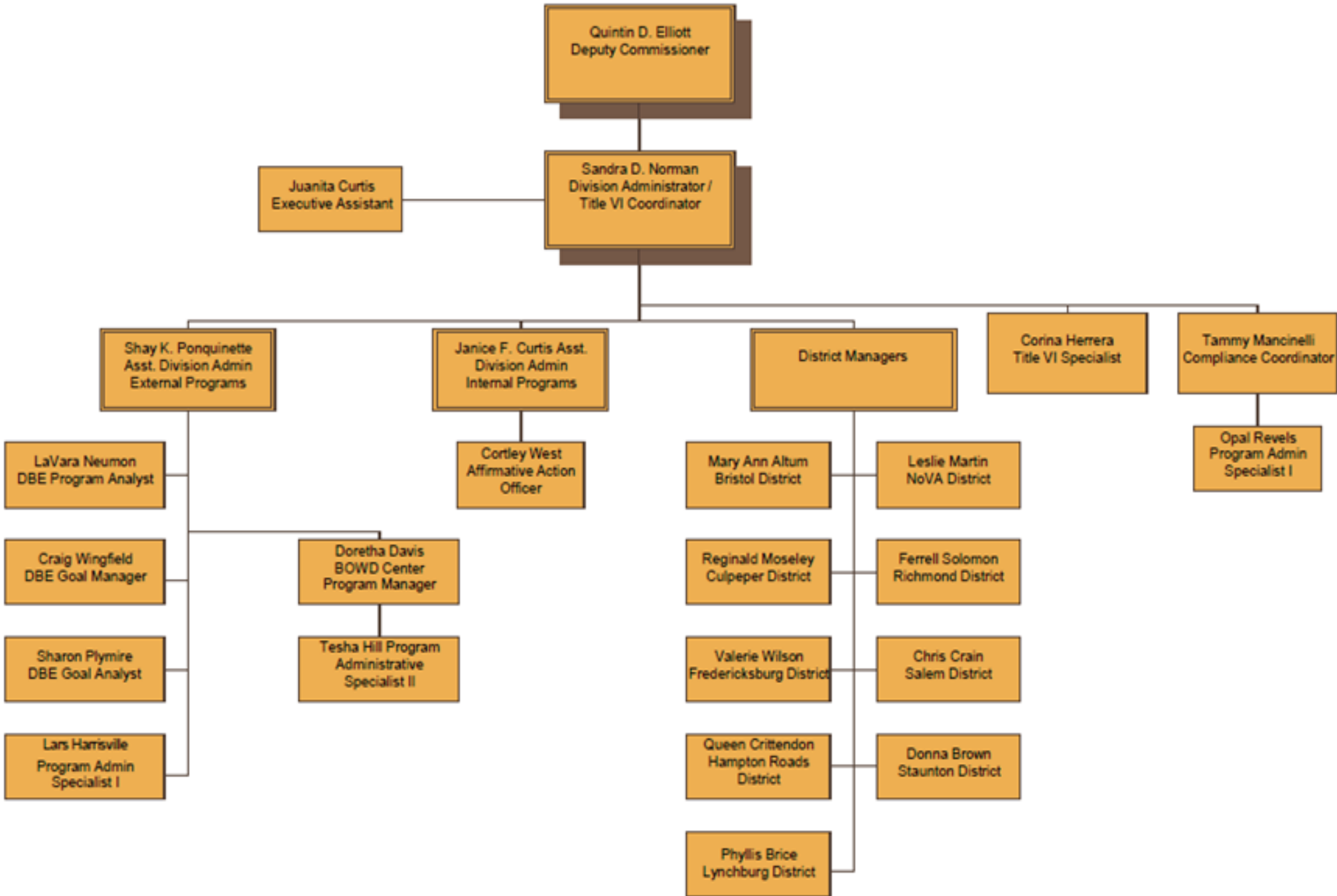
Subpart F – Compliance and Enforcement

26.109 Information, Confidentiality, Cooperation, and Intimidation or Retaliation

- A. *Availability of Records.* VDOT will comply with the provisions of the Federal Freedom of Information (5 U.S.C. 552), Privacy Acts (5 U.S.C. 552a), and the Virginia Freedom of Information Act (§ 2.2- 3704) when responding to requests for information concerning any aspect of the DBE Program. VDOT will safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law. VDOT will not release any information that may reasonably be construed as confidential business to any third party without the written consent of the firm that submitted the information.
- B. *Confidentiality of Information.* Complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing.
- C. *Cooperation.* All participants in VDOT's DBE program (including, but not limited to, recipient's, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with USDOT and VDOT compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).
- D. *Intimidation and retaliation.* If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.

APPENDIX A
ORGANIZATIONAL CHART

Civil Rights Organization Chart FY2016



APPENDIX B
UNIFORM CERTIFICATION APPLICATION



UNIFORM CERTIFICATION APPLICATION
DISADVANTAGED BUSINESS ENTERPRISE (DBE) /
AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE (ACDBE)
49 C.F.R. Parts 23 and 26

Roadmap for Applicants

1. Should I apply?

You may be eligible to participate in the DBE/ACDBE program if:

- The firm is a for-profit business that performs or seeks to perform transportation related work (or a concession activity) for a recipient of Federal Transit Administration, Federal Highway Administration, or Federal Aviation Administration funds.
- The firm is at least 51% owned by a socially and economically disadvantaged individual(s) who also controls it.
- The firm's disadvantaged owners are U.S. citizens or lawfully admitted permanent residents of the U.S.
- The firm meets the Small Business Administration's size standard and does not exceed \$23.98 million in gross annual receipts for DBE (\$52.47 million for ACDBEs). (Other size standards apply for ACDBE that are banks/financial institutions, car rental companies, pay telephone firms, and automobile dealers.)

2. How do I apply?

First time applicants for DBE certification must complete and submit this certification application and related material to the certifying agency in your home state and participate in an on-site interview conducted by that agency. The attached document checklist can help you locate the items you need to submit to the agency with your completed application. If you fail to submit the required documents, your application may be delayed and/or denied. Firms already certified as a DBE do not have to complete this form, but may be asked by certifying agencies outside of your home state to provide a copy of your initial application form, supporting documents, and any other information you submitted to your home state to obtain certification or to any other state related to your certification.

3. Where can I send my application? INSERT UCP PARTICIPATING MEMBER CONTACT INFORMATION

4. Who will contact me about my application and what are the eligibility standards?

The DBE and ACDBE Programs require that all U.S. Department of Transportation (DOT) recipients of federal assistance participate in a statewide Unified Certification Program (UCP). The UCP is a one-stop certification program that eliminates the need for your firm to obtain certification from multiple certifying agencies within your state. The UCP is responsible for certifying firms and maintaining a database of certified DBEs and ACDBEs for DOT grantees, pursuant to the eligibility standards found in 49 C.F.R. Parts 23 and 26.

5. Where can I find more information?

U.S. DOT—<https://www.civilrights.dot.gov/> (This site provides useful links to the rules and regulations governing the DBE/ACDBE program, questions and answers, and other pertinent information)

SBA—Small Business Size Standards matched to the North American Industry Classification System (NAICS): <http://www.census.gov/eos/www/naics/> and <http://www.sba.gov/content/table-small-business-size-standards>.

In collecting the information requested by this form, the Department of Transportation (Department) complies with the provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Privacy Act provides comprehensive protections for your personal information. This includes how information is collected, used, disclosed, stored, and discarded. Your information will not be disclosed to third parties without your consent. The information collected will be used solely to determine your firm's eligibility to participate in the Department's Disadvantaged Business Enterprise Program as defined in 49 CFR §26.5 and the Airport Concession Disadvantaged Business Enterprise Program as defined in 49 CFR §23.3. You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).

Under 49 C.F.R. §26.107, dated February 2, 1999 and January 28, 2011, if at any time, the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, the Department may initiate suspension or debarment proceedings against the person or firm under 2 CFR Parts 180 and 1200, Nonprocurement Suspension and Department, take enforcement action under 49 C.F.R. Part 31, Program Fraud and Civil Remedies, and/or refer the matter to the Department of Justice for criminal prosecution under 18 U.S.C. 1001, which prohibits false statements in Federal programs.



**INSTRUCTIONS FOR COMPLETING THE
DISADVANTAGED BUSINESS ENTERPRISE (DBE)
AIRPORT CONCESSIONS DISADVANTAGED BUSINESS ENTERPRISE (ACDBE)
UNIFORM CERTIFICATION APPLICATION**

NOTE: All participating firms must be for-profit enterprises. If your firm is not for profit, then you do NOT qualify for the DBE/ACDBE program and should not complete this application. If you require additional space for any question in this application, please attach additional sheets or copies as needed, taking care to indicate on each attached sheet/copy the section and number of this application to which it refers.

Section 1: CERTIFICATION INFORMATION

A. Basic Contact Information

- (1) Enter the contact name and title of the person completing this application and the person who will serve as your firm's contact for this application.
- (2) Enter the legal name of your firm, as indicated in your firm's Articles of Incorporation or charter.
- (3) Enter the primary phone number of your firm.
- (4) Enter a secondary phone number, if any.
- (5) Enter your firm's fax number, if any.
- (6) Enter the contact person's email address.
- (7) Enter your firm's website addresses, if any.
- (8) Enter the street address of the firm where its offices are physically located (not a P.O. Box).
- (9) Enter the mailing address of your firm, if it is different from your firm's street address.

B. Prior/Other Certifications and Applications

- (10) Check the appropriate box indicating whether your firm is currently certified in the DBE/ACDBE programs, and provide the name of the certifying agency that certified your firm. List the dates of any site visits conducted by your home state and any other states or UCP members. Also provide the names of state/UCP members that conducted the review.
- (11) Indicate whether your firm or any of the persons listed has ever been denied certification as a DBE, 8(a), or Small Disadvantaged Business (SDB) firm, or state and local MBE/WBE firm. Indicate if the firm has ever been decertified from one of these programs. Indicate if the application was withdrawn or whether the firm was debarred, suspended, or otherwise had its bidding privileges denied or restricted by any state or local agency, or Federal entity. If your answer is yes, identify the name of the agency, and explain fully the nature of the action in the space provided. Indicate if you have ever appealed this decision to the Department and if so, attach a copy of USDOT's final agency decision(s).

Section 2: GENERAL INFORMATION

A. Business profile:

- (1) Give a concise description of the firm's primary activities, the product(s) or services the company provides, or type of construction. If your company offers more than one product/service, list primary product or service first (attach additional sheets if necessary). This description may be used in our UCP online directory if you are certified as a DBE.

- (2) If you know the appropriate NAICS Code for the line(s) of work you identified in your business profile, enter the codes in the space provided.
- (3) State the date on which your firm was established as stated in your firm's Articles of Incorporation or charter.
- (4) State the date each person became a firm owner.
- (5) Check the appropriate box describing the manner in which you and each other owner acquired ownership of your firm. If you checked "Other," explain in the space provided.
- (6) Check the appropriate box that indicates whether your firm is "for profit." **If you checked "No," then you do NOT qualify for the DBE/ACDBE program** and should not complete this application. All participating firms must be for-profit enterprises. If the firm is a for profit enterprise, provide the Federal Tax ID number as stated on your firm's Federal tax return.
- (7) Check the appropriate box that describes the type of legal business structure of your firm, as indicated in your firm's Articles of Incorporation or similar document. Identify all joint venture partners if applicable. If you checked "Other," briefly explain in the space provided.
- (8) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time, part-time, and seasonal basis. Attach a list of employees, their job titles, and dates of employment, to your application.
- (9) Specify the firm's gross receipts for each of the past three years, as stated in your firm's filed Federal tax returns. You must submit complete copies of the firm's Federal tax returns for each year. If there are any affiliates or subsidiaries of the applicant firm or owners, you must provide these firms' gross receipts and submit complete copies of these firm(s) Federal tax returns. Affiliation is defined in 49 C.F.R. §26.5 and 13 C.F.R. Part 121.

B. Relationships and Dealings with Other Businesses

- (1) Check the appropriate box that indicates whether your firm is co-located at any of its business locations, or whether your firm shares a telephone number(s), a post office box, any office space, a yard, warehouse, other facilities, any equipment, financing, or any office staff and/or employees with any other business, organization or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and fully explain the nature of your relationship with these other businesses by identifying the business or person with whom you have any formal, informal, written, or



oral agreement. Provide an explanation of any items shared with other firms in the space provided.

- (2) Check the appropriate box indicating whether any other firm currently has or had an ownership interest in your firm at present or at any time in the past. If you checked yes, please explain.
- (3) Check the appropriate box that indicates whether at present or at any time in the past your firm:
 - (a) ever existed under different ownership, a different type of ownership, or a different name;
 - (b) existed as a subsidiary of any other firm;
 - (c) existed as a partnership in which one or more of the partners are/were other firms;
 - (d) owned any percentage of any other firm; and
 - (e) had any subsidiaries of its own.
 - (f) served as a subcontractor with another firm constituting more than 25% of your firm's receipts.

If you answered "Yes" to any of the questions in (3)(a-f), you may be asked to explain the arrangement in detail.

Section 3: MAJORITY OWNER INFORMATION

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below (if your firm has more than one owner, provide completed copies of this section for each owner):

A. Identify the majority owner of the firm holding 51% or more ownership interest

- (1) Enter the full name of the owner.
- (2) Enter his/her title or position within your firm.
- (3) Give his/her home phone number.
- (4) Enter his/her home (street) address.
- (5) Indicate this owner's gender.
- (6) Identify the owner's ethnic group membership. If you checked "Other," specify this owner's ethnic group/identity not otherwise listed.
- (7) Check the appropriate box to indicate whether this owner is a U.S. citizen or a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then this owner is NOT eligible for certification as a DBE owner.
- (8) Enter the number of years during which this owner has been an owner of your firm.
- (9) Indicate the percentage of the total ownership this person holds and the date acquired, including (if appropriate), the class of stock owned.
- (10) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, and/or other investment. Describe how you acquired your business and attach documentation substantiating this investment.

B. Additional Owner Information

- (1) Describe the familial relationship of this owner to each other owner of your firm and employees.
- (2) Indicate whether this owner performs a management or supervisory function for any other business. If you

checked "Yes," state the name of the other business and this owner's function/title held in that business.

- (3) (a) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has any relationship with your firm. If you checked "Yes," identify the name of the other business, the nature of the business relationship, and the owner's function at the firm.
 - (b) If the owner works for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week, please identify this activity.
- (4) (a) Provide the personal net worth of the owner applying for certification in the space provided. Complete and attach the accompanying "Personal Net Worth Statement for DBE/ACDBE Program Eligibility" with your application. Note, complete this section and accompanying statement only for each owner applying for DBE qualification (i.e., for each owner claiming to be socially and economically disadvantaged).
 - (b) Check the appropriate box that indicates whether any trust has been created for the benefit of the disadvantaged owner(s). If you answered "Yes," you may be asked to provide a copy of the trust instrument.
- (5) Check the appropriate to indicate whether any of your immediate family members, managers, or employees, own, manage, or are associated with another company. Immediate family member is defined in 49 C.F.R. §26.5. If you answered "Yes," provide the name of each person, your relationship to them, the name of the company, the type of business, and whether they own or manage the company.

Section 4: CONTROL

A. Identify the firm's Officers and Board of Directors

- (1) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each officer.
- (2) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each individual serving on your firm's Board of Directors.
- (3) Check the appropriate box to indicate whether any of your firm's officers and/or directors listed above performs a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.
- (4) Check the appropriate box that indicates whether any of your firm's officers and/or directors listed above own or work for any other firm(s) that has a relationship with your firm. (e.g., ownership interest, shared office space, financial investments, equipment leases, personnel sharing, etc.) If you answered "Yes," identify the name of the firm, the individual's name, and the nature of his/her business relationship with that other firm.



B. Duties of Owners, Officers, Directors, Managers and Key Personnel

(1), (2) Specify the roles of the majority and minority owners, directors, officers, and managers, and key personnel who control the functions listed for the business. Submit résumés for each owner and non-owner identified below. State the name of the individual, title, race and gender and percentage ownership if any. Circle the frequency of each person’s involvement as follows: “always, frequently, seldom, or never” in each area.

Indicate whether any of the persons listed in this section perform a management or supervisory function for any other business. Identify the person, business, and their title/function. Identify if any of the persons listed above own or work for any other firm(s) that has a relationship with this firm (e.g. ownership interest, shared office space, financial investment, equipment, leases, personnel sharing, etc.) If you answered “Yes,” describe the nature of his/her business relationship with that other firm.

C. Inventory: Indicate firm inventory in these categories:

- (1) **Equipment and Vehicles**
State the make and model, and current dollar value of each piece of equipment and motor vehicle held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm or owner, whether it is used as collateral, and where this item is stored.
- (2) **Office Space**
State the street address of each office space held and/or used by your firm. Indicate whether your firm or owner owns or leases the office space and the current dollar value of that property or its lease.
- (3) **Storage Space**
State the street address of each storage space held and/or used by your firm. Indicate whether your firm or owner owns or leases the storage space and the current dollar value of that property or its lease. Provide a signed lease agreement for each property.

D. Does your firm rely on any other firm for management functions or employee payroll?

Check the appropriate box that indicates whether your firm relies on any other firm for management functions or for employee payroll. If you answered “Yes,” you may be asked to explain the nature of that reliance and the extent to which the other firm carries out such functions.

E. Financial / Banking Information

Banking Information. State the name, City and State of your firm’s bank. In the space provided, identify the persons able to sign checks on this account. Provide bank authorization and signature cards

Bonding Information. State your firm’s bonding limits (in dollars), specifying both the aggregate and project limits.

F. Sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms guaranteeing the loan.

State the name and address of each source, the name of person securing the loan, original dollar amount and the current balance of each loan, and the purpose for which each loan was made to your firm. Provide copies of signed loan agreements and security agreements

G. Contributions or transfers of assets to/from your firm and to/from any of its owners or another individual over the past two years:

Indicate in the spaces provided, the type of contribution or asset that was transferred, its current dollar value, the person or firm from whom it was transferred, the person or firm to whom it was transferred, the relationship between the two persons and/or firms, and the date of the transfer.

H. Current licenses/permits held by any owner or employee of your firm.

List the name of each person in your firm who holds a professional license or permit, the type of permit or license, the expiration date of the permit or license, and issuing State of the license or permit. Attach copies of licenses, license renewal forms, permits, and haul authority forms.

I. Largest contracts completed by your firm in the past three years, if any.

List the name of each owner or contractor for each contract, the name and location of the projects under each contract, the type of work performed on each contract, and the dollar value of each contract.

J. Largest active jobs on which your firm is currently working.

For each active job listed, state the name of the prime contractor and the project number, the location, the type of work performed, the project start date, the anticipated completion date, and the dollar value of the contract.

AIRPORT CONCESSION (ACDBE) APPLICANTS

Identify the concession space, address and location at the airport, the value of the property or lease, and fees/lease payments paid to the airport. Provide information concerning any other airport concession businesses the applicant firm or any affiliate owns and/or operates, including name, location, type of concession, and start date of the concession enterprise.

AFFIDAVIT & SIGNATURE

The Affidavit of Certification must accompany your application for certification. Carefully read the attached affidavit in its entirety. Fill in the required information for each blank space, and sign and date the affidavit in the presence of a Notary Public, who must then notarize the form.

Section 1: CERTIFICATION INFORMATION



A. Basic Contact Information

(1) Contact person and Title: _____ (2) Legal name of firm: _____

(3) Phone #: (____) _____ - _____ (4) Other Phone #: (____) _____ - _____ (5) Fax #: (____) _____ - _____

(6) E-mail: _____ (7) Firm Websites: _____

(8) Street address of firm (No P.O. Box): _____ City: _____ County/Parish: _____ State: _____ Zip: _____

(9) Mailing address of firm (if different): _____ City: _____ County/Parish: _____ State: _____ Zip: _____

B. Prior/Other Certifications and Applications

(10) Is your firm currently certified for any of the following U.S. DOT programs?

DBE ACDBE Names of certifying agencies: _____

If you are certified in your home state as a DBE/ACDBE, you do not have to complete this application for other states. Ask your state UCP about the interstate certification process.

List the dates of any site visits conducted by your home state and any other states or UCP members:

Date ___/___/___ State/UCP Member: _____ Date ___/___/___ State/UCP Member: _____

(11) Indicate whether the firm or any persons listed in this application have ever been:

(a) Denied certification or decertified as a DBE, ACDBE, 8(a), SDB, MBE/WBE firm? Yes No

(b) Withdrawn an application for these programs, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or Federal entity? Yes No

If yes, explain the nature of the action. (If you appealed the decision to DOT or another agency, attach a copy of the decision)

Section 2: GENERAL INFORMATION

A. Business Profile: (1) Give a concise description of the firm's primary activities and the product(s) or service(s) it provides. If your company offers more than one product/service, list the primary product or service first. Please use additional paper if necessary. This description may be used in our database and the UCP online directory if you are certified as a DBE or ACDBE.

(2) Applicable NAICS Codes for this line of work include: _____

(3) This firm was established on ___/___/___ (4) I/We have owned this firm since: ___/___/___

(5) Method of acquisition (Check all that apply):

Started new business Bought existing business Inherited business Secured concession

Merger or consolidation Other (explain) _____



(6) Is your firm "for profit"? Yes No → **⊗ STOP!** If your firm is NOT for-profit, then you do NOT qualify for this program and should not fill out this application.
Federal Tax ID# _____

(7) Type of Legal Business Structure: (check all that apply):
 Sole Proprietorship Limited Liability Partnership
 Partnership Corporation
 Limited Liability Company Joint Venture (Identify all JV partners _____)
 Applying as an ACDBE Other, Describe _____

(8) Number of employees: Full-time _____ Part-time _____ Seasonal _____ Total _____
(Provide a list of employees, their job titles, and dates of employment, to your application).

(9) Specify the firm's gross receipts for the last 3 years. (Submit complete copies of the firm's Federal tax returns for each year. If there are affiliates or subsidiaries of the applicant firm or owners, you must submit complete copies of these firms' Federal tax returns).

| | | |
|------------|---|--|
| Year _____ | Gross Receipts of Applicant Firm \$ _____ | Gross Receipts of Affiliate Firms \$ _____ |
| Year _____ | Gross Receipts of Applicant Firm \$ _____ | Gross Receipts of Affiliate Firms \$ _____ |
| Year _____ | Gross Receipts of Applicant Firm \$ _____ | Gross Receipts of Affiliate Firms \$ _____ |

B. Relationships and Dealings with Other Businesses

(1) Is your firm co-located at any of its business locations, or does it share a telephone number, P.O. Box, office or storage space, yard, warehouse, facilities, equipment, inventory, financing, office staff, and/or employees with any other business, organization, or entity? Yes No
If Yes, explain the nature of your relationship with these other businesses by identifying the business or person with whom you have any formal, informal, written, or oral agreement. Also detail the items shared.

(2) Has any other firm had an ownership interest in your firm at present or at any time in the past?
 Yes No If Yes, explain _____

- (3) At present, or at any time in the past, has your firm:
- (a) Ever existed under different ownership, a different type of ownership, or a different name? Yes No
 - (b) Existed as a subsidiary of any other firm? Yes No
 - (c) Existed as a partnership in which one or more of the partners are/were other firms? Yes No
 - (d) Owned any percentage of any other firm? Yes No
 - (e) Had any subsidiaries? Yes No
 - (f) Served as a subcontractor with another firm constituting more than 25% of your firm's receipts? Yes No

(If you answered "Yes" to any of the questions in (2) and/or (3)(a)-(f), you may be asked to provide further details and explain whether the arrangement continues).



Section 3: MAJORITY OWNER INFORMATION

A. Identify the majority owner of the firm holding 51% or more ownership interest.

(1) Full Name: _____ (2) Title: _____ (3) Home Phone #: () _____ - _____
(4) Home Address (Street and Number): _____ City: _____ State: _____ Zip: _____

(5) Gender: [] Male [] Female
(6) Ethnic group membership (Check all that apply):
[] Black [] Hispanic
[] Asian Pacific [] Native American
[] Subcontinent Asian
[] Other (specify) _____
(7) U.S. Citizenship:
[] U.S. Citizen
[] Lawfully Admitted Permanent Resident

(8) Number of years as owner: _____
(9) Percentage owned: _____ %
Class of stock owned: _____
Date acquired _____
(10) Initial investment to acquire ownership interest in firm:
Type Dollar Value
Cash \$
Real Estate \$
Equipment \$
Other \$
Describe how you acquired your business:
[] Started business myself
[] It was a gift from: _____
[] I bought it from: _____
[] I inherited it from: _____
[] Other _____
(Attach documentation substantiating your investment)

B. Additional Owner Information

(1) Describe familial relationship to other owners and employees:

(2) Does this owner perform a management or supervisory function for any other business? [] Yes [] No
If Yes, identify: Name of Business: _____ Function/Title: _____

(3)(a) Does this owner own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) [] Yes [] No
Identify the name of the business, and the nature of the relationship, and the owner's function at the firm:

(b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: _____

(4)(a) What is the personal net worth of this disadvantaged owner applying for certification ? \$ _____

(b) Has any trust been created for the benefit of this disadvantaged owner(s)? [] Yes [] No
(If Yes, you may be asked to provide a copy of the trust instrument).

(5) Do any of your immediate family members, managers, or employees own, manage, or are associated with another company? [] Yes [] No If Yes, provide their name, relationship, company, type of business, and indicate whether they own or manage the company: (Please attach extra sheets, if needed): _____



Section 3: MAJORITY OWNER INFORMATION

A. Identify the majority owner of the firm holding 51% or more ownership interest.

(1) Full Name: _____ (2) Title: _____ (3) Home Phone #: _____

(4) Home Address (Street and Number): _____ City: _____ State: _____ Zip: _____

(5) Gender: Male Female

(6) Ethnic group membership (Check all that apply):

- Black Hispanic
 Asian Pacific Native American
 Subcontinent Asian
 Other (specify) _____

(7) U.S. Citizenship:

- U.S. Citizen
 Lawfully Admitted Permanent Resident

(8) Number of years as owner: _____

(9) Percentage owned: _____%

Class of stock owned: _____

Date acquired _____

Table with 3 columns: (10) Initial investment to acquire ownership interest in firm, Type, Dollar Value. Rows include Cash, Real Estate, Equipment, and Other.

Describe how you acquired your business:

- Started business myself
 It was a gift from: _____
 I bought it from: _____
 I inherited it from: _____
 Other _____

(Attach documentation substantiating your investment)

B. Additional Owner Information

(1) Describe familial relationship to other owners and employees:

(2) Does this owner perform a management or supervisory function for any other business? Yes No

If Yes, identify: Name of Business: _____ Function/Title: _____

(3)(a) Does this owner own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) Yes No

Identify the name of the business, and the nature of the relationship, and the owner's function at the firm:

(b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: _____

(4)(a) What is the personal net worth of this disadvantaged owner applying for certification ? \$ _____

(b) Has any trust been created for the benefit of this disadvantaged owner(s)? Yes No

(If Yes, you may be asked to provide a copy of the trust instrument).

(5) Do any of your immediate family members, managers, or employees own, manage, or are associated with another company? Yes No If Yes, provide their name, relationship, company, type of business, and indicate whether they own or manage the company: (Please attach extra sheets, if needed): _____



Section 4: CONTROL

A. Identify your firm's Officers and Board of Directors (If additional space is required, attach a separate sheet):

| | Name | Title | Date Appointed | Ethnicity | Gender |
|------------------------------------|------|-------|----------------|-----------|--------|
| (1) Officers of the Company | (a) | | | | |
| | (b) | | | | |
| | (c) | | | | |
| | (d) | | | | |
| (2) Board of Directors | (a) | | | | |
| | (b) | | | | |
| | (c) | | | | |
| | (d) | | | | |

(3) Do any of the persons listed above perform a management or supervisory function for any other business?

Yes No If Yes, identify for each:

Person: _____ Title: _____
 Business: _____ Function: _____

Person: _____ Title: _____
 Business: _____ Function: _____

(4) Do any of the persons listed in section A above own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)

Yes No If Yes, identify for each:

Firm Name: _____ Person: _____

Nature of Business Relationship: _____

B. Duties of Owners, Officers, Directors, Managers, and Key Personnel

1. (Identify your firm's management personnel who control your firm in the following areas (Attach separate sheets as needed).)

| A= Always F = Frequently | S = Seldom N = Never | Majority Owner (51% or more) | | | | Minority Owner (49% or less) | | | |
|--|----------------------------|------------------------------|----------------------------|----------------------------|----------------------------|------------------------------|----------------------------|----------------------------|--|
| | | Name: _____ | Title: _____ | Percent Owned: _____ | | Name: _____ | Title: _____ | Percent Owned: _____ | |
| Sets policy for company direction/scope of operations | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Bidding and estimating | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Major purchasing decisions | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Marketing and sales | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Supervises field operations | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Attend bid opening and lettings | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Perform office management (billing, accounts receivable/payable, etc.) | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Hires and fires management staff | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Hire and fire field staff or crew | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Designates profits spending or investment | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Obligates business by contract/credit | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Purchase equipment | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Signs business checks | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |

2. Complete for all Officers, Directors, Managers, and Key Personnel who control the following functions for the firm. (Attach separate sheets as needed).

| A= Always S = Seldom F = Frequently N = Never | Officer/Director/Manager/Key Personnel | | | | Officer/Director/Manager/ Key Personnel | | | |
|--|--|----------------------------|----------------------------|----------------------------|---|----------------------------|----------------------------|----------------------------|
| | Name: _____ | | | | Name: _____ | | | |
| | Title: _____ | | | | Title: _____ | | | |
| | Race and Gender: _____ | | | | Race and Gender: _____ | | | |
| | Percent Owned: _____ | | | | Percent Owned: _____ | | | |
| Sets policy for company direction/scope of operations | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Bidding and estimating | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Major purchasing decisions | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Marketing and sales | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Supervises field operations | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Attend bid opening and lettings | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Perform office management (billing, accounts receivable/payable, etc.) | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Hires and fires management staff | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Hire and fire field staff or crew | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Designates profits spending or investment | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Obligates business by contract/credit | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Purchase equipment | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Signs business checks | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |

Do any of the persons listed in B1 or B2 perform a management or supervisory function for any other business? If Yes, identify the person, the business, and their title/function: _____

Do any of the persons listed above own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) If Yes, describe the nature of the business relationship: _____

C. Inventory: Indicate your firm's inventory in the following categories (Please attach additional sheets if needed):

1. Equipment and Vehicles

| Make and Model | Current Value | Owned or Leased by Firm or Owner? | Used as collateral? | Where is item stored? |
|----------------|---------------|-----------------------------------|---------------------|-----------------------|
| 1. _____ | | | | |
| 2. _____ | | | | |
| 3. _____ | | | | |
| 4. _____ | | | | |
| 5. _____ | | | | |
| 6. _____ | | | | |
| 7. _____ | | | | |
| 8. _____ | | | | |
| 9. _____ | | | | |

2. Office Space

| Street Address | Owned or Leased by Firm or Owner? | Current Value of Property or Lease |
|----------------|-----------------------------------|------------------------------------|
| _____ | | |
| _____ | | |
| _____ | | |



3. Storage Space (Provide signed lease agreements for the properties listed)

| Street Address | Owned or Leased by Firm or Owner? | Current Value of Property or Lease |
|----------------|-----------------------------------|------------------------------------|
| _____ | _____ | _____ |
| _____ | _____ | _____ |

D. Does your firm rely on any other firm for management functions or employee payroll? Yes No

E. Financial/Banking Information (Provide bank authorization and signature cards)

Name of bank: _____ City and State: _____
The following individuals are able to sign checks on this account: _____

Name of bank: _____ City and State: _____
The following individuals are able to sign checks on this account: _____

Bonding Information: If you have bonding capacity, identify the firm's bonding aggregate and project limits:
Aggregate limit \$ _____ Project limit \$ _____

F. Identify all sources, amounts, and purposes of money loaned to your firm including from financial institutions. Identify whether you the owner and any other person or firm loaned money to the applicant DBE/ACDBE. Include the names of any persons or firms guaranteeing the loan, if other than the listed owner. (Provide copies of signed loan agreements and security agreements).

| Name of Source | Address of Source | Name of Person Guaranteeing the Loan | Original Amount | Current Balance | Purpose of Loan |
|----------------|-------------------|--------------------------------------|-----------------|-----------------|-----------------|
| 1. _____ | _____ | _____ | _____ | _____ | _____ |
| 2. _____ | _____ | _____ | _____ | _____ | _____ |
| 3. _____ | _____ | _____ | _____ | _____ | _____ |

G. List all contributions or transfers of assets to/from your firm and to/from any of its owners or another individual over the past two years (Attach additional sheets if needed):

| Contribution/Asset | Dollar Value | From Whom Transferred | To Whom Transferred | Relationship | Date of Transfer |
|--------------------|--------------|-----------------------|---------------------|--------------|------------------|
| 1. _____ | _____ | _____ | _____ | _____ | _____ |
| 2. _____ | _____ | _____ | _____ | _____ | _____ |
| 3. _____ | _____ | _____ | _____ | _____ | _____ |

H. List current licenses/permits held by any owner and/or employee of your firm (e.g. contractor, engineer, architect, etc.) (Attach additional sheets if needed):

| Name of License/Permit Holder | Type of License/Permit | Expiration Date | State |
|-------------------------------|------------------------|-----------------|-------|
| 1. _____ | _____ | _____ | _____ |
| 2. _____ | _____ | _____ | _____ |
| 3. _____ | _____ | _____ | _____ |



I. List the three largest contracts completed by your firm in the past three years, if any:

| | Name of Owner/Contractor | Name/Location of Project | Type of Work Performed | Dollar Value of Contract |
|----|---------------------------------|---------------------------------|-------------------------------|---------------------------------|
| 1. | _____ | _____ | _____ | _____ |
| 2. | _____ | _____ | _____ | _____ |
| 3. | _____ | _____ | _____ | _____ |

J. List the three largest active jobs on which your firm is currently working:

| | Name of Prime Contractor and Project Number | Location of Project | Type of Work | Project Start Date | Anticipated Completion Date | Dollar Value of Contract |
|----|--|----------------------------|---------------------|---------------------------|------------------------------------|---------------------------------|
| 1. | | | | | | |
| 2. | | | | | | |
| 3. | | | | | | |

AIRPORT CONCESSION (ACDBE) APPLICANTS ONLY MUST COMPLETE THIS SECTION

Identify the following information concerning the ACDBE applicant firm:

| <u>Concession Space</u> | <u>Address / Location at Airport</u> | <u>Value of Property or Lease</u> | <u>Fees/Lease Payments Paid to the Airport</u> |
|--------------------------------|---|--|---|
| | | | |
| | | | |
| | | | |

Provide information concerning any other airport concession businesses the applicant firm or any affiliate owns and/or operates, including name, location, type of concession, and start date of concession

| <u>Name of Concession</u> | <u>Location</u> | <u>Type of Concession</u> | <u>Start Date of Concession</u> |
|----------------------------------|------------------------|----------------------------------|--|
| | | | |
| | | | |
| | | | |



AFFIDAVIT OF CERTIFICATION

This form must be signed and notarized for each owner upon which disadvantaged status is relied.

A MATERIAL OR FALSE STATEMENT OR OMISSION MADE IN CONNECTION WITH THIS APPLICATION IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION, REVOCATION OF A PRIOR APPROVAL, INITIATION OF SUSPENSION OR DEBARMENT PROCEEDINGS, AND MAY SUBJECT THE PERSON AND/OR ENTITY MAKING THE FALSE STATEMENT TO ANY AND ALL CIVIL AND CRIMINAL PENALTIES AVAILABLE PURSUANT TO APPLICABLE FEDERAL AND STATE LAW.

I _____ (full name printed),
swear or affirm under penalty of law that I am

_____ (title) of the applicant firm
_____ and that I

have read and understood all of the questions in this application and that all of the foregoing information and statements submitted in this application and its attachments and supporting documents are true and correct to the best of my knowledge, and that all responses to the questions are full and complete, omitting no material information. The responses include all material information necessary to fully and accurately identify and explain the operations, capabilities and pertinent history of the named firm as well as the ownership, control, and affiliations thereof.

I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application, and I authorize such agency to contact any entity named in the application, and the named firm's bonding companies, banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility.

I agree to submit to government audit, examination and review of books, records, documents and files, in whatever form they exist, of the named firm and its affiliates, inspection of its places(s) of business and equipment, and to permit interviews of its principals, agents, and employees. I understand that refusal to permit such inquiries shall be grounds for denial of certification.

If awarded a contract, subcontract, concession lease or sublease, I agree to promptly and directly provide the prime contractor, if any, and the Department, recipient agency, or federal funding agency on an ongoing basis, current, complete and accurate information regarding (1) work performed on the project; (2) payments; and (3) proposed changes, if any, to the foregoing arrangements.

I agree to provide written notice to the recipient agency or Unified Certification Program of any material change in the information contained in the original application within 30 calendar days of such change (e.g., ownership changes, address/telephone number, personal net worth exceeding \$1.32 million, etc.).

I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or revocation of certification; suspension and debarment; and for initiating action under federal and/or state law concerning false statement, fraud or other applicable offenses.

I certify that I am a socially and economically disadvantaged individual who is an owner of the above-referenced firm seeking certification as a Disadvantaged Business Enterprise or Airport Concession Disadvantaged Business Enterprise. In support of my application, I certify that I am a member of one or more of the following groups, and that I have held myself out as a member of the group(s): (Check all that apply):

- Female Black American Hispanic American
- Native American Asian-Pacific American
- Subcontinent Asian American Other (specify)

I certify that I am socially disadvantaged because I have been subjected to racial or ethnic prejudice or cultural bias, or have suffered the effects of discrimination, because of my identity as a member of one or more of the groups identified above, without regard to my individual qualities.

I further certify that my personal net worth does not exceed \$1.32 million, and that I am economically disadvantaged because my ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

I declare under penalty of perjury that the information provided in this application and supporting documents is true and correct.

Signature _____ (Date) _____
(DBE/ACDBE Applicant)

NOTARY CERTIFICATE



UNIFORM CERTIFICATION APPLICATION SUPPORTING DOCUMENTS CHECKLIST

In order to complete your application for DBE or ACDBE certification, you must attach copies of all of the following REQUIRED documents. A failure to supply any information requested by the UCP may result in your firm denied DBE/ACDBE certification.

Required Documents for All Applicants

- Résumés (that include places of employment with corresponding dates), for all owners, officers, and key personnel of the applicant firm
- Personal Net Worth Statement for each socially and economically disadvantaged owners comprising 51% or more of the ownership percentage of the applicant firm.
- Personal Federal tax returns for the past 3 years, if applicable, for each disadvantaged owner
- Federal tax returns (and requests for extensions) filed by the firm and its affiliates with related schedules, for the past 3 years.
- Documented proof of contributions used to acquire ownership for each owner (e.g., both sides of cancelled checks)
- Signed loan and security agreements, and bonding forms
- List of equipment and/or vehicles owned and leased including VIN numbers, copy of titles, proof of ownership, insurance cards for each vehicle.
- Title(s), registration certificate(s), and U.S. DOT numbers for each truck owned or operated by your firm
- Licenses, license renewal forms, permits, and haul authority forms
- Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases
- Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past 2 years
- DBE/ACDBE and SBA 8(a), SDB, MBE/WBE certifications, denials, and/or decertifications, if applicable; and any U.S. DOT appeal decisions on these actions.
- Bank authorization and signatory cards
- Schedule of salaries (or other remuneration) paid to all officers, managers, owners, and/or directors of the firm
- List of all employees, job titles, and dates of employment.
- Proof of warehouse/storage facility ownership or lease arrangements

Partnership or Joint Venture

- Original and any amended Partnership or Joint Venture Agreements

Corporation or LLC

- Official Articles of Incorporation (signed by the state official)
- Both sides of all corporate stock certificates and your firm's stock transfer ledger
- Shareholders' Agreement(s)
- Minutes of all stockholders and board of directors meetings

- Corporate by-laws and any amendments
- Corporate bank resolution and bank signature cards
- Official Certificate of Formation and Operating Agreement with any amendments (for LLCs)

Optional Documents to Be Provided on Request

The UCP to which you are applying may require the submission of the following documents. If requested to provide these document, you must supply them with your application or at the on-site visit.

- Proof of citizenship
- Insurance agreements for each truck owned or operated by your firm
- Audited financial statements (if available)
- Personal Federal Tax returns for the past 3 years, if applicable, for other disadvantaged owners of the firm.
- Trust agreements held by any owner claiming disadvantaged status
- Year-end balance sheets and income statements for the past 3 years (or life of firm, if less than three years)

Suppliers

- List of product lines carried and list of distribution equipment owned and/or leased

APPENDIX C
PERSONAL NET WORTH STATEMENT



U.S. Department of
Transportation

**Personal Net Worth Statement
For DBE/ACDBE Program Eligibility**
As of _____

OMB APPROVAL NO:
EXPIRATION DATE:

This form is used by all participants in the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) Programs. Each individual owner of a firm applying to participate as a DBE or ACDBE, whose ownership and control are relied upon for DBE certification must complete this form. Each person signing this form authorizes the Unified Certification Program (UCP) recipient to make inquiries as necessary to verify the accuracy of the statements made. The agency you apply to will use the information provided to determine whether an owner is economically disadvantaged as defined in the DBE program regulations 49 C.F.R. Parts 23 and 26. **Return form to appropriate UCP certifying member, not U.S. DOT.**

| | | |
|--|--|-----------------|
| Name | | Business Phone |
| Residence Address (As reported to the IRS) City, State and Zip Code | | Residence Phone |
| Business Name of Applicant Firm | | |
| Spouse's Full Name (Marital Status: Single, Married, Divorced, Union) | | |

| ASSETS | | LIABILITIES | |
|---|----|--|----|
| (Omit Cents) | | (Omit Cents) | |
| Cash and Cash Equivalents | \$ | Loan on Life Insurance (Complete Section 5) | \$ |
| Retirement Accounts (IRAs, 401Ks, 403Bs, Pensions, etc.) (Report full value minus tax and interest penalties that would apply if assets were distributed today) (Complete Section 3) | \$ | Mortgages on Real Estate Excluding Primary Residence Debt (Complete Section 4) | \$ |
| Brokerage, Investment Accounts | \$ | Notes, Obligations on Personal Property (Complete Section 6) | \$ |
| Assets Held in Trust | \$ | Notes & Accounts Payable to Banks and Others (Complete Section 2) | \$ |
| Loans to Shareholders & Other Receivables (Complete section 6) | \$ | Other Liabilities (Complete Section 8) | \$ |
| Real Estate Excluding Primary Residence (Complete Section 4) | \$ | Unpaid Taxes (Complete Section 8) | \$ |
| Life Insurance (Cash Surrender Value Only) (Complete Section 5) | \$ | | |
| Other Personal Property and Assets (Complete Section 6) | \$ | | |
| Business Interests Other Than the Applicant Firm (Complete Section 7) | \$ | | |
| Total Assets | \$ | Total Liabilities | \$ |
| | | NET WORTH | |

Section 2. Notes Payable to Banks and Others

| Name of Noteholder(s) | Original Balance | Current Balance | Payment Amount | Frequency (monthly, etc.) | How Secured or Endorsed Type of Collateral |
|-----------------------|------------------|-----------------|----------------|---------------------------|--|
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

| Section 3. Brokerage and custodial accounts, stocks, bonds, retirement accounts. (Full Value) (Use attachments if necessary). | | | | |
|--|-------------------|---------------------------------|----------------------------|----------------------------|
| Name of Security / Brokerage Account / Retirement Account | Cost | Market Value Quotation/Exchange | Date of Quotation/Exchange | Total Value |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| Section 4. Real Estate Owned (Including Primary Residence, Investment Properties, Personal Property Leased or Rented for Business Purposes, Farm Properties, or any Other Income Producing property). (List each parcel separately. Add additional sheets if necessary). | | | | |
| | Primary Residence | Property B | Property C | |
| Type of Property | | | | |
| Address | | | | |
| Date Acquired and Method of Acquisition (purchase, inherit, divorce, gift, etc.) | | | | |
| Names on Deed | | | | |
| Purchase Price | | | | |
| Present Market Value | | | | |
| Source of Market Valuation | | | | |
| Name of all Mortgage Holders | | | | |
| Mortgage Acc. # and balance (as of date of form) | | | | |
| Equity line of credit balance | | | | |
| Amount of Payment Per Month/Year (Specify) | | | | |
| Section 5. Life Insurance Held (Give face amount and cash surrender value of policies, name of insurance company and beneficiaries). | | | | |
| Insurance Company | Face Value | Cash Surrender Amount | Beneficiaries | Loan on Policy Information |
| | | | | |
| | | | | |
| | | | | |

Section 6. Other Personal Property and Assets (Use attachments as necessary)

| Type of Property or Asset | Total Present Value | Amount of Liability (Balance) | Is this asset insured? | Lien or Note amount and Terms of Payment |
|--|---------------------|-------------------------------|------------------------|--|
| Automobiles and Vehicles (including recreation vehicles, motorcycles, boats, etc.) Include personally owned vehicles that are leased or rented to businesses or other individuals. | | | | |
| | | | | |
| | | | | |
| | | | | |
| Household Goods / Jewelry | | | | |
| | | | | |
| | | | | |
| Other (List) | | | | |
| | | | | |
| | | | | |
| Accounts and Notes Receivables | | | | |

Section 7. Value of Other Business Investments, Other Businesses Owned (excluding applicant firm)

Sole Proprietorships, General Partners, Joint Ventures, Limited Liability Companies, Closely-held and Public Traded Corporations

Section 8. Other Liabilities and Unpaid Taxes (Describe)

Section 9. Transfer of Assets: Have you within 2 years of this personal net worth statement, transferred assets to a spouse, domestic partner, relative, or entity in which you have an ownership or beneficial interest including a trust? Yes No If yes, describe.

I declare under penalty of perjury that the information provided in this personal net worth statement and supporting documents is complete, true and correct. I certify that no assets have been transferred to any beneficiary for less than fair market value in the last two years. I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application and this personal net worth statement, and I authorize such agency to contact any entity named in the application or this personal financial statement, including the names banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility. I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or revocation of certification; suspension and debarment; and for initiating action under federal and/or state law concerning false statement, fraud or other applicable offenses.

NOTARY CERTIFICATE:

(Insert applicable state acknowledgment, affirmation, or oath)

Signature (DBE/ACDBE Owner)

Date

In collecting the information requested by this form, the Department of Transportation complies with Federal Freedom of Information and Privacy Act (5 U.S.C. 552 and 552a) provisions. The Privacy Act provides comprehensive protections for your personal information. This includes how information is collected, used, disclosed, stored, and discarded. Your information will not be disclosed to third parties without your consent. The information collected will be used solely to determine your firm's eligibility to participate in the Disadvantaged Business Enterprise (DBE) Program or Airport Concessionaire DBE Programs as defined in 49 C.F.R. Parts 23 and 26. You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).



General Instructions for Completing the Personal Net Worth Statement for DBE/ACDBE Program Eligibility

Please do not make adjustments to your figures pursuant to U.S. DOT regulations 49 C.F.R. Parts 23 and 26. The agency that you apply to will use the information provided on your completed Personal Net Worth (PNW) Statement to determine whether you meet the economic disadvantage requirements of 49 C.F.R. Parts 23 and 26. If there are discrepancies or questions regarding your form, it may be returned to you to correct and complete again.

An individual's personal net worth according to 49 C.F.R. Parts 23 and 26 includes only his or her own share of assets held separately, jointly, or as community property with the individual's spouse and excludes the following:

- Individual's ownership interest in the applicant firm;
- Individual's equity in his or her primary residence;
- Tax and interest penalties that would accrue if retirement savings or investments (e.g., pension plans, Individual Retirement Accounts, 401(k) accounts, etc.) were distributed at the present time.

Indicate on the form, if any items are jointly owned. If the personal net worth of the majority owner(s) of the firm exceeds \$1.32 million, as defined by 49 C.F.R. Parts 23 and 26, the firm is not eligible for DBE or ACDBE certification. If the personal net worth of the majority owner(s) exceeds the \$1.32 million cap at any time after your firm is certified, the firm is no longer eligible for certification. Should that occur, it is your responsibility to contact your certifying agency in writing to advise that your firm no longer qualifies as a DBE or ACDBE. You must fill out all line items on the Personal Net Worth Statement.

If necessary, use additional sheets of paper to report all information and details. If you have any questions about completing this form, please contact one of the UCP certifying agencies.

Assets

All assets must be reported at their current fair market values as of the date of your statement. *Assessor's assessed value for real estate, for example, is not acceptable.* Assets held in a trust should be included.

Cash and Cash Equivalents: On page 1, enter the total amount of cash or cash equivalents in bank accounts, including checking, savings, money market, certificates of deposit held domestic or foreign. Provide copies of the bank statement.

Retirement Accounts, IRA, 401Ks, 403Bs, Pensions: On page 1, enter the full value minus tax and interest penalties that would apply if assets were distributed as of the date of the form. Describe the number of shares, name of securities, cost market value, date of quotation, and total value in section 3 on page 2.

Brokerage and Custodial Accounts, Stocks, Bonds, Retirement Accounts: Report total value on page 1, and on page 2, section 3, enter the name of the security, brokerage account, retirement account, etc.; the cost; market value of the asset; the date of quotation; and total value as of the date of the PNW statement.

Assets Held in Trust: Enter the total value of the assets held in trust on page 1, and provide the names of beneficiaries and trustees, and other information in Section 6 on page 3.

Loans to Shareholders and Other Receivables not listed: Enter amounts loaned to you from your firm, from any other business entity in which you hold an ownership interest, and other receivables not listed above. Complete Section 6 on page 3.

Real Estate: The total value of real estate excluding your primary residence should be listed on page 1. In section 4 on page 2, please list your primary residence in column 1, including the address, method of acquisition, date of acquired, names of deed, purchase price, present fair market value, source of market valuation, names of all mortgage holders, mortgage account number and balance, equity line of credit balance, and amount of payment. List this information for all real estate held. Please ensure that this section contains all real estate owned, including rental properties, vacation properties, commercial properties, personal property leased or rented for business purposes, farm properties and any other income producing properties, etc. Attach additional sheets if needed.

Life Insurance: On page 1, enter the cash surrender value of this asset. In section 5 on page 2, enter the name of the insurance company, the face value of the policy, cash surrender value, beneficiary names, and loans on the policy.

Other Personal Property and Assets: Enter the total value of personal property and assets you own on page 1. Personal property includes motor vehicles, boats, trailers, jewelry, furniture, household goods, collectibles, clothing, and personally owned vehicles that are leased or rented to businesses or other individuals. In section 6 on page 3, list these assets and enter the present value, the balance of any liabilities, whether the asset is insured, and lien or note information and terms of payments. For accounts and notes receivable, enter the total value of all monies owed to you personally, if any. This should include shareholder loans to the applicant firm, if those exist. If the asset is insured, you may be asked to provide a copy of the policy. You may also be asked to provide a copy of any liens or notes on the property.

Other Business Interests Other than Applicant Firm: On page 1, enter the total value of your other business investments (excluding the applicant firm). In section 7 on page 3, enter information concerning the businesses you

hold an ownership interest in, such as sole proprietorships, partnerships, joint ventures, corporations, or limited liability corporations (other than the applicant firm). Do not reduce the value of these entries by any loans from the outside firm to the DBE/ACDBE applicant business.

Liabilities

Mortgages on Real Estate: Enter the total balance on all mortgages payable on real estate on page 1.

Loans on Life Insurance: Enter the total value of all loans due on life insurance policies on page 1, and complete section 5 on page 2.

Notes & Accounts Payable to Bank and Others: On page 1, section 2, enter details concerning any liability, including name of noteholders, original and current balances, payment terms, and security/collateral information. The entries should include automobile installment accounts. This should not, however, include any mortgage balances as this information is captured in section 4. Do not include loans for your business or mortgages for your properties in this section. You may be asked to submit copy of note/security agreement, and the most recent account statement.

Other Liabilities: On page 1, enter the total value due on all other liabilities not listed in the previous entries. In section 8, page 3, report the name of the individual obligated, names of co-signers, description of the liability, the name of the entity owed, the date of the obligation, payment amounts and terms. Note: Do not include contingent liabilities in this section. Contingent liabilities are liabilities that belong to you only if an event(s) should occur. For example, if you

have co-signed on a relative's loan, but you are not responsible for the debt until your relative defaults, that is a contingent liability. Contingent liabilities do not count toward your net worth until they become actual liabilities.

Unpaid Taxes: Enter the total amount of all taxes that are currently due, but are unpaid on page 1, and complete section 8 on page 3. Contingent tax liabilities or anticipated taxes for current year should not be included. Describe in detail the name of the individual obligated, names of co-signers, the type of unpaid tax, to whom the tax is payable, due date, amount, and to what property, if any, the tax lien attaches. If none, state "NONE." You must include documentation, such as tax liens, to support the amounts.

Transfers of Assets:

Transfers of Assets: If you checked the box indicating yes on page 3 in this category, provide details on all asset transfers (within 2 years of the date of this personal net worth statement) to a spouse, domestic partner, relative, or entity in which you have an ownership or beneficial interest including a trust. Include a description of the asset; names of individuals on the deed, title, note or other instrument indicating ownership rights; the names of individuals receiving the assets and their relation to the transferor; the date of the transfer; and the value or consideration received. Submit documentation requested on the form related to the transfer.

Affidavit

Be sure to sign and date the statement. The Personal Net Worth Statement must be notarized

APPENDIX D
DBE INTERSTATE CERTIFICATION AFFIDAVIT

DBE Interstate Certification Affidavit

Per 49CFR 26.85, all out-of-state applicants are required to submit:

1. A complete copy of the DBE application form, all supporting documents, and any other information you have submitted to your home state or any other state related to your firm's certification. This includes affidavits of no change, updated tax documents, and any notices of changes that you have submitted to your home state, as well as any correspondence you have had with your home state's UCP or any other recipient concerning your application or status as a DBE firm.

Included is a complete copy of my home state DBE file, which includes:

Application Form(s) - Yes No Supporting Documents - Yes No Taxes - Yes No
No Change Affidavits - Yes No N/A Notices of Change - Yes No N/A

2. You must also provide any notices or correspondence from states other than your home state relating to your status as an applicant or certified DBE in those states. For example, if you have been denied certification or decertified in State C, or subject to a decertification action there, you must inform us of this fact and provide all documentation concerning this action.

Included are any notices related to approvals, denials or decertifications from states other than my home state: Yes No N/A

3. If you have filed a certification appeal with US DOT, you must inform us of this fact and provide your letter of appeal and DOT's response. **DOT appeal letters and responses included** Yes No N/A

I, _____ (printed name), in the City/County of _____ being duly sworn deposes and says that he/she is _____ (title) of _____ (print name of organization) and hereby declares under penalty of perjury that the information in this affidavit is true and correct as of the date hereby given. The undersigned attests that this packet contains all the information required by items 1-3 above and the information is complete and, in the case of the information required by item 1, is an identical copy of the information submitted to my firm's home state.

Signature: _____

Notary Certificate, with Notary Seal

Date: _____

City / County of _____

In the Commonwealth / State of _____

The foregoing instrument was subscribed and sworn before me

This _____ day of _____, 20____,

By _____ (name of person / DBE applicant)

Notary Signature

Notary Registration # _____

My Commission expires: _____ (date)

IMPORTANT NOTE: *In the Commonwealth of Virginia, any false statement is sufficient cause for denial of DBE certification, revocation of a prior approval or suspension, and may subject the person and/or entity making the false statement to any and all civil and criminal penalties under applicable federal and state laws.*

APPENDIX E

VIRGINIA UNIFIED CERTIFICATION PROGRAM

AFFIDAVIT OF NO CHANGE

Commonwealth of Virginia Unified Certification Program

Affidavit of No Change

Please complete the following carefully, so that we can check our records for accuracy, even if nothing has changed from last year.

Contact INFORMATION

A. Contact Information

| | | |
|--|-----------------|-----------------------------|
| 1) Contact Person: | Title: | 2) Legal Name of Firm: |
| FEIN: | | Certification No.: |
| 3) Phone: | 4) Other Phone: | 5) Fax: |
| 6) Email for Certification**: | | Email for Public Directory: |
| 7) Website: | | |
| 8) Street Address of Firm (No P.O. Box): | | City, State, Zip: |
| 9) Mailing Address of Firm (if different): | | City, State, Zip: |

****Please note that most communications from the Department of Small Business and Supplier Diversity about your DBE Certification will be sent to you electronically and not by the postal service.****

Firm's number of employees: Full-time _____ Part-time _____ Seasonal _____ Total _____
 Affiliates' number of employees: Full-time _____ Part-time _____ Seasonal _____ Total _____

Specify the firm's gross receipts for the last 3 years. (Submit complete copies of the firm's Federal tax returns for any year not already on file. If there are affiliates or subsidiaries of the applicant firm or owners, you must submit complete copies of these firms' Federal tax returns, if they have not been previously submitted).

Year _____ Gross Receipts of Applicant Firm \$ _____ Gross Receipts of Affiliate Firms \$ _____
 Year _____ Gross Receipts of Applicant Firm \$ _____ Gross Receipts of Affiliate Firms \$ _____
 Year _____ Gross Receipts of Applicant Firm \$ _____ Gross Receipts of Affiliate Firms \$ _____

SWaM Micro Business Designation

As a certified SWaM Small Business by the Department, your company might qualify to be a "Micro Business". Micro Business is a certified Small Business under the SWaM Program and, together with its affiliates, has no more than twenty-five (25) employees -AND- no more than \$3 million in average annual revenue over the three-year period prior to their certification.

Is the firm certified as a SWaM Small business? Yes No Expiration Date: _____
 If not already certified, or if time for renewal, do you also want to apply for "Micro Business Certification? Yes No
 If applying for, or renewing Micro, submit the last four Federal quarterly 941 (Employer's Quarterly Federal Tax Return) for the firm and its affiliates.

Commonwealth of Virginia Unified Certification Program

AFFIDAVIT OF NO CHANGE

I, _____ (printed name), in the City/County of _____
being duly sworn deposes and says that he/she is _____ (title) of
_____ (print name of organization) and hereby declares under penalty
of perjury that the information in this affidavit is a true and correct statement as of the date hereby given.
The undersign attests that there have been no material changes in the information provided with
_____ (print name of organization), except for any changes about which
I have provided written notice to the Virginia Department of Small Business and Supplier Diversity
(VDSBSD) pursuant to 49 CFR § 26.83(i). I swear that this firm continues to be owned and controlled by
disadvantaged individuals and that the personal net worth of all the owners whose ownership is relied upon
for Disadvantaged Business Enterprise (DBE) and/or Airport Concession Disadvantaged Business
Enterprise (ACDBE) status does not exceed \$1,320,000. I further affirm that the firm continues to meet the
Small Business Administration (SBA) business size criteria and the overall gross receipts cap of 49 CFR
Part 26 and/or Part 23 and _____ (print name of organization)'s average
annual gross receipts (as defined by SBA rules) over the previous three fiscal years do not exceed \$23.98 million,
in the case of DBE, and/or \$56.42 million, in the case of ACDBE. I provide the attached size and gross receipts
documentation to support this affidavit.

I further attest that I have not been denied bidding privileges, DBE, or ACDBE certification under any other federal
programs. I acknowledge that the VDSBSD hereby reserves the right to make inquiries in order to verify any
information relating to the firm's application and status as an eligible DBE.

I agree that VDSBSD will be notified in writing within 30 days of any changes in ownership and/or control,
personal net worth and/or size standard that would impact the firm's eligibility to remain in the program.

Signature: _____

Date: _____

Notary Certificate, with Notary Seal

City / County of _____

In the Commonwealth / State of _____

The foregoing instrument was subscribed and sworn before me

This _____ day of _____, 20____,

By _____ (name of person / DBE applicant)

_____ Notary Signature Notary Registration # _____

My Commission expires: _____ (date)

IMPORTANT NOTE: *In the Commonwealth of Virginia, any false statement is sufficient cause for denial of DBE certification, revocation of a prior approval or suspension, and may subject the person and/or entity making the false statement to any and all civil and criminal penalties under applicable federal and state laws.*

APPENDIX F

VIRGINIA UNIFIED CERTIFICATION PROGRAM

NOTICE OF CHANGE

Commonwealth of Virginia Unified Certification Program

Virginia Unified Certification Program Notice of Change

Please complete the following carefully. You must attach supporting documentation describing in detail the nature of any changes.

Contact INFORMATION

A. Contact Information

| | | |
|--|-----------------|-----------------------------|
| 1) Contact Person: | Title: | 2) Legal Name of Firm: |
| FEIN: | | Certification No.: |
| 3) Phone: | 4) Other Phone: | 5) Fax: |
| 6) Email for Certification**: | | Email for Public Directory: |
| 7) Website: | | |
| 8) Street Address of Firm (No P.O. Box): | | City, State, Zip: |
| 9) Mailing Address of Firm (if different): | | City, State, Zip: |

****Please note that most communications from the Department of Small Business and Supplier Diversity about your DBE Certification will be sent to you electronically and not by the postal service.****

Firm's number of employees: Full-time _____ Part-time _____ Seasonal _____ Total _____
 Affiliates' number of employees: Full-time _____ Part-time _____ Seasonal _____ Total _____

Specify the firm's gross receipts for the last 3 years. (Submit complete copies of the firm's Federal tax returns for any year not already on file. If there are affiliates or subsidiaries of the applicant firm or owners, you must submit complete copies of these firms' Federal tax returns, if they have not been previously submitted).

Year _____ Gross Receipts of Applicant Firm \$ _____ Gross Receipts of Affiliate Firms \$ _____
 Year _____ Gross Receipts of Applicant Firm \$ _____ Gross Receipts of Affiliate Firms \$ _____
 Year _____ Gross Receipts of Applicant Firm \$ _____ Gross Receipts of Affiliate Firms \$ _____

SWaM Micro Business Designation

As a certified SWaM Small Business by the Department, your company might qualify to be a "Micro Business". Micro Business is a certified Small Business under the SWaM Program and, together with its affiliates, has no more than twenty-five (25) employees -AND- no more than \$3 million in average annual revenue over the three-year period prior to their certification.

Is the firm certified as a SWaM Small business? Yes No Expiration Date: _____
 If not already certified, or if time for renewal, do you also want to apply for "Micro Business Certification? Yes No
 If applying for, or renewing Micro, submit the last four Federal quarterly 941 (Employer's Quarterly Federal Tax Return) for the firm and its affiliates.

EXPANSION OF SERVICES

1. **Only complete this section if your firm is requesting certification for additional NAICS Codes.**
2. Please list no more than 10 NAICS Codes under which your firm works (This will included the Codes for which you are currently certified): (see <http://www.census.gov/naics/2007/NAICOD07.HTM>)
3. You will be required to submit documentation demonstrating your firm's ability to perform the requested services, as well as your ability to control the firm with regards to these services. (**Out of State firms will require home state certification for all requested codes.**)

| NAICS Code | Work Description |
|------------|------------------|
| | |
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| | |
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| | |

Section 3: MAJORITY OWNER INFORMATION

A. Identify the majority owner of the firm holding 51% or more ownership interest.

| <p>(1) Full Name: _____</p> | <p>(2) Title: _____</p> | <p>(3) Home Phone #: () _____ - _____</p> | | | | | | | | | | | | | | | |
|---|--|---|---|-------------|---------------------|--|------|----------|--|-------------|----------|--|-----------|----------|--|-------|----------|
| <p>(4) Home Address (Street and Number): _____</p> | <p>City: _____</p> | <p>State: _____</p> | | | | | | | | | | | | | | | |
| <p>(4) Zip: _____</p> | | | | | | | | | | | | | | | | | |
| <p>(5) Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female</p> <p>(6) Ethnic group membership (Check all that apply):</p> <p><input type="checkbox"/> Black <input type="checkbox"/> Hispanic</p> <p><input type="checkbox"/> Asian Pacific <input type="checkbox"/> Native American</p> <p><input type="checkbox"/> Subcontinent Asian</p> <p><input type="checkbox"/> Other (specify) _____</p> <p>(7) U.S. Citizenship:</p> <p><input type="checkbox"/> U.S. Citizen</p> <p><input type="checkbox"/> Lawfully Admitted Permanent Resident</p> | <p>(8) Number of years as owner: _____</p> <p>(9) Percentage owned: _____ %</p> <p>Class of stock owned: _____</p> <p>Date acquired _____</p> <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">(10) Initial investment to acquire ownership interest in firm:</th> <th style="text-align: left;"><u>Type</u></th> <th style="text-align: left;"><u>Dollar Value</u></th> </tr> </thead> <tbody> <tr> <td></td> <td>Cash</td> <td>\$ _____</td> </tr> <tr> <td></td> <td>Real Estate</td> <td>\$ _____</td> </tr> <tr> <td></td> <td>Equipment</td> <td>\$ _____</td> </tr> <tr> <td></td> <td>Other</td> <td>\$ _____</td> </tr> </tbody> </table> <p>Describe how you acquired your business:</p> <p><input type="checkbox"/> Started business myself</p> <p><input type="checkbox"/> It was a gift from: _____</p> <p><input type="checkbox"/> I bought it from: _____</p> <p><input type="checkbox"/> I inherited it from: _____</p> <p><input type="checkbox"/> Other _____</p> | | (10) Initial investment to acquire ownership interest in firm: | <u>Type</u> | <u>Dollar Value</u> | | Cash | \$ _____ | | Real Estate | \$ _____ | | Equipment | \$ _____ | | Other | \$ _____ |
| (10) Initial investment to acquire ownership interest in firm: | <u>Type</u> | <u>Dollar Value</u> | | | | | | | | | | | | | | | |
| | Cash | \$ _____ | | | | | | | | | | | | | | | |
| | Real Estate | \$ _____ | | | | | | | | | | | | | | | |
| | Equipment | \$ _____ | | | | | | | | | | | | | | | |
| | Other | \$ _____ | | | | | | | | | | | | | | | |

B. Additional Owner Information

(1) Describe familial relationship to other owners and employees:

(2) Does this owner perform a management or supervisory function for any other business? Yes No

If Yes, identify: Name of Business: _____ Function/Title: _____

(3)(a) Does this owner own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) Yes No

Identify the name of the business, and the nature of the relationship, and the owner's function at the firm:

(b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: _____

(4)(a) What is the personal net worth of this disadvantaged owner applying for certification ? \$ _____

(b) Has any trust been created for the benefit of this disadvantaged owner(s)? Yes No

(If Yes, you may be asked to provide a copy of the trust instrument).

(5) Do any of your immediate family members, managers, or employees own, manage, or are associated with another company? Yes No If Yes, provide their name, relationship, company, type of business, and indicate whether they own or manage the company: (Please attach extra sheets, if needed): _____

Section 3: OWNER INFORMATION, Cont'd.

A. Identify all individuals, firms, or holding companies that hold LESS THAN 51% ownership interest in the firm (Attach separate sheets for each additional owner)

| | | |
|---|------------------|--|
| (1) Full Name: _____ | (2) Title: _____ | (3) Home Phone #: _____ () _____ - _____ |
| (4) Home Address (Street and Number): _____ | City: _____ | State: _____ Zip: _____ |

| <p>(5) Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female</p> <p>(6) Ethnic group membership (Check all that apply)</p> <p><input type="checkbox"/> Black <input type="checkbox"/> Hispanic <input type="checkbox"/> Asian Pacific <input type="checkbox"/> Native American <input type="checkbox"/> Subcontinent Asian <input type="checkbox"/> Other (specify) _____</p> <p>(7) U.S. Citizenship:</p> <p><input type="checkbox"/> U.S. Citizen <input type="checkbox"/> Lawfully Admitted Permanent Resident</p> | <p>(8) Number of years as owner: _____</p> <p>(9) Percentage owned: _____ % Class of stock owned: _____ Date acquired _____</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <th style="text-align: left;">(10) Initial investment to acquire ownership interest in firm:</th> <th style="text-align: left;">Type</th> <th style="text-align: left;">Dollar Value</th> </tr> <tr> <td></td> <td>Cash</td> <td>\$ _____</td> </tr> <tr> <td></td> <td>Real Estate</td> <td>\$ _____</td> </tr> <tr> <td></td> <td>Equipment</td> <td>\$ _____</td> </tr> <tr> <td></td> <td>Other</td> <td>\$ _____</td> </tr> </table> <p>Describe how you acquired your business:</p> <p><input type="checkbox"/> Started business myself <input type="checkbox"/> It was a gift from: _____ <input type="checkbox"/> I bought it from: _____ <input type="checkbox"/> I inherited it from: _____ <input type="checkbox"/> Other _____</p> <p><i>(Attach documentation substantiating your investment)</i></p> | (10) Initial investment to acquire ownership interest in firm: | Type | Dollar Value | | Cash | \$ _____ | | Real Estate | \$ _____ | | Equipment | \$ _____ | | Other | \$ _____ |
|---|---|--|------|--------------|--|------|----------|--|-------------|----------|--|-----------|----------|--|-------|----------|
| (10) Initial investment to acquire ownership interest in firm: | Type | Dollar Value | | | | | | | | | | | | | | |
| | Cash | \$ _____ | | | | | | | | | | | | | | |
| | Real Estate | \$ _____ | | | | | | | | | | | | | | |
| | Equipment | \$ _____ | | | | | | | | | | | | | | |
| | Other | \$ _____ | | | | | | | | | | | | | | |

B. Additional Owner Information

(1) Describe familial relationship to other owners and employees:

(2) Does this owner perform a management or supervisory function for any other business? Yes No
 If Yes, identify: Name of Business: _____ Function/Title: _____

(3)(a) Does this owner own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) Yes No
 Identify the name of the business, and the nature of the relationship, and the owner's function at the firm:

(b) Does this owner work for any other firm, non-profit organization, or is engaged in any other activity more than 10 hours per week? If yes, identify this activity: _____

(4)(a) What is the personal net worth of this disadvantaged owner applying for certification? \$ _____

(b) Has any trust been created for the benefit of this disadvantaged owner(s)? Yes No
(If Yes, you may be asked to provide a copy of the trust instrument).

(5) Do any of your immediate family members, managers, or employees own, manage, or are associated with another company? Yes No If Yes, provide their name, relationship, company, type of business, and indicate whether they own or manage: *(Please attach extra sheets, if needed):* _____

Section 4: CONTROL

A. Identify your firm's Officers and Board of Directors (If additional space is required, attach a separate sheet):

| | Name | Title | Date Appointed | Ethnicity | Gender |
|------------------------------------|------|-------|----------------|-----------|--------|
| (1) Officers of the Company | (a) | | | | |
| | (b) | | | | |
| | (c) | | | | |
| | (d) | | | | |
| (2) Board of Directors | (a) | | | | |
| | (b) | | | | |
| | (c) | | | | |
| | (d) | | | | |

(3) Do any of the persons listed above perform a management or supervisory function for any other business?

Yes No If Yes, identify for each:

Person: _____ Title: _____

Business: _____ Function: _____

Person: _____ Title: _____

Business: _____ Function: _____

(4) Do any of the persons listed in section A above own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)

Yes No If Yes, identify for each:

Firm Name: _____ Person: _____

Nature of Business Relationship: _____

B. Duties of Owners, Officers, Directors, Managers, and Key Personnel

1. (Identify your firm's management personnel who control your firm in the following areas (Attach separate sheets as needed).)

| A= Always F = Frequently | S = Seldom N = Never | Majority Owner (51% or more) | | | | Minority Owner (49% or less) | | | |
|--|----------------------------|------------------------------|----------------------------|----------------------------|----------------------------|------------------------------|----------------------------|----------------------------|--|
| | | Name: _____ | Title: _____ | Percent Owned: _____ | | Name: _____ | Title: _____ | Percent Owned: _____ | |
| Sets policy for company direction/scope of operations | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Bidding and estimating | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Major purchasing decisions | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Marketing and sales | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Supervises field operations | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Attend bid opening and lettings | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Perform office management (billing, accounts receivable/payable, etc.) | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Hires and fires management staff | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Hire and fire field staff or crew | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Designates profits spending or investment | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Obligates business by contract/credit | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Purchase equipment | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |
| Signs business checks | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | |

2. Complete for all Officers, Directors, Managers, and Key Personnel who control the following functions for the firm. (Attach separate sheets as needed).

| A= Always S = Seldom F = Frequently N = Never | Officer/Director/Manager/Key Personnel | | | | Officer/Director/Manager/ Key Personnel | | | |
|--|---|----------------------------|----------------------------|----------------------------|---|----------------------------|----------------------------|----------------------------|
| | Name: _____ Title: _____ Race and Gender: _____ Percent Owned: _____ | | | | Name: _____ Title: _____ Race and Gender: _____ Percent Owned: _____ | | | |
| Sets policy for company direction/scope of operations | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Bidding and estimating | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Major purchasing decisions | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Marketing and sales | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Supervises field operations | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Attend bid opening and lettings | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Perform office management (billing, accounts receivable/payable, etc.) | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Hires and fires management staff | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Hire and fire field staff or crew | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Designates profits spending or investment | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Obligates business by contract/credit | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Purchase equipment | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |
| Signs business checks | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> | A <input type="checkbox"/> | F <input type="checkbox"/> | S <input type="checkbox"/> | N <input type="checkbox"/> |

Do any of the persons listed in B1 or B2 perform a management or supervisory function for any other business? If Yes, identify the person, the business, and their title/function: _____

Do any of the persons listed above own or work for any other firm(s) that has a relationship with this firm? (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.) If Yes, describe the nature of the business relationship: _____

AFFIDAVIT OF CONTINUED ELIGIBILITY

I, _____ (printed name), in the City/County of _____ being duly sworn
deposes and says that he/she is _____ (title) of _____

(print name of organization) and hereby declares under penalty

of perjury that the information in this affidavit is true and correct statement as of the date hereby given. The undersign attests that this firm continues to be owned and controlled by disadvantaged individuals and that the personal net worth of all the owners whose ownership is relied upon for Disadvantaged Business Enterprise (DBE) status does not exceed \$1,320,000 and that the firm continues to be a small business as defined by the Small Business Administration (SBA) in its governing regulation, 13 CFR 121 located at: http://www.sba.gov/idc/groups/public/documents/sba_homepage/sba_010224.pdf

I further attest that I have not been denied bidding privileges or DBE certified under any other federal programs. I acknowledge that the Virginia Department of Small Business and Supplier Diversity (VDSBSD) hereby reserves the right to make inquiries in order to verify any information relating to the firm's application and status as an eligible DBE.

I agree that VDSBSD will be notified in writing within 30 days of any changes in ownership and/or control, personal net worth and/or size standard that would impact the firm's eligibility to remain in the program.

Notary Certificate, with Notary Seal

City / County of _____

In the Commonwealth / State of _____

The foregoing instrument was subscribed and sworn before me

This _____ day of _____, 20____,

By _____ (name of person / DBE applicant)

Notary Signature

Notary Registration # _____

My Commission expires: _____ (date)

Signature: _____

Date: _____

IMPORTANT NOTE: *In the Commonwealth of Virginia, any false statement is sufficient cause for denial of DBE certification, revocation of a prior approval or suspension, and may subject the person and/or entity making the false statement to any and all civil and criminal penalties under applicable federal and state laws.*

APPENDIX G

**SPECIAL PROVISION 107.15 – USE OF
DISADVANTAGED BUSINESS ENTERPRISES**

VIRGINIA DEPARTMENT OF TRANSPORTATION
SPECIAL PROVISION FOR
SECTION 107.15

July 12, 2016

Section 107.15 of the Specifications is replaced by the following:

Section 107.15—Use of Disadvantaged Business Enterprises (DBEs)

A. Disadvantaged Business Enterprise (DBE) Program Requirements

Any Contractor, subcontractor, supplier, DBE firm, and contract surety involved in the performance of work on a federal-aid contract shall comply with the terms and conditions of the United States Department of Transportation (USDOT) DBE Program as the terms appear in Part 26 of the Code of Federal Regulations (49 CFR as amended), the USDOT DBE Program regulations; and the Virginia Department of Transportation's (VDOT or the Department) Road and Bridge Specifications and DBE Program rules and regulations.

For the purposes of this provision, Contractor is defined as the Prime Contractor of the contract; and sub-contractor is defined as any DBE supplier, manufacturer, or subcontractor performing work or furnishing material, supplies or services to the contract. The Contractor shall physically include this same contract provision in every supply or work/service subcontract that it makes or executes with a subcontractor having work for which it intends to claim credit.

In accordance with 49 CFR Part 26 and VDOT's DBE Program requirements, the Contractor, for itself and for its subcontractors and suppliers, whether certified DBE firms or not, shall commit to complying fully with the auditing, record keeping, confidentiality, cooperation, and anti-intimidation or retaliation provisions contained in those federal and state DBE Program regulations. By bidding on this contract, and by accepting and executing this contract, the Contractor agrees to assume these contractual obligations and to bind the Contractor's subcontractors contractually to the same at the Contractor's expense.

The Contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award, administration, and performance of this contract. Failure by the Contractor to carry out these requirements is a material breach of this contract, which will result in the termination of this contract or other such remedy, as VDOT deems appropriate.

All administrative remedies noted in this provision are automatic unless the Contractor exercises the right of appeal within the required timeframe(s) specified herein. Appeal requirements, processes, and procedures shall be in accordance with guidelines stated herein and current at the time of the proceedings. Where applicable, the Department will notify the

Contractor of any changes to the appeal requirements, processes, and procedures after receiving notification of the Contractor's desire to appeal.

All time frames referenced in this provision are expressed in business days unless otherwise indicated. Should the expiration of any deadline fall on a weekend or holiday, such deadline will automatically be extended to the next normal business day.

B. DBE Certification

The only DBE firms eligible to perform work on a federal-aid contract for DBE contract goal credit are firms certified as Disadvantaged Business Enterprises by the Virginia Department of Small Business and Supplier Diversity (DSBSD) or the Metropolitan Washington Airports Authority (MWAA) in accordance with federal and VDOT guidelines. DBE firms must be certified in the specific work listed for DBE contract goal credit. A directory listing of certified DBE firms can be obtained from the Virginia Department of Small Business and Supplier Diversity and the Metropolitan Washington Airports Authority Internet websites: www.sbsd.virginia.gov and www.mwaa.com/business/ldb-and-acdbedbe-directory.

C. DBE Program-Related Certifications Made by Bidders/Contractors

By submitting a bid and by entering into any contract on the basis of that bid, the bidder/Contractor certifies to each of the following DBE Program-related conditions and assurances:

1. That the management and bidding officers of its firm agree to comply with the bidding and project construction and administration obligations of the USDOT DBE Program requirements and regulations of 49 CFR Part 26 as amended, and VDOT's Road and Bridge Specifications and DBE Program requirements and regulations.
2. Under penalty of perjury and other applicable penal law that it has complied with the DBE Program requirements in submitting the bid, and shall comply fully with these requirements in the bidding, award, and execution of the contract.
3. To ensure that DBE firms have been given full and fair opportunity to participate in the performance of the contract. The bidder certifies that all reasonable steps were, and will be, taken to ensure that DBE firms had, and will have, an opportunity to compete for and perform work on the contract. The bidder further certifies that the bidder shall not discriminate on the basis of race, color, age, national origin, or sex in the performance of the contract or in the award of any subcontract. Any agreement between a bidder and a DBE whereby the DBE promises not to provide quotations for performance of work to other bidders is prohibited.
4. As a bidder, good faith efforts were made to obtain DBE participation in the proposed contract at or above the goal for DBE participation established by VDOT. It has submitted as a part of its bid true, accurate, complete, and detailed documentation of the good faith efforts it performed to meet the contract goal for DBE participation. The

bidder, by signing and submitting its bid, certifies the DBE participation information submitted within the stated time thereafter is true, correct, and complete, and that the information provided includes the names of all DBE firms that will participate in the contract, the specific line item(s) that each listed DBE firm will perform, and the creditable dollar amounts of the participation of each listed DBE. The specific line item must reference the VDOT line number and item number contained in the proposal.

5. The bidder further certifies, by signing its bid, it has committed to use each DBE firm listed for the specific work item shown to meet the contract goal for DBE participation. Award of the contract will be conditioned upon meeting these and other listed requirements of 49 CFR Part 26.53 and the contract documents. By signing the bid, the bidder certifies on work that it proposes to sublet; it has made good faith efforts to seek out and consider DBEs as potential subcontractors. The bidder shall contact DBEs to solicit their interest, capability, and prices in sufficient time to allow them to respond effectively, and shall retain on file proper documentation to substantiate its good faith efforts. Award of the contract will be conditioned upon meeting these and other listed requirements of 49 CFR Part 26.53 and the contract documents.
6. Once awarded the contract, the Contractor shall make good faith efforts to utilize DBE firms to perform work designated to be performed by DBEs at or above the amount or percentage of the dollar value specified in the bidding documents. Further, the Contractor understands it shall not unilaterally terminate, substitute for, or replace any DBE firm that was designated in the executed contract in whole or in part with another DBE, any non-DBE firm, or with the Contractor's own forces or those of an affiliate of the Contractor without the prior written consent of VDOT as set out within the requirements of this provision.
7. Once awarded the contract, the Contractor shall designate and make known to the Department a liaison officer who is assigned the responsibility of administering and promoting an active and inclusive DBE program as required by 49 CFR Part 26 for DBEs. The designation and identity of this officer need be submitted only once by the Contractor during any twelve (12) month period at the preconstruction conference for the first contract the Contractor has been awarded during that reporting period. The Department will post such information for informational and administrative purposes at VDOT's Internet Civil Rights Division website.
8. Once awarded the contract, the Contractor shall comply fully with all regulatory and contractual requirements of the USDOT DBE Program, and that each DBE firm participating in the contract shall fully perform the designated work items with the DBE's own forces and equipment under the DBE's direct supervision, control, and management. Where a contract exists and where the Contractor, DBE firm, or any other firm retained by the Contractor has failed to comply with federal or VDOT DBE Program regulations and/or their requirements on that contract, VDOT has the authority and discretion to determine the extent to which the DBE contract regulations and/or requirements have not been met, and will assess against the Contractor any remedies available at law or provided in the contract in the event of such a contract breach.

9. In the event a bond surety assumes the completion of work, if for any reason VDOT has terminated the prime Contractor, the surety shall be obligated to meet the same DBE contract terms and requirements as were required of the original prime Contractor in accordance with the requirements of this specification.

D. Disqualification of Bidder

Bidders may be disqualified from bidding for failure to comply with the requirements of this Special Provision, the contract specifications, and VDOT Road and Bridge Specifications.

E. Bidding Procedures

The following bidding procedures shall apply to the contract for DBE Program compliance purposes:

- 1. Contract Goal, Good Faith Efforts Specified:** All bidders evidencing the attainment of DBE goal commitment equal to or greater than the required DBE goal established for the project must submit completed Form C-111, Minimum DBE Requirements, and Form C-48, Subcontractor/Supplier Solicitation and Utilization, as a part of the bid documents.

Form C-111 may be submitted electronically or may be faxed to the Department, but in no case shall the bidder's Form C-111 be received later than 10:00 a.m. the next business day after the time stated in the bid proposal for the receipt of bids. Form C-48 must be received within ten (10) business days after the bid opening.

If, at the time of submitting its bid, the bidder knowingly cannot meet or exceed the required DBE contract goal, it shall submit Form C-111 exhibiting the DBE participation it commits to attain as a part of its bid documents. The bidder shall then submit Form C-49, DBE Good Faith Efforts Documentation, within two (2) business days after the bid opening.

The lowest responsive and responsible bidder must submit its properly executed Form C-112, Certification of Binding Agreement, within three (3) business days after the bids are received. DBEs bidding as prime contractors are not required to submit Form C-112 unless they are utilizing other DBEs as subcontractors.

If, after review of the apparent lowest bid, VDOT determines the DBE requirements have not been met, the apparent lowest successful bidder must submit Form C-49, DBE Good Faith Efforts Documentation, which must be received by the Contract Engineer within two (2) business days after official notification of such failure to meet the aforementioned DBE requirements.

Forms C-48, C-49, C-111, and C-112 can be obtained from the VDOT website at:
<http://vdotforms.vdot.virginia.gov/>

Instructions for submitting Form C-111 can be obtained from the VDOT website at:
http://www.virginiadot.org/business/resources/const/Exp_DBE_Commitments.pdf

2. **Bid Rejection:** The failure of a bidder to submit the required documentation within the timeframes specified in the Contract Goal, Good Faith Efforts Specified section of this Special Provision may be cause for rejection of that bidder's bid.

If the lowest bidder is rejected for failure to submit the required documentation in the specified time frames, the Department may award the work to the next lowest bidder, or re-advertise the proposed work at a later date or proceed otherwise as determined by the Commonwealth.

3. **Good Faith Efforts Described:** In order to award a contract to a bidder that has failed to meet DBE contract goal requirements, VDOT will determine if the bidder's efforts were adequate good faith efforts, and if given all relevant circumstances, those efforts were made actively and aggressively to meet the DBE requirements. Efforts to obtain DBE participation are not good faith efforts if they could not reasonably be expected to produce a level of DBE participation sufficient to meet the DBE Program and contract goal requirements.

Good faith efforts may be determined through use of the following list of the types of actions the bidder may make to obtain DBE participation. This is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts of similar intent may be relevant in appropriate cases:

- (a) Soliciting through reasonable and available means, such as but not limited to, attendance at pre-bid meetings, advertising, and written notices to DBEs who have the capability to perform the work of the contract. Examples include: advertising in at least one daily/weekly/monthly newspaper of general circulation, as applicable; phone contact with a completely documented telephone log, including the date and time called, contact person, or voice mail status; and internet contacts with supporting documentation, including dates advertised. The bidder shall solicit this interest no less than five (5) business days before the bids are due so that the solicited DBEs have enough time to reasonably respond to the solicitation. The bidder shall determine with certainty if the DBEs are interested by taking reasonable steps to follow up initial solicitations as evidenced by documenting such efforts as requested on Form C-49, DBE Good Faith Efforts Documentation.
- (b) Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the Contractor might otherwise prefer to completely perform all portions of this work in its entirety or use its own forces;

- (c) Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner, which will assist the DBEs in responding to a solicitation;
- (d) Negotiating for participation in good faith with interested DBEs;
 - 1. Evidence of such negotiation shall include the names, addresses, and telephone numbers of DBEs that were considered; dates DBEs were contacted; a description of the information provided regarding the plans, specifications, and requirements of the contract for the work selected for subcontracting; and, if insufficient DBE participation seems likely, evidence as to why additional agreements could not be reached for DBEs to perform the work;
 - 2. A bidder using good business judgment should consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and should take a firm's price, qualifications, and capabilities, as well as contract goals, into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not sufficient reason for a bidder's failure to meet the contract goal for DBE participation, as long as such costs are reasonable and comparable to costs customarily appropriate to the type of work under consideration. Also, the ability or desire of a bidder to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make diligent good faith efforts. Bidders are not, however, required to accept higher quotes from DBEs if the price difference can be shown by the bidder to be excessive, unreasonable, or greater than would normally be expected by industry standards;
- (e) A bidder cannot reject a DBE as being unqualified without sound reasons based on a thorough investigation of the DBE's capabilities. The DBE's standing within its industry, membership in specific groups, organizations, associations, and political or social affiliations, and union vs. non-union employee status are not legitimate causes for the rejection or non-solicitation of bids in the bidder's efforts to meet the project goal for DBE participation;
- (f) Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by VDOT or by the bidder/Contractor;
- (g) Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services subject to the restrictions contained in these provisions;
- (h) Effectively using the services of appropriate personnel from VDOT and from DSBSD; available minority/women community or minority organizations; contractors' groups; local, state, and Federal minority/ women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and utilization of qualified DBEs.

F. Documentation and Administrative Reconsideration of Good Faith Efforts

During Bidding: As described in the Contract Goal, Good Faith Efforts Specified section of this Special Provision, the bidder must provide Form C-49, DBE Good Faith Efforts Documentation, of its efforts made to meet the DBE contract goal as proposed by VDOT within the time frame specified in this provision. The means of transmittal and the risk for timely receipt of this information shall be the responsibility of the bidder. The bidder shall attach additional pages to the certification, if necessary, in order to fully detail specific good faith efforts made to obtain the DBE firms participation in the proposed contract work.

However, regardless of the DBE contract goal participation level proposed by the bidder or the extent of good faith efforts shown, all bidders shall timely and separately file their completed and executed forms C-111, C-112, C-48, and C-49, as aforementioned, or face potential bid rejection.

If a bidder does not submit its completed and executed forms C-111, or C-112, when required by this Special Provision, the bidder's bid will be considered non-responsive and may be rejected.

Where the Department upon initial review of the bid results determines the apparent low bidder has failed or appears to have failed to meet the requirements of the **Contract Goal, Good Faith Efforts Specified** section of this Special Provision and has failed to adequately document that it made a good faith effort to achieve sufficient DBE participation as specified in the bid proposal, that firm upon notification of the Department's initial determination will be offered the opportunity for administrative reconsideration before VDOT rejects that bid as non-responsive. The bidder shall address such request for reconsideration in writing to the Contract Engineer within five (5) business days of receipt of notification by the Department and shall be given the opportunity to discuss the issue and present its evidence in person to the Administrative Reconsideration Panel. The Administrative Reconsideration Panel will be made up of VDOT Division Administrators or their designees, none of who took part in the initial determination that the bidder failed to make the goal or make adequate good faith efforts to do so. After reconsideration, VDOT shall notify the bidder in writing of its decision and explain the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

If, after reconsideration, the Department determines the bidder has failed to meet the requirements of the contract goal and has failed to make adequate good faith efforts to achieve the level of DBE participation as specified in the bid proposal, the bidder's bid will be rejected.

If sufficient documented evidence is presented to demonstrate that the apparent low bidder made reasonable good faith efforts, the Department will award the contract and reduce the DBE requirement to the actual commitment identified by the lowest successful bidder at the time of its bid. The Contractor is still encouraged to seek additional DBE participation during the life of the contract.

However, such action will not relieve the Contractor of its responsibility for complying with the reduced DBE requirement during the life of the contract or any administrative sanctions as may be appropriate.

During the Contract: If a DBE, through no fault of the Contractor, is unable or unwilling to fulfill his agreement with the Contractor, the Contractor shall immediately notify the Department and provide all relevant facts. If a Contractor relieves a DBE subcontractor of the responsibility to perform work under their subcontract, the Contractor is encouraged to take the appropriate steps to obtain a DBE to perform an equal dollar value of the remaining subcontracted work. In such instances, the Contractor is expected to seek DBE participation towards meeting the goal during the performance of the contract.

If the Contractor fails to conform to the schedule of DBE participation as shown on the progress schedule, or at any point at which it is clearly evident that the remaining dollar value of allowable credit for performing work is insufficient to obtain the scheduled participation, and the Contractor has not taken the preceding actions, the Contractor and any aforementioned affiliates may be subject to disallowance of DBE credit until such time as conformance with the schedule of DBE participation is achieved.

Project Completion: If the Contractor fails upon completion of the project to meet the required participation, the Contractor and any prime contractual affiliates, as in the case of a joint venture, may be enjoined from bidding as a prime Contractor, or participating as a subcontractor on VDOT projects for a period of 90 days.

Prior to enjoinder from bidding or denial to participate as a subcontractor for failure to comply with participation requirements, as provided hereinbefore, the Contractor may submit documentation to the State Construction Engineer to substantiate that failure was due solely to quantitative underrun(s), elimination of items subcontracted to DBEs, or to circumstances beyond their control, and that all feasible means have been used to obtain the required participation. The State Construction Engineer upon verification of such documentation shall make a determination whether or not the Contractor has met the requirements of the contract.

If it is determined that the aforementioned documentation is insufficient or the failure to meet required participation is due to other reasons, the Contractor may request an appearance before the Administrative Reconsideration Panel to establish that all feasible means were used to meet such participation requirements. The decision of the Administrative Reconsideration Panel shall be administratively final. If the decision is made to enjoin the Contractor from bidding on other VDOT work as described herein, the enjoinder period will begin upon the Contractor's failure to request a hearing within the designated time frame or upon the Administrative Reconsideration Panel's decision to enjoin, as applicable.

G. DBE Participation for Contract Goal Credit

DBE participation on the contract will count toward meeting the DBE contract goal in accordance with the following criteria:

1. Cost-plus subcontracts will not be considered to be in accordance with normal industry practice and will not normally be allowed for credit.
2. The applicable percentage of the total dollar value of the contract or subcontract awarded to the DBE will be counted toward meeting the contract goal for DBE participation in accordance with the **DBE Program-Related Certifications Made by Bidders\Contractors** section of this Special Provision for the value of the work, goods, or services that are actually performed or provided by the DBE firm itself or subcontracted by the DBE to other DBE firms.
3. When a DBE performs work as a participant in a joint venture with a non-DBE firm, the Contractor may count toward the DBE goal only that portion of the total dollar value of the contract equal to the distinctly defined portion of the contract work that the DBE has performed with the DBE's own forces or in accordance with the provisions of this Section. The Department shall be contacted in advance regarding any joint venture involving both a DBE firm and a non-DBE firm to coordinate Department review and approval of the joint venture's organizational structure and proposed operation where the Contractor seeks to claim the DBE's credit toward the DBE contract goal.
4. When a DBE subcontracts part of the work of the contract to another firm, the value of that subcontracted work may be counted toward the DBE contract goal only if the DBE's subcontractor at a lower tier is a certified DBE. Work that a DBE subcontracts to either a non-DBE firm or to a non-certified DBE firm will not count toward the DBE contract goal. The cost of supplies and equipment a DBE subcontractor purchases or leases from the prime Contractor or the prime's affiliated firms will not count toward the contract goal for DBE participation.
5. The Contractor may count expenditures to a DBE subcontractor toward the DBE contract goal only if the DBE performs a Commercially Useful Function (CUF) on that contract.
6. A Contractor may not count the participation of a DBE subcontractor toward the Contractor's final compliance with the DBE contract goal obligations until the amount being counted has actually been paid to the DBE. A Contractor may count sixty (60) percent of its expenditures actually paid for materials and supplies obtained from a DBE certified as a regular dealer, and one hundred (100) percent of such expenditures actually paid for materials and supplies obtained from a certified DBE manufacturer.
 - (a) For the purposes of this Special Provision, a regular dealer is defined as a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment required and used under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the DBE firm shall be an established business that regularly engages, as its principal business and under its own name, in the purchase and sale or lease of the products or equipment in question. Packers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions will not be considered regular dealers.

- (b) A DBE firm may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business where it keeps such items in stock if the DBE both owns and operates distribution equipment for the products it sells and provides for the contract work. Any supplementation of a regular dealer's own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis to be eligible for credit to meet the DBE contract goal.
- (c) If a DBE regular dealer is used for DBE contract goal credit, no additional credit will be given for hauling or delivery to the project site goods or materials sold by that DBE regular dealer. Those delivery costs shall be deemed included in the price charged for the goods or materials by the DBE regular dealer, who shall be responsible for their distribution.
- (d) For the purposes of this Special Provision, a manufacturer will be defined as a firm that operates or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the project specifications. A manufacturer shall include firms that produce finished goods or products from raw or unfinished material, or purchase and substantially alter goods and materials to make them suitable for construction use before reselling them.
- (e) A Contractor may count toward the DBE contract goal the following expenditures to DBE firms that are not regular dealers or manufacturers for DBE program purposes:
 - 1. The entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of the federal-aid contract, if the fee is reasonable and not excessive or greater than would normally be expected by industry standards for the same or similar services.
 - 2. The entire amount of that portion of the construction contract that is performed by the DBE's own forces and equipment under the DBE's supervision. This includes the cost of supplies and materials ordered and paid for by the DBE for contract work, including supplies purchased or equipment leased by the DBE, except supplies and equipment a DBE subcontractor purchases or leases from the prime Contractor or its affiliates.
- (f) A Contractor may count toward the DBE contract goal one hundred (100) percent of the fees paid to a DBE trucker or hauler for the delivery of material and supplies required on the project job site, but not for the cost of those materials or supplies themselves, provided that the trucking or hauling fee is determined by VDOT to be reasonable, as compared with fees customarily charged by non-DBE firms for similar services. A Contractor shall not count costs for the removal or relocation of excess

material from or on the job site when the DBE trucking company is not the manufacturer of or a regular dealer in those materials and supplies. The DBE trucking firm shall also perform a Commercially Useful Function (CUF) on the project and not operate merely as a pass through for the purposes of gaining credit toward the DBE contract goal. Prior to submitting a bid, the Contractor shall determine, or contact the VDOT Civil Rights Division or its district Offices for assistance in determining, whether a DBE trucking firm will meet the criteria for performing a CUF on the project. See section on **Miscellaneous DBE Program Requirements; Factors used to Determine if a DBE Trucking Firm is Performing a CUF.**

- (h) The Contractor will receive DBE contract goal credit for the fees or commissions charged by and paid to a DBE broker who arranges or expedites sales, leases, or other project work or service arrangements provided that those fees are determined by VDOT to be reasonable and not excessive as compared with fees customarily charged by non-DBE firms for similar services. For the purposes of this Special Provision, a broker is defined as a person or firm that regularly engages in arranging for delivery of material, supplies, and equipment, or regularly arranges for the providing of project services as a course of routine business but does not own or operate the delivery equipment necessary to transport materials, supplies, or equipment to or from a job site.

H. Performing a Commercially Useful Function (CUF)

No credit toward the DBE contract goal will be allowed for contract payments or expenditures to a DBE firm if that DBE firm does not perform a CUF on that contract. A DBE performs a CUF when the DBE is solely responsible for execution of a distinct element of the contract work and the DBE actually performs, manages, and supervises the work involved with the firm's own forces or in accordance with the provisions of the **DBE Participation for Contract Goal Credit** section of this Special Provision. To perform a CUF the DBE alone shall be responsible and bear the risk for the material and supplies used on the contract, selecting a supplier or dealer from those available, negotiating price, determining quality and quantity, ordering the material and supplies, installing those materials with the DBE's own forces and equipment, and paying for those materials and supplies. The amount the DBE firm is to be paid under the contract shall be commensurate with the work the DBE actually performs and the DBE credit claimed for the DBE's performance.

Monitoring CUF Performance: It shall be the Contractor's responsibility to ensure that all DBE firms selected for subcontract work on the contract, for which he seeks to claim credit toward the contract goal, perform a CUF. Further, the Contractor is responsible for and shall ensure that each DBE firm fully performs the DBE's designated tasks with the DBE's own forces and equipment under the DBE's own direct supervision and management or in accordance with the provisions of the **DBE Participation for Contract Goal Credit** section of this Special Provision. For the purposes of this provision the DBE's equipment will mean either equipment directly owned by the DBE as evidenced by title, bill of sale or other such

documentation, or leased by the DBE, and over which the DBE has control as evidenced by the leasing agreement from a firm not owned in whole or part by the prime Contractor or an affiliate of the Contractor under this contract.

VDOT will monitor the Contractor's DBE involvement during the performance of the contract. However, VDOT is under no obligation to warn the Contractor that a DBE's participation will not count toward the goal.

DBEs Must Perform a Useful and Necessary Role in Contract Completion: A DBE does not perform a commercially useful function if the DBE's role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.

DBEs Must Perform The Contract Work With Their Own Workforces: If a DBE does not perform and exercise responsibility for at least thirty (30) percent of the total cost of the DBE's contract with the DBE's own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involve, VDOT will presume that the DBE is not performing a CUF and such participation will not be counted toward the contract goal.

VDOT Makes Final Determination On Whether a CUF Is Performed: VDOT has the final authority to determine whether a DBE firm has performed a CUF on a federal-aid contract. To determine whether a DBE is performing or has performed a CUF, VDOT will evaluate the amount of work subcontracted by that DBE firm or performed by other firms and the extent of the involvement of other firms' forces and equipment. Any DBE work performed by the Contractor or by employees or equipment of the Contractor shall be subject to disallowance under the DBE Program, unless the independent validity and need for such an arrangement and work is demonstrated.

I. Verification of DBE Participation and Imposed Damages

Within fourteen days after contract execution, the Contractor shall submit to the Responsible Engineer, with a copy to the District Civil Rights Office (DCRO), a fully executed subcontract agreement for each DBE used to claim credit in accordance with the requirements stated on Form C-112. The subcontract agreement shall be executed by both parties stating the work to be performed, the details or specifics concerning such work, and the price which will be paid to the DBE subcontractor. Because of the commercial damage that the Contractor and its DBE subcontractor could suffer if their subcontract pricing, terms, and conditions were known to competitors, the Department staff will treat subcontract agreements as proprietary Contractor trade secrets with regard to Freedom of Information Act requests. In lieu of subcontract agreements, purchase orders may be submitted for haulers, suppliers, and manufacturers. These too, will be treated confidentially and protected. Such purchase orders must contain, as a minimum, the following information: authorized signatures of both parties; description of the scope of work to include contract item numbers, quantities, and prices; and required federal contract provisions.

The Contractor shall also furnish, and shall require each subcontractor to furnish; information relative to all DBE involvement on the project for each quarter during the life of the contract in which participation occurs and verification is available. The information shall be indicated on Form C-63, DBE and SWAM Payment Compliance Report. The department reserves the right to request proof of payment via copies of cancelled checks with appropriate identifying notations. Failure to provide Form C-63 to the District Civil Rights Office (DCRO) within five (5) business days after the reporting period may result in delay of approval of the Contractor's monthly progress estimate for payment. The names and certification numbers of DBE firms provided by the Contractor on the various forms indicated in this Special Provision shall be exactly as shown on the DSBSD's or MWAA's latest list of certified DBEs. Signatures on all forms indicated herein shall be those of authorized representatives of the Contractor as shown on the Prequalification Application, Form C-32 or the Prequalification/Certification Renewal Application, Form C-32A, or authorized by letter from the Contractor. If DBE firms are used which have not been previously documented with the Contractor's bid and for which the Contractor now desires to claim credit toward the project goal, the Contractor shall be responsible for submitting necessary documentation in accordance with the procedures stipulated in this Special Provision to cover such work prior to the DBE beginning work.

Form C-63 can be obtained from the VDOT website at: <http://vdotforms.vdot.virginia.gov/>

The Contractor shall submit to the Responsible Engineer its progress schedule with a copy to the DCRO, as required by Section 108.03 of the Specifications or other such specific contract scheduling specification that may include contractual milestones, i.e., monthly or VDOT requested updates. The Contractor shall include a narrative of applicable DBE activities relative to work activities of the Contractor's progress schedule, including the approximate start times and durations of all DBE participation to be claimed for credit that shall result in full achievement of the DBE goal required in the contract.

On contracts awarded on the basis of good faith efforts, narratives or other agreeable format of schedule information requirements and subsequent progress determination shall be based on the commitment information shown on the latest Form C-111 as compared with the appropriate Form C-63.

Prior to beginning any major component or quarter of the work, as applicable, in which DBE work is to be performed, the Contractor shall furnish a revised Form C-111 showing the name(s) and certification number(s) of any current DBEs not previously submitted who will perform the work during that major component or quarter for which the Contractor seeks to claim credit toward the contract DBE goal. The Contractor shall obtain the prior approval of the Department for any assistance it may provide to the DBE beyond its existing resources in executing its commitment to the work in accordance with the requirements listed in the Good Faith Efforts Described section of this Special Provision. If the Contractor is aware of any assistance beyond a DBE's existing resources that the Contractor, or another subcontractor, may be contemplating or may deem necessary and that have not been previously approved, the Contractor shall submit a new or revised narrative statement for VDOT's approval prior to assistance being rendered.

If the Contractor fails to comply with correctly completing and submitting any of the required documentation requested by this provision within the specified time frames, the Department will withhold payment of the monthly progress estimate until such time as the required submissions are received VDOT. Where such failures to provide required submittals or documentation are repeated the Department will move to enjoin the Contractor and any prime contractual affiliates, as in the case of a joint venture, from bidding as a prime Contractor, or participating as a subcontractor on VDOT projects until such submissions are received.

J. Documentation Required for Semi-final Payment

On those projects nearing completion, the Contractor must submit Form C-63 marked “Semi-Final” within twenty (20) days after the submission of the last regular monthly progress estimate to the DCRO. The form must include each DBE used on the contract work and the work performed by each DBE. The form shall include the actual dollar amount paid to each DBE for the accepted creditable work on the contract. The form shall be certified under penalty of perjury, or other applicable law, to be accurate and complete. VDOT will use this certification and other information available to determine applicable DBE credit allowed to date by VDOT and the extent to which the DBEs were fully paid for that work. The Contractor shall acknowledge by the act of filing the form that the information is supplied to obtain payment regarding a federal participation contract. A letter of certification, signed by both the prime Contractor and appropriate DBEs, will accompany the form, indicating the amount, including any retainage, if present, that remains to be paid to the DBE(s).

K. Documentation Required for Final Payment

On those projects that are complete, the Contractor shall submit a final Form C-63 marked “Final” to the DCRO, within thirty (30) days of the final estimate. The form must include each DBE used on the contract and the work performed by each DBE. The form shall include the actual dollar amount paid to each DBE for the creditable work on the contract. VDOT will use this form and other information available to determine if the Contractor and DBEs have satisfied the DBE contract goal percentage specified in the contract and the extent to which credit was allowed. The Contractor shall acknowledge by the act of signing and filing the form that the information is supplied to obtain payment regarding a federal participation contract.

L. Prompt Payment Requirements

The Contractor shall make prompt and full payment to the subcontractor(s) of any retainage held by the prime Contractor after the subcontractor’s work is satisfactorily completed.

For purposes of this Special Provision, a subcontractor’s work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished, documented, and accepted as required by the contract documents by VDOT. When VDOT has made partial acceptance of a portion of the prime contract, the Department will consider the work of any

subcontractor covered by that partial acceptance to be satisfactorily completed. Payment will be made in accordance with the requirements of Section 107.01, Section 109.08, and Section 109.09 of the Specifications.

Upon VDOT's payment of the subcontractor's portion of the work as shown on the monthly progress estimate and the receipt of payment by the Contractor for such work, the Contractor shall make compensation in full to the subcontractor for that portion of the work satisfactorily completed and accepted by the Department. For the purposes of this Special Provision, payment of the subcontractor's portion of the work shall mean the Contractor has issued payment in full, less agreed upon retainage, if any, to the subcontractor for that portion of the subcontractor's work that VDOT paid to the Contractor on the monthly progress estimate.

The Contractor shall make payment of the subcontractor's portion of the work within seven (7) days of the receipt of payment from VDOT in accordance with the requirements of Section 107.01, Section 109.08, and Section 109.09 of the Specifications.

If the Contractor fails to make payment for the subcontractor's portion of the work within the time frame specified herein, the subcontractor shall contact the Responsible Engineer and the Contractor's bonding company in writing. The bonding company and VDOT will investigate the cause for non-payment and, barring mitigating circumstances that would make the subcontractor ineligible for payment, ensure payment in accordance with the requirements of Section 107.01, Section 109.08, and Section 109.09 of the Specifications.

By bidding on this contract, and by accepting and executing this contract, the Contractor agrees to assume these contractual obligations, and to bind the Contractor's subcontractors contractually to those prompt payment requirements.

Nothing contained herein shall preclude the Contractor from withholding payment to the subcontractor in accordance with the terms of the subcontract in order to protect the Contractor from loss or cost of damage due to a breach of agreement by the subcontractor.

M. Miscellaneous DBE Program Requirements

Loss of DBE Eligibility: When a DBE firm has been removed from eligibility as a certified DBE firm, the following actions will be taken:

1. When a Bidder/Contractor has made a commitment to use a DBE firm that is not currently certified, thereby making the Contractor ineligible to receive DBE participation credit for work performed, and a subcontract has not been executed, the ineligible DBE firm does not count toward either the contract goal or overall goal. The Contractor shall meet the contract goal with a DBE firm that is eligible to receive DBE credit for work performed, or must demonstrate to the Contract Engineer that it has made good faith efforts to do so.

2. When a Bidder/Contractor has executed a subcontract with a certified DBE firm prior to official notification of the DBE firm's loss of eligibility, the Contractor may continue to use the firm on the contract and shall continue to receive DBE credit toward its DBE goal for the subcontractor's work.
3. When VDOT has executed a prime contract with a DBE firm that is certified at the time of contract execution but that is later ruled ineligible, the portion of the ineligible firm's performance on the contract before VDOT has issued the notice of its ineligibility shall count toward the contract goal.

Termination of DBE: If a certified DBE subcontractor is terminated, or fails, refuses, or is unable to complete the work on the contract for any reason, the Contractor must promptly request approval to substitute or replace that firm in accordance with this section of this Special Provision.

The Contractor, as aforementioned in **DBE Program-Related Certifications Made by Bidders/Contractors**, shall notify VDOT in writing before terminating and/or replacing the DBE that was committed as a condition of contract award or that is otherwise being used or represented to fulfill DBE contract obligations during the contract performance period. Written consent from the Department for terminating the performance of any DBE shall be granted only when the Contractor can demonstrate that the DBE is unable, unwilling, or ineligible to perform its obligations for which the Contractor sought credit toward the contract DBE goal. Such written consent by the Department to terminate any DBE shall concurrently constitute written consent to substitute or replace the terminated DBE with another DBE. Consent to terminate a DBE shall not be based on the Contractor's ability to negotiate a more advantageous contract with another subcontractor whether that subcontractor is, or is not, a certified DBE.

1. All Contractor requests to terminate, substitute, or replace a certified DBE shall be in writing, and shall include the following information:
 - (a) The date the Contractor determined the DBE to be unwilling, unable, or ineligible to perform.
 - (b) The projected date that the Contractor shall require a substitution or replacement DBE to commence work if consent is granted to the request.
 - (c) A brief statement of facts describing and citing specific actions or inaction by the DBE giving rise to the Contractor's assertion that the DBE is unwilling, unable, or ineligible to perform;
 - (d) A brief statement of the affected DBE's capacity and ability to perform the work as determined by the Contractor;
 - (e) A brief statement of facts regarding actions taken by the Contractor which are believed to constitute good faith efforts toward enabling the DBE to perform;

- (f) The current percentage of work completed on each bid item by the DBE;
 - (g) The total dollar amount currently paid per bid item for work performed by the DBE;
 - (h) The total dollar amount per bid item remaining to be paid to the DBE for work completed, but for which the DBE has not received payment, and with which the Contractor has no dispute;
 - (i) The total dollar amount per bid item remaining to be paid to the DBE for work completed, but for which the DBE has not received payment, and over which the Contractor and/or the DBE have a dispute.
2. Contractor's Written Notice to DBE of Pending Request to Terminate and Substitute with another DBE.

The Contractor shall send a copy of the "request to terminate and substitute" letter to the affected committed DBE firm, in conjunction with submitting the request to the DCRO. The affected DBE firm may submit a response letter to the Department within two (2) business days of receiving the notice to terminate from the Contractor. The affected DBE firm shall explain its position concerning performance on the committed work. The Department will consider both the Contractor's request and the DBE's response and explanation before approving the Contractor's termination and substitution request, or determining if any action should be taken against the Contractor.

If, after making its best efforts to deliver a copy of the "request to terminate and substitute" letter, the Contractor is unsuccessful in notifying the affected DBE firm, the Department will verify that the affected, committed DBE firm is unable or unwilling to continue the contract. The Department will immediately approve the Contractor's request for a substitution.

3. Proposed Substitution of another Certified DBE

Upon termination of a DBE, the Contractor shall use reasonable good faith efforts to replace the terminated DBE. The termination of such DBE shall not relieve the Contractor of its obligations pursuant to this section, and the unpaid portion of the terminated DBE's contract will not be counted toward the contract goal.

When a DBE substitution is necessary, the Contractor shall submit an amended Form C-111 with the name of another DBE firm, the proposed work to be performed by that firm, and the dollar amount of the work to replace the unfulfilled portion of the work of the originally committed DBE firm. The Contractor shall furnish all pertinent information including the contract I.D. number, project number, bid item, item description, bid unit and bid quantity, unit price, and total price. In addition, the Contractor shall submit documentation for the requested substitute DBE as described in this section of this Special Provision.

Should the Contractor be unable to commit the remaining required dollar value to the substitute DBE, the Contractor shall provide written evidence of good faith efforts made to obtain the substitute value requirement. The Department will review the quality, thoroughness, and intensity of those efforts. Efforts that are viewed by VDOT as merely superficial or pro-forma will not be considered good faith efforts to meet the contract goal for DBE participation. The Contractor must document the steps taken that demonstrated its good faith efforts to obtain participation as set forth in the Good Faith Efforts Described section of this Special Provision.

Factors Used to determine if a DBE Trucking Firm is performing a CUF:

The following factors will be used to determine whether a DBE trucking company is performing a CUF:

1. To perform a CUF the DBE trucking firm shall be completely responsible for the management and supervision of the entire trucking operation for which the DBE is responsible by subcontract on a particular contract. There shall not be a contrived arrangement, including, but not limited to, any arrangement that would not customarily and legally exist under regular construction project subcontracting practices for the purpose of meeting the DBE contract goal;
2. The DBE must own and operate at least one fully licensed, insured, and operational truck used in the performance of the contract work. This does not include a supervisor's pickup truck or a similar vehicle that is not suitable for and customarily used in hauling the necessary materials or supplies;
3. The DBE receives full contract goal credit for the total reasonable amount the DBE is paid for the transportation services provided on the contract using trucks the DBE owns, insures, and operates using drivers that the DBE employs and manages;
4. The DBE may lease trucks from another certified DBE firm, including from an owner-operator who is certified as a DBE. The DBE firm that leases trucks from another DBE will receive credit for the total fair market value actually paid for transportation services the lessee DBE firm provides on the contract;
5. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of the transportation services provided by non-DBE lessees, not to exceed the value of transportation services provided by DBE-owned trucks on the contract. For additional participation by non-DBE lessees, the DBE will only receive credit for the fee or commission it receives as a result of the lease arrangement.

EXAMPLE

DBE Firm X uses two (2) of its own trucks on a contract. The firm leases two (2) trucks from DBE Firm Y and six (6) trucks from non-DBE Firm Z.

Value of Trans. Serv.

(For Illustrative Purposes Only)

Firm X

| | | |
|---------|--------------|---------------|
| Truck 1 | Owned by DBE | \$100 per day |
| Truck 2 | Owned by DBE | \$100 per day |

Firm Y

| | | |
|---------|-----------------|---------------|
| Truck 1 | Leased from DBE | \$110 per day |
| Truck 2 | Leased from DBE | \$110 per day |

Firm Z

| | | |
|---------|----------------------|---------------|
| Truck 1 | Leased from Non DBE | \$125 per day |
| Truck 2 | Leased from Non DBE | \$125 per day |
| Truck 3 | Leased from Non DBE | \$125 per day |
| Truck 4 | Leased from Non DBE | \$125 per day |
| Truck 5 | Leased from Non DBE* | \$125 per day |
| Truck 6 | Leased from Non DBE* | \$125 per day |

DBE credit would be awarded for the total transportation services provided by DBE Firm X and DBE Firm Y, and may also be awarded for the total value of transportation services by four (4) of the six (6) trucks provided by non-DBE Firm Z (not to exceed the value of transportation services provided by DBE-owned trucks).

Credit = 8 Trucks

Total Value of Transportation Services = \$820

In all, full DBE credit would be allowed for the participation of eight (8) trucks (twice the number of DBE trucks owned and leased) and the dollar value attributable to the Value of Transportation Services provided by the 8 trucks.

* With respect to the other two trucks provided by non-DBE Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks that DBE Firm X receives as a result of the lease with non- DBE Firm Z.

6. For purposes of this section, the lease must indicate that the DBE firm leasing the truck has exclusive use of and control over the truck. This will not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, provided the lease gives the DBE absolute priority for and control over the use of the

leased truck. Leased trucks must display the name and identification number of the DBE firm that has leased the truck at all times during the life of the lease.

Data Collection: In accordance with 49CFR Section 26.11, all firms bidding on prime contracts and bidding or quoting subcontracts on federal-aid projects shall provide the following information to the Contract Engineer annually.

- Firm name
- Firm address
- Firm's status as a DBE or non-DBE
- The age of the firm and
- The annual gross receipts of the firm

The means of transmittal and the risk for timely receipt of this information shall be the responsibility of the bidder. However, the above information can be submitted by means of the Annual Gross Receipts Survey as required in the Prequalification/Certification application.

All bidders, including DBE prime Contractor bidders, shall complete and submit to the Contract Engineer the Subcontractor/Supplier Solicitation and Utilization Form C-48 for each bid submitted; to be received within ten (10) business days after the bid opening. Failure of bidders to submit this form in the time frame specified may be cause for disqualification of the bidder and rejection of their bid in accordance with the requirements of this Special Provision, the contract specifications, and VDOT Road and Bridge specifications.

N. Suspect Evidence of Criminal Behavior

Failure of a bidder, Contractor, or subcontractor to comply with the Virginia Department of Transportation Road and Bridge Specifications and these Special Provisions wherein there appears to be evidence of criminal conduct shall be referred to the Attorney General for the Commonwealth of Virginia and/or the FHWA Inspector General for criminal investigation and, if warranted, prosecution.

Suspected DBE Fraud

In appropriate cases, VDOT will bring to the attention of the U. S. Department of Transportation (USDOT) any appearance of false, fraudulent, or dishonest conduct in connection with the DBE program, so that USDOT can take the steps, e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General,

action under suspension and debarment or Program Fraud and Civil Penalties rules provided in 49CFR Part 31.

O. Summary of Remedies for Non-Compliance with DBE Program Requirements

Failure of any bidder\Contractor to comply with the requirements of this Special Provision for Section 107.15 of the Virginia Road and Bridge Specifications, which is deemed to be a condition of bidding, or where a contract exists, is deemed to constitute a breach of contract shall be remedied in accordance with the following:

1. Disadvantaged Business Enterprise (DBE) Program Requirements

The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award, administration, and performance of this contract. Failure by the Contractor to carry out these requirements is a material breach of this contract, which will result in the termination of this contract or other such remedy, as VDOT deems appropriate.

All administrative remedies noted in this provision are automatic unless the Contractor exercises the right of appeal within the required timeframe(s) specified herein.

2. DBE Program-Related Certifications Made by Bidders\Contractors

Once awarded the contract, the Contractor shall comply fully with all regulatory and contractual requirements of the USDOT DBE Program, and that each certified DBE firm participating in the contract shall fully perform the designated work items with the DBE's own forces and equipment under the DBE's direct supervision, control, and management. Where a contract exists and where the Contractor, DBE firm, or any other firm retained by the Contractor has failed to comply with federal or VDOT DBE Program regulations and/or their requirements on that contract, VDOT has the authority and discretion to determine the extent to which the DBE contract requirements have not been met, and will assess against the Contractor any remedies available at law or provided in the contract in the event of such a contract breach.

3. Disqualification of Bidder

Bidders may be disqualified from bidding for failure to comply with the requirements of this Special Provision, the contract specifications, and VDOT Road and Bridge Specifications.

4. Bidding Procedures

The failure of a bidder to submit the required documentation within the timeframes specified in the Contract Goal, Good Faith Efforts Specified section of this Special Provision may be cause for rejection of that bidder's bid. If the lowest bidder is rejected for failure to submit required documentation in the specified time frames, the Department

may either award the work to the next lowest bidder, or re-advertise and construct the work under contract or otherwise as determined by the Commonwealth.

In order to award a contract to a bidder that has failed to meet DBE contract goal requirements, VDOT will determine if the bidder's efforts were adequate good faith efforts, and if given all relevant circumstances, those efforts were to the extent a bidder actively and aggressively seeking to meet the requirements would make. Regardless of the DBE contract goal participation level proposed by the bidder or the extent of good faith efforts shown, all bidders shall timely and separately file their completed and executed Forms C-111, C-112, C-48, and Form C-49, as aforementioned, or face potential bid rejection. If a bidder does not submit its completed and executed C-111, or C-112, when required by this Special Provision, the bidder's bid will be considered non-responsive and may be rejected. If, after reconsideration, the Department determines the bidder has failed to meet the requirements of the contract goal and has failed to make adequate good faith efforts to achieve the level of DBE participation as specified in the bid proposal, the bidder's bid will be rejected. If sufficient documented evidence is presented to demonstrate that the apparent low bidder made reasonable good faith efforts, the Department will award the contract and reduce the DBE requirement to the actual commitment identified by the lowest successful bidder at the time of its bid. The Contractor is encouraged to seek additional participation during the life of the contract. If the Contractor fails to conform to the schedule of DBE participation as shown on the progress schedule, or at any point at which it is clearly evident that the remaining dollar value of allowable credit for performing work is insufficient to obtain the scheduled participation, the Contractor and any aforementioned affiliates may be enjoined from bidding for 60 days or until such time as conformance with the schedule of DBE participation is achieved. In such instances, the Contractor is expected to seek DBE participation towards meeting the goal during the prosecution of the contract.

If the Contractor fails upon completion of the project to meet the required participation, the Contractor and any prime contractual affiliates, as in the case of a joint venture, may be enjoined from bidding as a prime Contractor, or participating as a subcontractor on VDOT projects for a period of 90 days.

Prior to enjoinder from bidding or denial to participate as a subcontractor for failure to comply with participation requirements, as provided hereinbefore, the Contractor may submit documentation to the State Construction Engineer to substantiate that failure was due solely to quantitative underrun(s) or elimination of items subcontracted to DBEs, and that all feasible means have been used to obtain the required participation. The State Construction Engineer upon verification of such documentation shall make a determination whether or not the Contractor has met the requirements of the contract.

If it is determined that the aforementioned documentation is insufficient or the failure to meet required participation is due to other reasons, the Contractor may request an appearance before the Administrative Reconsideration Panel to establish that all feasible means were used to meet such participation requirements. The decision of the Administrative Reconsideration Panel shall be administratively final. The enjoinder

period will begin upon the Contractor's failure to request a hearing within the designated time frame or upon the Administrative Reconsideration Panel's decision to enjoin, as applicable.

5. Verification of DBE Participation and Imposed Damages

If the Contractor fails to comply with correctly completing and submitting any of the required documentation requested by this provision within the specified time frames, the Department will withhold payment of the monthly progress estimate until such time as the required submissions are received by VDOT. Where such failures to provide required submittals or documentation are repeated the Department will move to enjoin the Contractor and any prime contractual affiliates, as in the case of a joint venture, from bidding as a prime Contractor, or participating as a subcontractor on VDOT projects until such submissions are received.

In addition to the remedies described heretofore in this provision VDOT also exercises its rights with respect to the following remedies:

Suspect Evidence of Criminal Behavior

Failure of a bidder, Contractor, or subcontractor to comply with the Virginia Department of Transportation Road and Bridge Specifications and these Special Provisions wherein there appears to be evidence of criminal conduct shall be referred to the Attorney General for the Commonwealth of Virginia and/or the FHWA Inspector General for criminal investigation and, if warranted prosecution.

In appropriate cases, VDOT will bring to the attention of the U. S. Department of Transportation (USDOT) any appearance of false, fraudulent, or dishonest conduct in connection with the DBE program, so that USDOT can take the steps, e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules provided in 49CFR Part 31.

APPENDIX H.1

**INSTRUCTIONAL AND INFORMATIONAL
MEMORANDUM (IIM) – IIM-CD-2013-04.01 – DBE
GOALS AND SWaM POTENTIAL
ACHEIVEMENTS**

VIRGINIA DEPARTMENT OF TRANSPORTATION
CONSTRUCTION DIVISION (CD)

INSTRUCTIONAL AND INFORMATIONAL MEMORANDUM (IIM)

| | |
|--|----------------------------------|
| GENERAL SUBJECT: FINAL ACCEPTANCE LETTER | NUMBER: IIM-CD-2013-04.01 |
| SPECIFIC SUBJECT: DBE GOALS AND SWAM POTENTIAL ACHIEVEMENTS | DATE: August 1, 2013 |
| | SUPERCEDES: CD-2007-05 |
| <p>APPROVED:</p> <p style="text-align: center;">Signature On File</p> <p style="text-align: center;">-----</p> <p style="text-align: center;">Mark E. Cacamis, P.E., CCM State Construction Engineer</p> <p>DATE: <u>August 1, 2013</u></p> | |

DIRECTED TO - DISTRICT ADMINISTRATORS

The following procedures will be followed in determining project compliance; specifically with meeting the Disadvantaged Business Enterprise (DBE) goals or Small Women and Minority (SWAM) potential achievements.

On Federal projects nearing completion, the Contractor shall submit a Form C-63 marked Semifinal within 20 days of the submission of the last regular estimate. This will be accompanied by a letter of certification, signed by the prime Contractor and appropriate DBE, indicating the amount, including retainage, that remains to be paid. Form C-63A will no longer be required. Payments to DBEs will be verified using prompt payment procedures.

At the final acceptance of the project, a determination must be made by the person in responsible charge of the project and the District Civil Rights Manager (DCRM) regarding the Contractor's compliance or non-compliance with the project's DBE goals on Federal projects, and SWAMs' potential achievements on State projects:

1. If the Contractor is in compliance, the responsible charge will notify the Contractor by letter that it is in compliance with the goals or potential achievements, as applicable, on the project. Copies of that letter will be sent to the State Construction Engineer (Construction Engineer) and to the Civil Rights Division.

2. If the Contractor is not in compliance, the responsible charge will notify the Contractor by letter that it is in non-compliance with the goals or potential achievements, as applicable, on the project. Copies of that letter will be sent to the State Construction Engineer and to the Civil Rights Division. ***Please note: When there is non-compliance on a Federal Project, this letter is critical in that it establishes a specific point from which to measure the various time frames if the Contractor wants to request a panel hearing.***
3. Follow the applicable sections of the Road and Bridge Specifications, Special Provisions or Special Provision Copied Notes.

On Federal projects, within 30 days of the payment of the Final estimate, the Contractor shall submit a Form C-63 marked Final. The final Form C-63 will be compared with the Semifinal submissions to assure proper payment has been made to the DBE subcontractors and make certain that the Contractor has fully complied with the requirements of Special Provision for Section 110.04 of the specifications.

Attached are example letters for anticipated conditions, i.e., DBE goals met; DBE goals not met; no DBE goals; SWAM potential achievements met; SWAM potential achievements not met; no SWAM potential achievements. It is imperative that the language in bold type be included in the actual letter sent in accordance with the applicable condition(s).

EXAMPLE LETTER FOR DBE GOALS MET FEDERAL PROJECTS

>Date

>Contractor Name
>P.O. Box
>City, State Zip

ATTN: >

SUBJECT: Project Number
Final Inspection

To Addressee:

In accordance with your letter dated (DATE), a final inspection has been made on the above mentioned project on (DATE) with the following in attendance:

As authorized by the Chief Engineer, the work on the referenced project is deemed completed to the satisfaction of the Chief Engineer, and the project is accepted as of (DATE).

The project had a >_____ percent DBE goal. At this writing, our records indicate the DBE requirements will be met.

Within forty-five (45) days the final acceptance of the project, all required forms, certifications, and releases are due. Failure to submit these forms may extend the ninety (90) day time limit for final payment in accordance with Section 109.09 of the Specifications.

Sincerely,

Title (Responsible Charge Engineer)

>SEC/RE
cc: (Need to know personnel)

EXAMPLE LETTER FOR DBE GOALS NOT MET FEDERAL PROJECTS

>Date

>Contractor Name

>P.O. Box

>City, State Zip

ATTN: >

SUBJECT: Project Number
Final Inspection

To Addressee:

In accordance with your letter dated (DATE), a final inspection has been made on the above mentioned project on (DATE) with the following in attendance:

As authorized by the Chief Engineer, the work on the referenced project is deemed completed to the satisfaction of the Chief Engineer and the project is accepted as of (DATE).

This project has a >_____ percent DBE goal. At this writing, our records indicate the DBE goals have not been met. Paragraph 1 of the section on During the Contract, in Special Provision 110.04 states, "If the Contractor fails upon completion of the project to meet the required participation, the Contractor and any prime contractor affiliates, as in the case of a joint venture, may be enjoined from bidding as a prime Contractor, or participating as a subcontractor on VDOT projects for a period of 90 days."

Paragraph 2 of the section on During the Contract, in Special Provision 110.04 states, "Prior to enjoinder from bidding or denial to participate as a subcontractor for failure to comply with participation requirements, as provided hereinbefore, the Contractor may submit documentation to the Construction Engineer to substantiate that failure was due solely to quantitative underrun(s) or elimination of items subcontracted to DBEs and that all feasible means have been used to obtain the required participation. The Construction Engineer, upon verification of such documentation, shall make a determination whether or not the Contractor has met the requirements of the Contract."

Paragraph 3 of the aforementioned provision states, "If it is determined that the aforementioned documentation is insufficient or the failure to meet required participation is due to other reasons, the Contractor may request an appearance before the Administrative Reconsideration Panel to establish that all feasible means were used to meet such participation requirements."

If you elect to request an administrative review, as mentioned in Paragraph 2 of the section on During the Contract, of Special Provision 110.04, or a panel hearing, as mentioned in Paragraph 3 of the aforementioned provision, you are to advise the State Construction Engineer, 1401 East Broad Street, Richmond, Virginia, 23219, in writing, within 14 days of the date of this correspondence. Failure to make this written request within the time specified will result in an automatic ninety (90) day enjoinder. Any relevant documentation that you want to be considered by the Panel should be included in your panel hearing request. A panel hearing brochure is attached for your information.

Within forty-five (45) days of the final acceptance of the project, all required forms, certifications, and releases are due. Failure to submit these forms may extend the ninety (90) day time limit for final payment in accordance with Section 109.09 of the Specifications.

Sincerely,

Title (Responsible Charge Engineer)

>SEC/RE

cc: (Need to know personnel)

APPENDIX H.2

**INSTRUCTIONAL AND INFORMATIONAL
MEMORANDUM (IIM) – IIM-CD-2013-14.01 –
ALLOWABLE DBE CREDIT**

VIRGINIA DEPARTMENT OF TRANSPORTATION
CONSTRUCTION DIVISION (CD)
INSTRUCTIONAL AND INFORMATIONAL MEMORANDUM (IIM)

| | |
|---|----------------------------------|
| GENERAL SUBJECT: DISADVANTAGED BUSINESS ENTERPRISE (DBE) | NUMBER: IIM-CD-2013-14.01 |
| SPECIFIC SUBJECT: ALLOWABLE DBE CREDIT | DATE: August 1, 2013 |
| | SUPERCEDES: CD-2011-01 |
| <p>APPROVED:</p> <p style="text-align: center;">Signature On File</p> <p style="text-align: center;">-----</p> <p style="text-align: center;">Mark E. Cacamis, P.E., CCM State Construction Engineer</p> <p>DATE: <u>August 1, 2013</u></p> | |

DIRECTED TO - DISTRICT ADMINISTRATORS

Effective March 8th advertisement, the Department will require Contractors to list the general work category of DBE firms used for contract goal credit on form C-111, Minimum DBE Requirements. For purposes of this directive, the general work categories for DBE firms will be: Subcontractor, Manufacturer, Supplier and Hauler in accordance with the definitions listed in Section 107.15 of the Specifications which is based on 49 CFR (Code of Federal Regulations) Part 26.55.

A Contractor may count one hundred (100) percent of its expenditures to a DBE subcontractor toward the DBE contract goal only if the DBE performs a Commercially Useful Function (CUF) on that contract. To perform a CUF the DBE alone shall be responsible and bear the risk for the material and supplies used on the contract, selecting a supplier or dealer from those available, negotiating price, determining quality and quantity, ordering the material and supplies, installing those materials with the DBE's own forces and equipment, and paying for those materials and supplies.

A Contractor may count one hundred (100) percent of its expenditures actually paid for materials and supplies obtained from a DBE certified as a DBE manufacturer. A manufacturer is defined as a firm that operates or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the project specifications. A manufacturer shall include firms that produce finished goods or products from raw or unfinished material, or that purchase and substantially alter goods and materials to make them suitable for construction use before reselling them.

A Contractor may count sixty (60) percent of its expenditures actually paid for materials and supplies obtained from a DBE certified as a regular dealer or supplier. A regular dealer is defined as a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment required and used under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the DBE firm shall be an established business that regularly engages, as its principal business and under its own name, in the purchase and sale or lease of the products or equipment in question. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions will not be considered regular dealers. A DBE firm may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business where it keeps such items in stock if the DBE both owns and operates distribution equipment for

the products it sells and provides for the contract work. Any supplementation of a regular dealer's own distribution equipment shall be by a long-term lease agreement and not on an *ad hoc* or contract-by-contract basis to be eligible for credit to meet the DBE contract goal. If a DBE regular dealer is used for DBE contract goal credit, no additional credit will be given for hauling or delivery to the project site goods or materials sold by that DBE regular dealer. Those delivery costs shall be deemed included in the price charged for the goods or materials by the DBE regular dealer, who shall be responsible for their distribution.

A Contractor may count toward the DBE contract goal one hundred (100) percent of the fees paid to a DBE trucker or hauler for the delivery of material and supplies required on the project job site, but not for the cost of those materials or supplies themselves, provided that the trucking or hauling fee is determined by VDOT to be reasonable, as compared with fees customarily charged by non-DBE firms for similar services. A Contractor shall not count costs for the removal or relocation of excess material from or on the job site when the DBE trucking company is the manufacturer of or a regular dealer in those materials and supplies. The DBE trucking firm must also perform a Commercially Useful Function (CUF) on the project and not operate merely as a pass through for the purposes of gaining credit toward the DBE contract goal.

Attached is a copy of form C-111 which has been revised accordingly.

Form C-1

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
MINIMUM DBE REQUIREMENTS

PROJECT NO. _____

FHWA NO. _____

***** INSTRUCTIONS *****

_____ THIS FORM CAN BE USED BY THE CONTRACTOR TO SUBMIT THE NAMES OF DBE FIRMS TO BE UTILIZED ON THE PROJECT. THE CONTRACTOR SHALL INDICATE THE DESCRIPTION OF THE CATEGORY (S, M, SP or H) AND THE TYPE OF WORK THAT EACH DBE WILL PERFORM AND THE ALLOWABLE CREDIT PER ITEM(S). ADDITIONAL SHEETS TO SHOW THE ALLOWABLE CREDIT PER ITEM MAY BE ATTACHED IF NECESSARY. **PLEASE NOTE:** THE AMOUNT OF ALLOWABLE CREDIT FOR A DBE SUPPLIER IS 60% OF THE TOTAL COST OF THE MATERIALS OR SUPPLIES OBTAINED AND 100% FOR A DBE MANUFACTURER OF THE MATERIALS AND SUPPLIES OBTAINED. A CONTRACTOR MAY COUNT 100% OF THE FEES PAID TO A DBE HAULER FOR THE DELIVERY OF MATERIALS AND SUPPLIES TO THE PROJECT SITE, BUT NOT FOR THE COST OF THE MATERIALS AND SUPPLIES THEMSELVES.

DBE REQUIREMENT _____ %
PERCENT ATTAINED BY BIDDER _____ %

| NAMES(S) AND CERTIFICATION NO. OF DBE(S) TO BE USED | USED AS SUBCONTR. | | TYPE OF WORK AND ITEM NO(S) | \$ AMOUNT OF ALLOWABLE CREDIT PER ITEM |
|---|---------------------------------------|-------|-----------------------------|--|
| | (S) MFG. (M) SUPPLIER (SP) HAULER (H) | | | |
| _____ | _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ | _____ |

TOTAL \$

TOTAL CONTRACT VALUE \$ _____ x REQUIRED DBE _____ % = \$ _____

I/WE CERTIFY THAT THE PROPOSED DBE(S) SUBMITTED WILL BE USED ON THIS CONTRACT AS STATED HEREON AND ASSURE THAT DURING THE LIFE OF THE CONTRACT. I/WE WILL MEET OR EXCEED THE PARTICIPATION ESTABLISHED HEREON BY THE

| | | |
|--------|----|-------------|
| _____ | BY | _____ |
| BIDDER | | SIGNATURE |
| _____ | BY | _____ |
| TITLE | | DATE |
| | | TOTAL _____ |

APPENDIX I

**FORM C-112, CERTIFICATION OF BINDING
AGREEMENT WITH DISADVANTAGED
BUSINESS ENTERPRISE FIRMS**

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
CERTIFICATION OF BINDING AGREEMENT
WITH
DISADVANTAGED BUSINESS ENTERPRISE FIRMS**

Project No.:

Federal Project No.:

This form is to be submitted in accordance with the Department's Special Provision for Section 107.15.

It is hereby certified by the below signed Contractors that there exists a written quote, acceptable to the parties involved preliminary to a binding subcontract agreement stating the details concerning the work to be performed and the price which will be paid for the aforementioned work. This document is not intended to, nor should it be construed to, contain the entire text of the agreement between the contracting parties. This document does not take the place of, nor may it be substituted for, an official subcontracting agreement in those situations that may require such an agreement. A copy of the fully executed *subcontract agreement* shall be submitted to the Engineer within fourteen (14) business days after contract execution.

It is further certified that the aforementioned mutually acceptable quote and fully executed subcontract agreement represent the entire agreement between the parties involved and that no conversations, verbal agreements, or other forms of non-written representations shall serve to add to, delete, or modify the terms as stated.

The prime Contractor further represents that the aforementioned mutually acceptable quote and fully executed subcontract agreement shall remain on file for a period of not less than one year following completion of the prime's contract with the Department or for such longer period as provisions of governing Federal or State law or regulations may require. For purposes of this form, the term Prime Contractor shall refer to any Contractor utilizing a DBE subcontractor, regardless of tier, in which they are claiming DBE credit toward the contract goal.

Contractors further jointly and severally represent that said binding agreement is for the performance of a "commercially useful function" as that term is employed in 49 C.F.R. Part 26.55 (c), (d).

**TO BE SIGNED BY THE SUBCONTRACTOR TO THE PRIME CONTRACTOR, AND ANY LOWER TIER
SUBCONTRACTORS HAVING A CONTRACT WITH THE BELOW NAMED DBE FIRM**

Prime Contractor _____

By: _____
Signature Title
Date: _____

First Tier
Subcontractor if
Applicable _____

By: _____
Signature Title
Date: _____

APPENDIX J

**FORM C-48, SUBCONTRACTOR/SUPPLIER
SOLICITATION AND UTILIZATION FORM**

APPENDIX K
FORM C-49, DBE GOOD FAITH EFFORTS
DOCUMENTATION

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
DBE GOOD FAITH EFFORTS DOCUMENTATION

--DO NOT DETACH--

**THIS INFORMATION MUST BE SUBMITTED
WITHIN 2 DAYS AFTER BID OPENING IF YOUR
BID DOES NOT MEET THE PROJECT DBE
REQUIREMENTS, OR
WHEN REQUESTED BY VDOT**

CONTRACT I.D. NUMBER _____

PROJECT NUMBER _____

FHWA NUMBER _____

DISTRICT _____

DATE BID SUBMITTED _____

BIDDER'S NAME _____

SIGNATURE _____

TITLE _____

VENDOR NUMBER _____

DBE GOAL FROM BID PROPOSAL _____

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
DBE GOOD FAITH EFFORTS DOCUMENTATION

CONTRACT I.D. NO. _____ DATE SUBMITTED _____

IF THE DBE GOAL ESTABLISHED FOR THIS CONTRACT HAS NOT BEEN MET OR VDOT REQUESTS THE SUBMITTAL THEREOF, THE BIDDER IS REQUIRED TO SUBMIT GOOD FAITH EFFORTS AS OUTLINED IN THIS DOCUMENT.

THE BIDDER ACKNOWLEDGES AND CERTIFIES THAT THIS FORM ACCURATELY REPRESENTS THE INFORMATION CONTAINED HEREIN.

BIDDER _____ SIGNATURE _____

TITLE _____

NAMES OF CERTIFIED DBEs AND THE DATES ON WHICH THEY WERE SOLICITED TO BID ON THIS PROJECT

INCLUDE THE ITEMS OF WORK OFFERED AND THE DATES AND METHODS USED FOR FOLLOWING UP INITIAL SOLICITATIONS TO DETERMINE WHETHER OR NOT DBEs WERE INTERESTED.

| NAMES AND VENDOR NUMBERS OF DBEs SOLICITED | DATE OF INITIAL SOLICITATION | ITEM(S) OF WORK | FOLLOW-UP METHODS AND DATES |
|--|------------------------------|-----------------|-----------------------------|
| | | | |

NOTE: ATTACH ADDITIONAL PAGES IF NECESSARY

ATTACH COPIES OF SOLICITATIONS, TELEPHONE RECORDS, FAX CONFIRMATIONS, ELECTRONIC INFORMATION, ETC.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
DBE GOOD FAITH EFFORTS DOCUMENTATION

CONTRACT I.D. NO. _____ DATE SUBMITTED _____

IF THE DBE GOAL ESTABLISHED FOR THIS CONTRACT HAS NOT BEEN MET OR VDOT REQUESTS THE SUBMITTAL THEREOF, THE BIDDER IS REQUIRED TO SUBMIT GOOD FAITH EFFORTS AS OUTLINED IN THIS DOCUMENT.

THE BIDDER ACKNOWLEDGES AND CERTIFIES THAT THIS FORM ACCURATELY REPRESENTS THE INFORMATION CONTAINED HEREIN.

BIDDER _____ SIGNATURE _____

TITLE _____

TELEPHONE LOG

| DBE(s) CALLED | TELEPHONE NUMBER | DATE CALLED | TIME CALLED | CONTACT PERSON OR VOICE MAIL STATUS |
|---------------|------------------|-------------|-------------|-------------------------------------|
| | | | | |

NOTE: ATTACH ADDITIONAL PAGES IF NECESSARY

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
DBE GOOD FAITH EFFORTS DOCUMENTATION**

CONTRACT I.D. NO. _____ **DATE SUBMITTED** _____

IF THE DBE GOAL ESTABLISHED FOR THIS CONTRACT HAS NOT BEEN MET OR VDOT REQUESTS THE SUBMITTAL THEREOF, THE BIDDER IS REQUIRED TO SUBMIT GOOD FAITH EFFORTS AS OUTLINED IN THIS DOCUMENT.

THE BIDDER ACKNOWLEDGES AND CERTIFIES THAT THIS FORM ACCURATELY REPRESENTS THE INFORMATION CONTAINED HEREIN.

BIDDER _____ **SIGNATURE** _____

TITLE _____

ITEM(S) OF WORK THAT THE BIDDER MADE AVAILABLE TO DBE FIRMS

IDENTIFY THOSE ITEM(S) OF WORK THAT THE BIDDER MADE AVAILABLE TO DBE FIRMS OR THOSE ITEM(S) THE BIDDER IDENTIFIED AND DETERMINED TO SUBDIVIDE INTO ECONOMICALLY FEASIBLE UNITS TO FACILITATE DBE PARTICIPATION. FOR EACH ITEM LISTED, SHOW THE DOLLAR VALUE AND PERCENTAGE OF THE TOTAL CONTRACT AMOUNT. IT IS THE BIDDER'S RESPONSIBILITY TO DEMONSTRATE THAT SUFFICIENT WORK TO MEET THE GOAL WAS MADE AVAILABLE TO DBE FIRMS.

| ITEM(S) OF WORK MADE AVAILABLE | BIDDER NORMALLY PERFORMS ITEM(S) (Y/N) | ITEM(S) BROKEN DOWN TO FACILITATE PARTICIPATION (Y/N) | AMOUNT IN DOLLARS | PERCENTAGE OF CONTRACT |
|--------------------------------|--|---|-------------------|------------------------|
| | | | | |

**NOTE: INFORMATION REQUIRED FOR THIS SECTION CONTINUED ON SHEET 5
ATTACH ADDITIONAL PAGES IF NECESSARY**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
DBE GOOD FAITH EFFORTS DOCUMENTATION

CONTRACT I.D. NO. _____ DATE SUBMITTED _____

IF THE DBE GOAL ESTABLISHED FOR THIS CONTRACT HAS NOT BEEN MET OR VDOT REQUESTS THE SUBMITTAL THEREOF, THE BIDDER IS REQUIRED TO SUBMIT GOOD FAITH EFFORTS AS OUTLINED IN THIS DOCUMENT.

THE BIDDER ACKNOWLEDGES AND CERTIFIES THAT THIS FORM ACCURATELY REPRESENTS THE INFORMATION CONTAINED HEREIN.

BIDDER _____ SIGNATURE _____

TITLE _____

ADDITIONAL INFORMATION REGARDING ITEM(S) OF WORK THAT THE BIDDER MADE AVAILABLE TO DBE FIRMS (Continued From Sheet 4)

ITEM(S) OF WORK MADE AVAILABLE, NAMES OF SELECTED FIRMS AND DBE STATUS, DBEs THAT PROVIDED QUOTES, PRICE QUOTE FOR EACH FIRM, AND THE PRICE DIFFERENCE FOR EACH DBE IF THE SELECTED FIRM IS NOT A DBE.

| ITEM(S) OF WORK MADE AVAILABLE(CONT.) | NAME OF SELECTED FIRM AND VENDOR NUMBER | DBE OR NON-DBE | NAME OF REJECTED FIRM(S) | QUOTE IN DOLLARS | PRICE DIFFERENCE IN DOLLARS |
|---------------------------------------|---|----------------|--------------------------|------------------|-----------------------------|
| | | | | | |

NOTE: ATTACH ADDITIONAL PAGES IF NECESSARY.

IF THE FIRM SELECTED FOR THE ITEM IS NOT A DBE, PROVIDE THE REASON(S) FOR THE SELECTION ON A SEPARATE PAGE AND ATTACH.

PROVIDE NAMES, ADDRESSES, AND TELEPHONE NUMBERS FOR THE FIRMS LISTED ABOVE.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
DBE GOOD FAITH EFFORTS DOCUMENTATION

CONTRACT I.D. NO. _____ DATE SUBMITTED _____

IF THE DBE GOAL ESTABLISHED FOR THIS CONTRACT HAS NOT BEEN MET OR VDOT REQUESTS THE SUBMITTAL THEREOF, THE BIDDER IS REQUIRED TO SUBMIT GOOD FAITH EFFORTS AS OUTLINED IN THIS DOCUMENT.

THE BIDDER ACKNOWLEDGES AND CERTIFIES THAT THIS FORM ACCURATELY REPRESENTS THE INFORMATION CONTAINED HEREIN.

BIDDER _____ SIGNATURE _____

TITLE _____

ADVERTISEMENTS OR PROOFS OF PUBLICATION.

NAMES AND DATES OF EACH PUBLICATION IN WHICH A REQUEST FOR DBE PARTICIPATION FOR THE PROJECT WAS PLACED BY THE BIDDER. ATTACH COPIES OF PUBLISHED ADVERTISEMENTS OR PROOFS OF PUBLICATION.

| PUBLICATIONS | DATES OF ADVERTISEMENT |
|--------------|------------------------|
| | |

NOTE: ATTACH ADDITIONAL PAGES IF NECESSARY

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
DBE GOOD FAITH EFFORTS DOCUMENTATION

CONTRACT I.D. NO. _____ DATE SUBMITTED _____

IF THE DBE GOAL ESTABLISHED FOR THIS CONTRACT HAS NOT BEEN MET OR VDOT REQUESTS THE SUBMITTAL THEREOF, THE BIDDER IS REQUIRED TO SUBMIT GOOD FAITH EFFORTS AS OUTLINED IN THIS DOCUMENT.

THE BIDDER ACKNOWLEDGES AND CERTIFIES THAT THIS FORM ACCURATELY REPRESENTS THE INFORMATION CONTAINED HEREIN.

BIDDER _____ SIGNATURE _____

TITLE _____

NAMES OF AGENCIES CONTACTED TO PROVIDE ASSISTANCE

NAMES OF AGENCIES (SEE SPECIAL PROVISION FOR 107.15) AND THE DATES THESE AGENCIES WERE CONTACTED TO PROVIDE ASSISTANCE IN CONTACTING, RECRUITING, AND USING DBE FIRMS. IF THE AGENCIES WERE CONTACTED IN WRITING, ATTACH COPIES OF SUPPORTING DOCUMENTS.

| NAME OF AGENCY | METHOD AND DATE OF CONTACT | RESULTS |
|----------------|----------------------------|---------|
| | | |

NOTE: ATTACH ADDITIONAL PAGES IF NECESSARY.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
DBE GOOD FAITH EFFORTS DOCUMENTATION

CONTRACT I.D. NO. _____ DATE SUBMITTED _____

IF THE DBE GOAL ESTABLISHED FOR THIS CONTRACT HAS NOT BEEN MET OR VDOT REQUESTS THE SUBMITTAL THEREOF, THE BIDDER IS REQUIRED TO SUBMIT GOOD FAITH EFFORTS AS OUTLINED IN THIS DOCUMENT.

THE BIDDER ACKNOWLEDGES AND CERTIFIES THAT THIS FORM ACCURATELY REPRESENTS THE INFORMATION CONTAINED HEREIN.

BIDDER _____ SIGNATURE _____

TITLE _____

TECHNICAL ASSISTANCE AND INFORMATION PROVIDED TO DBEs

EFFORTS MADE TO PROVIDE INTERESTED DBEs WITH ADEQUATE INFORMATION ABOUT THE PLANS, SPECIFICATIONS, AND REQUIREMENTS OF THE BID DOCUMENTS TO ASSIST THE DBEs IN RESPONDING TO A SOLICITATION.

IDENTIFY THE DBEs ASSISTED, THE INFORMATION PROVIDED, AND THE DATE OF CONTACT. ATTACH COPIES OF SUPPORTING DOCUMENTS.

| DBEs ASSISTED | INFORMATION PROVIDED | DATE OF CONTACT |
|---------------|----------------------|-----------------|
| | | |

NOTE: ATTACH ADDITIONAL PAGES IF NECESSARY.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
DBE GOOD FAITH EFFORTS DOCUMENTATION

CONTRACT I.D. NO. _____ DATE SUBMITTED _____

IF THE DBE GOAL ESTABLISHED FOR THIS CONTRACT HAS NOT BEEN MET OR VDOT REQUESTS THE SUBMITTAL THEREOF, THE BIDDER IS REQUIRED TO SUBMIT GOOD FAITH EFFORTS AS OUTLINED IN THIS DOCUMENT.

THE BIDDER ACKNOWLEDGES AND CERTIFIES THAT THIS FORM ACCURATELY REPRESENTS THE INFORMATION CONTAINED HEREIN.

BIDDER _____ SIGNATURE _____
TITLE _____

EFFORTS MADE TO ASSIST DBEs OBTAIN BONDING, LINES OF CREDIT, INSURANCE, ETC.

EFFORTS MADE TO PROVIDE INTERESTED DBEs IN OBTAINING BONDING, LINES OF CREDIT, INSURANCE, NECESSARY EQUIPMENT, SUPPLIES, MATERIALS, OR RELATED ASSISTANCE OR SERVICES, EXCLUDING SUPPLIES AND EQUIPMENT THE SUBCONTRACTOR PURCHASES OR LEASES FROM THE PRIME CONTRACTOR OR ITS AFFILIATES.

IDENTIFY THE DBEs ASSISTED, THE ASSISTANCE OFFERED, AND THE DATES OF SERVICES OFFERED AND PROVIDED. ATTACH COPIES OF SUPPORTING DOCUMENTS.

| DBEs ASSISTED | ASSISTANCE OFFERED | DATES SERVICES OFFERED AND/OR PROVIDED |
|---------------|--------------------|--|
| | | |

NOTE: ATTACH ADDITIONAL PAGES IF NECESSARY.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
DBE GOOD FAITH EFFORTS DOCUMENTATION

CONTRACT I.D. NO. _____ DATE SUBMITTED _____

IF THE DBE GOAL ESTABLISHED FOR THIS CONTRACT HAS NOT BEEN MET OR VDOT REQUESTS THE SUBMITTAL THEREOF, THE BIDDER IS REQUIRED TO SUBMIT GOOD FAITH EFFORTS AS OUTLINED IN THIS DOCUMENT.

THE BIDDER ACKNOWLEDGES AND CERTIFIES THAT THIS FORM ACCURATELY REPRESENTS THE INFORMATION CONTAINED HEREIN.

BIDDER _____ SIGNATURE _____

TITLE _____

ADDITIONAL DATA TO SUPPORT DEMONSTRATION OF GOOD FAITH EFFORTS

| ADDITIONAL DATA TO SUPPORT DEMONSTRATION OF GOOD FAITH EFFORTS |
|--|
| |

NOTE: ATTACH ADDITIONAL PAGES, IF NECESSARY

APPENDIX L
FORM-63, VENDOR PAYMENT COMPLIANCE
REPORT

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
VENDOR PAYMENT COMPLIANCE REPORT**
(Vendor defined as: Subcontractor, Consultant, Supplier, Manufacturer, Hauler)

Pages(s) _____ of _____

(1a) Report No.
(1b) Quarter Ending

(2a) Federally Funded Federally Funded Local Govt. State Funded

(2b) Contractor/Subcontractor _____

(2c) Contract ID No. _____

(2d) Date of Execution _____

(2e) District _____

| (3) Vendor Name | (4) Tax I.D. | (5) Certification Type – Must Specify DBE, SWAM, or Non-DBE/SWAM | (6) Payments to Vendors | | (7) Reason for Payment this Qtr. |
|-----------------|--------------|--|-------------------------|--------------|----------------------------------|
| | | | (6a) This Quarter | (6b) To Date | |
| | | | | | |
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All amounts paid to all Vendors are to be reported and submitted according to the quarterly submittal schedule. See Instructions.

I/WE certify under penalty of law that the information provided herein is accurate, current, and complete to the best of my/our Knowledge.
 Signature and Title of Company Official _____ Date _____
 Print Name and Phone Number of Individual Completing Report _____

**VIRGINIA DEPARTMENT OF TRANSPORTATION
INSTRUCTIONS FOR
VENDOR PAYMENT COMPLIANCE REPORT C-63**

The Prime Contractor is required to submit a Vendor Payment Compliance Report and document all payments made to all vendors during the designated quarterly reporting period. All amounts paid to vendors are subject to monitoring and enforcement mechanisms. It is the responsibility of the prime contractor to provide evidence of vendor payments in response to monitoring and enforcement compliance reviews.

The instructions below correspond to each item on the report. Please follow the instructions.

- 1a. **Report No.**
Indicate the number of the report you are sending in sequence. For example: If this is the second report you are submitting for the contract, enter Report No. 2.
- 1b. **Quarter Ending**
Indicate the reporting period based on the Reporting Schedule listed in these instructions.
- 2a. **Funding Source**
Indicate the primary funding source: Federally Funded, Federally Funded Local Government or State Funded.
- 2b. **Contractor/Subcontractor**
Enter your company's name
- 2c. **Contract I.D. No.**
Enter the contract identification number assigned to your project.
- 2d. **Date of Execution**
Enter the date the contract was executed.
- 2e. **District**
Enter the VDOT District where the project under contract is located.
3. **Vendor Name**
Enter all subcontractors utilized.
4. **Tax I.D. No.**
Indicate the Federal Employer Identification No.
5. **Certification Type**
Specify the certification type of each Vendor:
DBE – Disadvantaged Business Enterprise
SWaM – Small, Woman, and Minority-Owned Business Enterprise
Non-DBE/SWaM – Subcontractor is not certified as a DBE or SWaM business in Virginia
6. **Payments to Vendors**
Dollar amount paid to Vendors during contract.
- 6a. **Payments to Vendors this Qtr.**
Dollar amount of payment made to Vendors in reporting quarter.

6b. **Payments to Vendors to Date**
Total dollar amount paid to Vendors since contract execution.

7. **Work Performed this Qtr.**
Describe specific reason for payment made to Vendor in reporting quarter.

Effective (date), All Form C-63s for each reporting period shall be submitted in an electronic format to the District Civil Rights Office in each District by the following dates of each calendar year.

REPORTING SCHEDULE

| Reporting Period | Date Due To Responsible VDOT Residency |
|-------------------------|--|
| July 1 – September 30 | Five (5) working days after the reporting period |
| October 1 – December 31 | Five (5) working days after the reporting period |
| January 1 – March 31 | Five (5) working days after the reporting period |
| April 1 – June 30 | Five (5) working days after the reporting period |

If the submittal date falls on a weekend/holiday, the forms shall be submitted to the District Civil Rights Office on the following business day.

APPENDIX M
UNIFORM REPORT FORM

General Reporting

| UNIFORM REPORT OF DBE COMMITMENTS/AWARDS AND PAYMENTS | | | | | |
|--|--|--------------------------------|--|--|---|
| **Please refer to the instructions sheet for directions on filling out this form** | | | | | |
| 1 Submitted to (check only one): | <input type="checkbox"/> FHWA | <input type="checkbox"/> FAA | <input type="checkbox"/> FTA—Recipient ID Number | | |
| 2 AIP Numbers (FAA Recipients); Grant Number (FTA Recipients): | | | | | |
| 3 Federal fiscal year in which reporting period falls: | | 4. Date This Report Submitted: | | | |
| 5 Reporting Period | <input type="checkbox"/> Report due June 1 (for period Oct. 1-Mar. 31) | | <input type="checkbox"/> Report due Dec. 1 (for period April 1-Sept. 30) | | <input type="checkbox"/> FAA annual report due Dec. 1 |
| 6 Name and address of Recipient: | | | | | |
| 7 Annual DBE Goal(s): | Race Conscious Projection | | Race Neutral Projection | | OVERALL Goal |

Awards/Commitments this Reporting Period

| A | AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD (total contracts and subcontracts committed during this reporting period) | A | B | C | D | E | F | G | H | I |
|----|--|---------------|--------------|-------------------------|------------------------|---|---------------------------------------|--------------------------------------|-------------------------------------|-------------------------------------|
| | | Total Dollars | Total Number | Total to DBEs (dollars) | Total to DBEs (number) | Total to DBEs /Race Conscious (dollars) | Total to DBEs/Race Conscious (number) | Total to DBEs/Race Neutral (dollars) | Total to DBEs/Race Neutral (number) | Percentage of total dollars to DBEs |
| 8 | Prime contracts awarded this period | | | | | | | | | |
| 9 | Subcontracts awarded/committed this period | | | | | | | | | |
| 10 | TOTAL | | | | | | | | | |

| B | BREAKDOWN BY ETHNICITY & GENDER | Contracts Awarded to DBEs this Period | | | | | | | | |
|----|---------------------------------|---------------------------------------|-----|-------|-----------------------|-----|-------|--|--|--|
| | | Total to DBE (dollar amount) | | | Total to DBE (number) | | | | | |
| | | A | B | C | D | E | F | | | |
| | | Women | Men | Total | Women | Men | Total | | | |
| 11 | Black American | | | | | | | | | |
| 12 | Hispanic American | | | | | | | | | |
| 13 | Native American | | | | | | | | | |
| 14 | Asian-Pacific American | | | | | | | | | |
| 15 | Subcontinent Asian Americans | | | | | | | | | |
| 16 | Non-Minority | | | | | | | | | |
| 17 | TOTAL | | | | | | | | | |

Payments Made this Period

| C | PAYMENTS ON ONGOING CONTRACTS (report activity of ongoing contracts) | A | B | C | D | E | F |
|----|--|---------------------------|--------------------|-------------------------------------|-----------------------------|--------------------------------|-----------------|
| | | Total Number of Contracts | Total Dollars Paid | Total Number of Contracts with DBEs | Total Payments to DBE firms | Total Number of DBE firms Paid | Percent to DBEs |
| 18 | Prime and sub contracts currently in progress | | | | | | |

| D | TOTAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD | A | B | C | D |
|----|---|-------------------------------|---|---|-----------------------------------|
| | | Number of Contracts Completed | Total Dollar Value of Contracts Completed | DBE Participation Needed to Meet Goal (Dollars) | Total DBE Participation (Dollars) |
| 19 | Race Conscious | | | | |
| 20 | Race Neutral | | | | |
| 21 | Totals | | | | |
| 22 | Submitted By: | 24. Signature: | | | 25. Phone Number: |

APPENDIX N

**DISADVANTAGED BUSINESS ENTERPRISE
PROGRAM COMPLIANCE REVIEW REPORT**



**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM
COMPLIANCE REVIEW REPORT**

DISTRICT:

PROJECT NO:

CONTRACT ID:

FHWA NO:

CONTRACT AWARD DATE:

PRIME CONTRACTOR:

DBE CONTRACTOR:

REPORT SUBMITTAL DATE:

DETERMINATION: IN COMPLIANCE NON-COMPLIANCE

*This report is the result of compliance review activities conducted in accordance
with the requirements of 49 CFR, Part 26.37 and the
Virginia Department of Transportation's policies and guidelines.*

SCHEDULE A
COMPLIANCE REVIEW CHECK LIST

| | |
|--------------------------|------------------------|
| Project #: | District: |
| Prime Contractor: | DBE Contractor: |

I. Management Documents

A. Project Contract Documents:

- C-111
- C-112
- DBE Schedule of Participation

B. Official Subcontract Forms:

- C-31

C. Quotations and Agreements:

- Subcontract Agreement
- DBE firm's price quotation to the prime
- Equipment Rental/Lease Agreement
- Material Quotation to DBE Firm
- Material Agreement between Supplier and DBE Firm

D. Material and Equipment Financial Review:

- Shipping Tickets
- Material Invoices matching shipping tickets
- Cancelled checks matching material invoices
- Equipment Invoices
- Canceled checks matching equipment invoices

E. Payroll Financial Review:

- Certified Payrolls
- Comparison of prime's and DBE firm's certified payrolls

F. List Additional Document(s) Reviewed:

II. Compliance Review Report Schedules Attached or Included in the Review Process

- | | | |
|-------------------------------------|--------------------------------------|-------------------------------------|
| <input type="checkbox"/> Schedule B | <input type="checkbox"/> Schedule E | <input type="checkbox"/> Schedule F |
| <input type="checkbox"/> Schedule C | <input type="checkbox"/> Schedule E1 | |
| <input type="checkbox"/> Schedule D | <input type="checkbox"/> Schedule E2 | |

The above information provides a summary of documents used throughout the review process. Upon written request to the District, such information may be made available for review.

**SCHEDULE B
DBE COMPLIANCE REVIEW REPORT**

| | |
|--------------------------|------------------------|
| Project #: | District: |
| Prime Contractor: | DBE Contractor: |

Project Inspector: Project Inspector Interviewed: Yes No

On-Site Observation: Desk Audit:

Date DBE Began Work: Date DBE to Complete Work:

| I. WORK ITEM(S) | QUANTITY COMPLETED | DOLLAR AMT COMPLETED <i>(per subcontract)</i> |
|-----------------|--------------------|--|
| | | |
| | | |
| | | |

Attach a separate sheet, if additional space is needed.

II. SUPERVISION AND PERFORMING WORK COVERED IN THIS REPORT

What percentage of items or portions of items are actually supervised by the DBE? %. If less than 100%, discuss.

III. MANAGING AND PERFORMING WORK COVERED IN THIS REPORT

A. Equipment:

1. Did the DBE lease any equipment for the execution of work? Yes No.
If yes, what percentage was leased with operator? %; without operator? %.
Of the equipment leased with operator, did the operator appear on the DBE's certified payroll? Yes No
2. Was any equipment leased from the prime? Yes No. If yes, was any equipment leased with operator? Yes No. If yes, discuss: .
3. Was any equipment used by the DBE owned and operated by the DBE? Yes No
If yes, what percentage: %.

B. Material:

1. In whose name are materials shipped?
2. Who make arrangements for delivery of materials?
3. Who schedules delivery of materials?

C. Labor:

1. Did the prime perform any of the DBE items or portions of items of work? Yes No
If yes, please discuss:
2. Did the DBE sublet any items or portions of items of work to any non DBE firms? Yes No
If yes, what percentage was sublet? %. Name of the Non-DBE firm(s):
3. Did any of the DBE's labor force appear on the prime's certified payroll or the payroll of any other subcontractor on the project? Yes No. If yes, discuss: .

Review Completed by District Civil Rights Representative

Name: _____ Signature: _____
Date: _____ Title: _____

**SCHEDULE C
COMPLIANCE REVIEW RECAP SHEET**

| | |
|--------------------------|------------------------|
| Project #: | District: |
| Prime Contractor: | DBE Contractor: |

This schedule shall be completed by the District Civil Rights Office in conjunction with the project inspector. If "in compliance," no other schedules following "C" will be required. Other determinations will require the completion and submittal of all other schedules as specified by appropriate CD Memorandum.

I. Findings

Yes No N/A

A. Element of Work

- | | | | |
|--------------------------|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 1. Is the work being performed by the DBE firm a distinct, necessary, readily identifiable element of work for which a written subcontract agreement has been executed? |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 2. If applicable, has Form C-31 been executed? |

B. Actual Managing

- | | | | |
|--------------------------|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 1. Is the subcontract agreement consistent with traditional industry practice? |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 2. Is the DBE firm in control of 100% of the contract? |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 3. Did the DBE firm make the necessary arrangements to secure materials, equipment, suppliers, and labor for the prosecution of work in a manner consistent with traditional industry practices? |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 4. Are invoices, delivery tickets and other documents generated by the DBE's element(s) of work in the name of the DBE? |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 5. Is the DBE firm actually scheduling work activities, material deliveries and other related scheduling activities required for the prosecution of work in a manner consistent with traditional industry practices? |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 6. Is the DBE firm maintaining its own payroll? |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 7. Are the financial management responsibilities generated via the DBE's participation on this project being actually managed by the DBE firm? |

C. Actual Supervising

- | | | | |
|--------------------------|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 1. Is the DBE's supervisory staff responsible only to the DBE? |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 2. Is the DBE firm providing 100% of the supervision? |

D. Actual Performing

- | | | | |
|--------------------------|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 1. Is the DBE firm performing the work in accordance with the standards of a commercially useful function? |
|--------------------------|--------------------------|--------------------------|--|

II. Determinations

- | | |
|--|---|
| <p>A. Review Posture:</p> <p><input type="checkbox"/> In Compliance</p> <p><input type="checkbox"/> Non Compliance</p> | <p>B. Credit Determination</p> <p>\$ Credit Allowed</p> <p>\$ Credit Disallowed</p> |
|--|---|

Name: _____
Date: _____

Signature: _____
Title: _____

**SCHEDULE D
PRIME CONTRACTOR'S REPORT**

| | |
|--------------------------|------------------------|
| Project #: | District: |
| Prime Contractor: | DBE Contractor: |

Check the appropriate spaces under each section. If you check "yes", attach discussion addressing your answer.

Yes **No** **N/A**

 A. ITEMS OF WORK FOR WHICH CREDIT IS BEING SOUGHT
Is the DBE firm performing the work under a subcontract agreement with a firm other than your firm?

 B. SUPERVISING THE WORK FORCE
1. Has your firm's supervisory staff given direct instruction to the DBE's work force?
 2. Has your firm's supervisory staff been required to take over any supervisory responsibilities of the DBE?
 3. Are any members of the DBE supervisory staff previously employees of your firm or affiliate company?

 C. MANAGING THE ITEMS OF WORK
1. Did your firm secure any price quotations from suppliers for the DBE or make available any price quotations?
 2. Did your firm assist the DBE in estimating any item of work being performed on this project?
 3. Did your firm negotiate or assist in negotiating prices for the material portion of the item of work being performed?
 4. Does your firm make arrangements for or schedule delivery of materials used by the DBE in the performance of the items of work?
 5. Did your firm assist in hiring the DBE firm's labor force?
 6. Is your firm proving any of the following administrative services?
 a. Preparing certified payrolls for the DBE.
 b. Preparing invoices for the DBE.
 c. Proving clerical services for the DBE.
 d. Providing office space for the DBE.
 e. Preparing bookkeeping and/or check writing services for the DBE.

 D. PERFORMING ITEMS OF WORK
 1. Does your firm lease equipment with operator to the DBE?
 2. Does your firm have any equipment on loan to the DBE?
 3. Has any member of your labor force worked on the DBE portion of this project?
 4. Has any member of a non-DBE firm's labor force worked on the DBE portion of this project?
 5. Has any portion of the DBE work been sublet to a non-DBE firm?
 6. Did your firm perform any portion of the DBE's work on this project?

Schedule D Completed by Prime Contractor's Representative:

Name: _____
Date: _____

Signature: _____
Title: _____

SCHEDULE E

DBE CONTRACTOR'S REPORT

| | |
|--------------------------------|------------------------------|
| Project #: _____ | District: _____ |
| Prime Contractor: _____ | DBE Contractor: _____ |

I. ACTUAL MANAGING

Yes No N/A

- Does your firm have a written subcontract agreement with the Prime?
- Does your firm have a written subcontract agreement with an approved subcontractor on this project?
- Did your firm sublet any portion of work to another contractor?
If yes, was the firm a certified DBE? Name of firm: _____
Attach a copy of the agreement if not previously submitted.
- Does your firm have a signed Labor Union Agreement for this project?
If yes, please submit a copy of the agreement if not previously submitted.
- Name of person who prepares your firm's certified payrolls: _____
Is this person employed by your firm? If no, explain: _____
- Did your firm secure material price quotations from material suppliers for this project?
Attach a copy of the material supplier's price quotations to your firm.
- Did your firm use the prime contractor's material price quotation in executing your firm's material agreement with the supplier?
- _____ Name of person responsible for scheduling delivery of materials for this project:
- Is this person an employee of your firm? If no, explain: _____
- How are your material invoices billed?
 - In the name of your company
 - In the name of the prime
 - In the name of your firm and the prime jointly
 - Other, explain: _____
- How are your material invoices paid?
 - Directly by your firm
 - Directly by the prime
 - Joint Check Agreement
 - Other, explain: _____
- What arrangements were made for equipment utilized on this project?
 - Lease invoices paid directly by your firm
 - Prime deducts invoiced costs from your firm's estimated receipts
 - Lease invoices paid with joint payee checks
 - Other, explain: _____
- Does your firm receive a fee for furnishing the materials on this project?

II. ACTUAL SUPERVISING

- A. Name of your supervisor on this project: _____
- B. Years of construction supervisory experience on items of work being supervised on this project: _____
- C. Length of employment with your firm: _____
- D. Was this supervisor employed by the prime prior to your work commencing on this project?
 Yes No
- E. Was the prime consulted or involved in the hiring of this superintendent? Yes No
- F. List below any other individual(s) who provided supervision to your firm on this project:

| Name | Percentage of Time on Project |
|------|-------------------------------|
| | |
| | |
| | |
| | |
| | |

G. What percentage of actual supervision does your firm provide? _____ %

III. ACTUAL PERFORMING

- A. EQUIPMENT – List information regarding equipment used, source(s) and operator(s) used on this project by your firm. Attach all equipment lease agreements executed by your firm which have not been previously submitted:

| <u>Description and Number</u> <i>Type of Equipment & No.</i> | <u>Source of Equipment</u> <i>Owned, leasing firm, prime, other</i> | <u>Source of Operator</u> <i>Your firm, prime, subcontractor, other</i> |
|---|--|--|
| | | |
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| | | |
| | | |

Attach a separate sheet, if additional space is needed.

Total pieces of equipment used on this project by your firm: _____

B. LABOR – List below all non-supervisory employees used by your firm who are employed by the prime contractor, a temporary agency or other subcontractor:

| <u>Classification</u> | <u>Source of Employment</u> | <u>Length of Employment</u> |
|-----------------------|-----------------------------|-----------------------------|
| | | |
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| | | |
| | | |

Attach a separate sheet, if additional space is needed.

Schedule E Completed by the DBE Contractor's Representative:

Name: _____ Signature: _____

Date: _____ Title: _____

**SCHEDULE E1
DBE SUPPLIER/MANUFACTURER REPORT**

| | |
|--------------------------------|------------------------------|
| Project #: _____ | District: _____ |
| Prime Contractor: _____ | DBE Contractor: _____ |

I. PRIMARY BUSINESS FUNCTION

Check the appropriate space below:

- The supply of construction related materials, equipment, products or supplies
- The manufacturing of construction materials, equipment, products or supplies
- Neither a supplier nor manufacturer of construction materials, equipment, products or supplies. State your primary business and/or function of your firm: _____

II. CONTRACTUAL RESPONSIBILITIES

Attach a copy of your firm's price quotation to the prime or subcontractor for which your firm will supply or manufacturer materials, equipment, products or supplies.

| <u>Yes</u> | <u>No</u> | <u>N/A</u> |
|--------------------------|--------------------------|--------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

- Does the agreement include your firm making arrangements for the delivery materials, equipment, products or supplies being supplied or manufactured by your firm?
- Is your firm paid for the cost of the materials, equipment, products or supplies supplied or manufactured by your firm?
- Is your firm paid a fee for materials, equipment, products or supplies supplied or manufactured for this project?

How are your supplies paid for the materials, equipment or supplies supplied for manufactured for this project?

- Paid directly by my firm
- Paid directly by the prime or subcontractor
- Paid via joint payee check
- Other, Explain: _____

III. ACTUAL SUPPLYING/MANUFACTURING RESPONSIBILITIES

How long has your firm been operating as a supplier/manufacturer? _____

| <u>Yes</u> | <u>No</u> | <u>N/A</u> |
|------------|-----------|------------|
|------------|-----------|------------|

- Does your firm stock materials, equipment, products or supplies for use on this project as a normal stock? If no, explain: _____
- Does your firm stock the products altered by your firm for this project as normal stock items?
- Does your firm have a full time crew of employees who either stock, ship and/or work in the altering of products being used on this project?
- Does your firm own or lease equipment needed for altering materials for this project?
- Does your firm employ sales representatives for the distribution of your products, equipment or materials?
- Does your firm have the capacity to deliver products?

Schedule E1 Completed by the DBE Supplier/Manufacturer Representative:

Name: _____
Date: _____

Signature: _____
Title: _____

**SCHEDULE E2
DBE HAULING FIRM REPORT**

| | |
|--------------------------------|------------------------------|
| Project #: _____ | District: _____ |
| Prime Contractor: _____ | DBE Contractor: _____ |

I. PRIMARY BUSINESS FUNCTION

Check the appropriate space below:

- My firm's primary business function is hauling of construction materials and my firm owns at least one dump type truck which is licensed by the Virginia Department of Motor Vehicles (VDMV), having met all local and state requirements and is operating.
- My firm's primary business is NOT hauling; however my firm owns at least one dump type truck or my firm has entered into a long term lease agreement for a dump type truck which is licensed by VDMV, having met all local and state requirements and is operating. The primary function of my firm is: _____

II. CONTRACUAL RESPONSIBILITES

- A. How many trucks are required for the execution of this contract? _____
- B. Of the total, how many are owned and operated by your firms? _____
- C. Of the total, how many are leased and operated by your drivers? _____
- D. Of the total, how many are owned and operated by other certified DBE firms? _____
- E. Are any trucks or operators used provided by the contractor for whom you are hauling? _____
- F. How are the hired trucks paid? Check the appropriate answer:
 - Directly by your firm
 - Directly by the prime
 - Joint payee checks
 - Other, Explain: _____

Schedule E2 Completed by the DBE Hauler Representative:

Name: _____ Signature: _____
 Date: _____ Title: _____

**SCHEDULE F
NON COMPLIANCE SUMMARY**

| | |
|--------------------------------|------------------------------|
| Project #: _____ | District: _____ |
| Prime Contractor: _____ | DBE Contractor: _____ |

I. COMPLIANCE INTERVIEW

Date of Interview: _____ Site of Interview: _____

| Attendee | Title | Representing |
|----------|-------|--------------|
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |

III. FINDINGS OF NON COMPLIANCE

In accordance with *49 CFR Part 26.37* and appropriate Construction Memoranda, review findings are as follows:

- A. Identification of Element of Work:**
- B. Actual Managing: utilization of resources for the prosecution of work.**
- C. Actual Supervising: directing the prosecution of work.**
- D. Actual Performance: physical execution of work.**

III. DETERMINATION (Use an attachment for narrative if additional space is required)

APPENDIX O

**GOOD FAITH EFFORTS PANEL HEARING
PROCEDURES**

GOOD FAITH EFFORTS PANEL HEARING PROCEDURES

Revised 5/05/2016

GOOD FAITH EFFORTS PANEL HEARING PROCEDURES

Procedures for Good Faith Efforts Reconsideration Hearings Held Pursuant to
Virginia Department of Transportation
Special Provision for Section 107.15 of the 2016 Road and Bridge Specifications - Use of
Disadvantaged Business Enterprises

Preface

The Virginia Department of Transportation (VDOT), in its procurement activities, owes its primary responsibility to the general public and citizens of Virginia. The Department also desires to afford to Contractors (hereinafter termed "respondents") fair and reasonable procedures in the hearing of Good Faith Efforts (GFE) reconsideration matters, while insuring its vital procurement activities involving road construction, maintenance, and repair are conducted with dispatch. This is because there is a direct relationship between the safety of all highway users and the modernity and good repair of the roads upon which they must travel.

It is intended that GFE reconsideration hearings shall be of an informal nature in order that all necessary facts and procurement documents may be reviewed in a comfortable and fair atmosphere.

GENERAL

Panel Organization

This panel is to be a standing body, appointed by the Commissioner of Highways, and shall consist of a presiding officer and five (5) voting members. Counsel for the Department will be present for panel hearings and its deliberations, but will not have any voting rights.

Time Limits

The following time limits are established for the DBE Reconsideration Panel procedures found herein with regard to specific issues listed below:

- A. Failure to show, during the award process, how DBE goal will be achieved.
 - (1) The apparent low bidder must submit a written request for a panel hearing to the project engineer. Such request must be received within five (5) days of notification from the Department that initial good faith efforts were not demonstrated. The panel will notify the apparent low bidder as to the time, date,

Page 1

GOOD FAITH EFFORTS PANEL HEARING PROCEDURES

and place of the hearing.

- (3) The panel will render its decision within seven (7) days of the close of the hearing; and such decision is administratively final.
- B. Failure to conform to the approved DBE progress schedule, or failure to obtain the required participation at project completion.
- (1) The Contractor must submit a written request for a panel hearing to the State Construction Engineer in writing; such request must be received within 14 days of the date of the letter notifying the Contractor that he/she may be enjoined from bidding, or the letter advising them of a negative administrative review determination, as applicable. Written requests may be submitted to the State Construction Engineer electronically by email.
 - (2) The panel will notify the Contractor as to the time, date, and place of the hearing; said hearing to be held on the second Wednesday of each month unless otherwise designated.
 - (3) The panel will render its decision within seven (7) days of the close of the hearing; such decision being administratively final.

Continuances

Postponements should be granted only for the most compelling of reasons. While respondents may secure the assistance of counsel at these hearings, the unavailability of a particular attorney of the respondent's choosing will not be permitted to delay or postpone these hearings. This particular circumstance is all too common, and unless the postponements were ruled out on such a ground, it is believed that the substantial and costly delay would be "built in," so to speak, to the hearings ab initio.

Subpoenas and Evidentiary Rules

There is no provision of law that grants VDOT subpoena power. Similarly, the formal rules of evidence do not apply. The hearing is an administrative hearing rather than a judicial one. However, where it appears from the circumstances that the quality of evidence produced by either VDOT or the respondent is inferior to that which may have been reasonably available to them, the panel may, in weighing an item of evidence, consider that with the exercise of reasonable diligence, VDOT or the respondent could have produced a more authoritative or original source for testimony or evidence offered. Each party, both VDOT and the respondent bear their own burden or persuasion with the administrative reconsideration panel.

The panel may elect to take notice of any general or well established matter that has come before any member of the panel in the ordinary course of their official duties including, of course, their specific duties as a panel member. However, such matter may not be used as a basis for decision

GOOD FAITH EFFORTS PANEL HEARING PROCEDURES

until and unless the respondent is first confronted with the matter and given an opportunity to respond thereto.

Documentary Evidence

Any document a respondent wishes to have considered by the reconsideration panel should be forwarded to VDOT along with the request for hearing. Documents not forwarded at the time of panel request will potentially be subject to exclusion at the panel Chairman's discretion.

Hearing Procedure

1. The Chairman shall call the hearing to order. The VDOT will furnish the reconsideration panel sufficient documents prior to the hearing to (1) support and illuminate their initial decision which is being reconsidered and (2) allow the reconsideration panel an opportunity to review the matter generally before the actual hearing date, including all those relevant documents previously submitted by the respondent.
2. A respondent may, but need not, be represented by counsel of his choosing.
3. The Administrative Reconsideration Panel will consist of five (5) voting panel members. The decision of the panel shall be determined by majority vote of such members. In the event of a tie vote, the Chairman shall cast the tie breaking vote. Except to break a tie vote, the Chairman shall not vote.
4. **Opening Statements** – The respondent or their counsel may, if they desire, make an opening statement. The respondent shall be required to swear to the best of their knowledge and belief to the truth of the averments stated in the attorney's statement or, in lieu thereof, to state which, if any, are not true while swearing to the truth of the remainder in the aforementioned manner. Where a respondent is not represented by counsel, or where they may otherwise so choose, they may make their own opening statement. In that event, such opening statement shall be preceded by an oath administered by the court stenographer to the effect that the statement to be made and all responses to questions thereafter propounded by members of the panel shall be true and correct to the best of the respondent's knowledge and belief. The opening statement shall contain all of the matters which the respondent believes are worthy of the panel's consideration in deciding whether the Contractor has employed those good faith efforts called for by the VDOT Road and Bridge Section Special Provision 107.15 - Use of Disadvantaged Business Enterprises (DBEs) and 49 CFR Part 26.

The respondent and/or their counsel may, if they choose, offer a written opening statement in lieu of an oral one, or offer written remarks supplementary to an oral opening statement. Before such written statement(s) may be accepted by the panel, the respondent shall swear that to the best of their knowledge and belief the averments contained therein are true. If an opening statement is presented to the panel, it will be read by the Chairman and entered into record.

GOOD FAITH EFFORTS PANEL HEARING PROCEDURES

The opening statement of the respondent should identify any person(s) present at the hearing that can verify or corroborate any claim of the respondent made therein.

5. **Exclusion of witnesses** - The panel Chairman may, on his own motion or motion of a panel member, exclude witnesses from the hearing room before commencing with questions to a witness, or may do so upon any motions at any stage of the proceedings where he believes that any exclusion will be of assistance in determining the truth of any matter.
6. **Questioning of Witnesses by Panel** - Immediately following the opening statement of counsel or the respondent, the respondent or the panel may question the respondent and their witnesses in any order they choose. Upon the recall of a witness, neither the respondent nor counsel for the respondent may propound questions to the respondent or other witnesses recalled without the consent of the panel Chairman.
7. **Re-Direct Examination by Respondent** - Upon conclusion of the examination of a respondent or each of his witnesses by members of the panel, counsel for the respondent may re-direct additional questions to the respondent or each witness for the purpose of clarifying any matter covered by the examination by the panel, or any matter, while not covered by the panel, that was covered in the opening statement. Questions will not be permitted which exceed the scope of the opening statement and/or the panel's direct examination.

The panel may, if it so chooses, hear evidence from persons other than those produced by the respondent. The panel will not hear evidence from any person that is not first sworn.

8. **Suspension of Proceedings** – By a majority vote, panel members may suspend and continue the hearing proceedings on their own motion or on motion of the respondent, but they are cautioned to exercise this power sparingly and only for the most compelling reasons so that the Department's vital procurement activities are not unduly hindered or delayed.
9. **Burden of Persuasion of the Respondent** – Because the proceeding is administrative and not adversarial or judicial in nature, and because, further, by the practical circumstances, most evidence bearing on the issues before the panel generally will be solely within knowledge of the respondent, the burden of persuasion shall be on the respondent to show that they have used reasonable good faith efforts to meet the DBE goal by a clear and decisive preponderance of the evidence.
10. **Executive Sessions** – The panel may, if it so chooses, in its deliberation and deciding of the issues, meet in executive session to consider the facts provided in the hearing.
11. **The Panel Decision** – The panel shall render its decision within seven (7) days.
12. **Written Opinions** – The panel will provide to the respondent a written opinion regarding the basis for its decision within 10 days of the panel decision.

GOOD FAITH EFFORTS PANEL HEARING PROCEDURES

Virginia Department of Transportation Good Faith Efforts (GFE) Guidelines

Good Faith efforts may be determined through use of the following list of the types of actions the bidder may make to obtain DBE participation. This is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts of similar intent may be relevant in appropriate cases:

- Include the following completed forms:
 - Form C-111 - Minimum DBE Requirements
 - Form C-112 - Certification of Binding Agreement
 - Form C-48 - Contractor/Supplier Solicitation and Utilization Form
 - Form C-49 - Summary of GFE Documentation
 - Copy of the Request for Bid Solicitation to DBEs

- Solicit through reasonable and available means, such as but not limited to, attendance at pre-bid meetings, advertising, and written notices to certified DBEs who have the capability to perform the work of the contract. Examples include: advertising in at least one daily/weekly/monthly newspapers of general circulation as applicable; phone contact with a completely documented telephone log, including the date and time called, contact person, or voice mail status; and internet contacts with supporting documentation, including dates advertised.

- Solicit DBEs no less than five (5) business days before the bids are due so that the solicited DBEs have enough time to reasonably respond to the solicitation.

- Follow up initial solicitations as evidenced by documenting such efforts on Department standard DBE good faith documentation form, C-49.

- Select portions of the work to be performed by certified DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the Contractor might otherwise prefer to perform these work items completely or with its own forces.

- Provide interested certified DBES with adequate information about the plans, specifications, and requirements of the contract in a timely manner, which will assist the DBEs in responding to a solicitation.

- Provide evidence of names, addresses, and telephone numbers of DBEs that were considered for the solicitation; dates DBEs were contacted, a description of the information provided regarding the plans, specifications, and requirements of the contract for the work selected for subcontracting, and, if insufficient DBE participation seems likely, evidence as to why additional agreements could not be reached for DBEs to perform the work.

- For DBE bids declared non-competitive, include copies of DBE and non-DBE bid quotes. DBE quotes may be rejected as noncompetitive if the DBE sub's quote is more than 10% higher than the non-DBE's quote, as verified by supporting documentation. The prime must contract with the non-DBE sub when declaring a DBE firm non-competitive.

GOOD FAITH EFFORTS PANEL HEARING PROCEDURES

- Offer assistance to DBEs in obtaining bonding, lines of credit, or insurance.
- Offer assistance to DBEs with information about securing equipment, supplies, materials, or related assistance/services.
- Effectively utilize the services of appropriate personnel from VDOT, the Virginia Department of Small Business and Supplier Diversity (VSBSD), the Metropolitan Washington Airports Authority (MWAA), and other organizations in the recruitment and utilization of qualified DBEs.

GOOD FAITH EFFORTS PANEL HEARING PROCEDURES

Sample Notification Letter to Low Bidder Regarding Panel Decision of Failure to Demonstrate Good Faith Efforts

DATE

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Mr. John Doe, President
ABC, Inc.
12345 ABC Highway
Anywhere, Virginia XXXXX

PANEL RECOMMENDATION AT AWARD

Project No.
FHWA No.:
County:

Dear Mr. Doe:

On (date) the Virginia Department of Transportation's (VDOT) Administrative Reconsideration Panel was convened at your request as a result of your firm's failure to meet the DBE requirements and to establish good faith efforts in attempting to achieve the required participation at the award stage of the above captioned project. The purpose of this hearing was to give your firm an opportunity to discuss the issue and present your evidence to establish good faith efforts in attempting to achieve the required participation.

(Reason for failure to demonstrate GFE)

A review of the documents which you provided to the Panel indicated that you had obtained a sufficient number of reasonable quotes from DBE firms to attain the goal of 8% established for this project prior to your bid, and that your low bid was submitted with only 4.79% DBE participation. Your failure to submit a bid meeting the established DBE goal for this project in light of the reasonable DBE quotes that you received prior to your bid resulted in the Panel determining that your firm failed to show good faith efforts at the award stage.

Additionally, we found that you failed to timely supply the required C-48 VDOT form and, under the RFP terms, this would render your bid non-responsive.

The aforementioned resulted in the Panel determining that you failed to produce sufficient evidence to the DBE Administrative Reconsideration Panel to show that the initial determination made by VDOT should be overturned; and that you also failed to produce sufficient evidence to the DBE Administrative Reconsideration Panel to show that you submitted the required C-48 VDOT Form in a timely manner. As a result, the Reconsideration Panel found: (1) that your firm failed to show good faith efforts to meet the established DBE goal at the award stage, and (2) that you failed to submit your C-48 VDOT Form in a timely manner as required by the Bid Specifications.

The decision is administratively final. The Panel has declared the bid to be non-responsive, and the project should be awarded to the next lowest responsive and responsible bidder.

GOOD FAITH EFFORTS PANEL HEARING PROCEDURES

Sincerely,

Sample Notification Letter to Low Bidder Regarding Panel Decision that Good Faith Efforts were Demonstrated

DATE

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Mr. John Doe
President, ABC Company, Inc.
1234 ABCD Street
Anywhere, Virginia XXXXX

PANEL RECOMMENDATION

Project No.:
FHWA No.:
Order No.:
ABC County

Dear Mr. Doe:

On (Date), the Virginia Department of Transportation's (VDOT) Administrative Reconsideration Panel was convened at your request as a result of your firm's failure to meet the DBE requirements. The Panel met specifically to reconsider whether you exhibited good faith efforts in attempting to achieve the required DBE participation goal at the bid stage of the above captioned project. The purpose of the reconsideration hearing was to give your firm an opportunity to provide written documents and/or argument concerning the issue of whether you met the DBE goal or made adequate good faith efforts to do so. The Panel allowed you the opportunity to provide any written documents or argument which you desired in an effort to establish exhibited good faith efforts in attempting to achieve the required DBE participation goal.

I am pleased to inform you that you and your firm carried the burden of persuasion and produced sufficient evidence to the DBE Administrative Reconsideration Panel to show that the initial determination made by VDOT should be overturned.

The decision is administratively final. The Panel has declared that you exhibited the requisite good faith efforts to meet the DBE goal in submitting your bid, that the contract DBE goal for this project appears capable of being met as ABC Company, Inc. has performed this work on similar VDOT contracts and has been given prior DBE credit for said work, that your bid was therefore responsive, and accordingly that the contract for this project be awarded to your firm at the DBE established goal of x percent.

Sincerely,

APPENDIX P
DISADVANTAGE BUSINESS ENTERPRISE
REGULATIONS: 49 CFR PART 26

§ 25.545 Pre-employment inquiries.

(a) Marital status. A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss" or "Mrs."
(b) Sex. A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) ("Title VI") are hereby adopted and applied to these Title IX regulations. These procedures may be found at 49 CFR part 21.

[65 FR 52895, Aug. 30, 2000]

PART 26—PARTICIPATION BY DIS-ADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

Subpart A—General

§ 25.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ 25.500 through 25.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Sec.

- 26.1 What are the objectives of this part?
26.3 To whom does this part apply?
26.5 What do the terms used in this part mean?
26.7 What discriminatory actions are forbidden?
26.9 How does the Department issue guidance and interpretations under this part?
26.11 What records do recipients keep and report?
26.13 What assurances must recipients and contractors make?
26.15 How can recipients apply for exemptions or waivers?

Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracting

- 26.21 Who must have a DBE program?
26.23 What is the requirement for a policy statement?
26.25 What is the requirement for a liaison officer?
26.27 What efforts must recipients make concerning DBE financial institutions?
26.29 What prompt payment mechanisms must recipients have?
26.31 What requirements pertain to the DBE directory?
26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?
26.35 What role do business development and mentor-protégé programs have in the DBE program?
26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?

Subpart F—Procedures

§ 25.600 Notice of covered programs.

Within 60 days of September 29, 2000, each Federal agency that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of the programs covered by these Title IX regulations. Each such Federal agency shall periodically republish the notice of covered programs to reflect changes in covered programs. Copies of this notice also shall be made available upon request to the Federal agency's office that enforces Title IX.

Subpart C—Goals, Good Faith Efforts, and Counting

§ 25.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of

- 26.41 What is the role of the statutory 10 percent goal in this program?
26.43 Can recipients use set-asides or quotas as part of this program?
26.45 How do recipients set overall goals?

- 26.47 Can recipients be penalized for failing to meet overall goals?
- 26.49 How are overall goals established for transit vehicle manufacturers?
- 26.51 What means do recipients use to meet overall goals?
- 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?
- 26.55 How is DBE participation counted toward goals?

Subpart D—Certification Standards

- 26.61 How are burdens of proof allocated in the certification process?
- 26.63 What rules govern group membership determinations?
- 26.65 What rules govern business size determinations?
- 26.67 What rules determine social and economic disadvantage?
- 26.69 What rules govern determinations of ownership?
- 26.71 What rules govern determinations concerning control?
- 26.73 What are other rules affecting certification?

Subpart E—Certification Procedures

- 26.81 What are the requirements for Unified Certification Programs?
- 26.83 What procedures do recipients follow in making certification decisions?
- 26.84 How do recipients process applications submitted pursuant to the DOT/SBA MOU?
- 26.85 How do recipients respond to requests from DBE-certified firms or the SBA made pursuant to the DOT/SBA MOU?
- 26.86 What rules govern recipients' denials of initial requests for certification?
- 26.87 What procedures does a recipient use to remove a DBE's eligibility?
- 26.89 What is the process for certification appeals to the Department of Transportation?
- 26.91 What actions do recipients take following DOT certification appeal decisions?

Subpart F—Compliance and Enforcement

- 26.101 What compliance procedures apply to recipients?
- 26.103 What enforcement actions apply in FHWA and FTA programs?
- 26.105 What enforcement actions apply in FAA programs?
- 26.107 What enforcement actions apply to firms participating in the DBE program?
- 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

APPENDIX A TO PART 26—GUIDANCE CONCERNING GOOD FAITH EFFORTS

- APPENDIX B TO PART 26—UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS FORM
- APPENDIX C TO PART 26—DBE BUSINESS DEVELOPMENT PROGRAM GUIDELINES
- APPENDIX D TO PART 26—MENTOR-PROTÉGÉ PROGRAM GUIDELINES
- APPENDIX E TO PART 26—INDIVIDUAL DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE
- APPENDIX F TO PART 26—UNIFORM CERTIFICATION APPLICATION FORM

AUTHORITY: 23 U.S.C. 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C 1615, 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

SOURCE: 64 FR 5126, Feb. 2, 1999, unless otherwise noted.

Subpart A—General

§ 26.1 What are the objectives of this part?

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- (e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- (f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- (g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

§ 26.3 To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

- (1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102–240, 105 Stat. 1914,

or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107, (2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

§ 26.5 What do the terms used in this part mean?

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

- (i) One concern controls or has the power to control the other; or
- (ii) A third party or parties controls or has the power to control both; or
- (iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof

of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43

U.S.C. 1601, *et seq.*).

Compliance means that a recipient has correctly implemented the requirements of this part.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

Contractor means one who participates, through a contract or sub-contract (at any tier), in a DOT-assisted highway, transit, or airport program.

Department or *DOT* means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged business enterprise or *DBE* means a for-profit small business concern—

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

DOT/SBA Memorandum of Understanding or MOU, refers to the agreement signed on November 23, 1999, between the Department of Transportation (DOT) and the Small Business Administration (SBA) streamlining certification procedures for participation in SBA's 8(a) Business Development (8(a) BD) and Small Disadvantaged Business (SDB) programs, and DOT's Disadvantaged Business Enterprise (DBE) program for small and disadvantaged businesses.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawai-

ians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Operating Administration or OA means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary industry classification means the North American Industrial Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the *North American Industry Classification Manual—United States, 1997* which is available from the National Technical Information Service, 5285

Port Royal Road, Springfield, VA, 22161; by calling 1 (800) 553-6847; or via the Internet at: <http://www.ntis.gov/product/naics.htm>.

Primary recipient means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or *SBA* means the United States Small Business Administration.

SBA certified firm refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;

(ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or

Portuguese culture or origin, regardless of race;

(iii) “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., “You must do XYZ” means that recipients must do XYZ).

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35553, June 16, 2003]

§ 26.7 What discriminatory actions are forbidden?

(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of

§ 26.9

a particular race, color, sex, or national origin.

§ 26.9 How does the Department issue guidance and interpretations under this part?

(a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 express the official positions and views of the Department of Transportation or any of its operating administrations.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

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.

[72 FR 15617, Apr. 2, 2007]

§ 26.11 What records do recipients keep and report?

(a) [Reserved]

(b) You must continue to provide data about your DBE program to the Department as directed by DOT operating administrations.

(c) You must create and maintain a bidders list.

(1) The purpose of this list is to provide you as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts for use in helping you set your overall goals.

(2) You must obtain the following information about DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts:

- (i) Firm name;
- (ii) Firm address;
- (iii) Firm's status as a DBE or non-DBE;
- (iv) Age of the firm; and

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(v) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (e.g., less than \$500,000; \$500,000-\$1 million; \$1-2 million; \$2-5 million; etc.) rather than requesting an exact figure from the firm.

(3) You may acquire the information for your bidders list in a variety of ways. For example, you can collect the data from all bidders, before or after the bid due date. You can conduct a survey that will result in statistically sound estimate of the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts. You may combine different data collection approaches (e.g., collect name and address information from all bidders, while conducting a survey with respect to age and gross receipts information).

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000]

§ 26.13 What assurances must recipients and contractors make?

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49

CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/ or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

§ 26.15 How can recipients apply for exemptions or waivers?

(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rule-making that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public par-

ticipation process and the information gathered through it.

(2) Your application must show that—

(i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;

(ii) Conditions in your jurisdiction are appropriate for implementing the proposal;

(iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

(iv) Your proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.

(3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

(i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49;

(ii) Your level of DBE participation continues to be consistent with the objectives of this part;

(iii) There is a reasonable limitation on the duration of your modified program; and

(iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

§ 26.21

Subpart B—Administrative
Re-quirements for DBE Programs for
Con-tracting Federally-Assisted

§ 26.21 Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(1) All FHWA recipients receiving funds authorized by a statute to which this part applies;

(2) FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) exceeding \$250,000 in FTA funds in a Federal fiscal year;

(3) FAA recipients receiving grants for airport planning or development who will award prime contracts exceeding \$250,000 in FAA funds in a Federal fiscal year.

(b)(1) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 65 FR 68951, Nov. 15, 2000]

§ 26.23 What is the requirement for a policy statement?

You must issue a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation.

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You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

§ 26.25 What is the requirement for a liaison officer?

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

§ 26.27 What efforts must recipients make concerning DBE financial institutions?

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

§ 26.29 What prompt payment mechanisms must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.

(b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. You must use one of the following methods to comply with this requirement:

(1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.

(2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within

30 days after the subcontractor's work is satisfactorily completed.

(3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.

(c) For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

(d) Your DBE program must provide appropriate means to enforce the requirements of this section. These means may include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(e) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:

(1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and

other contractors are fully and promptly paid.

[68 FR 35553, June 16, 2003]

§ 26.31 What requirements pertain to the DBE directory?

You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE. You must revise your directory at least annually and make updated information available to contractors and the public on request.

§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?

(a) If you determine that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.

(b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with § 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

(c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.

§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?

(a) You may or, if an operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully

in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.

(b) As part of a BDP or separately, you may establish a “mentor-protégé” program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.

(1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protégé program.

(2) During the course of the mentor-protégé relationship, you must:

(i) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any contract let by the recipient; and

(ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.

(3) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program. See Appendix D of this part for guidance concerning the operation of mentor-protégé programs.

(c) Your BDPs and mentor-protégé programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

§ 26.37 What are a recipient’s responsibilities for monitoring the performance of other program participants?

(a) You must implement appropriate mechanisms to ensure compliance with the part’s requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state and local law). You must set

forth these mechanisms in your DBE program.

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs.

(c) This mechanism must provide for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments. In your reports of DBE participation to the Department, you must display both commitments and attainments.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35554, June 16, 2003]

Subpart C—Goals, Good Faith Efforts, and Counting

§ 26.41 What is the role of the statutory 10 percent goal in this program?

(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs’ opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

§ 26.43 Can recipients use set-asides or quotas as part of this program?

(a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.

(b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

§ 26.45 How do recipients set overall goals?

(a)(1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.

(2) If you are a FTA or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) \$250,000 or less in FTA or FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA respectively for that fiscal year. However, if you have an existing DBE program, it must remain in effect and you must seek to fulfill the objectives outlined in § 26.1.

(b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.

(c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.

(1) *Use DBE Directories and Census Bureau Data.* Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, will-

ing and able businesses available in your market that perform work in the same NAICS codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, www.census.gov/epcd/cbp/view/cbpview.html.) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in your market.

(3) *Use data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study.

(4) *Use the goal of another DOT recipient.* If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) *Alternative methods.* You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

(i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and

(iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

(2) If available, you must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.

(3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the “but for” factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:

(1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming three fiscal years.

(2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA- or FAA-assisted contracts in the three forthcoming fiscal years.

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects.

(f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency’s Web site. You must submit to the oper-

ating administration for approval any significant adjustment you make to your goal during the three-year period based on changed circumstances. The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.

(2) If you are an FHWA, FTA, or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FHWA, FTA, or FAA Administrator.

(3) Timely submission and operating administration approval of your overall goal is a condition of eligibility for DOT financial assistance.

(4) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive DOT financial assistance.

(g) In establishing an overall goal, you must provide for public participation. This public participation must include:

(1) Consultation with minority, women’s and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs.

(2) A published notice announcing your proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at your principal office for 30 days following the date of the notice, and informing the public that you and the Department will accept comments on the goals for 45 days from the date of the notice. The notice must include addresses to which comments may be sent, and you must publish it in general circulation media and available

minority-focused media and trade association publications.

(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 65 FR 68951, Nov. 15, 2000; 68 FR 35553, June 16, 2003; 75 FR 5536, Feb. 3, 2010]

§ 26.47 Can recipients be penalized for failing to meet overall goals?

(a) You cannot be penalized, or treated by the Department as being in non-compliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

§ 26.49 How are overall goals established for transit vehicle manufacturers?

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal. In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will perform during the fiscal year in question. You must exclude from this base funds attributable to work performed outside the United States and its territories, possessions, and commonwealths. The requirements and procedures of this part with respect to submission and ap-

proval of overall goals apply to you as they do to recipients.

(c) As a transit vehicle manufacturer, you may make the certification required by this section if you have submitted the goal this section requires and FTA has approved it or not disapproved it.

(d) As a recipient, you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

§ 26.51 What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);

(2) Providing assistance in overcoming limitations such as inability to

obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

(4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

Example to paragraph (f)(1): Your overall goal for Year 1 is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year 1.

(2) If, during the course of any year in which you are using contract goals,

you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

Example to paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (*i.e.*, not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example to paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (*i.e.*, from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two consecutive years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

(a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of

this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and

(3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

(c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

(2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.

(3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

(4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

(5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.

(e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.

(f)(1) You must require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.

(2) When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for

the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.

(3) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.

(g) You must apply the requirements of this section to DBE bidders/offers for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

§ 26.55 How is DBE participation counted toward goals?

(a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.

(1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

(2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted

work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

(b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

(c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

(1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must

evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors. (2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.

(3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved,

you must presume that it is not performing a commercially useful function.

(4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

(d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

(1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

(2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

(3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

(4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

(5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appro-

appropriate Department Operating Administration.

Example to this paragraph (d)(5): DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

(6) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)(i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(2)(i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

(B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

(C) Packers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).

(3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

(f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in § 26.87(i).

(g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.

(h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35554, June 16, 2003]

Subpart D—Certification Standards

§ 26.61 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups identified in § 26.67(a) are socially and economically disadvantaged. This means they do not have the burden of proving to you that they are socially and economically disadvantaged. In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups in § 26.67(a). Applicants do have the obligation to provide you information concerning their economic disadvantage (*see* § 26.67).

(d) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to you, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Appendix E of this part.)

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35554, June 16, 2003]

§ 26.63 What rules govern group membership determinations?

(a)(1) If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group (*see* § 26.61(c)), you have a well founded reason to question the individual's claim of membership in that group,

you must require the individual to present additional evidence that he or she is a member of the group.

(2) You must provide the individual a written explanation of your reasons for questioning his or her group membership and a written request for additional evidence as outlined in paragraph (b) of this section.

(3) In implementing this section, you must take special care to ensure that you do not impose a disproportionate burden on members of any particular designated group. Imposing a disproportionate burden on members of a particular group could violate § 26.7(b) and/or Title VI of the Civil Rights Act of 1964 and 49 CFR part 21.

(b) In making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. You may require the applicant to produce appropriate documentation of group membership.

(1) If you determine that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of § 26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35554, June 16, 2003]

§ 26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations

(see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$22.41 million.

(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.

[74 FR 15224, Apr. 3, 2009]

§ 26.67 What rules determine social and economic disadvantage?

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2) (i) You must require each individual owner of a firm applying to participate as a DBE (except a firm applying to participate as a DBE airport concessionaire) 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 \$750,000.

(ii) 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. This statement and documentation must not be unduly lengthy, burdensome, or intrusive.

(iii) In determining an individual's net worth, you must observe the following requirements:

(A) Exclude an individual's ownership interest in the applicant firm;

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm).

(C) Do not use a contingent liability to reduce an individual's net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(iv) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documentation supporting it to any third party without the written consent of the submitter. *Provided*, that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 in which the disadvantaged status of the individual is in question.

(b) *Rebuttal of presumption of disadvantage.*
 (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and

until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(c) [Reserved]

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$750,000 shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35554, June 16, 2003]

§ 26.69 What rules govern determinations of ownership?

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole.

(b) To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

(3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

(c) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if—

- (1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or

- (2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

(e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's ac-

tivities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

- (1) The owner's expertise must be—
 - (i) In a specialized field;
 - (ii) Of outstanding quality;
 - (iii) In areas critical to the firm's operations;
 - (iv) Indispensable to the firm's potential success;
 - (v) Specific to the type of work the firm performs; and
 - (vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

- (2) The individual whose expertise is relied upon must have a significant financial investment in the firm.

(g) You must always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual—

- (1) As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

- (2) Through inheritance, or otherwise because of the death of the former owner.

(h)(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is—

- (i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

- (ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

(j) You may consider the following factors in determining the ownership of a firm. However, you must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because—

(1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of

a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;

(2) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or

(3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, you must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

§ 26.71 What rules govern determinations concerning control?

(a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

(b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE

firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

(c) A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executive agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in § 26.69(j)(2).

(d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily oper-

ations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential.

However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

(i)(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

(j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family mem-

bers (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(l) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

(m) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime

contractor or other party that compromises the independence of the firm. (n) 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. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You may not, in this situation, require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue

to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

§ 26.73 What are other rules affecting certification?

(a)(1) Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in paragraph (a)(2) of this section, you must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

(b) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part. Nor must you refuse to certify a firm solely on the basis that it is a newly formed firm.

(c) DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process.

Failure or refusal to provide such information is a ground for a denial or removal of certification. (d) Only firms organized for profit may be eligible DBEs.

Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a

firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.

(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

Example 1: Socially and economically disadvantaged individuals own 100 percent of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

Example 2: Disadvantaged individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

Example 3: Disadvantaged individuals own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is 56 percent (80 percent of the 70 percent). This is

more than 51 percent, so you may certify the subsidiary, if all other requirements are met. *Example 4:* Same as Example 2 or 3,

but someone other than the socially and economically disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, you cannot certify it because it fails to meet control requirements.

Example 5: Disadvantaged individuals own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. This is less than 51 percent, so you cannot certify the subsidiary.

Example 6: The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined

gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of § 26.65(b). Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

(g) You must not require a DBE firm to be prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.

(h) A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of § 26.35. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in § 26.71.

(i) The following special rules apply to the certification of firms related to Alaska Native Corporations (ANCs).

(1) Notwithstanding any other provisions of this subpart, a direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all of the following requirements:

(i) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;

(ii) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and

(iii) The subsidiary, joint venture, or partnership entity has been certified

by the Small Business Administration under the 8(a) or small disadvantaged business program.

(2) As a recipient to whom an ANC-related entity applies for certification, you do not use the DOT uniform application form (*see* Appendix F of this part). You must obtain from the firm documentation sufficient to demonstrate that entity meets the requirements of paragraph (i)(1) of this section. You must also obtain sufficient information about the firm to allow you to administer your program (*e.g.*, information that would appear in your DBE Directory).

(3) If an ANC-related firm does not meet all the conditions of paragraph (i)(1) of this section, then it must meet the requirements of paragraph (h) of this section in order to be certified, on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003]

Subpart E—Certification Procedures

§ 26.81 What are the requirements for Unified Certification Programs?

(a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).

(1) Within three years of March 4, 1999, you and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval. The Secretary may, on the basis of extenuating circumstances shown by the recipients in the state, extend this deadline for no more than one additional year.

(2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring

that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

(3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.

(4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.

(5) If you and the other recipients in your state fail to meet the deadlines set forth in this paragraph (a), you shall have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct you to complete the required action by a date certain. If you and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this part.

(b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

(1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.

(2) The UCP shall provide “one-stop shopping” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

(3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.

(c) All certifications by UCPs shall be pre-certifications; *i.e.*, certifications that have been made final before the

due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

(d) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The "home state" UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm's application.

(e) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.

(f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

(g) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this section), the information required by § 26.31. The UCP shall make the directory available to the public electronically, on the internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

(h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

§ 26.83 What procedures do recipients follow in making certification decisions?

(a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their résumés and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

(2) If the firm is a corporation, analyze the ownership of stock in the firm; (3)

Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;

(6) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(7) Require potential DBEs to complete and submit an appropriate application form, unless the potential DBE is an SBA certified firm applying pursuant to the DOT/SBA MOU.

(i) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the approval of the concerned operating administration, for supplementing the form by requesting additional information not inconsistent with this part.

(ii) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the

application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(iii) You must review all information on the form prior to making a decision about the eligibility of the firm.

(d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.

(e) When another DOT recipient has certified a firm, you have discretion to take any of the following actions:

(1) Certify the firm in reliance on the certification decision of the other recipient;

(2) Make an independent certification decision based on documentation provided by the other recipient, augmented by any additional information you require the applicant to provide; or (3)

Require the applicant to go through your application process without regard to the action of the other

recipient.

(f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.

(g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

(h) Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of § 26.87. You may not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual

basis on which the certification was made changes.

(i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.

(1) Changes in management responsibility among members of a limited liability company are covered by this requirement.

(2) You must attach supporting documentation describing in detail the nature of such changes.

(3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under

§ 26.109(c).

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under

§ 26.109(c).

(k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under § 26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003]

§ 26.84 How do recipients process applications submitted pursuant to the DOT/SBA MOU?

(a) When an SBA-certified firm applies for certification pursuant to the DOT/SBA MOU, you must accept the certification applications, forms and packages submitted by a firm to the SBA for either the 8(a) BD or SDB programs, in lieu of requiring the applicant firm to complete your own application forms and packages. The applicant may submit the package directly, or may request that the SBA forward the package to you. Pursuant to the MOU, the SBA will forward the package within thirty days.

(b) If necessary, you may request additional relevant information from the SBA. The SBA will provide this additional material within forty-five days of your written request.

(c) Before certifying a firm based on its 8(a) BD or SDB certification, you must conduct an on-site review of the firm (*see* § 26.83(c)(1)). If the SBA conducted an on-site review, you may rely on the SBA's report of the on-site review. In connection with this review, you may also request additional relevant information from the firm.

(d) Unless you determine, based on the on-site review and information obtained in connection with it, that the firm does not meet the eligibility re-

quirements of Subpart D of this part, you must certify the firm.

(e) You are not required to process an application for certification from an SBA-certified firm having its principal place of business outside the state(s) in which you operate unless there is a report of a "home state" on-site review on which you may rely.

(f) You are not required to process an application for certification from an SBA-certified firm if the firm does not provide products or services that you use in your DOT-assisted programs or airport concessions.

[68 FR 35555, June 16, 2003]

§ 26.85 How do recipients respond to requests from DBE-certified firms or the SBA made pursuant to the DOT/SBA MOU?

(a) Upon receipt of a signed, written request from a DBE-certified firm, you must transfer to the SBA a copy of the firm's application package. You must transfer this information within thirty days of receipt of the request.

(b) If necessary, the SBA may make a written request to the recipient for additional materials (*e.g.*, the report of the on-site review). You must provide a copy of this material to the SBA within forty-five days of the additional request.

(c) You must provide appropriate assistance to SBA-certified firms, including providing information pertaining to the DBE application process, filing locations, required documentation and status of applications.

[68 FR 35555, June 16, 2003]

§ 26.86 What rules govern recipients' denials of initial requests for certification?

(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

(b) When you deny DBE certification to a firm certified by the SBA, you must notify the SBA in writing. The

notification must include the reason for denial.

(c) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm.

(d) When you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under § 26.89.

[64 FR 5126, Feb. 2, 1999. Redesignated and amended at 68 FR 35555, June 16, 2003]

§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in § 26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings

on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under § 26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (*i.e.*, an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm; or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an eligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) When you decertify a DBE firm certified by the SBA, you must notify the SBA in writing. The notification must include the reason for denial.

(i) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(j) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract

and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(k) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under § 26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

§ 26.89 What is the process for certification appeals to the Department of Transportation?

(a)(1) If you are a firm that is denied certification or whose eligibility is removed by a recipient, including SBA-certified firms applying pursuant to the DOT/SBA MOU, you may make an administrative appeal to the Department.

(2) If you are a complainant in an ineligibility complaint to a recipient (including the concerned operating administration in the circumstances provided in § 26.87(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address: Department of Transportation, Office of Civil Rights, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(b) Pending the Department's decision in the matter, the recipient's decision remains in effect. The Department does not stay the effect of the recipient's decision while it is considering an appeal.

(c) If you want to file an appeal, you must send a letter to the Department

within 90 days of the date of the recipient's final decision, including information and arguments concerning why the recipient's decision should be reversed. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal.

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(2) If you are an appellant other than one described in paragraph (c)(1) of this section, the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an

appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a *de novo* review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substan-

tially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (*see* paragraph (d) of this section). The Department will also notify the SBA in writing when DOT takes an action on an appeal that results in or confirms a loss of eligibility to any SBA-certified firm. The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

(8) The Department's policy is to make its decision within 180 days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

(g) All decisions under this section are administratively final, and are not subject to petitions for reconsideration.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35556, June 16, 2003; 73 FR 33329, June 12, 2008]

§ 26.91 What actions do recipients take following DOT certification appeal decisions?

(a) If you are the recipient from whose action an appeal under § 26.89 is taken, the decision is binding. It is not binding on other recipients.

(b) If you are a recipient to which a DOT determination under § 26.89 is applicable, you must take the following action:

(1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.87(i) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.

(3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other

recipients are not required to certify the firm based on the DOT decision.

Subpart F—Compliance and Enforcement

§ 26.101 What compliance procedures apply to recipients?

(a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23

CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

(b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

§ 26.103 What enforcement actions apply in FHWA and FTA programs?

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

(a) *Noncompliance complaints.* Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the

confidentiality of your identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part. (b) *Compliance reviews.* The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.

(c) *Reasonable cause notice.* If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, upon receipt requested, a written notice advising you that there is reasonable cause to find you in non-compliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.

(d) *Conciliation.* (1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as being in compliance. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

(3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.

(4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.

(e) *Enforcement actions.* (1) Enforcement actions are taken as provided in this subpart.

(2) Applicable findings in enforcement proceedings are binding on all DOT offices.

§ 26.105 What enforcement actions apply in FAA programs?

(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

§ 26.107 What enforcement actions apply to firms participating in the DBE program?

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been

§ 26.109

certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

§ 26.109 What are the rules governing information, confidentiality, co-operation, and intimidation or retaliation?

(a) *Availability of records.* (1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

(2) Notwithstanding any provision of Federal or state law, you must not release information that may be reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 in which the disadvantaged status of the individual is in question.

(b) *Confidentiality of information on complainants.* Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or

result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

(c) *Cooperation.* All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

(d) *Intimidation and retaliation.* If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

APPENDIX A TO PART 26—GUIDANCE
CONCERNING GOOD FAITH EFFORTS

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to

APPENDIX Q.1.

**DBE REGULATORY PROGRAM UPDATES
FEDERAL REGISTER/ VOL 64, NO. 21/
Tuesday, February 2, 1999**

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Parts 23 and 26****[Docket OST-97-2550; Notice 97-5]****RIN 2105-AB92****Participation by Disadvantaged Business Enterprises in Department of Transportation Programs****AGENCY:** Office of the Secretary, DOT.**ACTION:** Final rule.

SUMMARY: This final rule revises the Department of Transportation's regulations for its disadvantaged business enterprise (DBE) program. The DBE program is intended to remedy past and current discrimination against disadvantaged business enterprises, ensure a "level playing field" and foster equal opportunity in DOT-assisted contracts, improve the flexibility and efficiency of the DBE program, and reduce burdens on small businesses. This final rule replaces the former DBE regulation, which now contains only the rules for the separate DBE program for airport concessions, with a new regulation. The new regulation reflects President Clinton's policy to mend, not end, affirmative action programs. It modifies the Department's DBE program in light of developments in case law requiring "narrow tailoring" of such programs and last year's Congressional debate concerning the continuation of the DBE program. It responds to comments on the Department's December 1992 notice of proposed rulemaking (NPRM) and its May 1997 supplemental notice of proposed rulemaking (SNPRM).

DATES: This rule is effective March 4, 1999. Comments on Paperwork Reduction Act matters should be received by April 5, 1999; however, late-filed comments will be considered to the extent practicable.

ADDRESSES: Persons wishing to comment on Paperwork Reduction Act matters (see discussion at end of preamble) should send comments to Docket Clerk, Docket No. OST-97-2550, Department of Transportation, 400 7th Street, SW., Room 4107, Washington, DC 20590. We emphasize that the docket is open only with respect to Paperwork Reduction Act matters, and the Department is not accepting comments on other aspects of the regulation. We request that, in order to minimize burdens on the docket clerk's staff, commenters send three copies of their comments to the docket. Commenters wishing to have their

submissions acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 10 a.m. to 5:00 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590, phone numbers (202) 366-9306 (voice), (202) 366-9313 (fax), (202) 755-7687 (TDD), bob.ashby@ost.dot.gov (email); or David J. Goldberg, Office of Environmental, Civil Rights and General Law, Department of Transportation, 400 7th Street, SW., Room 5432, Washington, DC 20590, phone number (202) 366-8023 (voice), (202) 366-8536 (fax).

SUPPLEMENTARY INFORMATION:**Background**

The Department has the important responsibility of ensuring that firms competing for DOT-assisted contracts are not disadvantaged by unlawful discrimination. For eighteen years, the Department's most important tool for meeting this responsibility has been its Disadvantaged Business Enterprise (DBE) program. This program began in 1980. Originally, the program was a minority/women's business enterprise program established by regulation under the authority of Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes that apply to DOT financial assistance programs. See 49 CFR part 23.

In 1983, Congress enacted, and President Reagan signed, the first statutory DBE provision. This statute applied primarily to small firms owned and controlled by minorities in the Department's highway and transit programs. Firms owned and controlled by women, and the Department's airport program, remained under the original 1980 regulatory provisions. In 1987, Congress enacted, and President Reagan signed, statutes expanding the program to airports and to women-owned firms. In 1991 (for highway and transit programs) and 1992 (for airport programs), Congress enacted, and President Bush signed, statutes reauthorizing the expanded DBE program.

After each statutory amendment, and at other times to resolve program issues, the Department amended part 23. The result has been that part 23 has become

a patchwork quilt of a regulation. In addition, years of interpretation by various grantees and different DOT offices has created confusion and inconsistency in program administration. These problems, particularly in the area of certification, were criticized in General Accounting Office reports. The Department's desire to improve program administration and make the rule a more unified whole led to our publication of a December 1992 notice of proposed rulemaking (NPRM).

The Department received about 600 comments on this NPRM. The Department carefully reviewed these comments and, by early 1995, had prepared a draft final rule responding to them. However, in light of the Supreme Court's June 1995 decision in *Adarand v. Peña* and the Administration's review of affirmative action programs, the Department conducted further review of the DBE program. As a result, rather than issuing a final rule, we issued a supplemental notice of proposed rulemaking (SNPRM) in May 1997. This SNPRM incorporated responses to the comments on the 1992 NPRM and proposed further changes in the program, primarily in response to the "narrow tailoring" requirements of *Adarand*. We received about 300 comments on the SNPRM. The Department has carefully considered these comments, and the final rule responds to them. The final rule also specifically complies with the requirements that the courts have established for a narrowly tailored affirmative action program.

At the same time that the Department was working on this final rule, Congress once again considered reauthorization of the DBE program. In both the House and the Senate, opponents of affirmative action sponsored amendments that would have effectively ended the program. In both cases, bipartisan majorities defeated the amendments. The final highway/transit authorization legislation, known as the Transportation Equity Act for the 21st Century (TEA-21), retains the DBE program. In shaping this final rule, the Department has listened carefully to what both supporters and opponents of the program have said in Congressional debates.

Key Points of the Final Rule

This discussion reviews and responds to the SNPRM comments and the Congressional debates on certain key issues. Congressional debate references are to the *Congressional Record* for March 5 and 6, 1998, for the Senate debate and April 1, 1998, for the House debate, unless otherwise noted.

1. Quotas and Set-Asides

SNPRM Comments: Most comments on this issue came from non-DBE contractors, who argued that the program was a *de facto* quota program. Many of these contractors said that recipients insisted that they meet numerical goals regardless of other considerations, and that the recipients did not take showings of good faith efforts seriously. Some non-DBE contractor organizations argued, in addition, that the program was a quota program because it was based on a statute that had a 10 percent target for the use of businesses defined by a racial classification.

Congressional Debate: Opponents of the DBE program generally asserted that it created quotas or set-asides. Senator McConnell described the entire program, particularly the provision that "not less than 10 percent" of authorized funds go to DBEs, as

* * * a \$17.3 billion quota. In other words, if the government decides that you are the preferred race and gender, then you are able to compete for \$17.3 billion of taxpayer-funded highway contracts. But, if you are the wrong race and gender, then—too bad—you can't compete for that \$17 billion pot. (S1936).

The "not less than 10 percent" language also led opponents, such as Senator Ashcroft, to label the program a "set-aside," (S1405), a term also employed in testimony provided by a law professor from California who said that the statute "imposes a set-aside that's required regardless of the availability of race-neutral solutions." (S1407). Senator Gorton said that the DBE statute provides that "those not defined as disadvantaged in our society are absolutely barred and prohibited from getting certain governmental contracts." (S1415).

On the other hand, supporters of the program were adamant that it was not a quota program. Senator Baucus argued that the program, as implemented by DOT, allows substantial flexibility to recipients and contractors. Recipients could have an overall goal other than 10 percent under current rules, he pointed out. Senator Kerry of Massachusetts added that what the statute does is to "set a national goal. And it is appropriate in this country to set national goals for what we will do to try to break down the walls of discrimination. * * *" (S1408). He also alluded to the flexibility of the Secretary to permit overall goals of less than 10 percent. Senator Robb stated:

I want to stress at the outset that this program is not a "quota program," as some have suggested. There is a great difference

[between] an aspirational goal and a rigid numerical requirement. Quotas utilize rigid numerical requirements as a means of implementing a program. The DBE program uses aspirational goals. (S1425).

With respect to individual contract goals, Senator Baucus said, "once a goal is established for a contract, each contractor must make a good-faith effort to meet the goal—not mathematically required, not quota required, but a good faith effort to meet it." (S1402). Senator Baucus pointed to provisions of the SNPRM concerning overall goals, means of meeting them, and good-faith efforts as further narrowly tailoring the program. The SNPRM confirms, he said, that "contract goals are not binding. If a contractor makes good faith efforts to find qualified women or minority-owned subcontractors, but fails to meet the goal, there is no penalty." (S1403). Senator Robb added that "Contract goals are not operated as quotas because they require that the prime contractor make 'good faith efforts' to find DBEs. If a prime contractor cannot find qualified and competitive DBEs, the goal can be waived." (S1425).

One of the Senators who addressed the quota/set-aside issue in the most detail was Senator Domenici. He concluded that "I do not agree that this minority business program we have in this ISTEA bill before us is a program that mandates quotas and mandates set-asides." (S1426). He made this statement, in part, on the basis of March 5, 1998, letter to him signed by Secretary of Transportation Rodney Slater and Attorney General Janet Reno. In relevant part, this letter (which Senator Domenici inserted into the record) read as follows:

The 10 percent figure contained in the statute is not a mandatory set aside or rigid quota. First, the statute explicitly provides that the Secretary of Transportation may waive the goal for any reason * * * Second, in no way is the 10 percent figure imposed on any state or locality * * * Moreover, state agencies are permitted to waive goals when achievement on a particular contract or even for a specific year is not possible. The DBE program does not set aside a certain percentage of contracts or dollars for a specific set of contractors. Nor does the DBE program require recipients to use set-asides. The DBE program is a goals program which encourages participation without imposing rigid requirements of any type. Neither the Department's current nor proposed regulations permit the use of quotas. The DBE program does not use any rigid numerical requirements that would mandate a fixed number of dollars or contracts for DBEs. (S1427).

The debate in the House proceeded in similar terms. Opponents of the DBE program, such as Representative

Roukema (H2000), Representative Cox (H2004) and Speaker Gingrich (H2009) said the legislation constituted a quota, while proponents, such as Representatives Tauscher (H2001), Poshard (H2003), Bonior (H2004) and Menendez (H2004) said the program did not involve quotas or set-asides.

DOT Response: The DOT DBE program is not a quota or set-aside program, and it is not intended to operate as one. To make this point unmistakably clear, the Department has added explicitly worded new or amended provisions to the rule.

Section 26.41 makes clear that the 10 percent statutory goal contained in ISTEA and TEA-21 is an aspirational goal at the national level. It does not set any funds aside for any person or group. It does not require any recipient or contractor to have 10 percent (or any other percentage) DBE goals or participation. Unlike former part 23, it does not require recipients to take any special administrative steps (e.g., providing a special justification to DOT) if their annual overall goal is less than 10 percent. Recipients must set goals consistent with their own circumstances (see § 26.45). There is no direct link between the national 10 percent aspirational goal and the way a recipient operates its program. The Department will use the 10 percent goal as a means of evaluating the overall performance of the DBE program nationwide. For example, if nationwide DBE participation were to drop precipitously, the Department would reevaluate its efforts to ensure nondiscriminatory access to DOT-assisted contracting opportunities.

Section 26.43 states flatly that recipients are prohibited from using quotas under any circumstances. The section also prohibits set-asides except in the most extreme circumstances where no other approach could be expected to redress egregious discrimination. Section 26.45 makes clear that in setting overall goals, recipients aspire to achieving only the amount of DBE participation that would be obtained in a nondiscriminatory market. Recipients are not to simply pick a number representing a policy objective or responding to any particular constituency.

Section 26.53 also outlines what bidders must do to be responsive and responsible on DOT-assisted contracts having contract goals. They must make good faith efforts to meet these goals. Bidders can meet this requirement either by having enough DBE participation to meet the goal or by documenting good faith efforts, even if those efforts did not actually achieve the

goal. These means of meeting contract goal requirements are fully equivalent. Recipients are prohibited from denying a contract to a bidder simply because it did not obtain enough DBE participation to meet the goal. Recipients must seriously consider bidders' documentation of good faith efforts. To make certain that bidders' showings are taken seriously, the rule requires recipients to offer administrative reconsideration to bidders whose good faith efforts showings are initially rejected.

These provisions leave no room for doubt: there is no place for quotas in the DOT DBE program. In the Department's oversight, we will take care to ensure that recipients implement the program consistent with the intent of Congress and these regulatory prohibitions.

2. Sanctions for Recipients Who Fail To Meet Overall Goals

SNPRM Comments: The issue of sanctions for recipients who fail to meet overall goals was not a subject of comments on the SNPRM. Since the Department has never imposed such sanctions, this absence of comment is not surprising.

Congressional Debate: DBE program opponents asserted, in connection with their argument that the DBE program is a quota program, that the Department could impose sanctions for failure to meet goals. "The goals have requirements and the real threat of sanctions," Senator McConnell said. (S1488). Citing a provision of a Federal Highway Administration (FHWA) manual saying that if "a state has violated or failed to comply with Federal laws or * * * regulations," FHWA could withhold Federal funding, Senator McConnell said,

In other words, there are sanctions. The same threats appear in * * * the Federal transportation regulations * * * When the Federal government is wielding that kind of weapon from on high, it does not have to punish them. A 10 percent quota is still a quota, even if the States always comply and no one is formally punished. (Id.)

Defenders of the DBE program pointed out that the Department had never punished a recipient for failing to meet an overall goal (e.g., Rep. Tauscher, H2001; Senator Boxer, S1433). Senator Domenici asked Secretary Slater and Attorney General Reno whether there are sanctions, penalties, or fines that may be (or ever have been) imposed on a recipient who does not meet DBE program goals. He entered the following reply in the record:

No state has ever been sanctioned by DOT for not meeting its goals. Nothing in the

statute or regulations imposes sanctions on any state recipient that has attempted in good faith, but failed, to meet its self-imposed goals. (S1427).

Senator Lieberman added that if states fail to meet their own goals, "there is no Federal sanction or enforcement mechanism." (S1493).

DOT Response: The Department has never sanctioned a recipient for failing to meet an overall goal. We do not intend to do so. To eliminate any confusion, we have added a new provision (§ 26.47) that explicitly states that a recipient cannot be penalized, or treated by the Department as being in noncompliance with the rule, simply because its DBE participation falls short of its overall goal. For example, if a recipient's overall goal is 12 percent, and its participation is 8 percent, the Department cannot and will not penalize the recipient simply because its actual DBE participation rate was less than its goal.

Overall goals are not quotas, and the Department does not sanction recipients because their participation levels fall short of their overall goals. Of course, if a recipient does not have a DBE program, does not set a DBE goal, does not implement its DBE program in good faith, or discriminates in the way it operates its program, it can be found in noncompliance. But its noncompliance would never be having failed to "make a number."

3. Economic Disadvantage

SNPRM Comments: Some commenters favored eliminating the presumption of economic disadvantage, saying that applicants should have to prove their economic disadvantage. Other commenters favored obtaining additional financial information from applicants so that, even if the presumption remained in force, recipients would have a better idea of whether applicants really were disadvantaged. The question of the standard for determining disadvantage generated substantial comment, with some commenters favoring, and others objecting to, the proposed use of a personal net worth standard to assist recipients in determining whether an applicant was economically disadvantaged. There was also disagreement among commenters concerning the level at which such a standard should be set (e.g., \$750,000, or something higher or lower). These comments, and the Department's response to them, are further discussed in the section-by-section analysis for § 26.67.

Congressional Debate: The Congress debated the topic of who is regarded as

economically disadvantaged under the statute. DBE opponents, including Senators Ashcroft (S1405) and McConnell (S1418) and Representative Cox (H2004), asserted that outrageously rich people could be eligible to participate as DBEs, frequently using the Sultan of Brunei as an example. The basic thrust of their argument was that if the program does not exclude wealthy members of the designated groups—meaning those who are not, in fact, disadvantaged—then it is "overinclusive" and therefore not narrowly tailored. Senator McConnell added that, because the Department's SNPRM did not include a specific dollar amount for a cap on personal net worth, it would not be effective. (S1486). On the other hand, DBE program supporters cited the SNPRM's proposed net worth cap as an effective device to stop wealthy people from participating in the program. These included Minority Leader Daschle (with a reference to a letter from the Associate Attorney General, S1413), Senator Baucus (S1414, S1423), Senator Lieberman (S1493), Senator Boxer (S1433), and Senator Moseley-Braun, who responded to the Sultan of Brunei example by noting that the program was directed primarily at U.S. citizens (S1420).

DOT Response: The final rule (§ 26.67) specifically imposes a personal net worth cap of \$750,000. This means that, regardless of race, gender or the size of their business, any individual whose personal net worth exceeds \$750,000 is not considered economically disadvantaged and is not eligible for the DBE program. The provision also makes it much easier for recipients to determine whether an individual's net worth exceeds the cap. Applicants will have to submit a statement of personal net worth and supporting documentation to the recipient with their applications. If the information shows net worth above the cap, the recipient would rebut the presumption based on the information in the application itself and the individual would not be eligible for the program. In such a case, it would not be necessary for a third party to challenge the economic disadvantage of an applicant in order to rebut the presumption. While there have been very few documented cases of wealthy individuals seeking to take advantage of the Department's program, the revised provisions of part 26 virtually eliminate even the possibility of this type of abuse.

4. Social Disadvantage

SNPRM Comments: A few commenters suggested that the

presumption of social disadvantage, as well as that of economic disadvantage, be eliminated, so that applicants would have to demonstrate both elements of disadvantage. Any presumption of disadvantage tied to a racial classification, in the view of some of these commenters, undermined the constitutionality of the program. Other commenters noted that persons who are not members of the presumptively disadvantaged groups can be eligible and, in some cases, suggested that the criteria for evaluating such applications be clarified.

Congressional Debate: The presumption of social disadvantage drew fire from DBE program opponents because it was allegedly overinclusive. For example, Senator McConnell produced a map illustrating the over 100 countries of origin leading to inclusion in one of the presumed socially disadvantaged groups, pointing out that people from some countries (e.g., Pakistan) are presumed to be socially disadvantaged while those from other countries (e.g., Poland) are not. (S1418). Senator McConnell said that there was no basis for selecting this definition over any other. (Id.) Senator Hatch also listed the countries from which Asian-Pacific Americans and Subcontinent Asian-Americans can originate, suggesting that it was inappropriate to create "all kinds of special interest groups who are vying for these programs." (S1411).

DBE proponents responded that discrimination against minorities and women in general, and against specific minorities in particular (e.g., African Americans) was very real and formed a basis for the presumption of social disadvantage (see discussion below concerning the existence of discrimination). Senator Baucus also noted that this presumption could be overcome. (S1402).

Opponents also charged that the presumption of social disadvantage was underinclusive; that is, "you underinclude people who have a right to be included in the bid process." (Senator McConnell, S1399). The people who are not included who have a right to be, in the view of opponents, are white males (e.g., Senator Sessions' reference to testimony from Adarand Constructors' owner, S1400). Senator Kennedy disagreed with this assertion, saying

Of course, this program doesn't just help women and minorities. It extends a helping hand to firms owned by white males, as well. They can be certified to [participate] if they prove that they have been disadvantaged. Just ask Randy Pech—owner of the Adarand

Construction Firm—because he is currently seeking certification. (S1482).

Senator Domenici was interested in the same question, and entered into the record the following response from Secretary Slater and Attorney General Reno:

Any individual owning a business may demonstrate that he is socially and economically disadvantaged, even if that individual is not a woman or a minority. Both the current and proposed regulations provide detailed guidance to recipients to assist them in making individual determinations of disadvantaged status. And, in fact, businesses owned by white males have qualified for DBE status. (S1427).

DOT Response: By having passed the DBE statutory provision, after lengthy and specific debate, Congress has once again determined that members of the designated groups should be presumed socially disadvantaged. All of these groups are specifically incorporated by reference in the legislation that Congress debated and approved. This presumption (i.e., a determination that it is not necessary for group members to prove individually that they have been the subject of discrimination or disadvantage) is based on the understanding of Members of Congress about the discrimination that members of these groups have faced. The presumption is rebuttable in the DOT program. If a recipient or third party determines that there is a reasonable basis for concluding that an individual from one of the designated groups is not socially disadvantaged, it can pursue a proceeding under § 26.87 to remove the presumption. Likewise, a white male, or anyone else who is not presumed to be disadvantaged, can make an individual showing of social and economic disadvantage and participate in the program on the same basis as any other disadvantaged individual (see § 26.67).

5. The "Low-Bid System"

SNPRM Comments: Non-DBE contractors expressed concern that a variety of provisions under the program and the SNPRM adversely affected the low-bid system, including contract goals, evaluation credits, and good faith efforts guidance concerning prime contractors' handling of subcontractor prices and consideration of other bidders' success in meeting goals.

Congressional Debate: Opponents of the DBE program assert that the program results in white male contractors not receiving contracts they would otherwise expect to receive. Senator Sessions cited the statement of the Adarand company to this effect. (S1400). Senator Ashcroft said that "if two bids come in from two

subcontractors, one owned by a white male and the other by a racial minority, and the bids are the same, or even close, the job will go to the minority-owned company, not the low bidder." (S1405). Senator Gorton inserted into the record letters from a Spokane subcontractor asserting that, in a number of cases, it had lost subcontracts to DBE firms despite having a lower quote. (S1415–16). Representative Roukema also cited examples of firms who made similar assertions. (H2000).

In contrast, DBE program proponents argued that the program was about leveling the playing field for DBEs. Senator Moseley-Braun cited letters from her constituents for the point that

* * * the DBE program is not about taking away contracts from qualified male-owned businesses and handing them over to unqualified female-owned firms. The program is not about denying contracts to Caucasian low bidders in favor of higher bids that happen to have been submitted by Hispanics or African Americans or Asians or women. (S1420).

Without such a program, her constituents' letters said, they would lose the chance to compete. (Id.). Citing testimony from a Judiciary Committee hearing, Senator Kennedy noted that it was the experience of some DBEs that white male prime contractors had accepted higher bids from other firms to avoid working with DBEs. (S1430).

Why would a general contractor accept a higher bid? It doesn't make sense unless you remember that the traditional business network doesn't include women or minorities * * * [A woman business owner testified] that some general contractors would rather lose money than deal with female contractors. (Id.)

DOT Response: For the most part, statutory low-bid requirements exist only at the prime contracting level. That is, state and local governments, in awarding prime contracts, must select the low bidder in many procurements (there may be exceptions in some types of purchases). Nothing in this regulation requires, under any circumstances, a recipient to accept a higher bid for a prime contract from a DBE when a non-DBE has presented a lower bid. This rule does not interfere with recipients' implementation of state and local low-bid legislation.

The selection of subcontractors by a prime contractor is typically not subject to any low-bid requirements under state or local law. Prime contractors have unfettered discretion to select any subcontractor they wish. Price is clearly a key factor, but nothing legally compels a prime contractor to hire the subcontractor who makes the lowest quote. Other factors, such as the prime

contractor's familiarity and experience with a subcontractor, the quality of a subcontractor's work, the word-of-mouth reputation of the subcontractor in the prime contracting community, or the prime's comfort or discomfort with dealing with a particular subcontractor can be as or more important than price in some situations. It is in this context that § 26.53 requires that prime contractors make good faith efforts to achieve DBE contract goals. The rule does not require that recipients ignore price or quality, let alone obtain a certain amount of DBE participation without regard to other considerations. The good faith efforts requirements are intended to ensure that prime contractors cannot simply refuse to consider qualified, competitive DBE subcontractors. At the same time, the good faith efforts waiver of contract goals serves as a safeguard to ensure that prime contractors will not be forced into accepting an unreasonable or excessive quote from a DBE subcontractor.

6. Constitutionality

SNPRM Comments: Non-DBE contractors and their groups argued that the SNPRM proposals, particularly with respect to overall goals and the use of race-conscious measures, failed to meet the *Adarand* narrow tailoring test. Many of these commenters said that the overall goals were suspect because they did not adequately consider the capacity of DBEs to perform contracts and *Adarand* requires that race-conscious measures may be used only after a recipient has demonstrated that race-neutral means have failed. The use of presumptions based on racial classifications was viewed as intrinsically unconstitutional by these commenters, many of whom cited the language of Judge Kane's decision in the *Adarand* remand to this effect. Some commenters also contended that, absent recipient-specific findings of compelling need, the program could not be constitutional. They said that existing information alleging compelling interest—such as various disparity studies or information compiled by the Department of Justice—was inadequate to meet the compelling interest test. DBEs and recipients who commented defended the constitutionality of the program, often citing experience with discrimination in the marketplace and contending that the SNPRM succeeded in narrowly tailoring the program.

Congressional Debate: Proponents and opponents of the DBE program extensively debated the constitutionality of the DBE statutory provision and the entire DBE program. Generally, opponents argued that the

Supreme Court and District Court decisions in *Adarand* rendered the program unconstitutional, while proponents said that the decisions did not have that effect.

Proponents and opponents of the DBE program agreed that the Supreme Court's *Adarand* decision established a two-part test for the constitutionality of a program that uses a racial classification. The program must be based on a compelling governmental interest and be narrowly tailored to further that interest (e.g., Senator McConnell, S1396; Senator Baucus, S1403). Opponents relied on the finding of a Colorado district court on remand that the program was not narrowly tailored and was thus unconstitutional (Senator McConnell, S 1396; Senator Ashcroft, S1405). Proponents replied that the remand decision represented the views of only one district court (Senator Baucus, S1403), that it failed to properly apply the reasoning of the Supreme Court decision with respect to narrow tailoring (Senator Domenici, S1425), and that the Department's forthcoming regulations would ensure that the program was narrowly tailored (see discussion below).

A. Compelling Interest

(1) *Existence of Discrimination.* Proponents (and some opponents) of the DBE provision said that discrimination and/or disadvantage with respect to minorities and/or women persists. In the House, these included Representative Roukema (H2000–01), Representative Norton (H2003), Representative Poshard (H2003), Representative Menendez (H2004), Representative Davis of Illinois (H2005), Representative Boswell (H2005), Representative Lampson (H2006), Representative Kennedy (H2006), Representative Jackson-Lee (H2006), Representative Edwards (H2007), Representative Andrews (H2007), Representative Rodriguez (H2008), Representative Towns (H2010), Representative Dixon (H2010), and Representative Millender-McDonald (H2011). DBE opponents typically remained silent on this point, neither affirming nor denying the existence of discrimination against women and minorities.

There was a similar pattern in the Senate debates. Opponents typically did not address the present existence of discrimination or disadvantage with respect to minorities and women or its continuing effects, spoke of such discrimination as something that existed in the past (Senator Sessions, S1399; Senator Hatch, S1411), or asserted that race-based disadvantage or

discrimination no longer exists (Senator Ashcroft, S1406).

The Senators who said that such discrimination persists included Senator Baucus (S1403, S1413, S1496), Senator Warner (S1403), Senator Kerry (S1408), Senator Wellstone (S1410), Senator Moseley-Braun (S1419–20), Senator Robb (S1422); Senator Brownback (S1423–24), Senator Domenici (S1425–26), Senator Kennedy (S1429–30, S1482), Senator Specter (S1485), Senator McCain (S1489), Senator Lautenberg (S1490), Senator Durbin (S1491), Senator Daschle (S1492), Senator Lieberman (S1493), Senator Bingaman (S1494), Senator Murray (S1495), and Senator Dorgan (S1495).

(2) *Evidence of discrimination or disadvantage.* In comments on the passage of the TEA–21 conference report in the Senate, Senator Chafee noted a Colorado Department of Transportation disparity study that found a disproportionately small number of women- and minority-owned contractors participating in that state's highway construction industry. More than 99 percent of contracts went to firms owned by white men. (Congressional Record, May 22, 1998; S5413). In the House discussion of the conference report, Representative Norton presented an extensive summary of relevant evidence of discrimination forming the basis for a compelling need for the DBE program. (H3957).

Throughout the debate, the Members who affirmed the existence of discrimination and/or disadvantage asserted a number of factual bases for concluding that the DBE program was necessary. This information is largely drawn from the Senate debate; the briefer House debate contains less detail.

Senator Baucus cited disparities between the earnings of women and men and between the percentage of small businesses women own and the percentage of Federal procurement dollars they receive. He also noted that minorities make up 20 percent of the population, own 9 percent of construction businesses, and get only 4 percent of construction receipts. (S1403). Finally, Senator Baucus, via a letter from the Associate Attorney General, cited to numerous Congressional findings concerning the effects of discrimination in the construction industry and in DOT-assisted programs. (S1413).

Senator Kerry added that women own 9.2 percent of the nation's construction firms but their companies earn only about half of what is earned by male-owned firms. (S1409). Senator Robb

commented that the evidence of racially based disadvantage is "compelling and disturbing." He continued, stating that, "White-owned construction firms receive 50 times as many loan dollars as African-American owned firms that have identical equity." (S1422). Senator Kennedy said that the playing field for women and minorities and other victims of discrimination was still not level. Job discrimination against minorities and the "glass ceiling" for women still persisted, he said, adding that "Nowhere is the deck stacked more heavily against women and minorities than in the construction industry." (S1429). He cited a number of instances in which minority or female contractors encountered overt discrimination in trying to get work. (S1429-30).

Senator Lautenberg said that, for transportation-related contracts, minority-owned firms get only 61 cents for every dollar of work that white male-owned businesses receive. The comparable figure for women-owned firms was 48 cents. He also mentioned that "women-owned businesses have a lower rate of loan delinquency, yet still have far greater difficulty in obtaining loans." (S1490). He then spoke of the continuing effects of past discrimination:

Jim Crow laws were wiped off the books over 30 years ago. However, their pernicious effects on the construction industry remain. Transportation construction has historically relied on the old boy network which, until the last decade, was almost exclusively a white, old boy network. * * * This is an industry that relies heavily on business friendships and relationships established decades, sometimes generations, ago—years before minority-owned firms were even allowed to compete. (Id.)

Senator Durbin referred to recent studies concerning job bias against minorities and women. (S1491). Senator Lieberman referred generally to previous Congressional committee findings and testimony concerning still-existing barriers to full participation for minorities and women. (S1493). He also cited the May 1996 Department of Justice survey of discrimination and its effects in business and contracting. He referred to a recent study in Denver showing that African Americans were 3 times, and Hispanics 1.5 times, more likely than whites to be rejected for business loans. Senator Daschle summed up by saying, "[t]here is clearly a compelling interest in addressing the pervasive discrimination that has characterized the highway construction industry." (S1492).

Throughout the portion of the debate described above, many of the Members stressed that goal-based programs like

the DBE program were the only effective way to combat the continuing effects of discrimination.

Senator Baucus cited the experience of Michigan, in which DBE participation in the state-funded portion of the highway program fell to zero in a nine-month period after the state terminated its DBE program, while the Federal DBE program in Michigan was able to maintain 12.7 percent participation. (S1404). Senator Kerry also raised the Michigan example, and went on to cite similar sharp decreases in DBE participation when Louisiana, Hillsborough County, Florida, and San Jose, California, eliminated affirmative action programs covering state- and locally-funded programs. Senator Kerry asked rhetorically:

* * * is that just the economy of our country speaking, an economy at one moment that is capable of having 12 percent and at another moment, where they lose the incentive to do so, to drop down to zero, to drop down by 99 percent, to drop down by 80 percent, to have .4 at the State level while at the Federal level there are 12 percent? You could not have a more compelling interest if you tried. * * * (S1409-10).

Senator Moseley-Braun added the examples of Arizona, Arkansas, Rhode Island, and Delaware to the jurisdictions cited by other members where state-funded projects without a DBE program have significantly less DBE participation than Federally funded projects subject to the DBE program. She added, "Where there are no DBE programs, women- and minority-owned small businesses are shut out of highway construction." (S1420-21). Senator Kennedy added Nebraska, Missouri, Tampa and Philadelphia to the list of jurisdictions that experienced precipitous drops in DBE participation after goals programs ended. (S1429-30; S1482). He also cited comments from DBE companies that goal programs were needed to surmount discrimination-related barriers. (S1482). Senator Domenici repeated many of the same points as previous DBE proponents concerning the basis for concluding that the program was needed (S1426), as did Senator Kempthorne. (S1494).

Senator Robb emphasized that the DBE program was essential to combating discrimination and ensuring economic opportunity, explicitly linking the fall-off in DBE participation to continuing discrimination:

Where DBE programs at the State level have been eliminated, participation by qualified women and qualified minorities in government transportation contracts has plummeted. There is no way to know whether this discrimination is intentional or subconscious, but the effect is the same. This

experience demonstrates the sad but inescapable truth that, when it comes to providing economic opportunities to women and minorities, passivity equals inequality. (S1422).

3. *Narrow tailoring.*—DBE proponents cited the Department's proposed DBE rule as the vehicle that would ensure that the DBE program would be narrowly tailored. They cited features of the SNPRM including a new mechanism for calculation of overall goals, giving priority to race-neutral measures in meeting goals, a greater emphasis on good faith efforts, DBE diversification, added flexibility for recipients, net worth provisions, ability to challenge presumptions of social and economic disadvantage, and flexibility in goal-setting. In comments on the Senate consideration of the TEA-21 conference report, Senator Baucus concluded by saying:

As I explained in my statements during the debate on the McConnell amendment * * * the program is narrowly tailored, both under the current and the new regulations, which emphasize flexible goals tied to the capacity of firms in the local market, the use of race-neutral measures, and the appropriate use of waivers for good faith efforts. (Congressional Record, May 22, 1998; S5414).

Following Senator Baucus' remarks, Senator Chafee, Chairman of the committee of jurisdiction, requested that he be associated with Senator Baucus' remarks on constitutionality. (S5414).

DBE opponents denied that regulatory change could result in a narrowly tailored program. Senator Smith said "The administration's attempt to comply with the Court's decision by fiddling around with the DOT regulations does not meet the constitutional litmus test." (S1398). The most frequent argument against the efficacy of regulatory change was that a racial classification is inherently unable to be narrowly tailored. (Senator Sessions, S1399-1400; Senator Ashcroft, S1407).

DOT Response: The 1998 debate over DBE legislation was the most thorough in which Congress has engaged since the beginning of the program. The record of this debate clearly supports the Department's view that there is a compelling governmental interest in remedying discrimination and its effects in DOT-assisted contracting. Congress clearly determined that real, pervasive, and injurious discrimination exists. Congress backed up that determination with reference to a wide range of factual material, including private and public contracting, DOT-assisted and state- and locally-funded programs and the financing of the contracting industry. By retaining the DBE statutory provisions

against this factual background, Congress clearly found that there was a compelling governmental interest in having the program.

The courts, including the court in the *Adarand Constructors Inc. v. Peña*, 965 F.Supp. 1556 (D. Colo., 1997) and the court in *In re: Sherbrooke Sodding*, 6–96–CV–41 (D. Minn. 1998), agree that Congress has the power to legislate on a nationwide basis to address nationwide problems. Congress has a unique role as the national legislature to look at the whole of the United States for the basis to find a compelling governmental interest supporting the use of race-based remedies. Congress is not required to make particularized findings of discrimination in individual localities to which a nationwide program may apply. Nor is Congress required to find that the Federal government itself has discriminated before applying a race-conscious remedy. (Id. at 1573).

Having reviewed the extensive evidence of discrimination and its relationship to DOT-assisted contracting, the District Court in *Adarand* determined that current and previous DBE provisions were a “considered response by Congress to the effects of discrimination on the ability of minorities to participate in the mainstream of federal contracting.” (Id. at 1576). The court stated that “Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a ‘compelling governmental interest.’” (Id. at 1577). The extensive Congressional debate and information supporting the enactment of the 1998 DBE provision significantly strengthens the existing basis for declaring that this program serves a compelling governmental interest.

The basis for District Court’s view that the program at issue in *Adarand* is unconstitutional is stated most clearly in the following passage:

Contrary to the [Supreme] Court’s pronouncement that strict scrutiny is not ‘fatal in fact,’ I find it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such [a] program is both underinclusive and overinclusive. (Id. at 1580).

By underinclusive, the court said it meant that caucasians and members of non-designated minority groups are excluded. By overinclusive, it said it meant that all the members of the designated groups are presumed to be economically and/or socially disadvantaged, without Congress having inquired whether a particular entity seeking a racial preference has suffered from the effects of past discrimination (citing the Supreme Court’s *Croson*

decision, which concerned the powers of state and local governments to use race-based remedies). (Id.)

As Senator Domenici pointed out (S1425), the key words in the District Court’s opinion are “Contrary to the [Supreme] Court’s pronouncement. * * *” The District Court’s analysis departs markedly from the controlling decision of the Supreme Court on this issue (*Adarand v. Peña*, 515 U.S. 200 (1995)). The Supreme Court’s language with which the District Court disagreed is the following:

Finally, we wish to dispel the notion that strict scrutiny is “strict in theory, but fatal in fact.” [citation omitted] The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it * * * When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the “narrow tailoring” test this Court has set out in previous cases. (515 U.S. at 237).

The Supreme Court evidently considers the “not fatal in fact” language to have continuing vitality, having cited it in a subsequent case (*U.S. v. Virginia*, 518 U.S. 515, note 6 (1996)).

Under the District Court’s analysis, Congress could never use a race-based classification, no matter how compelling the need, because any such classification would intrinsically fail to be narrowly tailored. This approach effectively moots the determination of whether there is a compelling governmental interest. The Supreme Court’s approach, by contrast, permits a racial classification to be used, given the existence of a compelling interest, if it is narrowly tailored.

What is the test for narrow tailoring? As set forth in *United States v. Paradise*, 480 U.S. 149, 171 (1987), the test includes several factors: “the necessity for relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the goals to the relevant labor market; and the impact of the relief on the rights of third parties.” In *Adarand*, the Supreme Court specifically invited inquiry into whether there was any consideration of the use of race-neutral means to increase minority business participation (related to the efficacy of alternative remedies) and whether the program was appropriately limited so that it will not last longer than the discrimination it is designed to eliminate (related to the duration of relief). (515 U.S. at 238).

This final rule successfully addresses each element of this test:

- *The necessity of relief.* Throughout the debate on the compelling governmental interest, the bipartisan majority of both houses of Congress repeatedly described the necessity of the DBE program’s goal-based approach to remedying the effects of discrimination in DOT-assisted contracting. The most significant evidence demonstrating the necessity of a goal-oriented program is the evidence cited of the fall-off in DBE participation in state contracting when goal-oriented programs end, compared to participation rates in the Federal DBE program.

- *Efficacy of alternative remedies.* This element of the narrow tailoring standard is related to the Supreme Court’s inquiry concerning race-neutral programs. Under § 26.51 of this rule, recipients are required to meet the maximum feasible portion of their overall goals by using race-neutral measures. Recipients are not required to have contract goals on each contract. Instead, they are instructed to use contract goals only for any portion of their overall goal they cannot meet through race-neutral measures. Contract goals are intended as a safety net to be used when race-neutral means are not effective to ensure that a recipient can achieve “level playing field.” Moreover, the regulations provide that recipients must reduce the use of contract goals when other means are sufficient to meet their overall goals. This ensures that race-conscious relief is used only to the extent necessary and is replaced by race-neutral as quickly as possible.

- *Flexibility of relief.* Flexibility is built into the program in a variety of ways. Recipients set their own goals, based on local market conditions; their goals are not imposed by the federal government nor do recipients have to tie them to any uniform national percentage. (§ 26.45). Recipients also choose their own method for goal setting and can choose to base the goal on the evidence that they believe best reflects their market conditions. (§ 26.45). Recipients have broad discretion to choose whether or not to use a goal on any given contract, and if they do choose to use a contract goal, they are free to set it at any level they believe is appropriate for the type and location of the specific work involved. (§ 26.51). The rule also ensures flexibility for contractors by requiring that any contract goal be waived entirely for a prime contractor that demonstrates that it made good faith efforts but was still unable to meet the goal. (§ 26.53). The rule also allows recipients that believe they can achieve equal opportunity for DBEs through different approaches to get waivers releasing

them from almost any of the specific requirements of the rule. (§ 26.103). Recipients can also get exemptions from the rule if they have unique circumstances that make complying with the rule impractical. (§ 26.103).

- *Duration of relief.* The TEA-21 DBE program will end in 2004 unless reauthorized by the Congress. In each successive reauthorization bill for the surface transportation and airport programs, Congress will have the opportunity to examine the current state of transportation contracting and determine whether the DBE program statutes are still necessary to remedy the continuing effects of discrimination. In addition, the duration of relief for individuals and firms are limited by the personal net worth threshold and business size caps. When an individual's personal wealth grows beyond the threshold, he or she will lose the presumption of disadvantage. (§ 26.67). Similarly, when a firm's receipts grows beyond the small business size standards, it loses its eligibility to participate in the program. (§ 26.65). Finally, to ensure that race-conscious remedies are not used any longer than absolutely necessary, § 26.51 requires recipients to reduce the use of contract goals and rely on race-neutral measures to the extent that they are effective.

- *Relationship of goals to the relevant market.* The overall goal setting provisions of § 26.45 require that recipient set overall goals based on demonstrable evidence of the relative availability of ready, willing and able DBEs in the areas from which each recipient obtains contractors. These provisions ensure that there is as close a fit as possible between the goals set by each recipient and the realities of its relevant market. When a recipient sets contract goals, § 26.51 provides that these goals are to be set realistically in relation to the availability of DBEs for the type and location of work involved.

- *Impact of relief on the rights of third parties.* The legitimate interests of third parties (e.g., prime contractors, non-DBE subcontractors) are only minimally impacted by the DBE program, since the program is aimed at replicating a market in which there are no effects of discrimination and the program affects only a relatively small percentage of total federal-aid funds. The design of the overall and contract goal provisions ensures that the use of race-conscious remedies having the potential to affect the interests of third parties is limited to the extent necessary to counter the effects of discrimination. Individual prime contractors are further protected from suffering any undue

burdens by § 26.51, which prevents a prime contractor from losing a contract if it made good faith efforts but was still unable to meet a goal. Non-DBE firms are also protected by § 26.33, which directs recipients to take appropriate steps to address areas of overconcentration of DBE firms in certain types of work that could unduly burden non-DBE firms seeking the same type of work.

- *Inclusion of appropriate beneficiaries.* The certification provisions of Subparts D and E, and particularly the social and economic disadvantage provisions of § 26.67, ensure that only firms owned and controlled by individuals who are in fact socially and economically disadvantaged can participate in the program. Eligibility provisions guard against overinclusiveness by ensuring that individuals with too great net worth are not presumed disadvantaged and by permitting the recipient—on its own initiative or as the result of a complaint—to follow procedures to rebut the presumption of social and/or economic disadvantage. They guard against underinclusiveness by permitting any business owner, including a white male, to demonstrate social and economic disadvantage on an individual basis.

Section-by-Section Analysis

Section 26.1 What Are the Objectives of This Part?

There were relatively few comments on this section of the SNPRM, most of which agreed with the proposed language. We have adopted the suggestion of some commenters that specific reference be made to the role of the DBE program in helping DBEs overcome barriers (e.g., access to capital and bonding) to equal participation. We have also added a specific reference to the role of the program in creating a level playing field on which DBEs can compete fairly for DOT-assisted contracts. Some non-DBE contractors urged that language be added to explicitly oppose "reverse discrimination." The rule clearly states that nondiscrimination is the program's first objective and the Department reiterates here that it opposes unlawful discrimination of any kind.

Section 26.3 To Whom Does This Part Apply?

This provision is unchanged from the SNPRM, except for references to the new TEA-21 statutory provisions. A few commenters wanted this provision to apply to Federal Railroad Administration (FRA) programs, as did

the original version of former part 23. However, FRA does not have specific statutory authority for a DBE program parallel to the TEA-21 language. One commenter asked if the language saying that DBE requirements do not apply to contracts without any DOT funding is inconsistent with Federal Transit Administration (FTA) guidance on applicability. While the structure of the FTA program is such that FTA funds are commingled with local funds in many transit authority contracts (e.g., any contract involving FTA operating assistance funds), to which DBE requirements would apply, a contract which is funded entirely with local funds—and without any Federal funds—would not be subject to requirements under this rule.

Section 26.5 What Do The Terms Used in This Part Mean?

There were relatively few comments on the definitions proposed in the SNPRM. One commenter wanted to substitute the term "historically underutilized business" for DBE. Given the continued use of the DBE term in Congressional consideration of the program, the continued use of the "socially and economically disadvantaged individuals" language in the statute, and the familiarity of concerned parties with the DBE term, we do not believe changing the term would be a good idea.

A few commenters asked for additional definitions or elaboration of existing definitions (e.g., "form of arrangement," "financial assistance program," "commercially useful function"). These terms are either already defined sufficiently or are best understood in context of the operational sections in which they are embedded, and abstract definitions in this section would not add much to anyone's ability to make the program work well. Consequently, we are not adding them. Otherwise the final rule adopts the SNPRM proposals for definitions with only minor editorial changes.

The Department has added, for the sake of clarity and consistency with other Federal programs, definitions of the terms Alaskan native, Alaskan native corporation (ANC), Indian tribe, immediate family member, Native Hawaiian, Native Hawaiian organization, principal place of business, primary industry classification, and tribally-owned concern. These definitions are taken from the SBA's new small disadvantaged business program regulation (13 CFR § 124.3). The definitions of the designated groups included in the definition of "socially

and economically disadvantaged individual” also derive from the SBA regulations, as the Department’s DBE statutes require. We believe these will be useful terms of art in implementing the DBE program.

A few commenters requested definitions for the terms “race-conscious” and “race-neutral,” and we have provided definitions. A race-conscious program is one that focuses on, and provides benefits only for, DBEs. The use of contract goals is the primary example of a race-conscious measure in the DBE program. A race-neutral program is one that, while benefiting DBEs, is not solely focused on DBE firms. For example, small business outreach programs, technical assistance programs, and prompt payment clauses can assist a wide variety of small businesses, not just DBEs.

Section 26.7 What Discriminatory Actions Are Forbidden?

One commenter wanted to add prohibitions of discrimination based on age, disability and religion. The Department is not doing so, because discrimination on these grounds is already prohibited by other statutes (e.g., the Americans with Disabilities Act with respect to disability). Also, statutes which form the basis for this rule focus on race, color, national origin, and sex. Congress determined that remedial action focused on these areas is necessary. These grounds for discrimination are also most relevant to problems in the DBE program that have been alleged to exist (e.g., disparate treatment of DBE certification applicants by race or sex). Some opponents of the program said that the DBE program discriminates against non-DBEs. However, the Department believes that the program is constitutional and does not violate equal protection requirements. A reference to DOT Title VI regulations has been deleted as unnecessary; otherwise, this provision is the same as in the SNPRM.

Section 26.9 How Does the Department Issue Guidance and Interpretations Under This Part?

Commenters, most of whom were recipients, focused on two issues in this section. First, a majority of the comments favored the “coordination mechanism” concept for ensuring consistent DOT guidance and interpretations. The few that disagreed with this approach did so out of a concern that the mechanism would add delays to the process. These commenters favored additional training

or an 800 number hot line to speed up the process.

We believe that proper coordination of interpretations and guidance is vital to the successful implementation of this rule. As the preambles to the 1992 and 1997 proposed rules mentioned, inconsistent implementation of part 23 has been a continuing problem, which has been criticized by a General Accounting Office report and which has created unnecessary difficulty for recipients, contractors, and the Department itself. A process for ensuring that the Department speaks with one voice on DBE implementation matters, and for letting the public know when DOT has spoken, will greatly improve the service we give our customers.

We do not believe this coordination process will result in significant delays in providing guidance. Nor will it inhibit the ability of DOT staff and customers to communicate with one another. For example, the process does not apply to informal advice provided by staff to recipients or contractors over the phone or in a letter or e-mail. It does maintain, however, the important distinction between informal staff assistance on one hand and a binding institutional position on the other.

For clarity in the process, we have modified the language of the rule text to make clear that interpretations and guidance are binding, official Departmental positions if the Secretary signs them or if the document includes a statement that they have been reviewed and approved by the General Counsel. The General Counsel will consult fully with all concerned offices as part of this review process.

We intend to post significant guidance documents and interpretations on the Department’s web site to make them widely and quickly available. As some commenters suggested, we are also continuing to consider forming an advisory committee (or working group of an existing committee) to facilitate customer input into DBE program matters. This is separate from the coordination mechanism, however, which is an internal DOT process.

The rule’s provisions regarding exemptions and waivers, previously found in the SNPRM’s § 26.9 (c) and (d), are now included as a separate section at § 26.15.

Section 26.11 What Records do Recipients Keep and Report?

The Department asked, in the SNPRM, whether it would be advisable to have one standard reporting form for information about the DBE program. Currently, each operating

administration (OA) has its own reporting form and requirements. Virtually all the commenters that addressed this issue favored a single, DOT-wide reporting form. Commenters also had a wide variety of suggestions for what data should be reported, formats, and retention periods.

The Department is adopting the suggestion of having a single reporting form, which we believe will reduce administrative burdens for recipients, particularly those who receive funds from more than one OA. Because we do not want to delay the issuance of this rule while a form is being developed, we are reserving the date on which this single form requirement will go into effect. We will take comments on the specifics of reporting into account and consult with interested parties as we devise the form, which will be published subsequently in Appendix B to this rule. The Appendix will also address the issues of reporting frequency and record retention periods. Meanwhile, recipients will continue to report as directed by the concerned OA(s), using existing reporting forms.

The rule is also adding a requirement that recipients develop and maintain a “bidders” list. The bidders list is intended to be a count of all firms that are participating, or attempting to participate, on DOT-assisted contracts. The list must include all firms that bid on prime contracts or bid or quote subcontracts on DOT-assisted projects, including both DBEs and non-DBEs. Bidders lists appear to be a promising method for accurately determining the availability of DBE and non-DBE firms and the Department believes that developing bidders data will be useful for recipients. Creating and maintaining a bidders list will give recipients another valuable way to measure the relative availability of ready, willing and able DBEs when setting their overall goals. (See § 26.45). We realize that identifying subcontractors, particularly non-DBEs and all subcontractors that were unsuccessful in their attempts to obtain contracts, may well be a difficult task for many recipients. Mindful of that potential burden, the rule will not impose any procedural requirements for how the data is collected. Recipients are free to choose whether or not they wish to gather this data through their existing bidding and reporting processes. Recipients are encouraged to make use of all of the data already available to them and all methods of reporting and communication with their contracting community that they already have in place. In addition, the Department suggests that recipients consider using a widely publicized public notice or a

widely disseminated survey to encourage all firms that have bid or quoted contracts to make themselves known to recipients.

Once recipients have created the list of bidders, they will have to supplement that information with the age of each firm (since establishment) and the annual gross receipts of the firm (or an average of its annual gross receipts). Recipients can gather this additional information by sending a questionnaire to the firms on the list, or by any other means that the recipient believes will yield reliable information. The recipient's plan for how to create and maintain the list and gather the required information must be included in its DBE program.

Section 26.13 What Assurances Must Recipients and Contractors Make?

There were few comments on this section. Most of these supported the proposal. One comment suggested specific mention of prompt payment, but in view of the substantive requirements on this subject, we do not believe such a mention is needed. Some commenters favored requiring additional public participation as part of the assurance for recipients. Again, given substantive provisions of this rule concerning public participation, we do not believe that repetition here is needed. One commenter said that incorporating the requirements of part 26 in the contract was confusing, since many provisions of part 26 apply only to recipients. We have rewritten the assurance for contractors in response to this concern, specifying that contractors are responsible only for carrying out the requirements of part 26 that apply to them.

Section 26.15 How Can Recipients Apply for Exemptions or Waivers?

There has been some confusion as to this rule's distinction between exemption and waiver. Put simply, exemptions are for unique situations that are most likely not to be either generally applicable to all recipients or to have been contemplated in the rulemaking process. If such a situation occurs and it makes it impractical for a particular recipient to comply with a provision of part 26, the recipient should apply for an exemption from that provision. The waiver provision, by contrast, is not designed for extraordinary circumstances where a recipient may not be able to comply with part 26. Waiver is for a situation where a recipient believes that it can better accomplish the objectives of the DBE program through means other than the specific provisions of part 26.

There were a number of comments about the proposed program waiver provision. Most commenters on this issue favored the proposal, believing it could add flexibility to the way recipients implement the DBE program. A few commenters were concerned that too liberal use of the waiver provision might undermine the goals of the rule.

The Department believes that the waiver provision is an important aspect of the DBE program. The provision ensures that the Department and a recipient can work together to respond to any unique local circumstances. Recipients are encouraged to carefully review the circumstances in their own jurisdictions to determine what mechanisms are best suited to achieving compliance with the overall objectives of the DBE program. If a recipient believes it is appropriate to operate its program differently from the way that a provision of Subpart B or C provides, including, but not limited to, any provisions regarding administrative requirements, overall or contract goals, good faith efforts or counting provisions, it can apply for a waiver. For example, waiver requests could pertain to such subjects as the use of a race-conscious measure other than a contract goal, different ways of counting DBE participation in certain industries, use of separate overall or contract goals to address demonstrated discrimination against specific categories of socially and economically disadvantaged individuals, the use or wording of assurances, differences in information collection requirements and methods, etc.

The Department will, of course, carefully review any applications for waivers to make sure that innovative state or local programs are able to meet the objectives of the statutes and regulation. Decisions on waiver requests are made by the Secretary. This authority has not been delegated to other officials. The waiver provision, which the Department believes will help assist recipients to "narrowly tailor" the program to state and local circumstances and ensure nondiscrimination, remains in the final rule.

Section 26.21 Who Must Have a DBE Program?

The only substantive comment concerning this provision asked that Federal Railroad Administration (FRA) programs be included. The Department is not including FRA programs under this rule because FRA does not have a specific DBE program statute parallel to those covering the Federal Aviation Administration (FAA), FTA, and

FHWA. FRA could consider issuing a rule similar to part 26 under its own, separate statutory authority. The Department shortened paragraph (b)(1) to make it easier to understand. Within 180 days of the effective date of this rule, all recipients with existing programs must submit revised programs to the relevant OA for approval. The only changes from existing programs that recipients would have to make are changes needed to accommodate differences between former part 23 and part 26. Future new recipients would, of course, submit a DBE program as part of the approval process for financial assistance.

Section 26.23 What is the Requirement for a Policy Statement?

Section 26.25 What is the Requirement for a Liaison Officer?

Section 26.27 What Efforts Must Recipients Make Concerning DBE Financial Institutions?

There were no substantive comments concerning §§ 26.23–26.27, and the Department is adopting them as proposed.

Section 26.29 What Prompt Payment Mechanisms Must Recipients Have?

There was substantial comment on the issue of prompt payment. A majority of commenters supported the concept of prompt payment provisions. Some recipients pointed out that they already had prompt payment provisions on the books. DBEs generally supported mandating prompt payment provisions though they, as well as other commenters, recognized that slow payment is a problem affecting many subcontractors, not just DBEs. Some of these comments suggested making prompt payment requirements applicable to subcontracts in general, not just DBE subcontracts. Some recipients were concerned about getting in the middle of disputes between prime contractors and subcontractors. Some commenters wanted the Department to mandate prompt payment provisions, while others preferred that their use by recipients remain optional.

Having considered the variety of views expressed on this subject, the Department believes that prompt payment provisions are an important race-neutral mechanism that can benefit DBEs and all other small businesses. Under part 26, all recipients must include a provision in their contracts requiring prime contractors to make prompt payments to their subcontractors, DBE and non-DBE alike. It is clear that DBE subcontractors are significantly—and, to the extent that

they tend to be smaller than non-DBEs, disproportionately—affected by late payments from prime contractors. Lack of prompt payment constitutes a very real barrier to the ability of DBEs to compete in the marketplace. It is appropriate for the Department to require recipients to take reasonable steps to deal with this barrier. We recognize that delayed payments do not affect only DBE contractors; a prompt payment requirement applying to all subcontracts is an excellent example of a race-neutral measure that will assist DBEs, and we are therefore requiring that recipients' prompt payment mechanisms apply to all subcontracts on Federally-assisted contracts.

Paragraph (a) of this section requires recipients to put into their DBE programs a requirement for a prompt payment contract clause. This clause would appear in every prime contract on which there are subcontracting possibilities, and it would obligate the prime contractor to pay subcontractors within a given number of days from the receipt of each payment the recipient makes to the prime contractor. Payment is required only for satisfactory completion of the subcontractor's work. The clause would also apply to the return of retainage from the prime to the subcontractor. Retainage would have to be returned within a given number of days from the time the subcontractor's work had been satisfactorily completed, even if the prime contract had not yet been completed. A majority of commenters on the retainage issue favored a requirement of this kind.

The number of days involved would be selected by the recipient, subject to OA approval as part of the recipient's DBE program. In approving these time frames, the OAs will consider whether they are realistic and sufficiently brief to ensure genuinely prompt payment. Recipients who already operate under prompt payment statutes may use their existing authority in implementing this requirement. It may be necessary to add to existing contract clauses in some cases (e.g., if existing prompt payment requirements do not cover retainage).

Paragraph (b) lists a series of additional measures that the regulation authorizes, but does not require, recipients to use. These include alternative dispute resolution, holding of payments to primes until subcontractors are paid, and other mechanisms that the recipient may devise. All these mechanisms could be made part of the recipient's DBE programs.

Section 26.31 What Requirements Pertain to the DBE Directory?

Recipients maintain directories listing certified DBEs. The issue most discussed by commenters on this section was whether the directory should include material concerning the qualifications of the firm to do various sorts of work. For example, has the firm been pre-qualified by the recipient? Can it do creditable work? What kinds of work does the firm prefer to do? Some commenters also asked that the directory should list the geographical areas in which the firm is willing to work. Other commenters opposed the idea of including this kind of information in the directory.

The Department believes that the directory and the certification process are closely intertwined. The primary purpose of the directory is to show the results of the certification process. Consequently, the directory should list all firms that the recipient has certified, along with basic identifying information for the firm. Since certification under this rule pertains to the various kinds of work a firm's disadvantaged owners can control, it is important to list those kinds of work in the directory. For example, if a firm seeks to work in fields A, B, and C, but the recipient has determined that its disadvantaged owners can control its operations only with respect to A and B, then the directory would recite that the firm is certified to perform work as a DBE in fields A and B.

The focus of the directory is intended to be eligibility. A directory is a list of firms that have been certified as eligible DBEs, with sufficient identifying information to permit interested firms to contact the DBEs. We do not intend to turn a recipient's directory into a comprehensive business resource manual. For example, information about firms' qualifications, geographical preferences for work, performance track record, capitalization, etc. are not required to be part of the directory. Some commenters favored including one or more of these elements, but we are concerned that other business information—however useful in its own right—could clutter up the directory and dilute its focus on certification.

Section 26.33 What Steps Must a Recipient Take to Address Overconcentration of DBEs in Certain Types of Work?

For some time, the Department has heard allegations that DBEs are overconcentrated in certain fields of highway construction work (e.g., guardrail, fencing, landscaping, traffic

control, striping). The concern expressed is that there are so many DBEs in these areas that non-DBEs are frozen out of the opportunity to work. In an attempt to respond to these concerns, the SNPRM asked for comment on a series of options for "diversification" mechanisms, various incentives and disincentives designed to shift DBE participation to other types of work.

The Department received a great deal of comment on these proposals, almost all of it negative. There were few comments suggesting that overconcentration was a serious problem, and many comments said that the alleged problem was not real. Some FTA and FAA recipients said that if there was a problem with overconcentration, it was limited to the highway construction program. As a general matter, recipients said that the proposed mechanisms were costly, cumbersome, and too prescriptive.

Prime contractors opposed the provisions because they would make it more difficult for them to find DBEs with which to meet their goals, while DBEs opposed them because they felt the provisions would penalize success and force them out of areas of business in which they were experienced. Many commenters suggested using outreach or business development plans as ways of assisting DBEs to move into additional areas of work.

The Department does not have data from commenters or other sources to support a finding that "overconcentration" is a serious, nationwide problem. However, as part of the narrow tailoring of the DBE program, we believe it would be useful to give recipients the authority to address overconcentration problems where they may occur. In keeping with the increased flexibility that this rule provides recipients, we give recipients discretion to identify situations where overconcentration is unduly burdening non-DBE firms. If a recipient finds an area of overconcentration, it would have to devise means of addressing the problem that work in their local situations. Possible means of dealing with the problem could include assisting prime contractors to find DBEs in non-traditional fields or varying the use of contract goals to lessen any burden on particular types of non-DBE specialty contractors. While recipients would have to obtain DOT approval of determinations of overconcentration and measures for dealing with them, the Department is not prescribing any specific mechanisms for doing so.

Section 26.35 What Role do Business Development and Mentor-Protégé Programs Have in the DBE Program?

In the SNPRM, both mentor-protégé programs and business development programs (BDPs) were cast as tools to use for diversification. They still may be used for that purpose, as noted in § 26.33. However, the Department believes that they may have a broader application, and their use in the final rule is not limited to diversification purposes. BDPs, in particular, are good examples of race-neutral methods recipients can use to promote the participation of DBEs and other small businesses in their contracting programs.

There were few comments on these provisions. Recipients wanted flexibility, and suggested that these kinds of programs should be optional. Their comments said that such programs were resource-intensive, and that Federal financial assistance for them would be welcome. One contractors' organization offered its own mentor-protégé plan as a model. A few comments voiced suspicion of mentor-protégé plans, on the basis that they allowed fronts and frauds into the program.

The final rule makes the use of BDPs and mentor-protégé programs optional for recipients. An operating administration can direct a particular recipient to institute a BDP, but BDPs are not mandatory across the board. The operating administration would negotiate with the recipient before mandating a BDP.

One feature added to this provision allows recipients to establish a kind of mini-graduation requirement for firms that voluntarily participate in BDPs. One of the purposes of a BDP is to equip DBE firms to compete in the market outside the DBE program. Therefore, a recipient could ask BDP participants to agree—as a condition of receiving BDP assistance—to agree to leave the DBE program after a certain number of years, or after certain business development objectives had been achieved.

Standing alone, mentor-protégé programs are not an adequate substitute for the DBE program. While they can be an important tool to help selected firms, they cannot be counted on to level the playing field for DBEs in general. An effective mentor-protégé program requires close monitoring to guard against abuse, which further limits the number of DBEs they can assist. Even with these limits, a mentor-protégé program that has safeguards to prevent large non-DBE firms from circumventing the DBE program can be a useful

component of a recipient's overall strategy to ensure equal opportunities for DBEs.

The final rule includes safeguards intended to prevent the misuse of mentor-protégé programs. Only firms that a recipient has already certified as DBEs (necessarily including a determination that they are independent firms) can participate as protégés. This is intended to preclude non-DBE firms from creating captive DBE firms to serve as protégés. A non-DBE mentor firm cannot get credit for more than half its goal on any contract by using its own protégé. Moreover, a non-DBE mentor firm cannot get DBE credit for using its own protégé on more than every other contract performed by the protégé. That is, if Mentor Firm X uses Protégé Firm Y to perform a subcontract, X cannot get DBE credit for using Y on another subcontract until Y had first worked on an intervening prime contract or subcontract with a different prime contractor.

To make mentor-protégé relationships feasible, the rule provides that mentors and protégés are not treated as affiliates of one another for size determination purposes. Mentor-protégé programs and BDPs must be approved by the concerned operating administration before they take effect. Recipients who already have such programs in place would make them part of their revised DBE programs sent to the concerned OA within 180 days of the effective date of part 26.

Section 26.37 What Are a Recipient's Responsibilities for Monitoring the Performance of Other Program Participants?

The few comments on this section asked for more detail and clarification. In the interest of flexibility, the Department is reluctant to be prescriptive in the matter of monitoring and enforcement mechanisms. What we are looking for is a strong and effective set of monitoring and compliance provisions in each recipient's DBE program. These mechanisms could be most anything available to the recipient under Federal, state, or local law (e.g., liquidated damages provisions, responsibility determinations, suspension and debarment rules, etc.)

One of the main purposes of these provisions is to make sure that DBEs actually perform work committed to them at contract award. The results that recipients must measure consist of payments actually made to DBEs, not just promises at the award stage. Credit toward goals can be awarded only when payments (including, for example, the return of retainage payments) are

actually made to DBEs. Under the final rule, recipients would keep a running tally of the extent to which, on each contract, performance had matched promises. Prime contractors whose performance fell short of original commitments would be subject to the compliance mechanisms the recipient had made applicable.

Section 26.41 What Is the Role of the Statutory 10 Percent Goal in This Program?

This is a new section, intended to explain what role the 10 percent statutory goal plays in the DBE program. Under former part 23, the 10 percent figure derived from the statute had a role in the setting of overall goals by recipients. For example, if recipients had a goal of less than 10 percent, the rule required them to make a special justification.

This section makes clear that the 10 percent goal is an aspirational goal that applies to the Department of Transportation on a national level, not to individual recipients. It is a goal that the Department can use to evaluate its overall national success in achieving the objectives that Congress has established for this program. However, the national 10 percent goal is not tied to recipients' goal-setting decisions. Recipients set goals based on what will achieve a level playing field for DBEs in their own programs, without regard to the national goal. Recipients are not required to set their overall or contract goals at 10 percent or any other particular level. Recipients are no longer required to make a special justification if their overall goals are less than 10 percent.

As discussed in connection with the Congressional debate on the TEA-21 DBE provision, Congress viewed flexibility concerning the statutory 10 percent goal as an important feature of narrow tailoring and made clear that it was setting a national goal, not a goal for any individual recipient. The Department wants to ensure that state and local programs have sufficient flexibility to implement their programs in a narrowly tailored way. This section is part of the Department's effort toward that end.

Section 26.43 Can Recipients Use Quotas or Set-Asides as Part of This Program?

The DBE program has often been labeled as a "quota" or "set-aside" program, especially, though not exclusively, by its opponents. This label is, and always has been, incorrect. Fifteen years ago, in the preamble to the Department's first rule implementing a DBE statute, the Department carefully

specified that neither quotas nor set-asides were required (see 48 FR 33437-38; July 21, 1983). This remains true today. However, in light of *Adarand* and this year's Congressional debates on the DBE statutes, we believe this point deserves additional emphasis. This regulation prohibits quotas under any circumstances and makes clear that set-asides can only be used as a means of last resort for redressing egregious discrimination.

A number of non-DBE contractors and their organizations continued to assert, in comments on the SNPRM, that the DBE program operates as a quota program. This section makes clear that recipients cannot use quotas on DOT-assisted contracts under any circumstances. A quota is a simple numerical requirement that a recipient or contractor must meet, without consideration of other factors. For example, if a recipient sets a 12 percent goal on a particular contract and refuses to award the contract to any bidder who does not have 12 percent DBE participation, either refusing to look at showings of good faith efforts or arbitrarily disregarding them, then the recipient has used a quota. The Department's regulations have never endorsed this practice. The issue of good faith efforts is discussed further below in connection with § 26.51.

A set-aside is a very specific tool. A contracting agency sets a contract aside for DBEs if it permits no one but DBEs to compete for the contract. Firms other than DBEs are not eligible to bid. The Department's DBE program has never required the use of set-asides and has allowed recipients to use set-asides only under very limited circumstances.

Under the SNPRM, a recipient could use a set-aside on a DOT-assisted contract only if other methods of meeting overall goals were demonstrated to be unavailing *and* the recipient had legal authority independent of part 26. Comments were divided concerning the use of set-asides. A number of non-DBE contractors opposed the use of set-asides, some of them saying that set-asides might be something they could live with if their use were balanced by the elimination of DBE contract goals on other contracts in the same field. Some recipients and DBEs said, however, that set-asides were a useful tool to achieve goals, particularly for start-up contractors or small contracts.

The Department has carefully reviewed these comments and continues to believe that set-asides should not be used in the DBE program unless they are absolutely necessary to address a specific problem when no other means

would suffice. If a recipient has been unable to remedy the effects of egregious discrimination through other means, it may, as a last resort, make limited use of set-asides to the extent necessary to resolve the problem.

Section 26.45 How Do Recipients Set Overall Goals?

Since its inception, the recipient's overall goal has been the heart of the DBE program. Responding to *Adarand*, DOT clarified the theory and purpose of the overall goal in the SNPRM. In the proposed rule, the Department made clear that the purpose of the overall goal—and, in fact, the DBE program as a whole—is to achieve a "level playing field" for DBEs seeking to participate in federal-aid transportation contracting. To reach a level playing field, recipients need to examine their programs and their markets and determine the amount of participation they would expect DBEs to achieve in the absence of discrimination and the effects of past discrimination. The focus of the goal section of the SNPRM was to propose ways to measure what a level playing field would look like and to seek input on the availability of data to make such a measurement.

The Proposed Rule and Comments

The Department proposed several options that recipients might use for setting overall goals, including three alternative formulas for measuring the availability of ready, willing and able DBEs in local markets. The specific formulas will be discussed below, but generally, they each called for setting a goal that reflected the percentage of locally available firms that were DBEs (i.e. dividing the number of DBEs by the number of all businesses). On all of the alternatives, the SNPRM sought comments on both the feasibility and practical value of the options, as well as the prospects for combining any of the approaches and the question of whether to mandate a single approach or allow each recipient to choose amongst the options. We invited commenters to propose changes to any of the details of the options or to devise entirely new ones. Finally, we asked commenters for their input on the availability of reliable data for use with each of the options.

Hundreds of commenters of all types—including DBEs and non-DBEs, prime and subcontractors, state and local recipients, industry and interest groups and private individuals—responded with a wealth of feedback, opinions and data. It is an understatement to say that there was no consensus among commenters as to the best way to set overall goals. Support for

the proposed options was almost evenly spread over the choices presented, with many commenters firmly against all of the options. Still more suggested that the current, non-formulaic method was the best way to ensure the flexibility to respond to local market conditions. Similarly, among those who expressed an opinion, commenters were split between the propriety of choosing a single "best" method and imposing it on all recipients and allowing recipients to choose amongst all the options. One of the few universal themes in the goal-setting comments was the problem of the availability of reliable data on the number of DBE and non-DBE contractors.

There were a few common threads that different groups of commenters tended to apply to all of the formulas. Among recipients, many comments focused on the lack of data about non-DBE contractors, especially subcontractors. Recipients often noted that they would not have the information needed for the denominator of any of the formulas (i.e. the total number of available businesses). Non-DBE contractors—and industry groups representing them—generally believed that there should be a capacity measure built into any goal setting mechanism. Finally, DBEs—and their industry associations—were concerned that all of the formulas would create goals based only on the current number of DBEs, locking in the effects of past discrimination by ignoring the fact that the lack of opportunities in the past has suppressed the number of DBE firms available today.

Under the proposed rule's Alternative 1, recipients would calculate the percentage of DBE firms in their directories among all firms available to work on their DOT-assisted contracts. Under Alternative 2, recipients would calculate the percentage of all minority- and women-owned firms in certain SIC codes in their areas among all firms in these SIC codes in the same areas. Under Alternative 3, recipients would calculate a percentage based on the average number of DBE firms that had worked on their DOT-assisted contracts in recent years divided by the average number of all firms that had worked on their DOT-assisted contracts in the same period. The SNPRM also proposed that recipients could use other means, such as disparity studies or goals developed by other recipients serving the same area, as a basis for their goals.

Each of the three proposed alternatives received some support, though this was often the rather tepid endorsement of commenters who felt that one or another alternative was the

best of a bad lot. Non-DBE contractors often claimed that the alternatives would unfairly increase goals, while DBE contractors often claimed that the same proposals would unfairly decrease goals.

Commenters said that data for determining the denominators of the equations in Alternatives 1 and 2, as well as the numerator in Alternative 2, did not exist and that it would be a major, time-consuming job to begin to obtain the data. Adaptation of existing information from other sources (e.g., Census data) was said to have significant statistical difficulties. The difficulty of getting data on out-of-state firms was emphasized in some comments.

Commenters looked on the alternatives as cumbersome, creating unreasonable administrative burdens, and as producing statistical results that were skewed in various ways. The use of DBE directories as the source of the numerator in Alternative 1 was criticized on the basis that directories may contain firms that never actually participate in DOT-assisted contracts. It was suggested that the number of firms bidding rather than the number of firms certified would be a more reliable guide, but it was also pointed out that, because subcontractors seldom formally bid for work, this data would be hard to obtain. Some commenters proposed adding overall population statistics to the mix.

A significant number of commenters—primarily non-DBE contractors, but including some recipients and other commenters as well—emphasized the need to take “capacity” into account. Most popular among these comments was using a capacity version of Alternative 3. These comments did not propose a method of determining the capacity of the firms contracting with the recipient.

The Final Rule

In view of the complexity and importance of the goal setting process and the many issues raised by commenters, the Department has decided to adopt a two step process for goal setting. The process is intended to provide the maximum flexibility for recipients while ensuring that goals are based on the availability of ready, willing and able DBEs in each recipient’s relevant market. The Department believes that this approach is critical to meeting our constitutional obligation to ensure that the program is narrowly tailored to remedy the effects of discrimination. The first step of the process will be to create a baseline figure for the relative availability of ready, willing and able DBEs in each

recipient’s market. The second step will be to make adjustments from the base figure, relying on an examination of additional evidence, past experience, local expertise and anticipated changes in DOT-assisted contracting over the coming year.

Step 1: Determining a Base Figure for the Overall Goal

The base figure is intended to be a measurement of the current percentage of ready, willing and able businesses that are DBEs. Ensuring that this figure is based on demonstrable evidence of each recipient’s relevant market conditions will help to ensure that the program remains narrowly tailored. To be explicit, recipients cannot simply use the 10 percent national goal, their goal from the previous year, or their DBE participation level from the previous year as their base figure. Instead, all recipients must take an actual measurement of their marketplace, using the best evidence they have available, and derive a base figure that is as fair and accurate a representation as possible of the percentage of available businesses that are DBEs.

There are many different ways to measure the contracting market and assess the relative availability of DBEs. As discussed above, the SNPRM proposed three alternate formulas to measure relative availability, none of which were particularly popular with commenters. In this final rule, the Department is placing primary emphasis on the principles underlying the measurement, mandating only that a measurement of the relative availability of DBEs be made on the basis of demonstrable evidence of relevant market conditions, rather than requiring that any particular procedure or formula be used. The final rule contains a number of examples of how to create a base figure which recipients are free to adopt in their entirety or to use as guidelines for how to devise their own measurement.

There are several reasons we have taken this approach. First, the Department is aware of the differences in available data in various markets across the nation. The flexibility inherent in this approach will ensure that all recipients can use the procedure to set a reasonable goal and allow each recipient to use the best data available to it. As discussed in another section, this rule will also provide for the development of more standard data for future goal setting. Second, for many recipients, setting goals in this way will be a new exercise. By fixing only the basic principle, but allowing the methodology to change, recipients will

have the opportunity to fine tune the process each year as their experience grows and the data available to them improve. Finally, the rule makes sure that every recipient will have at least one reasonable and practical goal setting method available to them.

The first example for setting a base figure relies on data sources that are immediately available to all recipients: their DBE directories, and a Census Bureau database that DOT and the Census Bureau will make available to all recipients that wish to use it. This example has its roots in the first two goal setting formulas proposed in the SNPRM. Recipients would first assess the number of ready, willing and able DBEs based on their own directories. For some recipients this will be as simple as counting the number of firms in their directory. For others, particularly those using directories maintained by other agencies, the directories will have to be “filtered” for firms involved in transportation contracting. The resulting number of DBEs would become the numerator. The denominator would then be derived from the Census Bureau’s County Business Pattern (CBP) database. We will provide user-friendly electronic access to the database via the internet to allow recipients to input the geographic area and SIC codes in which they contract and receive a number for the availability of all businesses.

There are several issues that must be addressed when comparing numbers derived from two different data sources, some of which were raised in the comments on the SNPRM. Recipients will need to ensure that the scope of businesses included in the numerator is as close as possible to the scope included in the denominator. Using as close as possible to the same SIC codes and geographic base is very important. A recipient using its own DBE directory, particularly one that contains only firms in the fields in which it contracts, will still need to determine what fields it will use for the denominator when sorting through the CBP database. The best way to do this would be to examine their contracting program and determine the SIC codes in which they let the substantial majority of their contracts and subcontracts. The geographic area used for both the numerator and the denominator should cover the area from which the recipient draws the substantial majority of its contractors. While it may be sufficient for some state recipients to use their state borders as their contracting area, local transit and airport recipients will rarely have such an obvious choice. Those recipients will need to more carefully examine the

geographic area from which they draw contractors and base their calculation of both the numerator and denominator of the equation on the same area.

The Department and the Census Bureau will make the CBP data available in a format that gives recipients as much flexibility as possible to tailor the data to their contracting programs. Recipients will be able to extract the data in one block for all of the SIC codes they expect to contract in, or by individual SIC codes, allowing them to

weight the relative availability of DBEs in various fields, giving more weight to the fields in which they spend more money. For example, let us assume a recipient estimates that it will expend 10% of its federal aid funds within SIC code 15, 40% in SIC code 16, 25% in SIC code 17, and the remaining 25% on contracting spread over SIC codes 07, 42 and 87. The recipient could separately determine the relative availability of DBEs for each of the three major construction SIC codes (i.e., 15, 16 and

17) and the relative availability of DBEs in the other three SIC codes grouped together and weight each according to the amount of money to be spent in each area. In this example, the recipient could calculate its weighted base figure by first determining the number of DBEs in its directory for each of the groups, then extracting the availability of CBP businesses for the same groups. It would then perform the following calculation to arrive at a base figure for step one of the goal setting process:

$$\text{Base Figure} = \left[.10 \frac{(\text{DBEs in SIC 15})}{\text{CBPs in SIC 15}} + .40 \frac{(\text{DBEs in 16})}{\text{CBPs in 16}} + .25 \frac{(\text{DBEs in 17})}{\text{CBPs in 17}} + .25 \frac{(\text{DBEs in 07,42,87})}{\text{CBPs in 07,42,87}} \right] \times 100$$

As has been stated generally, this formula is offered only as an example of a way that a recipient could choose to use the CBP database. Recipients using the CBP data should choose whether to weight their calculation, and whether to do so by individual SIC codes or by groups of SIC codes, based on their own assessment of what method will best fit their spending pattern.¹

Finally, there is still the question of the propriety of comparing data from two sources as different as DBE directories and the CBP. As mentioned above, some commenters asserted that the directories may contain firms that do not normally perform DOT-assisted contracts. This problem is greatest, of course, for directories maintained by other agencies for purposes beyond DOT-assisted contracting. We believe that the recipient's knowledge of its contracting needs and the contents of its DBE directory will allow it to solve this problem by sorting the directories by SIC code to extract only the firms likely to be interested in DOT-assisted contracting. Any remaining effect from DBEs that are certified in the relevant SIC codes but still do not intend to compete for DOT-assisted contracts will be more than offset by the hurdles involved in actually becoming a DBE. It is important to note here that the certification process itself, with its paperwork, review and on-site inspection, create a filter on the number of existing firms that will be counted in the numerator without there being any equivalent filter culling firms out of the denominator. Ultimately, the Department chose these two data sources for the example because; while they may not be perfect, they represent

the best universally available current data on both the presence of DBEs and the presence of all businesses in local markets. Any recipient that believes it has available to it better sources of local data from which to make a similar calculation for its base figure is encouraged to use them.

The second example for calculating a base figure is using a bidders list to determine the relative availability of DBEs. The concept is similar to the one described above. The recipient would divide the number of available ready, willing and able DBEs by the number for all firms. The difference is that instead of measuring availability by DBE certifications and Census data, the recipient would measure availability by the number of firms that have directly participated in, or attempted to participate in, DOT-assisted contracting in the recent past. This approach has its roots in Alternative 3 from the SNPRM. Of fundamental importance to this approach is that the recipient would need to include all firms that have sought DOT-assisted contracts, regardless of whether they did so by bidding on a prime contract or quoting a job as a subcontractor. Because most DOT recipients derive the substantial majority of their DBE participation through subcontracting, it is absolutely essential that all DBE and non-DBE firms that quote subcontracts be included in the bidders list.² Bidders lists are a very focussed measure of ready, willing and able firms because they filter the pool of available firms by requiring a demonstration of their ability to participate in the process through tracking and identifying

contracting opportunities, understanding the requirements of a particular job and assembling a bid for it. Another attractive feature of the bidding "filter" is that it applies equally to both DBEs and non-DBEs.

The third example included in the final rule for setting a base figure is using data derived from a disparity study. As was discussed in the SNPRM, the Department is not requiring recipients to do a disparity study, but is only making clear that use of disparity study data by recipients that have them or choose to conduct them is a valid means of setting a goal. Disparity studies generally contain a wide array of statistical data, as well as anecdotal data and analysis that can be particularly useful in the goal setting process. We list disparity studies here, not because they are needed to justify operating the DBE program—Congress has already established the compelling need for the DBE program—but because the data a good disparity study provides can be an excellent guide for a recipient to use to set a narrowly tailored goal.

The Department will not set out specific requirements for what data or analysis is required before a disparity study can be used for setting a goal, because we believe that the design and conduct of the study is best left to the local officials and the professional organizations with which they contract to conduct the studies. Instead, we again offer simple general principles that should apply to all studies used for goal setting. Any study data relied on in the goal setting process should be as recent as possible and be focussed on the transportation contracting industry. When setting the goal, first use the study's statistical evidence to set a base figure for the relative availability of DBEs. Other study information, whether it is anecdotal data, analysis or statistical information about related

¹ While it is not statistically necessary to account for 100% of program dollars when performing this type of weighting, the greater the percentage accounted for, the more accurate the resulting calculation will be.

² To prevent any confusion, it is important to note that the DBE program does not use the so-called "benchmarking" system employed in direct Federal procurement. The benchmarking system relies on a unique database created specifically for use in the federal procurement program.

fields, should be included when making adjustments to the base figure (discussed in more detail below), but not included in the base figure for the relative availability of DBEs.

The last specific example included in the rule is using the goal of another recipient as the base figure for goal setting. This option was also included in the SNPRM. It is intended to avoid duplicative work and to lighten the burden the goal setting process might put on smaller recipients. It is important to note that a recipient could only use another recipient's goal if it was set in accordance with this rule and the other recipient performed similar contracting in a similar market area. Using another recipient's approved goal would only satisfy the first step of the goal setting process. It would serve as the base figure, and could not be used to skip over step two of the process. The recipient would need to examine the same additional evidence it would otherwise use to determine whether to adjust its goal from the base figure, as well as being required to make adjustments to account for differences in its local market or contracting program.

The final rule also maintains the option of devising an alternative method of calculating a base figure for the goal setting process. Explicitly listing this option serves to emphasize the point that the options in the rule are examples meant as guidelines intended to ensure maximum flexibility for recipients. Recipients can use this option to take advantage of their unique expertise or any unique source of data that they have that may not be available to other recipients. The concerned operating administration will review and approve the proposals of recipients that believe they can calculate a base figure that will better reflect their relevant market than any of the examples provided in this rule. Approval will be contingent on the proposals following the same principles that apply to any recipient: the methodology must be based on demonstrable data of relevant market conditions and be designed to reach a goal that the recipient would expect DBEs to achieve in the absence of discrimination.

Step 2: Adjusting the Base Figure

As alluded to above, measuring the relative availability of DBEs to derive a base figure is only the first step of the goal setting process. To ensure that they arrive at goals that truly and accurately reflect the participation they would expect absent the effects of discrimination, recipients must go beyond the formulaic measurement of

current availability to account for other evidence of conditions affecting DBEs. To accomplish this second step, recipients must first survey their jurisdiction to determine what types of relevant evidence is available to them. Then, relying on their own knowledge of their contracting markets they must review the evidence to determine whether either an up or down adjustment from the base figure is needed.

One universally available form of evidence that all recipients should consider is the proven capacity of DBEs to perform work on DOT-assisted contracts. All recipients have been tracking and reporting the dollar volume of work that is contracted and subcontracted to DBEs each year. Viewed in isolation, the past achievements of DBEs do not reflect the availability of DBEs relative to all available businesses, but it is an important and current measure of the ability of DBEs to perform on DOT-assisted contracts.

Though not universally available, there are hundreds of existing disparity studies that contain a wealth of statistical and anecdotal evidence on the utilization of disadvantaged businesses. In addition to being a possible source of data for Step 1 of the goal setting process, disparity studies should be considered during Step 2 of the process. The base figure from Step 1 is intended to determine the relative availability of DBEs. The data and analysis in a disparity study can help a recipient determine whether those existing businesses are under- or over-utilized. If a recipient has a study with disparity ratios showing that existing DBEs are receiving significantly less work than expected, an upward adjustment from the base figure is called for. Similarly, if the disparity ratio shows overutilization, a downward adjustment to the base figure would be warranted. The anecdotal evidence and analysis of contracting requirements and conditions that may have a discriminatory impact on DBEs are also important sources that should be examined when determining what adjustment to make to the base figure.³ Finally, disparity studies that are conducted within a recipient's jurisdiction should be examined even if they were not done specifically for the recipient. For example, a state highway agency may find useful data and

analysis in either a statewide disparity study covering other agencies or in a disparity study examining contracting in a county or city within the state.

If a recipient uses another recipient's goal as its base figure under Step 1 of the goal setting process, it will have to make additional adjustments to ensure that its final goal is narrowly tailored to its market and contracting program. For example, if a local transit or airport authority adopts a statewide goal as its base figure, it must determine the extent that local relative availability of DBEs differs from the relative availability of DBEs in the contracting area relied on by the state. The local recipient would also need to examine the differences in the type of contracting work in its program and determine whether there are significant differences in the relative availability of DBEs in any fields that are unique to its program—or unique to the program of the other recipient. Similarly, if one local recipient used the goal of another local recipient in the same market as its base figure, it would also need to adjust for differences in the contracting fields used by the two programs.

Finally, the rule contains a brief list of other types of data a recipient could consider when adjusting its base figure to arrive at an overall goal. The list is by no means intended to be exhaustive. Instead, it is meant as a guide to the types of information a recipient should look for in Step 2 of the goal setting process. There is a wide array of relevant local, regional and national information about the utilization of disadvantaged businesses. Recipients are encouraged to cast as wide a net as they can to carefully examine their contracting programs and the public and private markets in which they operate.

Additional Goal Setting Issues

The Department proposed, in both the 1992 NPRM and the 1997 SNPRM, that overall goals be calculated as a percentage of DOT funds a recipient expects to expend in DOT-assisted contracts. This is different from the existing part 23 rule, which asked recipients to set overall goals on the basis of all funds, including state and local funds, to be expended in DOT-assisted contracts. This change is for accounting and administrative convenience and is not intended to have a substantive effect on the program. While not the subject of many comments, those who did comment on the proposal favored the change. The final rule adopts this approach.

A few recipients commented that public participation concerning goal setting was bothersome. Nevertheless,

³ It is important to note that adjusting the goal is only part of the response a recipient should make to evidence of discriminatory barriers for DBEs. All recipients have a primary responsibility to ensure non-discrimination in their programs and should act aggressively to remove any discriminatory barriers in their programs.

we view it as an essential part of the goal setting process. There are many stakeholders involved in setting goals, and it is reasonable that they should be involved in the process and have an opportunity for comment. The part 23 provision requiring getting a state governor's approval of a goal of less than 10 percent has been eliminated, both because overall goals are no longer tied to the national 10 percent goal and to reduce administrative burdens.

The goal setting provision of the final rule continues to direct recipients to set one annual overall goal for DBEs, rather than group-specific goals separating minority and women-owned businesses.

Section 26.47 Can Recipients Be Penalized for Failing To Meet Overall Goals?

This is a new section of the regulation, the purpose of which is to clarify the Department's views on the situations in which it is appropriate to impose sanctions on recipients with respect to goals. The provision states explicitly what has long been the Department's policy: no recipient is sanctioned, or found in noncompliance, simply because it fails to meet its overall goal. In fact, through the history of the DBE program, the Department never has sanctioned a recipient for failing to obtain a particular amount of DBE participation.

On the other hand, if a recipient fails to set an overall goal which the concerned operating administration approves, or fails to operate its program in good faith toward the objective of meeting the goal, it is subject to a finding of noncompliance and possible sanctions. For example, if a recipient refuses to establish a goal or, having established one, does little or nothing to work toward attaining it, it would be reasonable for the Department to find the recipient in noncompliance. Like all compliance provisions of the rule, this provision is subject to the "court order" exception recently created by statute (see § 26.101 (b)).

Section 26.49 How Are Overall Goals Established for Transit Vehicle Manufacturers?

This provision basically continues in effect the existing transit vehicle manufacturer (TVM) provisions of the rule. The SNPRM proposed to change the existing rule in two respects. FHWA or FAA recipients could avail themselves of similar provisions, if they chose. The final rule retains this flexibility. Also, it was proposed that FTA, rather than manufacturers, would set TVM goals. The few comments we received on this section objected to the

latter change. Consequently, we will not adopt the proposed change and will continue to require the TVMs themselves to set their own goals based on the principles outlined in § 26.45 of this rule.

Section 26.51 What Means Do Recipients Use To Meet Overall Goals?

One of the key points of both the SNPRM and this final rule is that, in meeting overall goals, recipients have to give priority to race-neutral means. By race-neutral means (a term which, for purposes of this rule, includes gender neutrality), we mean outreach, technical assistance, procurement process modification, etc.—measures which can be used to increase opportunities for all small businesses, not just DBEs, and do not involve setting specific goals for the use of DBEs on individual contracts. Contract goals, on the other hand, are race-conscious measures.

In the context of these definitions, it is important to note that awards of contracts to DBEs are not necessarily race-conscious actions. Whenever a DBE receives a prime contract because it is the lowest responsible bidder, the resulting DBE participation was achieved through race-neutral means. Similarly, when a DBE receives a subcontract on a project that does not have a contract goal, its participation was also achieved through race-neutral means. Finally, even on projects that do carry contract goals, when a prime awards a particular subcontract to a DBE because it has proven in the past that it does the best or quickest work, or because it submitted the lowest quote, the resulting DBE participation has, in fact, been achieved through race-neutral means. We also note that the use of race-neutral measures (e.g., outreach, technical assistance) specifically to increase the participation of DBEs does not convert these measures into race-conscious measures.

A number of non-DBE contractors commented that race-neutral measures should not only be given priority, but must be tried and fail before any use of contract goals can occur. This, they asserted, is essential for a program to be narrowly tailored. The law on this point is fairly clear, and does not support the commenters' contention. The extent to which race-neutral alternatives were considered and deemed inadequate to remedy the problem is the relevant narrow tailoring question. Both in past legislation and when considering TEA-21, Congress did consider race-neutral alternatives. In fact, as described above, throughout the debate, Member after Member gave examples of how state and local race-neutral programs without

goals fail to overcome the discriminatory barriers that face DBEs. Congress' careful consideration and conclusion that race-neutral means are insufficient, buttressed by this rule's emphasis on achieving as much of the goal as possible through race-neutral means, satisfies this part of the narrow tailoring requirement.

No one opposed the use of race-neutral means, though a number of DBEs and recipients stressed that these means, standing alone, were insufficient to address discrimination and its effects. Most recipients and non-DBE contractors supported the use of race-neutral measures, though some recipients said that increased use of these measures would require additional resources.

The relationship between race-conscious and race-neutral measures in the final rule is very important. The recipient establishes an overall goal. The recipient estimates, in advance, what part of that goal it can meet through the use of race-neutral means. This projection, and the basis for it, would be provided to the concerned operating administration at the same time as the overall goal, and is subject to OA approval.

The requirement of the rule is that the recipient get the maximum feasible DBE participation through race-neutral means. The recipient uses race-conscious measures (e.g., sets contract goals) to get the remainder of the DBE participation it needs to meet the overall goal. If the recipient expects to be able to meet its entire overall goal through race-neutral means, it could, with OA approval, implement its program without any use of contract goals.

For example, suppose Recipient X establishes an 11 percent overall goal for Fiscal Year 2000. This is the amount of DBE participation that X has determined it would have if the playing field were level. Recipient X projects that, using a combination of race-neutral means, it can achieve 5 percent DBE participation. Recipient X then sets contract goals on some of its contracts throughout the year to bring in an additional 6 percent DBE participation. Recipients would keep data separately on the DBE participation obtained through those contracts that either did or did not involve the use of contract goals. Recipients would use this and other data to adjust their use of race-neutral means and contract goals during the remainder of the year and in future years. For example, if Recipient X projected being able to attain 5 percent DBE participation through race-neutral measures, but was only able to obtain 1 percent from the race-neutral measures

it used, Recipient X would increase its future use of contract goals. On the other hand, if Recipient X exceeded its prediction that it would get 5 percent DBE participation from race-neutral measures and actually obtained 10 percent DBE participation from the contracts on which there were no contract goals, it would reduce its future use of contract goals. A recipient that was consistently able to meet its overall goal using only race-neutral measures would never need to use contract goals.

Most recipients and non-DBE contractors agreed with the SNPRM's proposal that (contrary to the part 23 provision on this subject) contract goals not be required on all contracts. This provision is retained in the final rule. We believe that this provision provides recipients the ability to achieve the objective of a narrowly tailored program. The rule also reiterates that the contract goal need not be set at the same level as the overall goal. To express this more clearly, let us return to the above example of Recipient X. Just because Recipient X has an overall goal of 11 percent, it does not have to set a contract goal on each contract. Nor does it have to establish an 11 percent goal on each contract on which it does set a contract goal. Indeed, since X has projected that it can achieve almost half of its overall goal through race-neutral means, it would most likely set contract goals on some contracts but not on others. On contracts with a contract goal, the goal might be 4 percent one time, 18 percent another time, 9 percent another time, depending on the actual work involved in each contract, the location of the work and the subcontracting opportunities available. The idea is for X to set contract goals that, cumulatively over the year, bring in 6 percent DBE participation, which, added to the 5 percent participation X projects achieving from race-neutral measures, ends up meeting the 11 percent overall goal.

The SNPRM asked for comment on evaluation credits as an additional race-conscious measure that recipients could use to meet overall goals. The vast majority of the many comments on this subject opposed the use of evaluation credits, on both legal (e.g., as contrary to narrow tailoring) and policy (e.g., as confusing and subjective) grounds. A smaller number of commenters favored at least giving recipients discretion to use this tool. While the Department does not agree with the contention that evaluation credits are legally suspect, we do agree with much of the sentiment against using them in the DBE program, particularly the practical difficulties they might involve when applied to

subcontracting (which constitutes the main source of DBE participation in the program). As a result, the final rule does not contain an evaluation credits provision.

The SNPRM proposed certain mechanisms for determining when it was appropriate to ratchet back the use of contract goals. Most commenters said they found these particular mechanisms complicated and confusing. The Department believes that, as a matter of narrow tailoring, it is important to have concrete mechanisms in place to ensure that race-conscious measures like contract goals are used only to the extent necessary to ensure a level playing field. The final rule contains examples of four such mechanisms.

The first mechanism applies to a situation in which a recipient estimates that it can meet its overall goal exclusively through the use of race-neutral goals. In this case, the recipient simply does not set contract goals during the year. The second mechanism takes this approach one step further. If the recipient meets its overall goal two years in a row using *only* race-neutral measures, the recipient continues to use only race-neutral measures in future years, without having to project each year how much of its overall goal it anticipates meeting through race-neutral and race-conscious means, respectively. However, if in any year the recipient does not meet its overall goal, the recipient must make the projection for the following year, using race-conscious means as needed to meet the goal.

The third mechanism applies to recipients who exceed their overall goals for two years in a row while using contract goals. In the third year, when setting their overall goal and making their projection of the amount of DBE participation they will achieve through race-neutral means, they would determine the average percentage by which they exceeded their overall goals in the two previous years. They would then use that percentage to reduce their reliance on contract goals in the coming year, as noted in the regulatory text example. The rationale for this reduction is that the recipient's overall goal represents its best estimation of the participation level expected for DBEs in the absence of discrimination. By exceeding that goal consistently, the recipient may be relying too heavily on race-conscious measures. Scaling back the use of contract goals—while keeping careful track of DBE participation rates on projects without contract goals—will ensure that the recipient's DBE program remains narrowly tailored to overcoming the continuing effects of discrimination.

The fourth mechanism operates within a given year. If a recipient determines part way through the year that it will exceed (or fall short of) its overall goal, and it is using contract goals during that year, it would scale back its use of contract goals (or increase its use of race-neutral means and/or contract goals) during the remainder of the year to ensure that it is using an appropriate balance of means to meet its "level playing field" objectives.

There were also a number of comments on how contract goals should be expressed. Most favored continuing the existing practice of adding together the Federal and local shares of a contract and expressing the contract goal as a percentage of the sum because it works well and avoids confusion. A few comments favored expressing contract goals as a percentage of only the Federal share of a contract. Ultimately, we believe that it is not necessary for the Department to dictate which method to use. Recipients may continue to use whichever method they feel works best and allows them to accurately track the participation of DBEs in their program. Recipients need only ensure that they are consistent and clearly express the method they are using, and report to the Department the total federal aid dollars spent and the federal aid dollars spent with DBEs.

As a last note on this topic, FAA recipients are reminded that funds derived from passenger facility charges (PFCs) are not covered by this part and should not be counted as part of the Federal share in any goal calculation. If a recipient chooses to express its contract goals as a percentage of the combined Federal and local share, it may include the PFC funds as part of the local share.

Section 26.53 What Are the Good Faith Efforts Procedures Recipients Follow in Situations Where There Are Contract Goals?

There was little disagreement about the main point of this section. When a recipient sets a contract goal, the basic obligation of bidders is to make good faith efforts (GFE) to meet it. They can demonstrate these efforts in either of two ways, which are equally valid. First, they can meet the goal, by documenting that they have obtained commitments for enough DBE participation to meet the goal. Second, even though they have not met the goal, they can document that they have made good faith efforts to do so. The Department emphasizes strongly that this requirement is an important and serious one. A refusal by a recipient to accept valid showings of

good faith is not acceptable under this rule.

Appendix A discusses in greater detail the kinds of good faith efforts bidders are expected to make. There was a good deal of comment concerning its contents. Non-minority contractors recited that good faith efforts standards should be "objective, measurable, realistically achievable, and standardized." Not one of these comments provided any examples or suggestions of what "objective, measurable, realistically achievable, and standardized" standards would look like, however. Certainly a one-size-fits-all checklist is neither desirable nor possible. What constitutes a showing of adequate good faith efforts in a particular procurement is an intrinsically fact-specific judgment that recipients must make. Circumstances of procurements vary widely, and GFE determinations must fit each individual situation as closely as possible.

The proposed good faith efforts appendix suggested that one of the factors recipients could take into account is the behavior of bidders other than the apparent successful bidder. For example, if the latter failed to meet the contract goal, but other bidders did, that could suggest that the apparent successful bidder had not exerted sufficient efforts to get DBE participation. Recipients who commented on this issue favored the concept; non-DBE contractors opposed it. The final rule's Appendix A makes clear that recipients are not to use a "conclusive presumption" approach, in which the apparent successful bidder is summarily found to have failed to make good faith efforts simply because another bidder was able to meet the goal. However, the track record of other bidders can be a relevant factor in a GFE determination, in more than one way. If other bidders have met the goal, and the apparent successful bidder has not, this at least raises the question of whether the apparent successful bidder's efforts were adequate. It does not, by itself, prove that the apparent successful bidder did not make a good faith effort to get DBE participation, however. On the other hand, if the apparent successful bidder—even if it failed to meet the goal—got as much or more DBE participation than other bidders, then this fact would support the apparent successful bidder's showing of GFE. The revised Appendix makes these points.

The proposed good faith efforts appendix also expanded on language in part 23 concerning price-based decisions by prime contractors. The existing language provides that a

recipient can use, as evidence of a bidder's failure to make good faith efforts, the recipient's rejection of a DBE subcontractor's "reasonable price" offer. The SNPRM added that a recipient could set a price differential from 1–10 percent to evaluate bidders' efforts. If a bidder did not meet the goal and rejected a DBE offer within the range, the recipient could view the bidder as not making good faith efforts. This was an attempt to provide additional, quantified, guidance to recipients on this issue.

Comment was mixed on this issue. Non-DBE prime contractors generally opposed the price differential idea, saying that it encouraged deviations from the traditional low bid system. It should be noted, however, that subcontracts are typically awarded outside any formal low bid system. Some recipients thought that it was a bad idea to designate a range, because it would limit their discretion, while others liked the additional definiteness of the range. Most recipients supported the "reasonable price" concept in general, even if they had their doubts about the value of a range. Some DBE organizations favored the range approach.

Taking all the comments into consideration, the Department has decided to retain language similar to that of part 23, without reference to any specific range. Appendix A now provides that the fact that some additional costs may be involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet a DBE contract goal, as long as such costs are reasonable. Along with this emphasis on the reasonableness of the cost necessarily comes the fact that prime contractors are not expected to bear unreasonable costs. The availability of a good faith efforts waiver of the contract goal helps to ensure that a prime contractor will not be in a position where it has to accept an excessive or unreasonable bid from a DBE subcontractor. At the same time, any burden that a non-DBE subcontractor might face is also limited by the reasonableness of competing bids. This approach retains flexibility for recipients while avoiding the concerns commenters expressed about a particular range.

The SNPRM proposed that recipients would have to provide for an administrative review of decisions that a bidder's GFE showing was inadequate. The purpose of the provision was to ensure that recipients did not arbitrarily dismiss bidders' attempts to show that they made good faith efforts. The provision was meant to emphasize the

seriousness with which the Department takes the GFE requirement and to help respond to allegations that some recipients administered the program in a quota-like fashion. The SNPRM also asked whether such a mechanism should be operated entirely by the recipient or whether a committee including representatives of DBE and non-DBE contractors should be involved.

A number of recipients, and a few contractors, opposed the idea on the basis of concern about administrative burdens on recipients and potential delays in the procurement process. A greater number of commenters, largely non-DBE contractors but also including recipients and DBEs, supported the proposal as ensuring greater fairness in the process. A significant majority of all commenters said that the recipient should operate the system on its own, because a committee would make the process more cumbersome and raise conflict of interest issues.

The Department will adopt this proposal, which should add to the fairness of the system and make allegations of *de facto* quota operations less likely. The Department intends that reconsideration be administered by recipients. The regulation does not call for a committee involving non-recipient personnel. The Department intends that the process be informal and timely. The recipient could ensure that the process be completed within a brief period (e.g., 5–10 days) to minimize any potential delay in procurements. The bidder would have an opportunity to meet with the reconsideration official, but a formal hearing is not required. To ensure fairness, the reconsideration official must be someone who did not participate in the original decision to reject the bidder's showing. The recipient would have to provide a written decision on reconsideration, but there would be no provision for administrative appeals to DOT.

A point raised by several non-DBE commenters was that DBEs should have to make good faith efforts (even when they were not acting as prime contractors). The commenters suggested things like providing capacity statements and documenting that they have bid on contracts. This point is unrelated to the subject of this section, which has to do with what efforts bidders for prime contracts have to make to show that they have made to obtain DBE subcontractors. It is difficult to see what purpose the additional paperwork burdens these commenters' requests would serve.

One of the most hotly debated issues among commenters was whether DBE

firms bidding on prime contracts should have to meet goals and make good faith efforts to employ DBE subcontractors. Under part 23, DBE prime contractors did not have to meet goals or make good faith efforts. The rationale for this position was that, as DBEs, 100 percent of the work of these contractors counted toward recipients' contract goals, which the firms automatically met.

A significant majority of commenters on this issue—particularly non-DBE contractors but also including some recipients and a few DBEs—argued that DBE primes should meet goals and make GFE the same as other contractors. Failing to do so, they said, went beyond providing a level playing field to the point of providing an unfair advantage for DBE bidders for prime contracts. This change would also increase opportunities for DBE subcontractors, they said. One comment suggested requiring DBE prime contractors to meet goals or make GFE, but stressed that work they performed with their own forces as well as work awarded to DBE subcontractors should count toward goals.

Supporters of the current system said that many prime contracts performed by DBEs are too small to permit subcontracting (of course, goals need be set only on contracts with subcontracting possibilities). Moreover, these commenters—mostly DBEs and recipients—said that there was already inequity as between DBEs and non-DBEs, and requiring DBEs to meet the same requirements simply maintained the inequity. There was also some support for a third option the Department included in the SNPRM, in which DBEs would have to meet goals and make GFE to the extent that work they proposed to perform with their own forces was insufficient to meet goals.

The Department believes that, in a rule aimed at providing a level playing field for DBEs, it is appropriate to impose the same requirements on all bidders for prime contracts. Consequently, part 26 will depart from the part 23 approach and require DBE prime contractors to meet goals and make good faith efforts on the same basis as other prime contractors. However, in recognition of the DBE bidders' status as DBEs, we will permit them to count toward goals the work that they commit to performing with their own forces, as well as the work that they commit to be performed by DBE subcontractors. DBE bidders on prime contracts will be expected to make the same outreach efforts as other bidders and to document good faith

efforts in situations where they do not fully meet contract goals.

Under part 23 and the SNPRM, recipients have a choice between handling bidder compliance with contract goals and good faith efforts requirements as a matter of responsiveness or responsibility. Some recipients and other contractors recounted successful experience with one approach or the other, and suggested reasons why everyone should follow each approach (e.g., responsiveness as a deterrent to bid-shopping; responsibility as a more flexible and cost-effective approach). Both approaches have their merits, and the Department believes the best course is to maintain the existing recipient discretion on this issue.

Some recipients use so-called "design-build" or "turnkey" contracts, in which the design and construction of an entire project is contracted out to a master contractor. The master contractor then lets subcontracts, which are often equivalent to the prime contracts that the recipient would let if it were designing and building the project directly. In a sense, the master contractor stands in the shoes of the recipient.

On design-build contracts, the normal process for setting contract goals does not fit the contract award process well. At the time of the award of the master contract, neither the recipient nor the master contractor knows in detail what the project will look like or exactly what contracting opportunities there will be, let alone the identity of DBEs who may subsequently be involved. In these situations, the recipient may alter the normal process, setting a project goal to which the master contractor commits. Later, when the master contractor is letting subcontracts, it will set contract goals as appropriate, standing in the shoes of the recipient. The recipient will exercise oversight of this process.

The final issue in this section has to do with replacement of DBEs that drop out of a contract. What actions, if any, should a prime contractor have to take when a DBE is unable to complete a subcontract, for whatever reason? Should it matter whether or not the DBE's participation is needed to achieve the prime contractor's goal?

Comment on this issue came mostly from recipients, with some non-DBE contractors and a few DBEs providing their views. A majority of the commenters believed that replacement of a fallen-away DBE with another DBE (or making a good faith effort toward that end) should be required only when needed to ensure that the prime contractor continued to meet its contract

goal. Others said that, since using DBEs to which the prime had committed at the time of award was a contractual requirement, replacement or good faith efforts should be required regardless of the prime's ability to meet the goal without the lost DBE's participation.

The Department believes that, in a narrowly tailored rule, it is not appropriate to require DBE participation at a level exceeding that needed to ensure a level playing field. Consequently, we will require a prime contractor to replace a fallen-away DBE (or to demonstrate that it has made good faith efforts toward that end) only to the extent needed to ensure that the prime contractor is able to achieve the contract goal established by the recipient for the procurement. The Department will also retain the SNPRM provision—supported by most commenters who mentioned it—that a prime contractor may not terminate a DBE firm for convenience and then perform the work with its own forces without the recipient's written consent. This provision is intended to prevent abuse of the program by a prime contractor who would commit to using a DBE and then bump the DBE off the project in favor of doing the work itself.

Section 26.55 How Is DBE Participation Counted Toward Goals?

In a narrowly tailored program, it is important that DBE credit be awarded only for work actually being performed by DBEs themselves. The necessary implication of this principle is that when a DBE prime contractor or subcontractor subcontracts work to another firm, the work counts toward DBE goals only if the other firm is itself a DBE. This represents a change from the existing rule and the SNPRM, which said that all the work of a DBE's contract (implicitly including work subcontracted to non-DBEs) counts toward goals. A few comments urged such a change. The new language is also consistent with the way that the final rule treats goals for DBE prime contractors.

The value of work performed by DBEs themselves is deemed to include the cost of materials and supplies purchased, and equipment leased, by the DBE from non-DBE sources. For example, if a DBE steel erection firm buys steel from a non-DBE manufacturer, or leases a crane from a non-DBE construction firm, these costs count toward DBE goals. There is one exception: if a DBE subcontractor buys supplies or leases equipment from the prime contractor on its contract, these costs do not count toward DBE goals. Several comments from prime contractors suggested these costs should

count, but this situation is too problematic, in our view, from an independence and commercially useful function (CUF) point of view to permit DBE credit.

One of the most difficult issues in this section concerns how to count DBE credit for the services of DBE trucking firms. The SNPRM proposed that, to be performing a CUF, a DBE trucking firm had to own 50 percent of the trucks it used in connection with a contract. A number of comments said that this requirement was out of step with industry practice, which commonly involves companies leasing trucks from owner-operators and other sources for purposes of a project. In response to these comments, the Department revisited this issue and reviewed the trucking CUF policies of a number of states. The resulting provision requires DBEs to have overall control of trucking operations and own at least one truck, but permits leasing from a variety of sources under controlled conditions, with varying consequences for DBE credit awarded.

A DBE need not provide all the trucks on a contract to receive credit for transportation services, but it must control the trucking operations for which it seeks credit. It must have at least one truck and driver of its own, but it can lease the trucks of others, both DBEs and non-DBEs, including owner operators. For work done with its own trucks and drivers, and for work with DBE lessees, the firm receives credit for all transportation services provided. For work done with non-DBE lessees, the firm gets credit only for the fees or commissions it receives for arranging the transportation services, since the services themselves are being performed by non-DBEs.

When we say that a DBE firm must own at least one of the trucks it uses on a contract, we intend for recipients to have a certain amount of discretion for handling unexpected circumstances, beyond the control of the firm. For example, suppose firm X starts the contract with one truck it owns. The truck is disabled by an accident or mechanical problem part way through the contract. Recipients need not conclude that the firm has ceased to perform a commercially useful function.

Most commenters who addressed the issue agreed with the SNPRM proposal that a DBE does not perform a CUF unless it performs at least 30 percent of the work of a contract with its own forces (a few commenters suggested 50 percent). This provision has been retained. A commenter suggested that the use of two-party checks by a DBE and another firm should not

automatically preclude there being a CUF. While we do not believe it is necessary to include rule text language on this point, we agree with the commenter. As long as the other party acts solely as a guarantor, and the funds do not come from the other party, we do not object to this practice where it is a commonly-recognized way of doing business. Recipients who accept this practice should monitor its use closely to avoid abuse.

One commenter noted an apparent inconsistency between counting 100 percent of the value of materials and supplies used by a DBE construction contractor (e.g., in the context of a furnish and install contract) and counting only 60 percent of the value of goods obtained by a non-DBE contractor from a DBE regular dealer. The two situations are treated differently, but there is a policy reason for the difference. There is a continuing concern in the program that, if non-DBEs are able to meet DBE goals readily by doing nothing more than obtaining supplies made by non-DBE manufacturers through DBE regular dealers, the non-DBEs will be less likely to hire DBE subcontractors for other purposes. As a policy matter, the Department does not want to reduce incentives to use DBE subcontractors, so we have not permitted 100 percent credit for supplies in this situation. Giving 100 percent credit for materials and supplies when a DBE contractor performs a furnish and install contract does not create the same type of disincentive, so the policy concern does not apply. In our experience, the 60 percent credit has been an effective incentive for the use of DBE regular dealers, so those firms are not unduly burdened.

Section 26.61 How Are Burdens of Proof Allocated in the Certification Process?

This section, which states a "preponderance of evidence" standard for applicants' demonstration to recipients concerning group membership, ownership, control, and business size, received favorable comment from all commenters who addressed it. We are retaining it with only one change, a reference to the fact that, in the final rule, recipients will collect information concerning the economic status of prospective DBE owners.

Section 26.63 What Rules Govern Group Membership Determinations?

There were several comments on details of this provision. One commenter suggested that tribal

registration be used as an identifier for Native Americans. The suggestion is consistent with long-standing DOT guidance; however this section of the regulation is meant to set out general rules applicable to all determinations of group membership, not to enumerate means of making the determination for specific groups. The same commenter suggested that if someone knowingly misrepresents himself as a group member, he should not be given further consideration for eligibility.

Misrepresentation of any kind on an application is a serious matter. Indeed, misrepresentation of material facts in an application can be grounds for debarment or even criminal prosecution. While it would certainly be appropriate for recipients to take action against someone who so misrepresented himself, the regulatory text on group membership is not the place to make a general point about the consequences of misrepresentation.

Some commenters wanted further definition of what "a long period of time" means. We believe it would be counterproductive to designate a number of years that would apply in all cases, since circumstances are likely to differ. The point is to avoid "certification conversions" in which an individual suddenly discovers, not long before the application process, ancestry or culture with which he previously has had little involvement.

We are adopting the SNPRM provision without substantive change.

Section 26.65 What Rules Govern Business Size Determinations?

By statute, the Department is mandated to apply SBA small business size standards to determining whether a firm is a small business. The Department is also mandated to apply the statutory size cap (\$16.6 million in the current legislation, which the Department adjusts for inflation from time to time). Consequently, the Department cannot adopt the variety of comments we received to adjust size standards or the gross receipts cap to take differences among industries or regions into account. We are adopting the proposed language, using the new statutory gross receipts cap. As under part 23, a firm must fit under both the relevant SBA size standard and the generally applicable DOT statutory cap to be eligible for certification.

A few commenters asked for additional guidance for situations in which a firm is working in more than one SIC code, and the SBA size standards for the different SIC codes are different. First, size determinations are made for the firm as a whole, not for one

division or another. Second, suppose the size of Firm X (e.g., determined through looking at the firm's gross receipts) is \$5 million, and X is seeking certification as a DBE in SIC code yyyy and zzzz, whose SBA small business size standards are \$3.5 and \$7 million, respectively. Firm X would be a small business that could be certified as a DBE, and that could receive DBE credit toward goals, in SIC code zzzz but not in SIC code yyyy. This approach to the issue of differing standards being involved with the same firm fits in well with the general requirement of part 26 that certification be for work in particular SIC codes.

Section 26.67 What Rules Determine Social and Economic Disadvantage?

The statutes governing the DBE program continue to state that members of certain designated groups are presumed to be both socially and economically disadvantaged. Therefore, the Department is not adopting comments suggesting that one or both of the presumptions be eliminated from the DBE rule. While the rule does specify that applicants who are members of the designated groups do have to submit a signed certification that they are, in fact, socially and economically disadvantaged, this requirement should not be read as making simple "self-certification" sufficient to establish disadvantage. As has been the case since the beginning of the DBE program, the presumptions of social and economic disadvantage are rebuttable.

The Department is making an important change in this provision in response to comments about how to rebut the presumption of economic disadvantage. Recipient comments unanimously said that recipients should collect financial information, such as statements of personal net worth (PNW) and income tax returns, in order to determine whether the presumption of economic disadvantage really applies to individual applicants. Particularly in the context of a narrowly tailored program, in which it is important to ensure that the benefits are focussed on genuinely disadvantaged people (not just anyone who is a member of a designated group), we believe that these comments have merit. While charges by opponents of the program that fabulously wealthy persons could readily participate under part 23 have been exceedingly hyperbolic and inaccurate (e.g., references to the Sultan of Brunei as a potential DBE), it is appropriate to give recipients this tool to make sure that non-disadvantaged persons do not participate.

For this reason, part 26 requires recipients to obtain a signed and notarized statement of personal net worth from all persons who claim to own and control a firm applying for DBE certification *and* whose ownership and control are relied upon for DBE certification. These statements must be accompanied by appropriate supporting documentation (e.g., tax returns, where relevant). The rule does not prescribe the exact supporting documentation that should be provided, and recipients should strive for a good balance between the need for thorough examination of applicants' PNW and the need to limit paperwork burdens on applicants. For reasons of avoiding a retroactive paperwork burden on firms that are now certified, the rule does not require recipients to obtain this information from currently certified firms. These firms would submit the information the next time they apply for renewal or recertification. The final rule's provisions on calculating personal net worth are derived directly from SBA regulations on this subject (see 13 CFR § 124.104(c)(2), as amended on June 30, 1998).

One of the primary concerns of DBE firms commenting about submitting personal financial information is ensuring that the information remains confidential. In response to this concern, the rule explicitly requires that this material be kept confidential. It may be provided to a third party only with the written consent of the individual to whom the information pertains. This provision is specifically intended to preempt any contrary application of state or local law (e.g., a state freedom of information act that might be interpreted to require a state transportation agency to provide to a requesting party the personal income tax return of a DBE applicant who had provided the return as supporting documentation for his PNW statement). There is one exception to this confidentiality requirement. If there is a certification appeal in which the economic disadvantage of an individual is at issue (e.g., the recipient has determined that he or she is not economically disadvantaged and the individual seeks DOT review of the decision), the personal financial information would have to be provided to DOT as part of the administrative record. The Department would treat the information as confidential.

Creating a clear and definitive standard for determining when an individual has overcome the economic disadvantage that the DBE program is meant to remedy has long been a contentious issue. In 1992, the

Department proposed to use a personal net worth standard of \$750,000 to rebut the presumption of disadvantage for members of the designated groups. In 1997, the Department proposed a similar idea, though rather than use the \$750,000 figure, the SNPRM asked the public for input on what the specific amount should be. Finally, as discussed in detail above, the issue of ensuring that wealthy individuals do not participate in the DBE program was a central part of the 1998 Congressional debate.

Public comment on both proposals was sharply divided. Roughly equal numbers of commenters thought \$750,000 was too high as thought it was too low. Commenters proposed figures ranging from \$250,000 to \$2 million. Others supported the \$750,000 level, which is based on the SBA's threshold for participation in the SDB program (it is also the retention level for the 8(a) program). One theme running through a number of comments was that recipients should have discretion to vary the threshold depending on such factors as the local economy or the type of firms involved. Some comments opposed the idea of a PNW threshold altogether or suggested an alternative approach (e.g., based on Census data about the distribution of wealth).

Others commented that rebutting the presumption did not go far enough, pointing out that the only way to ensure that wealthy people did not participate in the program was for the threshold to act as a complete bar on the eligibility of an individual to participate in the program. Congress appears to share this concern. While they differed on the effectiveness of past DOT efforts, both proponents and opponents of the program agreed that preventing the participation of wealthy individuals was central to ensuring the constitutionality of the DBE program.

The Department agrees and, in light of the comments and the intervening TEA-21 debate, is adopting the clearest and most effective standard available: when an individual's personal net worth exceeds the \$750,000 threshold, the presumption of economic disadvantage is conclusively rebutted and the individual is no longer eligible to participate in the DBE program. The Department is using the \$750,000 figure because it is a well established and effective part of the SBA programs and is a reasonable middle ground in view of the wide range of comments calling for higher or lower thresholds. Using a figure any lower, as some commenters noted, could penalize success and make growth for DBEs difficult (since, for example, banks and insurers frequently

look to the personal assets of small business owners in making lending and bonding decisions). Operating the threshold as a cap on eligibility for all applicants also serves to treat men and women, minorities and non-minorities equally.

When a recipient determines, from the PNW statement and supporting information, that an individual's personal net worth exceeds \$750,000, the recipient must deem the individual's presumption of economic disadvantage to have been conclusively rebutted. No hearing or other proceeding is called for in this case. When this happens in the course of an application for DBE eligibility, the certification process for the applicant firm stops, unless other socially and economically disadvantaged owners can account for the required 51 percent ownership and control. A recipient cannot count the participation of the owner whose presumption of economic disadvantage has been conclusively rebutted toward the ownership and control requirements for DBE eligibility.

There may be other situations in which a recipient has a reasonable basis (e.g., from information in its own files, as the result of a complaint from a third party) for believing that an individual who benefits from the statutory presumptions is not really socially and/or economically disadvantaged. In these cases, the recipient may begin a proceeding to rebut the presumptions. For example, if a recipient had reason to believe that the owner of a currently-certified firm had accumulated personal assets well in excess of \$750,000, it might begin such a proceeding. The recipient has the burden of proving, by a preponderance of evidence, that the individual is not disadvantaged. However, the recipient may require the individual to produce relevant information.

It is possible that, at some time in the future, SBA may consider changing the \$750,000 cap amount. The Department anticipates working closely with SBA on any such matter and seeking comment on any potential changes to this rule that would be coordinated with changes SBA proposes for Federal procurement programs in this area.

Under part 23, recipients had to accept 8(a)-certified firms (except for those who exceeded the statutory gross receipts cap). The SNPRM proposed some modifications of this requirement. Recipients were concerned that in some situations information used for 8(a) certification could be inaccurate or out of date. They noted differences between 8(a) and DBE certification standards and procedures. They asked for the ability to

look behind 8(a) certifications and make their own certification decisions.

In response to these comments, the Department is providing greater discretion to recipients. Under part 26, recipients can treat 8(a) certifications as they do certifications made by other DOT recipients. A recipient can accept such a certification in lieu of conducting its own certification process or it can require the firm to go through part or all of its own application process. Because SBA is beginning a certification process for firms participating in the small and disadvantaged business (SDB) program, we will treat certified SDB firms in the same way. If an SDB firm is certified by SBA or an organization recognized by SBA as a certifying authority, a recipient may accept this certification instead of doing its own certification. (This does not apply to firms whose participation in the SDB program is based on a self-certification.) We note that this way of handling SBA program certifications is in the context of the development by DOT recipients of uniform certification programs. If a unified certification program (UCP) accepts a firm's 8(a) or 8(d) certification, then the firm will be certified for all DOT recipients in the state.

People who are not presumed socially and economically disadvantaged can still apply for DBE certification. To do so, they must demonstrate to the recipient that they are disadvantaged as individuals. Using the guidance provided in Appendix E, recipients must make case-by-case decisions concerning such applications. It should be emphasized that the DBE program is a disadvantage-based program, not one limited to members of certain designated groups. For this reason, recipients must take these applications seriously and consider them fairly. The applicant has the burden of proof concerning disadvantage, however.

Section 26.69 What Rules Govern Determinations of Ownership?

Commenters on the ownership provisions of the SNPRM addressed a variety of points. Most commenters agreed that the general burden of proof on applicants should be the preponderance of the evidence. A few commenters thought that this burden should also apply in situations where a firm was formerly owned by a non-disadvantaged individual. For some of these situations, the SNPRM proposed the higher "clear and convincing evidence" standard, because of the heightened opportunities for abuse involved. The Department believes this safeguard is necessary, and we will

retain the higher standard in these situations.

Commenters asked for more guidance in evaluating claims that a contribution of expertise from disadvantaged owners should count toward the required 51 percent ownership. They cited the potential for abuse. The Department believes that there may be circumstances in which expertise can be legitimately counted toward the ownership requirement. For example, suppose someone with a great deal of expertise in a computer-related field, without whom the success of his or her high-tech start-up business would not be feasible, receives substantial capital from a non-disadvantaged source.

We have modified the final rule provision to reflect a number of considerations. Situations in which expertise must be recognized for this purpose are limited. The expertise must be outstanding and in a specialized field: everyday experience in administration, construction, or a professional field is unlikely to meet this test. (This is not a "sweat equity" provision.) We believe that it is fair that the critical expertise of this individual be recognized in terms of the ownership determination. At the same time, the individual must have a significant financial stake in the company. This program focuses on entrepreneurial activity, not simply expertise. While we will not designate a specific percentage of ownership that such an individual must have, entrepreneurship without a reasonable degree of financial risk is inconceivable.

The SNPRM's proposals on how to treat assets obtained through inheritance, divorce, and gifts were somewhat controversial. Most comments agreed with the proposal that assets acquired through death or divorce be counted. One commenter objected to the provision that such assets always be counted, saying that the owner should have to make an additional demonstration that it truly owned the assets before the recipient counted them. We do not see the point of such an additional showing. If a white male business owner dies, and his widow inherits the business, the assets are clearly hers, and the deceased husband will play no further role in operating the firm. Likewise, assets a woman obtains through a divorce settlement are unquestionably hers. Absent a term of a divorce settlement or decree that limits the customary incidents of ownership of the assets or business (a contingency for which the proposed provision provided), there is no problem for which an additional showing of some

sort by the owner would be a useful remedy.

A majority of comments on the issue of gifts opposed the SNPRM proposal, saying that gifts should not be counted toward ownership at all. The main reason was that allowing gifts would make it easier for fronts to infiltrate the program. Some comments also had a flavor of opposition to counting what commenters saw as unearned assets. The Department understands these concerns. If a non-disadvantaged individual who provides a gift is no longer connected with the business, or a disadvantaged individual makes the gift, the issue of the firm being a potential front is much reduced. Where a non-disadvantaged individual makes a gift and remains involved with the business, the concern about potential fronts is greater.

For this reason, the SNPRM erected a presumption that assets acquired by gift in this situation would not count. The applicant could overcome this presumption only by showing, through clear and convincing evidence—a high standard of proof—that the transfer was not for the purpose of gaining DBE certification and that the disadvantaged owner really controls the company. This provides effective safeguards against fraud, without going to the unfair extreme of creating a conclusive presumption that all gifts are illegitimate. Also, for purposes of ownership, all assets are created equal. If the money that one invests in a company is really one's own, it does not matter whether it comes from the sweat of one's brow, a bank loan, a gift or inheritance, or hitting the lottery. As long as there are sufficient safeguards in place to protect against fronts—and we believe the rule provides them—the origin of the assets is unimportant. We are adopting the proposed provisions without change.

Commenters were divided about how to handle marital property, especially in community property states. Some commenters believed that such assets should not be counted at all. This was based, in part, on the concern that allowing such assets to be counted could make it difficult to screen out interspousal gifts designed to set up fronts, even if irrevocable transfers of assets were made. Other commenters said they thought the proposal was appropriate, and some of these thought the requirement for irrevocable transfers was unfair.

The Department is adopting the proposed language. In a community property state, or elsewhere where property is jointly held between spouses, the wife has a legal interest in

a portion of the property. It is really hers. It would be inappropriate to treat this genuine property interest as if it did not exist for purposes of DBE ownership.

To ensure the integrity of the program, it is necessary to put safeguards in place. The regulation does so. First, recipients would not count more assets toward DBE ownership than state law treats as belonging to the wife (the final rule provision adds language to this effect). Second, the irrevocable transfer requirement prevents the husband from being in a position to continue to claim any ownership rights in the assets. If an irrevocable transfer of assets constitutes a gift from a non-disadvantaged spouse who remains involved in the business, then the presumption/clear and convincing evidence mechanism discussed above for gifts would apply to the transaction. If recipients in community property states wanted to establish a mechanism for allocating assets between spouses that was consistent with state law, but did not require court involvement or other more formal procedures, they could propose doing so as part of their DBE programs, subject to operating administration approval.

Most commenters supported the SNPRM's proposal concerning trusts, particularly the distinction drawn between revocable living and irrevocable trusts. One commenter favored counting revocable living trusts when the same disadvantaged individual is both the grantor and beneficiary. The Department believes there is merit in making this exception. If the same disadvantaged individual is grantor, beneficiary, and trustee (i.e., an individual puts his own money in a revocable living trust for tax planning or other legitimate purposes and he alone plays the roles of grantor, beneficiary, and trustee), the situation seems indistinguishable for DBE program purposes from the situation of the same individual controlling his assets without the trust. In all other situations, revocable living trusts would not count.

Some comments asked for clarification of the 51 percent ownership requirement, a subject on which the Department has received a number of questions over the years. The Department has clarified this requirement, with respect to corporations, by stating that socially and economically disadvantaged individuals must own 51 percent of each class of voting stock of a corporation, as well as 51 percent of the aggregate stock. A similar point applies to partnerships and limited liability companies. This latter type of company was not

mentioned in the SNPRM, but a commenter specifically requested clarification concerning it. (We have also noted, in § 26.83, that limited liability companies must report changes in management responsibility to recipients. This is intended to include situations where management responsibility is rotated among members.) These clarifications are consistent with SBA regulations.

There are some ownership issues (e.g., concerning stock options and distribution of dividends) that SBA addresses in some detail in its regulations (see 13 CFR § 124.105 (c), (e), (f)) that were not the subject of comments to the DOT SNPRM. These issues have not been prominent in DOT certification practice, to the best of our knowledge, so we are not adding them to the rule. However, we would use the SBA provisions as guidance in the event such issues arise.

Section 26.71 What Rules Govern Determinations Concerning Control?

Commenters generally agreed with the proposed provisions concerning expertise and delegation of responsibilities, 51 percent control of voting stock, and differences in remuneration. A few commenters expressed concern about having to make judgments concerning expertise. However, this expertise standard, as a matter of interpretation, has been part of the DBE program since the mid-1980s. We do not believe that articulating it in the regulatory text should cause problems, and we believe it is a very reasonable and understandable approach to expertise issues. The provision concerning 51 percent ownership of voting stock, as discussed above, has been relocated in the ownership section of the rule. The Department has added three useful clarifications of the general requirement that disadvantaged owners must control the firm (e.g., by serving as president or CEO, controlling a corporate board). These clarifications are based on SBA's regulations (see 13 CFR § 124.106(a)(2), (b), (d)(1)). The Department intends to use other material in 13 CFR § 124.106 as guidance on control matters, when applicable. Otherwise, the Department is adopting these provisions as proposed.

There was some concern about the proposal concerning licensing. Some recipients thought that it would be better to require a license as proof of control in the case of all licensed occupations. We do not think it is justifiable for the DBE program to require more than state law does. If state law allows someone to run a certain

type of business (e.g., electrical contractors, engineers) without personally having a license in that occupation, then we do not think it is appropriate for the recipient to refuse to consider that someone without a license may be able to control the business. The rule is very explicit in saying that the recipient can consider the presence or absence of a license in determining whether someone really has sufficient ability to control a firm.

Family-owned firms have long been a concern in the program. The SNPRM provided explicitly that if the threads of control in a family-run business cannot be disentangled, such that the recipient can specifically find that a woman or other disadvantaged individual independently controls the business, the recipient may not certify the firm. A business that is controlled by the family as a group, as distinct from controlled individually by disadvantaged individuals, is not eligible.

Notwithstanding this provision, a few recipients commented that certifying any businesses in which non-disadvantaged family members participate would open the program to fronts. We do not agree. Non-disadvantaged individuals can participate in any DBE firm, as long as disadvantaged individuals control the firm. It is not fair and does not achieve any reasonable program objective to say that an unrelated white male may perform functions in a DBE while the owner's brother may never do so.

Commenters generally supported the provision calling for recipients to certify firms only for types of work in which disadvantaged owners had the ability to control the firm's operations. One commenter suggested that recipients, while not requiring recertification of firms seeking to perform additional types of work as DBEs (e.g., work in other than their primary industrial classification), should have to approve a written request from firms in this position. We do believe it is necessary for recipients to verify that disadvantaged owners can control work in an additional area, and we have added language to this effect. Recipients will have discretion about how to administer this verification process.

Commenters asked for additional clarification about the eligibility of people who work only part-time in a firm. We have done so by adding examples of situations that do not lead to eligibility (part-time involvement in a full-time firm and absentee ownership) and a situation that may, depending on circumstances, be compatible with eligibility (running a part-time firm all the time it is operating). It should be

noted that this provision does not preclude someone running a full-time firm from having outside employment. Outside employment is incompatible with eligibility only when it interferes with the individual's ability to control the DBE firm on a full-time basis.

One commenter brought to the Department's attention the situation of DBEs who use "employee leasing companies." According to the commenter, employee leasing companies fill a number of administrative functions for employers, such as payroll, personnel, forwarding of taxes to governmental entities, and drug testing. Typically, the employees of the underlying firm are transferred to the payroll of the employee leasing firm, which in turn leases them back to the underlying employer. The underlying employer continues to hire, fire, train, assign, direct, control etc. the employees with respect to their on-the-job duties. While the employee leasing firm sends payments to the IRS, Social Security, and state tax authorities on behalf of the underlying employer, it is the latter who is remains responsible for paying the taxes.

For practical and legal purposes, the underlying employer retains an employer-employee relationship with the leased employees. The employee leasing company does not get involved in the operations of the underlying employer. In this situation, the use of an employee leasing company by a DBE does not preclude the DBE from meeting the control requirements of this rule. Nor does the employee leasing company become an affiliate of the DBE for business size purposes. Case-by-case judgement, of course, remains necessary. Should an employee leasing company in fact exercise control over the on-the-job activities of employees of the DBE, then the ability of the DBE to meet control requirements would be compromised.

One commenter said, as a general matter, that independence and control should be considered separately. We view independence as an aspect of control: If a firm is not independent of some other business, then the other firm, not the disadvantaged owners, exercise control. While independence is an aspect of control that recipients must review, we do not see any benefit in separating consideration of the two concepts.

A recent court decision (*Jack Wood Construction Co., Inc. v. U.S. Department of Transportation*, 12 F. Supp. 2d 25 (D.D.C., 1998)) overturned a DOT Office of Civil Rights certification appeal decision that upheld a denial of certification based on lack of control.

The court, reading existing part 23 closely, said that a non-disadvantaged individual who was an employee, but not an owner, of a firm could disproportionately control the affairs of a firm without making it ineligible. The court also said that the existing rule language did not make it necessary for a disadvantaged owner to have both technical and managerial competence to control a firm. Part 26 solves both problems that the court found to exist in part 23's control provisions (see § 26.71(e)-(g)).

Section 26.73 What Are Other Rules Affecting Certification?

There were relatively few comments on this section. One commenter disagreed with the proposal to continue the provision that a firm owned by a DBE firm, rather than by socially and economically disadvantaged individuals, was not eligible. The argument against this provision, as we understand it, is that precluding a DBE firm from being owned by, for example, a holding company that is in turn owned by disadvantaged individuals would deny those individuals a financing and tax planning tool available to other businesses.

This argument has merit in some circumstances. The purpose of the DBE program is to help create a level playing field for DBEs. It would be inconsistent with the program's intent to deny DBEs a financial tool that is generally available to other businesses. The Department will allow this exception. Recipients must be careful, however, to ensure that certifying a firm under this exception does not have the effect of allowing the firm, or its parent company, to evade any of the requirements or restrictions of the certification process. The arrangement must be consistent with local business practices and must not have the effect of diluting actual ownership by disadvantaged individuals below the 51 percent requirement. All other certification requirements, including control by disadvantaged individuals and size limits, would continue to apply.

Another commenter suggested a firm should not be certified as a DBE if its owners have interests in non-DBE businesses. We believe that a *per se* rule to this effect would be too draconian. If owners of a DBE—whether disadvantaged individuals or not—also have interests in other businesses, the recipient can look at the relationships among the businesses to determine if the DBE is really independent.

One commenter opposed basing certification on the present status of

firms, seeking discretion to deny certification based on the history of the firm. We believe there is no rational or legal basis for denying certification to a firm on the basis of what it was in the past. Is it a small business presently owned and controlled by socially and economically disadvantaged individuals? If so, it would be contrary to the statute, and to the intent of the program, to deny certification because at some time—perhaps years—in the past, it was not owned and controlled by such individuals. The rule specifies that recipients may consider whether a firm has engaged in a pattern of conduct evincing an intent to evade or subvert the program.

The final provision of this section concerns firms owned by Alaska Native Corporations (ANCs), Indian tribes, and Native Hawaiian Organizations. Like the NPRM, it provides that firms owned by these entities can be eligible DBEs, even though their ownership does not reside, as such, in disadvantaged individuals. These firms must meet the size standards applicable to other firms, including affiliation (lest large combinations of tribal or ANC-owned corporations put other DBEs at a strong competitive disadvantage). Also, they must be controlled by socially and economically disadvantaged individuals. For example, if a tribe or ANC owns a company, but its daily business operations are controlled by a non-disadvantaged white male, the firm would not be eligible.

Commenters pointed us to the following provision of the Alaska Native Claims Settlement Act (ANCSA):

(e) Minority and economically disadvantaged status—

(1) For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.

(2) For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both—

(A) The total equity of the subsidiary corporation, joint venture, or partnership; and

(B) The total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers. (43 U.S.C. 1626(e)).

The question for the Department is whether, reading this language together with the language of the Department's DBE statutes, DOT must alter these provisions.

The DOT DBE statute (TEA-21 version) provides as follows:

(b) Disadvantaged Business Enterprises.—(1) General rule.—Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) Definitions.—In this subsection, the following definitions apply:

(A) Small business concern.—The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of \$16,600,000, as adjusted by the Secretary for inflation.

(B) Socially and economically disadvantaged individuals.—The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

* * * * *

(4) Uniform certification.—The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity, and type of work preferred.

While the language § 1626(e) is broad, the terms used in the two statutes are not identical. Section 1626(e) refers to "minority and economically disadvantaged business enterprise[s]", while the Department's statutes refer to "small business concerns owned and controlled by socially and economically disadvantaged individuals." Requirements applicable to the former need not necessarily apply to the latter.

The legislative history of § 1626(e) lends support to distinguishing the two statutes. The following excerpt from House Report 102-673 suggests that the intent of Congress in enacting this provision was to focus on direct Federal procurement programs:

[The statute] amends section [1626(e)] of ANCSA to clarify that Alaska Native Corporations are minority and economically disadvantaged business enterprises for the purposes of implementing the SBA programs * * * This section would further clarify that Alaska Native Corporations and their subsidiary companies are minority and economically disadvantaged business enterprises for purposes of qualifying for participation in federal contracting and subcontracting programs, the largest of which include the SBA 8(a) program and the Department of Defense Small and Disadvantaged Business Program. These programs were established to increase the participation of certain segments of the population that have historically been denied access to Federal procurement activities. While this section eliminates the need for Alaska Native Corporations or their subsidiaries to prove their "economic" disadvantage the corporations would still be required to meet size requirements as small businesses. This will continue to be determined on a case-by-case basis. (Id. at 19.)

This statute, in other words, was meant to apply to direct Federal procurement programs like the 8(a) program or the DOD SBD program, rather than a program involving state and local procurements reimbursed by DOT financial assistance.

The TEA-21 program is a more recent, more specific statute governing DOT recipients' programs. In contrast, the older, more general section 1626(e) evinces no specific intent to govern the DOT DBE program. There is no evidence that Congress, in enacting section 1626(e), had any awareness of or intent to alter the DOT DBE program.

A number of provisions of the TEA-21 statute suggest that Congress intended to impose specific requirements for the DOT program, without regard to other more general statutory references. For example, the \$16.6 million size cap and the uniform certification requirements suggest that Congress wanted the eligibility for the DOT program to be determined in very specific ways, giving no hint that they intended these specific requirements to be overridden in the case of ANCs.

The Department concludes that section 1626(e) is distinguishable from the DOT DBE statutes, and that the latter govern the implementation of the DBE program. The Department is not compelled to alter its approach to certification in the case of ANCs.

Section 26.81 What Are the Requirements for Unified Certification Programs?

As was the case following the 1992 NPRM, a significant majority of the large number of commenters addressing the issue favored implementing the proposed UCP requirement, which the final rule retains largely as proposed. A few commenters suggested that airports be included in UCPs for concession purposes as well as for FAA-assisted contracting, because there are not any significant differences between the certification standards for concessionaires and contractors (the only exception is size standards, which are easy to apply). We agree, and the final rule does not make an exception for concessions (regardless of the CFR part in which the concessions provisions appear). Some commenters wanted either a longer or shorter implementation period than the SNPRM proposed, but we believe the proposal is a good middle ground between the goal of establishing UCPs as soon as possible and the time recipients will need to resolve organizational, operational, and funding issues.

There were a number of comments and questions about details of the UCP provision. One recipient wondered whether a UCP may or must be separate from a recipient and what the legal liability implications of various arrangements might be. As far as the rule is concerned, a UCP can either be situated within a recipient's organization or elsewhere. Recipients can take state law concerning liability into account in determining how best to structure a UCP in their state. Another recipient asked if existing UCPs could be exempted from submitting plans for approval. Rather than being exempted, we believe that it would be appropriate for such UCPs to submit their existing plans. They would have to change them only to the extent needed to conform to the requirements of the rule.

Some commenters asked about the relationship of UCPs to recipients. For example, should a recipient be able to certify a firm that the UCP had not certified (or whose application the UCP had not yet acted on) or refuse to recognize the UCP certification of a firm the recipient did not think should be eligible? In both cases, the answer is no. Allowing this kind of discretion would fatally undermine the "one-stop shopping" rationale of UCPs. However, a recipient could, like any other party, initiate a third-party challenge to a UCP certification action, the result of which could be appealed to DOT.

We would emphasize that the form of the UCP is a matter for negotiation among DOT recipients in a state, and this regulation does not prescribe its organization. A number of models are available, including single state agencies, consortia of recipients that hire a contractor or share the workload among themselves, mandatory reciprocity among recipients, etc. It might be conceivable for a UCP to be a "virtual entity" that is not resident in any particular location. What matters is that the UCP meet the functional requirements of this rule and actually provide one-stop shopping service to applicants. The final rule adds a provision to clarify that UCPs—even when not part of a recipient's own organization—must comply with all provisions of this rule concerning certification and nondiscrimination. Recipients cannot use a UCP that does not do so. For example, if a UCP fails to comply with part 26 certification standards and procedures, or discriminates against certain applicants, the Secretary reserves the right to direct recipients not to use the UCP, effectively "decertifying" the UCP for purposes of DOT-assisted programs. In this case, which we hope will never happen, the Department would work with recipients in the state on interim measures and replacement of the erring UCP.

The SNPRM proposed "pre-certification." That is, the UCP would have to certify a firm before the firm became eligible to participate as a DBE in a contract. The application could not be submitted as a last-minute request in connection with a procurement action, which could lead to hasty and inaccurate certification decisions. Commenters were divided on this issue, with most expressing doubts about the concept. The Department believes that avoiding last-minute (and especially post-bid opening) applications is important to an orderly and accurate certification process, so we are retaining this requirement. However, we are modifying the timing of the requirement, by requiring that certification take place before the bid/offer due date, rather than before the issuance of the solicitation. The certification action must be *completed* by this date in order for the firm's proposed work on the particular contract to be credited toward DBE goals. It is not enough for the application to have been submitted by the deadline.

The SNPRM proposed that, once UCPs were up and running, a UCP in State A would not have to process an application from a firm whose principal

place of business was in State B unless State B had first certified the firm. Most commenters supported this proposal, one noting that it would help eliminate problems of having to make costly out-of-state site visits. It would also potentially reduce confusion caused by multiple, and potentially conflicting, outcomes in certification decisions. One commenter was concerned that this provision would lead to "free-rider" problems among recipients. The Department will be alert to this possibility, but we do not see it as precluding going forward with this provision. We have added a provision making explicit that when State B has certified a firm, it would have an obligation to send copies of the information and documents it had on the firm to State A when the firm applied there.

All save one of the comments on mandatory reciprocity opposed the concept. That is, commenters favored UCPs being able to choose whether or not to accept certification decisions made by other UCPs. The Department urges UCPs to band together in multi-state or regional alliances, but we believe that it is best to leave reciprocity discretionary. Mandatory reciprocity, even among UCPs, could lead to forum shopping problems.

UCPs will have a common directory, which will have to be maintained in electronic form (i.e., on the internet). One commenter suggested that this electronic directory be updated daily. We think this comment has merit, and the final rule will require recipients to keep a running update of the electronic directory, making changes as they occur.

Section 26.83 What Procedures Do Recipients Follow in Making Certification Decisions?

Commenters generally supported this certification process section, and we are adopting it with only minor changes. Commenters suggested that provision for electronic filing of applications be discretionary rather than mandatory. We agree, and the final rule does not mandate development of electronic filing systems. Some commenters remained concerned about site visits and asked for more guidance on the subject. We intend to provide future guidance on this subject.

Most commenters who addressed the subject favored the development of a mandatory, nationwide, standard DOT application form for DBE eligibility. A number of commenters supplied the forms they use as examples. We believe that this is a good idea, which will help avoid confusion among applicants in a nationwide program. However, we have

not yet developed a form for this purpose. The final rule reserves a requirement for recipients to use a uniform form. We intend to work on developing such a form during the next year, in consultation with recipients and applicants. Meanwhile, recipients can continue to use existing forms, modified as necessary to conform to the requirements of this part.

The SNPRM said recipients could charge a reasonable fee to applicants. A majority of commenters, both recipients and DBEs, opposed the idea of a fee or said it should be capped at a low figure. Fees are not mandatory, and they would be limited, under the final rule, to modest application fees (not intended to recover the cost of the certification process). However, if a recipient wants to charge a modest application fee, we do not see that it is inconsistent with the nature of the program to allow it to do so. Fee waivers would be required if necessary (i.e., a firm who showed they could not afford it). All fees would have to be approved by the concerned OA as part of the DBE program approval process, which would preclude excessive fees.

Given that reciprocity is discretionary among recipients, we thought it would be useful to spell out the options a recipient has when presented by an applicant with the information that another recipient has certified the firm. The recipient may accept the other recipient's certification without any additional procedures. The recipient can make an independent decision based, in whole or in part, on the information developed by the first recipient (e.g., application forms, supporting documents, reports of site visits). The recipient may make the applicant start an entire new application process. The choice among these options is up to the recipient. (As noted above, UCPs will have these same options.)

Most commenters on the subject supported the three-year term for certifications. Some wanted a shorter or longer period. We believe the three-year term is appropriate, particularly given the safeguards of annual and update affidavits that the rule provides. In response to a few comments that recipients should have longer than the proposed 21 days after a change in circumstances to submit an update affidavit, we have extended the period to 30 days. If recipients want to have a longer term in their DBE programs than the three years provided in the rule, they can do so, with the Department's approval, as part of their DBE programs.

A few recipients said that the 90-day period for making decisions on

applications (with the possibility of a 60-day extension) was too short. Particularly since this clock does not begin ticking until a *complete* application, including necessary supporting documentation, is received from the applicant, we do not think this time frame is unreasonable. We would urge recipients and applicants to work together to resolve minor errors or data gaps during the assembly of the package, before this time period begins to run.

Section 26.85 What Rules Govern Recipients' Denials of Initial Requests for Certification?

A modest number of commenters addressed this section, most of whom supported it as proposed. One commenter noted that it was appropriate to permit minor errors to be corrected in an application without invoking the 12-month reapplication waiting period. We agree, and we urge recipients to follow such a policy. Most commenters thought 12 months was a good length for a reapplication period. A few opposed the idea of a waiting period or thought a shorter period was appropriate. The rule keeps 12 months, but permits recipients to seek DOT approval, through the DBE program review process, for shorter periods.

Section 26.87 What Procedures Does a Recipient Use To Remove a DBE's Eligibility?

As long ago as 1983, the Department (in the preamble to the first DBE rule) strongly urged recipients to use appropriate due process procedures for decertification actions. Recipient procedures are still inconsistent and, in some cases, inadequate, in this respect. Quite recently, for example, litigation forced one recipient to rescind a decertification of an apparently ineligible firm because it had failed to provide administrative due process. We believe that proper due process procedures are crucial to maintaining the integrity of this program. The majority of commenters agreed, though a number of commenters had concerns about particular provisions of the SNPRM proposal.

Some recipients, for example, thought separation of functions was an unnecessary requirement, or too burdensome, particularly for small recipients. We believe separation of functions is essential: there cannot be a fair proceeding if the same party acts as prosecutor and judge. We believe that the burdens are modest, particularly in the context of state DOTs and statewide UCPs. We acknowledge that for small recipients, like small airports and transit

authorities, small staffs may create problems in establishing separation of functions (e.g., if there is only one person in the organization who is knowledgeable about the DBE program). For this reason, the rule will permit small recipients to comply with this requirement to the extent feasible until UCPs are in operation (at which time the UCPs would have to ensure separation of functions in all such cases). The organizational scheme for providing separation of functions will be part of each recipient's DBE program. In the case of a small recipient, if the DBE program showed that other alternatives (e.g., the airport using the transit authority's DBE officer as the decisionmaker in decertification actions, and vice-versa) were unavailable, the Department could approve something less than ideal separation of functions for the short term before the UCP becomes operational. In reviewing certification appeals from such recipients, the Department would take into account the absence of separation of functions.

It is very important that the decisionmaker be someone who is familiar with the DBE certification requirements of this part. The decisionmaker need not be an administrative law judge or some similar official; a knowledgeable program official is preferable to an ALJ who lacks familiarity with the program.

Another aspect of the due process requirements that commenters addressed was the requirement for a record of the hearing, which some commenters found to be burdensome. We want to emphasize that, while recipients have to keep a hearing record (including a verbatim record of the hearing), they do not need to produce a transcript unless there is an appeal. A hearing record is essential, because DOT appellate review is a review of the administrative record.

Some commenters suggested deleting two provisions. One of these allowed recipients to impose a sort of administrative temporary restraining order on firms pending a final decertification decision. The other allowed the effect of a decertification decision to be retroactive to the date of the complaint. The Department agrees that these two provisions could lead to unfairness, and so we have deleted them.

Section 26.89 What Is the Process for Certification Appeals to the Department of Transportation?

Several commenters addressed this section, supporting it with a few requests for modification. Some

commenters wanted a time limit for DOT consideration of appeals. We have added a provision saying that if DOT takes longer than 180 days from the time we receive a complete package, we will write everyone concerned with an explanation of the delay and a new target date for completion. Some commenters thought a different time limit for appeals to the Department (e.g., 180 days) would be beneficial. We believe that 90 days is enough time for someone to decide whether a decision of a recipient or UCP should be appealed and write a letter to DOT. This time period starts to run from the date of the final recipient decision on the matter. DOT can accept late-filed appeals on the basis of a showing of good cause (e.g., factors beyond the control of the appellant). Some recipients thought that more time might be necessary to compile an administrative record, so we have permitted DOT to grant extensions for good cause. Generally, however, the Department will adhere to the 90-day time period in order to prevent delays in the appeals process. As a clarification, we have added a provision that all recipients involved must provide administrative record material to DOT when there is an appeal. For example, State A has relied on the information gathered by State B to certify Firm X. A competitor files an ineligibility complaint with State A, which decertifies the firm. Firm X appeals to the Department. Both State A and State B must provide their administrative record materials to DOT for purposes of the appeal. (The material would be provided to the Departmental Office of Civil Rights.)

Section 26.91 What Actions Do Recipients Take Following DOT Certification Appeal Decisions?

There were few comments concerning this section. Some comments suggested DOT appeal decisions should have mandatory nationwide effect. That is if DOT upheld the decertification action of Recipient A, Recipients B, C, D, E, etc. should automatically decertify the firm. This approach is inconsistent with the administrative review of the record approach this rule takes for appeals to DOT.

A DOT decision that A's decertification was supported by substantial evidence is not a DOT decision that the firm is ineligible. It is only a finding that A had enough evidence to decertify the firm. Other results might also be supported by substantial evidence. Nevertheless, when the Department takes action on an appeal, other recipients would be well

advised to review their own decisions to see if any new proceedings are appropriate. One comment suggested the Department should explain a refusal to accept a complaint. This is already the Department's practice.

The SNPRM included a proposal to permit direct third-party complaints to the Department. There were few comments on this proposal, which would have continued an existing DOT practice. Some of these comments suggested dropping this provision, saying it made more sense to have all certification matters handled at the recipient level in the first instance. Others raised procedural issues (e.g., the possibility of the Department holding *de novo* hearings). The Department has reconsidered this proposal, and we have decided to delete it. We believe it will avoid administrative confusion and simplify procedures for everyone if all certification actions begin at the recipient level, with DOT appellate review on the administrative record.

Subpart F—Compliance and Enforcement

There were very few comments concerning this subpart, which we are adopting as proposed. One section has been added to reflect language in TEA-21 that prohibits sanctions against recipients for noncompliance in situations where compliance is precluded by a final Federal court order finding the program unconstitutional.

DBE Participation in Airport Concessions

The Department proposed a number of changes to its airport concessions DBE program rule in the 1997 SNPRM. We received a substantial number of comments on these proposals. The Department is continuing to work on its responses to these comments, as well as on refinements of the rule to ensure that it is narrowly tailored. This work is not complete. Rather than postpone issuance of the rest of the rule pending completion of this work, we are not issuing final concessions provisions at this time. The existing concessions provisions of 49 CFR part 23 will remain in place pending completion of the revised rule.

Regulatory Analyses and Notices

Executive Order 12866

This rule is a significant rule under Executive Order 12866, because of the substantial public interest concerning and policy importance of programs to ensure nondiscrimination in Federally-assisted contracting. It also affects a wide variety of parties, including

recipients in three important DOT financial assistance programs and the DBE and non-DBE contractors that work for them. It has been reviewed by the Office of Management and Budget. It is also a significant rule for purposes of the Department's Regulatory Policies and Procedures.

We do not believe that the rule will have significant economic impacts, however. In evaluating the potential economic impact of this rule, we begin by noting that it does not create a new program. It simply revises the rule governing an existing program. The economic impacts of the DBE program are created by the existing regulation and the statutes that mandate it, not by these revisions. The changes that we propose in this program are likely to have some positive economic impacts. For example, "one-stop shopping" and clearer standards in certification are likely to reduce costs for small businesses applying for DBE certification, as well as reducing administrative burdens on recipients.

The rule's "narrow tailoring" changes are likely to be neutral in terms of their overall economic impact. These could have some distributive impacts (e.g., if the proposed goal-setting mechanism results in changes in DBE goals, a different mix of firms may work on recipients' contracts), but there would probably not be net gains or losses to the economy. There could be some short-term costs to recipients owing to changes in program administration resulting from "narrow tailoring," however.

In any event, the economic impacts are quite speculative and appear nearly impossible to quantify. Comments did not provide, and the Department does not have, any significant information that would allow the Department to estimate any such impacts.

Regulatory Flexibility Act Analysis

The DBE program is aimed at improving contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals. Virtually all the businesses it affects are small entities. There is no doubt that a DBE rule always affects a substantial number of small entities.

This rule, while improving program administration and facilitating DBE participation (e.g., by making the certification process clearer) and responding to legal developments, appears essentially cost-neutral with respect to small entities in general (as noted above, the one-stop shopping feature is intended to benefit small entities seeking to participate). It does

not impose new burdens or costs on small entities, compared to the existing rule. It does not affect the total funds or business opportunities available to small businesses that seek to work in DOT financial assistance programs. To the extent that the proposals in this rule (e.g., with respect to changes in the methods used to set overall goals) lead to different goals than the existing rule, some small firms may gain, and others lose, business.

There is no data of which the Department is aware that would permit us, at this time, to measure the distributive effects of the revisions on various types of small entities. It is likely that any attempt to gauge these effects would be highly speculative. For this reason, we are not able to make a quantitative, or even a precise qualitative, estimate of these effects.

Paperwork Reduction Act

A number of provisions of this rule involve information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). One of these provisions, concerning a report of DBE achievements that recipients make to the Department, is the subject of an existing OMB approval under the PRA.

With one exception, the other information collection requirements of the rule continue existing part 23 requirements, major elements of the DBE program that recipients and contractors have been implementing since 1980 or 1983. While the final rule modifies these requirements in some ways, the Department believes the overall burden of these requirements will remain the same or shrink. These requirements are the following:

- Firms applying for DBE certification must provide information to recipients to allow them to make eligibility decisions. Currently certified firms must provide information to recipients to allow them to review the firms' continuing eligibility. (After the UCP requirements of the rule are implemented, the burdens of the certification provisions should be substantially reduced.)
- When contractors bid on prime contracts that have contract goals, they must document their DBE participation and/or the good faith efforts they have made to meet the contract goals. (Given the final rule's emphasis on race-neutral measures, it is likely the burden in this area will be reduced.)
- Recipients must maintain a directory of certified DBE firms. (Once UCPs are implemented, there will be 52 consolidated directories rather than the hundreds now required, reducing burdens substantially.)

- Recipients must calculate overall goals and transmit them to the Department for approval. (The process of setting overall goals is more flexible, but may also be more complex, than under part 23. As they make their transition to the final rule's goal-setting process during the first years of implementation, recipients may temporarily expend more hours than in the past on information-related tasks.)

- Recipients must have a DBE program approved by the Department. (The final rule includes a one-time requirement to submit a revised program document making changes to conform to the new regulation.)

The Department estimates that these program elements will result in a total of approximately 1.58 million burden hours to recipients and contractors combined during the first year of implementation and approximately 1.47 million annual burden hours thereafter.

The final rule also includes one new information collection element. It calls for recipients to collect and maintain data concerning both DBE and non-DBE bidders on DOT-assisted contracts. This information is intended to assist recipients in making more precise determinations of the availability of DBEs and the shape of the "level playing field" the maintenance of which is a major objective of the rule. The Department estimates that this requirement will add 254,595 burden hours in the first year of implementation. This figure is projected to decline to 193,261 hours in the second year and to 161,218 hours in the third and subsequent years.

Both as the result of comments and what the Department learns as it implements the DBE program under part 26, it is possible for the Department's information needs and the way we meet them to change. Sometimes the way we collect information can be changed informally (e.g., by guidance telling recipients they need not repeat information that does not change significantly from year to year). In other circumstances, a technical amendment to the regulation may be needed. In any case, the Department will remain sensitive to situations in which modifying information collection requirements becomes appropriate.

As required by the PRA, the Department has submitted an information collection approval request to OMB. Organizations and individuals desiring to submit comments on information collection requirements should direct them to the Department's docket for this rulemaking. You may also submit copies of your comments to

the Office of Information and Regulatory Affairs (OIRA), OMB, Room 10235, New Executive Office Building, Washington, DC, 20503; Attention: Desk Officer for U.S. Department of Transportation.

The Department considers comments by the public on information collections for several purposes:

- Evaluating the necessity of information collections for the proper performance of the Department's functions, including whether the information has practical utility.
- Evaluating the accuracy of the Department's estimate of the burden of the information collections, including the validity of the methods and assumptions used.
- Enhancing the quality, usefulness, and clarity of the information to be collected.

- Minimizing the burden of the collection of information on respondents, including through the use of electronic and other methods.

The Department points out that, with the exception of the bid data collection, all the information collection elements discussed in this section of the preamble have not only been part of the Department's DBE program for many years, but have also been the subject of extensive public comment following the 1992 NPRM and 1997 SNPRM. Among the over 900 comments received in response to these notices were a number addressing administrative burden issues surrounding these program elements. In this final rule, the Department has responded to these comments.

OMB is required to make a decision concerning information collections within 30–60 days of the publication of this notice. Therefore, for best effect, comments should be received by DOT/OMB within 30 days of publication. Following receipt of OMB approval, the Department will publish a **Federal Register** notice containing the applicable OMB approval numbers.

Federalism

The rule does not have sufficient Federalism impacts to warrant the preparation of a Federalism assessment. While the rule concerns the activities of state and local governments in DOT financial assistance programs, the rule does not significantly alter the role of state and local governments vis-a-vis DOT from the present part 23. The availability of program waivers could allow greater flexibility for state and local participants, however.

List of Subjects

49 CFR Part 23

Administrative practice and procedure, Airports, Civil rights,

Concessions, Government contracts, Grant programs—transportation, Minority businesses, Reporting and recordkeeping requirements.

49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant programs—transportation, Highways and roads, Mass transportation, Minority businesses, Reporting and recordkeeping requirements.

Issued this 8th day of January, 1999, at Washington, DC.

Rodney E. Slater,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department amends 49 CFR subtitle A as follows:

PART 23—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

1. Revise the heading of 49 CFR part 23 as set forth above.
2. Revise the authority citation for 49 CFR part 23 to read as follows:

Authority: 42 U.S.C. 200d *et seq.*; 49 U.S.C. 47107 and 47123; Executive Order 12138, 3 CFR, 1979 Comp., p. 393.

Subparts A, C, D, and E—[Removed and Reserved]

3. Remove and reserve subparts A, C, D, and E of part 23.

§ 23.89 [Amended]

4. Amend § 23.89 as follows:
a. In the definition of “disadvantaged business,” remove the words “§ 23.61 of subpart D of this part” and add the words “49 CFR part 26”; and remove the words “§ 23.61” in the last line of the definition and add the words “49 CFR part 26”.

b. In the definition of “small business concern,” paragraph (b), remove the words “§ 23.43(d)” and add the words “§ 23.43(d) in effect prior to March 4, 1999 (See 49 CFR Parts 1 to 99 revised as of October 1, 1998.)”.

c. In the definition of “socially and economically disadvantaged individuals,” remove the words “§ 23.61 of subpart D of this part” and add “49 CFR part 26”.

§ 23.93 [Amended]

5. Amend § 23.93(a) introductory text by removing the words “§ 23.7” and adding the words “§ 26.7”.

§ 23.95 [Amended]

6. Amend § 23.95(a)(1) by removing the words “based on the factors listed in § 23.45(g)(5)” and adding the words

“consistent with the process for setting overall goals set forth in 49 CFR 26.45”.

7. In addition, amend § 23.95 as follows:

a. In paragraph (f)(1), remove the words “§ 23.51” and add the words “49 CFR part 26, subpart E”;

b. In paragraph (f)(2), remove the words “Except as provided in § 23.51(c), each” and add “Each”;

c. Remove paragraph (f)(5);

d. In paragraph (g)(1), remove the words “§ 23.53” and add the words “49 CFR part 26, subpart D”.

§ 23.97 [Amended]

8. Amend § 23.97 by removing the words “§ 23.55” and adding the words “49 CFR 26.89”.

§ 23.11 [Removed]

9. Remove § 23.111.

10. Add a new 49 CFR part 26, to read as follows:

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

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Sec.

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- 26.61 How are burdens of proof allocated in the certification process?
26.63 What rules govern group membership determinations?
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Subpart E—Certification Procedures

- 26.81 What are the requirements for Unified Certification Programs?
26.83 What procedures do recipients follow in making certification decisions?
26.85 What rules govern recipients’ denials of initial requests for certification?
26.87 What procedures does a recipient use to remove a DBE’s eligibility?
26.89 What is the process for certification appeals to the Department of Transportation?
26.91 What actions do recipients take following DOT certification appeal decisions?

Subpart F—Compliance and Enforcement

- 26.101 What compliance procedures apply to recipients?
26.103 What enforcement actions apply in FHWA and FTA programs?
26.105 What enforcement actions apply in FAA Programs?
26.107 What enforcement actions apply to firms participating in the DBE program?
26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?
Appendix A to part 26—Guidance Concerning Good Faith Efforts
Appendix B to part 26—Forms [Reserved]
Appendix C to part 26—DBE Business Development Program Guidelines
Appendix D to part 26—Mentor-Protégé Program Guidelines
Appendix E to part 26—Individual Determinations of Social and Economic Disadvantage

Authority: 23 U.S.C. 324; 42 U.S.C. 2000d *et seq.*; 49 U.S.C. 1615, 47107, 47113, 47123;

Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.

Subpart A—General

§ 26.1 What are the objectives of this part?

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- (e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- (f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- (g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

§ 26.3 To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

(1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

26.5 What do the terms used in this part mean?

Affiliation has the same meaning the term has in the Small Business

Administration (SBA) regulations, 13 CFR part 121.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

- (i) One concern controls or has the power to control the other; or
- (ii) A third party or parties controls or has the power to control both; or
- (iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakila Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

Compliance means that a recipient has correctly implemented the requirements of this part.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

Department or *DOT* means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged business enterprise or *DBE* means a for-profit small business concern—

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Operating Administration or *OA* means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U.S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site (www.ntis.gov/naics).

Primary recipient means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or *SBA* means the United States Small Business Administration.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

§ 26.7 What discriminatory actions are forbidden?

(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

§ 26.9 How does the Department issue guidance and interpretations under this part?

(a) This part applies instead of subparts A and C through E of 49 CFR part 23 in effect prior to March 4, 1999. (See 49 CFR Parts 1 to 99, revised as of October 1, 1998.) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 have definitive, binding effect in implementing the provisions of this part and constitute the official position of the Department of Transportation.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid and binding, and constitute the official position of the Department of Transportation, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

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.

§ 26.11 What records do recipients keep and report?

- (a) [Reserved]
- (b) You must continue to provide data about your DBE program to the Department as directed by DOT operating administrations.
- (c) You must create and maintain a bidders list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. For every firm, the following information must be included:
- (1) Firm name;
 - (2) Firm address;
 - (3) Firm's status as a DBE or non-DBE;
 - (4) The age of the firm; and
 - (5) The annual gross receipts of the firm.

§ Section 26.13 What assurances must recipients and contractors make?

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

§ 26.15 How can recipients apply for exemptions or waivers?

(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that—

- (i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;

- (ii) Conditions in your jurisdiction are appropriate for implementing the proposal;

- (iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

- (iv) Your proposal is consistent with applicable law and program requirements of the concerned operating

administration's financial assistance program.

(3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

- (i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49;

- (ii) Your level of DBE participation continues to be consistent with the objectives of this part;

- (iii) There is a reasonable limitation on the duration of your modified program; and

- (iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracting

§ 26.21 Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

- (1) All FHWA recipients receiving funds authorized by a statute to which this part applies;

- (2) FTA recipients that receive \$250,000 or more in FTA planning, capital, and/or operating assistance in a Federal fiscal year;

- (3) FAA recipients that receive a grant of \$250,000 or more for airport planning or development.

(b)(1) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed and approved by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has

approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

§ 26.23 What is the requirement for a policy statement?

You must issue a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

§ 26.25 What is the requirement for a liaison officer?

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

26.27 What efforts must recipients make concerning DBE financial institutions?

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

§ 26.29 What prompt payment mechanisms must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than a specific number of days from receipt of each payment you make to the prime contractor. This clause must also require the prompt return of retainage payments from the prime contractor to the subcontractor within a specific number of days after the subcontractor's work is satisfactorily completed.

(1) This clause may provide for appropriate penalties for failure to comply, the terms and conditions of which you set.

(2) This clause may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(b) You may also establish, as part of your DBE program, any of the following

additional mechanisms to ensure prompt payment:

(1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

§ 26.31 What requirements pertain to the DBE directory?

You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE. You must revise your directory at least annually and make updated information available to contractors and the public on request.

§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?

(a) If you determine that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.

(b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with § 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

(c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.

§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?

(a) You may or, if an operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.

(b) As part of a BDP or separately, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.

(1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protégé program.

(2) During the course of the mentor-protégé relationship, you must:

(i) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any contract let by the recipient; and

(ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.

(3) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program. See Appendix D of this part for guidance concerning the operation of mentor-protégé programs.

(c) Your BDPs and mentor-protégé programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

§ 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?

(a) You must implement appropriate mechanisms to ensure compliance with the part's requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state and local law). You must set forth these mechanisms in your DBE program.

(b) Your DBE program must also include a monitoring and enforcement mechanism to verify that the work committed to DBEs at contract award is

actually performed by the DBEs. This mechanism must provide for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms) and include a provision ensuring that DBE participation is credited toward overall or contract goals only when payments are actually made to DBE firms.

Subpart C—Goals, Good Faith Efforts, and Counting

§ 26.41 What is the role of the statutory 10 percent goal in this program?

(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

§ 26.43 Can recipients use set-asides or quotas as part of this program?

(a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.

(b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

§ 26.45 How do recipients set overall goals?

(a) You must set an overall goal for DBE participation in your DOT-assisted contracts.

(b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.

(c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.

(1) *Use DBE Directories and Census Bureau Data.* Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market that perform work in the same SIC codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, www.census.gov/epcd/cbp/view/cbpview.html.) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in your market.

(3) *Use data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study.

(4) *Use the goal of another DOT recipient.* If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) *Alternative methods.* Subject to the approval of the DOT operating administration, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your

jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

(i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and

(iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

(2) You may also consider available evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.

(3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:

(1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming fiscal year;

(2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the forthcoming fiscal year. In appropriate cases, the FTA or FAA Administrator may permit you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects.

(f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration for review on August 1 of each year, unless the Administrator of the concerned operating administration establishes a different submission date.

(2) If you are an FTA or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FTA or FAA Administrator.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see § 26.51(c)).

(4) You are not required to obtain prior operating administration concurrence with the your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

(5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:

(i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and

(ii) Avoid imposing undue burdens on non-DBEs.

(g) In establishing an overall goal, you must provide for public participation. This public participation must include:

(1) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs.

(2) A published notice announcing your proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at your principal office for 30 days following the date of the notice, and informing the public that you and the Department will accept comments on the goals for 45 days from the date of the notice. The notice must include addresses to which comments may be sent, and you must publish it in general circulation media and available minority-focused media and trade association publications.

(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

§ 26.47 Can recipients be penalized for failing to meet overall goals?

(a) You cannot be penalized, or treated by the Department as being in noncompliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

§ 26.49 How are overall goals established for transit vehicle manufacturers?

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal. In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will perform during the fiscal year in question. You must exclude from this base funds attributable to work performed outside the United States and its territories, possessions, and commonwealths. The requirements and procedures of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) As a transit vehicle manufacturer, you may make the certification required by this section if you have submitted the goal this section requires and FTA has approved it or not disapproved it.

(d) As a recipient, you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

§ 26.51 What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);

(2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific

contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not

project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

(4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

Example to Paragraph (f)(1): Your overall goal for Year I is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year I.

(2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

Example to Paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the

amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to Paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

Example to Paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (i.e., from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two consecutive years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

(a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/

offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and

(3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

(c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a)

of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

(2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.

(3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

(4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

(5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.

(e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.

(f) (1) You must require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.

(2) When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.

(3) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.

(g) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

§ 26.55 How is DBE participation counted toward goals?

(a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.

(1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

(2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

(b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

(c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

(1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities

by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

(2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.

(3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.

(4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

(d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

(1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

(2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

(3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

(4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

(5) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.

(6) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)(i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(2)(i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the

purchase and sale or lease of the products in question.

(B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).

(3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

(f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in § 26.87(i).

(g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.

(h) Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or your overall goal until the amount being counted toward the goal has been paid to the DBE.

Subpart D—Certification Standards

§ 26.61 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups

identified in § 26.67(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to you that they are socially and economically disadvantaged. However, applicants have the obligation to provide you information concerning their economic disadvantage (see § 26.67).

(d) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to you, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Appendix E of this part.)

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

§ 26.63 What rules govern group membership determinations?

(a) If you have reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, you must require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.

(b) In making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. You may require the applicant to produce appropriate documentation of group membership.

(1) If you determine that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of § 26.89.

§ 26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. You must apply current SBA

business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$16.6 million. The Secretary adjusts this amount for inflation from time to time.

§ 26.67 What rules determine social and economic disadvantage?

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) 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 submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.

(ii) In determining net worth, you must exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

(b) *Rebuttal of presumption of disadvantage.* (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(c) *8(a) and SDB Firms.* If a firm applying for certification has a current, valid certification from or recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), you may accept the firm's 8(a) or SDB certification in lieu of conducting your own certification proceeding, just as you may accept the certification of another DOT recipient for this purpose. You are not required to do so, however.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE

certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$750,000 shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

§ 26.69 What rules govern determinations of ownership?

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole.

(b) To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

(3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

(c) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are

considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if—

(1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or

(2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

(e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

(1) The owner's expertise must be—

(i) In a specialized field;

(ii) Of outstanding quality;

(iii) In areas critical to the firm's operations;

(iv) Indispensable to the firm's potential success;

(v) Specific to the type of work the firm performs; and

(vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

(2) The individual whose expertise is relied upon must have a significant financial investment in the firm.

(g) You must always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual—

(1) As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce

decreed is inconsistent with this section; or

(2) Through inheritance, or otherwise because of the death of the former owner.

(h)(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is—

(i) Involved in the same firm for

which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

(j) You may consider the following factors in determining the ownership of a firm. However, you must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because—

(1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;

(2) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or

(3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, you must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

§ 26.71 What rules govern determinations concerning control?

(a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

(b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential

DBE and non-DBE firms with normal industry practice.

(c) A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in § 26.69(j)(2).

(d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in

the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

(i)(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that

owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

(j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(l) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual

now owning the firm must demonstrate to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

(m) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

(n) 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. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You may not, in this situation, require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on

the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

§ 26.73 What are other rules affecting certification?

(a)(1) Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in paragraph (a)(2) of this section, you must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

(b) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part. Nor must you refuse to certify a firm solely on the basis that it is a newly formed firm.

(c) DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

(d) Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.

(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

Example 1: Socially and economically disadvantaged individuals own 100 percent of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

Example 2: Disadvantaged individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

Example 3: Disadvantaged individuals own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is 56 percent (80 percent of the 70 percent). This is more than 51 percent, so you may certify the subsidiary, if all other requirements are met.

Example 4: Same as Example 2 or 3, but someone other than the socially and economically disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, you cannot certify it because it fails to meet control requirements.

Example 5: Disadvantaged individuals own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. This is less than 51 percent, so you cannot certify the subsidiary.

Example 6: The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of § 26.65(b). Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

(g) You must not require a DBE firm to be prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.

(h) A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of § 26.65. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in § 26.71.

Subpart E—Certification Procedures

§ 26.81 What are the requirements for Unified Certification Programs?

(a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).

(1) Within three years of March 4, 1999, you and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval. The Secretary may, on the basis of extenuating circumstances shown by the recipients in the state, extend this deadline for no more than one additional year.

(2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring

that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

(3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.

(4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.

(5) If you and the other recipients in your state fail to meet the deadlines set forth in this paragraph (a), you shall have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct you to complete the required action by a date certain. If you and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this part.

(b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

(1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.

(2) The UCP shall provide “one-stop shopping” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

(3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.

(c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

(d) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The “home state” UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm’s application.

(e) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.

(f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

(g) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this section), the information required by § 26.31. The UCP shall make the directory available to the public electronically, on the internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

(h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

§ 26.83 What procedures do recipients follow in making certification decisions?

(a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their résumés and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

(2) If the firm is a corporation, analyze the ownership of stock in the firm;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;

(6) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(7) Require potential DBEs to complete and submit an appropriate application form.

(i) *Uniform form.* [Reserved]

(ii) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(iii) You must review all information on the form prior to making a decision about the eligibility of the firm.

(d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.

(e) When another DOT recipient has certified a firm, you have discretion to take any of the following actions:

(1) Certify the firm in reliance on the certification decision of the other recipient;

(2) Make an independent certification decision based on documentation provided by the other recipient, augmented by any additional information you require the applicant to provide; or

(3) Require the applicant to go through your application process without regard to the action of the other recipient.

(f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.

(g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may

reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

(h) Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of § 26.87. You may not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes.

(i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.

(1) Changes in management responsibility among members of a limited liability company are covered by this requirement.

(2) You must attach supporting documentation describing in detail the nature of such changes.

(3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under § 26.109(c).

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be

deemed to have failed to cooperate under § 26.109(c).

(k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under § 26.89.

§ 26.85 What rules govern recipients' denials of initial requests for certification?

(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

(b) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm.

(c) When you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under § 26.89.

§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not

continue to be certified. Confidentiality of complainants' identities must be protected as provided in § 26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must

give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under § 26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (i.e., an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm; or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(i) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(j) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under § 26.89.

§ 26.89 What is the process for certification appeals to the Department of Transportation?

(a) (1) If you are a firm which is denied certification or whose eligibility is removed by a recipient, you may make an administrative appeal to the Department.

(2) If you are a complainant in an ineligibility complaint to a recipient (including the concerned operating administration in the circumstances provided in § 26.87(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address: Department of Transportation, Office of Civil Rights, 400 7th Street, SW, Room 2401, Washington, DC 20590.

(b) Pending the Department's decision in the matter, the recipient's decision remains in effect. The Department does not stay the effect of the recipient's decision while it is considering an appeal.

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and arguments concerning why the recipient's decision should be reversed. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal.

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before

which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(2) If you are an appellant other than one described in paragraph (c)(1) of this section, the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by

substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section). The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

(8) The Department's policy is to make its decision within 180 days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

(g) All decisions under this section are administratively final, and are not subject to petitions for reconsideration.

§ 26.91 What actions do recipients take following DOT certification appeal decisions?

(a) If you are the recipient from whose action an appeal under § 26.89 is taken, the decision is binding. It is not binding on other recipients.

(b) If you are a recipient to which a DOT determination under § 26.89 is applicable, you must take the following action:

(1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.87(i) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.

(3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

Subpart F—Compliance and Enforcement

§ 26.101 What compliance procedures apply to recipients?

(a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action

under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

(b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

§ 26.103 What enforcement actions apply in FHWA and FTA programs?

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

(a) *Noncompliance complaints.* Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.

(b) *Compliance reviews.* The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.

(c) *Reasonable cause notice.* If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in

noncompliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.

(d) *Conciliation.* (1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as being in compliance. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

(3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.

(4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.

(e) *Enforcement actions.* (1) Enforcement actions are taken as provided in this subpart.

(2) Applicable findings in enforcement proceedings are binding on all DOT offices.

§ 26.105 What enforcement actions apply in FAA Programs?

(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

§ 26.107 What enforcement actions apply to firms participating in the DBE program?

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations

or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

(a) *Availability of records.* (1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

(2) If you are a recipient, you shall safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

(b) *Confidentiality of information of complainants.* Notwithstanding the provisions of paragraph (a) of this

section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

(c) *Cooperation.* All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

(d) *Intimidation and retaliation.* If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

Appendix A to Part 26—Guidance Concerning Good Faith Efforts

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took

all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere *pro forma* efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring *bona fide* good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the

available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

Appendix B to Part 26—Forms [Reserved]

Appendix C to Part 26—DBE Business Development Program Guidelines

The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from the recipient.

(A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages; a developmental stage and a transitional stage.

(B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility criteria contained in part 26.

(C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability in non-traditional areas of work and/or work outside the DBE program.

(D) The business plan should contain at least the following:

(1) An analysis of market potential, competitive environment and other business analyses estimating the program participant's prospects for profitable operation during the term of program participation and after graduation from the program.

(2) An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of DBE participation.

(3) Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (C) and (D)(1) of this appendix;

(4) Estimates of contract awards from the DBE program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and

(5) Such other information as the recipient may require.

(E) Each participant should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient should establish an anniversary date for review of the participant's business plan and contract forecasts.

(F) Each participant should annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast should be included in the participant's business plan. The forecast should include:

- (1) The aggregate dollar value of contracts to be sought under the DBE program, reflecting compliance with the business plan;
- (2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of DBE participation;
- (3) The types of contract opportunities being sought, based on the firm's primary line of business; and
- (4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.

(G) Program participation is divided into two stages: (1) a developmental stage and (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.

(H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to, the number of contracts, aggregate amount of the contract received, years in business, growth potential, etc.

(I) Beginning in the first year of the transitional stage of program participation, each participant should annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of DBE participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth the same information as required under paragraph (F) of steps the participant will take to continue its business development after the expiration of its program term.

(J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace, its further participation within the program may be determined by the recipient.

(K) In determining whether a concern has substantially achieved the goals and

objectives of its business plan, the following factors, among others, should be considered by the recipient:

- (1) Profitability;
- (2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;
- (3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;
- (4) Ability to obtain bonding;
- (5) A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and
- (6) Good management capacity and capability.

(L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification should also provide the participant 45 days from the date of service of the letter to submit in writing information that would explain why the proposed basis of graduation is not warranted.

(M) Participation of a DBE firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient should take such action if over a 2-year period a DBE firm exhibits such a pattern.

Appendix D to Part 26—Mentor-Protégé Program Guidelines

(A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.

(B)(1) Any mentor-protégé relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by

the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.

(C) DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protégé agreement.

Appendix E to Part 26—Individual Determinations of Social and Economic Disadvantage

The following guidance is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

Social Disadvantage

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(1) *Education.* Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) *Employment.* Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) *Business history.* The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

II. With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)—may be socially and economically disadvantaged.

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

Economic Disadvantage

(A) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) *Submission of narrative and financial information.*

(1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(C) *Factors to be considered.* In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash),

personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(D) *Transfers within two years.*

(1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

[FR Doc. 99-1083 Filed 1-29-99; 11:00 am]

BILLING CODE 4910-62-P

APPENDIX Q.2.

DBE REGULATORY PROGRAM UPDATES
FEDERAL REGISTER/VOL. 75, NO. 22/
Wednesday, February 2, 2010

[FR Doc. 2010-2254 Filed 2-2-10; 8:45 am]
BILLING CODE 4910-50-9

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 26

[Docket No. OST-2010-0021]

RIN 2105-AD76

Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Final rule.

SUMMARY: This final rule changes the Department of Transportation (Department) regulation concerning how often recipients of DOT financial assistance are required to submit to the appropriate DOT operating administration for approval the methodology and process used to establish their overall disadvantaged business enterprise (DBE) goal for federally funded contracting opportunities. Under the rule, recipients will submit overall goals for review every three years, rather than annually.

DATES: *Effective Date:* This rule is effective March 5, 2010.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W94-302, Washington, DC 20590, 202 366-9310, Bob.Ashby@dot.gov.

SUPPLEMENTARY INFORMATION: On April 8, 2009, the Department published in the *Federal Register* at 74 FR 15910, a notice of proposed rulemaking (NPRM) inviting public comment on a proposal to establish a staggered three-year schedule for the submission by DOT recipients subject to the regulations at 49 CFR part 26 of their overall goal for DBE participation on DOT-assisted contracts. Recipients are currently required to make a DBE goal submission each year on August 1st. This proposed rule change was modeled largely on the comparable provision in the airport concessions DBE rule in Part 23 of this Title, with which the Department has had successful experience.

The Department received approximately 27 comments from state departments of transportation, airports, transit authorities, DBEs, contractor

associations, and transportation consultants. This final rule responds to the comments from those who supported or opposed the adoption of the proposed rule.

The majority of commenters supported the proposed rule change as long as recipients are either required to conduct annual reviews to account for changes that may warrant a modification of the overall goal or are simply allowed to make adjustments to the overall goal during the three-year period based on changed circumstances without necessarily requiring annual reviews. Some of the circumstances or conditions that may indicate the need for an adjustment include, but are not limited to, the collection of new data, a significant change in the recipient's DOT assisted contracting program (e.g., new contracting opportunities presented by the availability of new or different grant opportunities), a marked increase or decrease in the availability of DBEs in the recipient's contracting market, or a significant change in the legal standards governing the DBE program. Some supporters also thought it advisable to give recipients the flexibility to request a waiver to set their own schedule or to submit an overall goal that covers a one-, two-, or three-year period as appropriate due to the nature of the recipient's contracting program. The ability to maintain the status quo—i.e., set annual overall goals—was an approach strongly endorsed by some airports, some representatives of the aviation industry, and some representatives of general contractors.

The commenters opposed to the proposed rule change raised several concerns about moving to a three-year cycle: (1) The difficulty in estimating a DBE goal beyond one year given the changes in the political landscape or changes in the kind of projects that are funded; (2) locking in goals for three years undermines the ability to assess market conditions and DBE availability; (3) requiring annual reviews during the three-year period defeats the purpose of reducing the administrative burden associated with the annual goal setting process since an annual review will likely result in the need for an adjustment and thereby trigger the annual goal setting process; and (4) it fails to achieve a level playing field or ensure narrow tailoring.

Having considered the comments, the Department believes going to a system of staggered three-year overall DBE goal submissions would not compromise the ability of recipients to implement a narrowly tailored program and would

enable recipients to improve the data collection, analysis, and consultation required to establish an overall goal that truly aims to reflect the level of DBE participation one would expect absent the effects of discrimination. Since the DBE program rules were substantially revised in 1999, generally we have not seen huge variances in the annual DBE goal submissions made by recipients over the last ten years. Thus, we do not assume that requiring an annual review would necessarily lead to annual adjustments resulting from a process that mimics the current yearly process. That said, we do not think it necessary to mandate annual reviews. Instead, we believe recipients or operating administrations should be allowed, based on changed circumstances, to initiate mid-course reviews as needed to determine if adjustments to the overall goal are warranted. Also, we do not think it prudent to allow each recipient to establish a different schedule for submission. Such a series of exceptions would likely swallow the rule. It also would make it much more difficult for operating administrations to manage reviews and oversee compliance. However, in those cases where a recipient believes its situation differs from other similarly situated recipients, the existing program waiver process offers the recipient the opportunity to seek an exception. These program waivers, unlike the general program waiver provisions of 49 CFR 26.15, could be granted by an operating administration and would not have to be approved by the Secretary.

Under the final rule, each operating administration is required to establish a schedule for submissions to be posted on its Web site. The schedules are intended to be posted no later than 30 days after the effective date of this rule. During the transition to this new system, specific notice of the deadline for overall goal submissions and the consequences of failing to meet the deadline should be provided to recipients. The schedules established by the operating administrations should include each year a proportionate or representative number of recipients from all regions of the country (e.g., north, south, east, and west). During the transition to the new scheduling system, recipients should continue using or operating under the goals last approved by the operating administration.

Regulatory Analyses and Notices

Executive Order 12866 and Regulatory Flexibility Act

The Department has determined that this action is not a significant regulatory

action for purposes of Executive Order 12866 or the Department's regulatory policies and procedures. The rule would not impose any costs or burdens on grantees or other parties. It would reduce burdens on recipients by reducing the frequency of goal submissions to the Department. For these reasons, the Department certifies that the rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This rule does not create any information collection requirements covered by the Paperwork Reduction Act.

List of Subjects in 49 CFR Part 26

Administrative practice and procedures, Airports, Civil rights, Government contracts, Grant programs—transportation, Minority business, Reporting and recordkeeping requirements.

Issued this 20th day of January 2010, at Washington, DC.

Ray LaHood,

Secretary of Transportation.

- For the reasons stated in the preamble, the Department amends 49 CFR part 26 as follows:

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

- 1. The authority for 49 CFR part 26 continues to read as follows:

Authority: 23 U.S.C. 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C 1615, 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

Subpart C—Goals, Good Faith Efforts, and Counting

- 2. Revise § 26.45(e) and (f) to read as follows:

§ 26.45 How do recipients set overall goals?

* * * * *

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:

(1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming three fiscal years.

(2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to

be used for the purchase of transit vehicles) that you will expend in FTA- or FAA-assisted contracts in the three forthcoming fiscal years.

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects.

(f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's Web site. You must submit to the operating administration for approval any significant adjustment you make to your goal during the three-year period based on changed circumstances. The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.

(2) If you are an FHWA, FTA, or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FHWA, FTA, or FAA Administrator.

(3) Timely submission and operating administration approval of your overall goal is a condition of eligibility for DOT financial assistance.

(4) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive DOT financial assistance.

* * * * *

[FR Doc. 2010–2294 Filed 2–2–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 192 and 195

[Docket No. PHMSA–2007–27954; Amdt. Nos. 192–112 and 195–93]

RIN 2137–AE28

Pipeline Safety: Control Room Management/Human Factors, Correction

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

ACTION: Final rule; correction.

SUMMARY: PHMSA is correcting a Final Rule that appeared in the **Federal Register** on December 3, 2009. That final rule amended the Federal Pipeline Safety Regulations to address human factors and other aspects of control room management for pipelines where controllers use supervisory control and data acquisition (SCADA) systems, but contained errors regarding certain dates, both in the preamble and the amendments. This document corrects those errors.

DATES: *Effective Date:* February 3, 2010. *Applicability Date:* This correction is applicable beginning February 1, 2010.

FOR FURTHER INFORMATION CONTACT: For technical information contact Byron Coy at (609) 989–2180 or by e-mail at *Byron.Coy@dot.gov*. For legal information contact Benjamin Fred at (202) 366–4400 or by e-mail at *Benjamin.Fred@dot.gov*. All materials in the docket may be accessed electronically at *http://www.regulations.gov*. General information about PHMSA may be found at *http://phmsa.dot.gov*.

SUPPLEMENTARY INFORMATION: On December 3, 2009, PHMSA published a final rule in the **Federal Register** (74 FR 63310) entitled “Pipeline Safety: Control Room Management/Human Factors.” This final rule contained several errors regarding certain compliance dates. The final rule became effective on February 1, 2010, and the corrected dates detailed in this final rule correction are applicable as of February 1, 2010.

On page 63311 of the preamble to the December 3 rule, in the first column in the **DATES** section, the compliance date is corrected to read “Compliance Date: An operator must develop control room management procedures by August 1, 2011, and implement the procedures by February 1, 2013.”

- Therefore, in accordance with the reasons stated in the preamble, PHMSA

APPENDIX Q.3.

**DBE REGULATORY PROGRAM UPDATES
FEDERAL REGISTER/VOL. 76, NO. 19/ Friday,
January 28, 2011**

| State and location | Community No. | Effective date authorization/cancellation of sale of flood insurance in community | Current effective map Date | Date certain federal assistance no longer available in SFHAs |
|---|---------------|---|----------------------------|--|
| Taft, Town of, Muskogee County | 400128 | June 26, 1976, Emerg; August 25, 1987, Reg; February 4, 2011, Susp. |do* | Do. Do. Do. Do. |
| Wainwright, Town of, Muskogee County | 400129 | March 9, 1976, Emerg; August 8, 1978, Reg; February 4, 2011, Susp. |do* | Do. Do. Do. Do. |
| Warner, Town of, Muskogee County | 400130 | December 29, 1976, Emerg; May 25, 1978, Reg; February 4, 2011, Susp. |do* | Do. Do. Do. Do. |
| Webbers Falls, Town of, Muskogee County. | 400131 | November 28, 1975, Emerg; May 1, 1980, Reg; February 4, 2011, Susp. |do* | Do. |
| as: Bandera County, Unincorporated Areas | 480020 | January 21, 1974, Emerg; November 1, 1978, Reg; February 4, 2011, Susp. |do* | |
| Benavides, City of, Duval County | 480792 | July 24, 1975, Emerg; March 4, 1986, Reg; February 4, 2011, Susp. |do* | |
| Colorado County, WCID Number 2 | 481489 | October 28, 1977, Emerg; June 1, 1988, Reg; February 4, 2011, Susp. |do* | |
| Colorado County, Unincorporated Areas | 480144 | February 29, 1980, Emerg; September 19, 1990, Reg; February 4, 2011, Susp. |do* | |
| Columbus, City of, Colorado County | 480145 | February 19, 1975, Emerg; June 19, 1985, Reg; February 4, 2011, Susp. |do* | |
| Duval County, Unincorporated Areas | 480202 | July 24, 1975, Emerg; May 1, 1987, Reg; February 4, 2011, Susp. |do* | |
| Eagle Lake, City of, Colorado County ... | 480146 | July 30, 1975, Emerg; April 1, 1987, Reg; February 4, 2011, Susp. |do* | |
| Lamesa, City of, Dawson County | 480191 | February 25, 1972, Emerg; April 30, 1976, Reg; February 4, 2011, Susp. |do* | |
| San Diego, City of, Duval and Jim Wells Counties. | 481199 | December 26, 1975, Emerg; March 1, 1987, Reg; February 4, 2011, Susp. |do* | |

Dated: January 19, 2011.
Sandra K. Knight,
Deputy Federal Insurance and Mitigation Administrator, Mitigation.
 [FR Doc. 2011-1930 Filed 1-27-11; 8:45 am]
BILLING CODE 9110-12-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 26

[Docket No. OST-2010-0118]

RIN 2105-AD75

Disadvantaged Business Enterprise: Program Improvements

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Final rule.

SUMMARY: This rule improves the administration of the Disadvantaged Business Enterprise (DBE) program by increasing accountability for recipients with respect to meeting overall goals, modifying and updating certification requirements, adjusting the personal net worth (PNW) threshold for inflation,

post-award oversight, and addressing other issues.

DATES: Effective Dates: This rule is effective February 28, 2011.

FOR FURTHER INFORMATION CONTACT:

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, Room W94-302, 202-366-9310, bob.ashby@dot.gov.

SUPPLEMENTARY INFORMATION: The Department of Transportation issued an advance notice of proposed rulemaking (ANPRM) concerning several DBE program issues on April 8, 2009 (74 FR 15904). The first issue raised in the ANPRM concerned counting of items obtained by a DBE subcontractor from its prime contractor. The second concerned ways of encouraging the providing for expedited interstate certification, adding provisions to foster small business participation, improving

The sixth concerned additional limitations on the discretion of prime contractors to terminate DBEs for convenience, once the prime contractor had committed to using the DBE as part of its showing of good faith efforts. The Department received approximately 30 comment letters regarding these issues.

On May 10, 2010, the Department issued a notice of proposed rulemaking (NPRM) seeking further comment on proposals based on the ANPRM and proposing new provisions (75 FR 25815). The NPRM proposed an inflationary adjustment of the PNW cap to \$1.31 million, the figure that would result from proposed Federal Aviation Administration (FAA) reauthorization legislation then pending in both Houses of Congress. The Department proposed additional measures to hold recipients accountable for their performance in achieving DBE overall goals. "unbundling" of contracts to facilitate participation by small businesses, including DBEs. The third was a request for comments on potential improvements to the DBE application form and personal net worth (PNW) form. The fourth asked for suggestions related to program

oversight. The fifth concerned potential regulatory action to facilitate certification

for firms seeking to work as DBEs in more than one state. The NPRM also proposed

recipients (*i.e.*, state highway agencies, transit authorities, and airport sponsors who receive DOT grant financial assistance) and the Department have had to grapple over the last 11 years. The Department received approximately 160 comments on the NPRM from a variety of interested parties, including DBE and non-DBE firms, associations representing them, and recipients of DOT financial assistance. A summary of comments on the major issues in the rulemaking, and the Department's responses to those comments, follows.

Counting Purchases From Prime Contractors

Under current counting rules, a DBE subcontractor and its prime contractor may count for DBE credit the entire cost of a construction contract, including items that the DBE subcontractor purchases or leases from a third party (*e.g.*, in a so-called "furnish and install" contract).

There is an exception to this general rule: A DBE and its prime contractor may not count toward goals items that the DBE purchases or leases from its own prime contractor. The reason for this provision is that doing so would allow the prime contractor to count for DBE credit items that it produced itself.

As noted in the ANPRM, one DBE subcontractor and a number of prime contractors objected to this approach, saying that it unfairly denies a DBE in this situation the opportunity to count credit for items it has obtained from its prime contractor rather than from other sources. Especially in situations in which a commodity might only be available from a single source—a prime contractor or its affiliate—the rule would create a hardship, according to proponents of this view. The ANPRM proposed four options (1) keeping the rule as is; (2) keeping the basic rule as is, but allowing recipients to make exceptions in some cases; (3) allowing DBEs to count items purchased from any third party source, including the DBE's prime contractor; and (4) not allowing any items obtained from any non-DBE third party to be counted for DBE credit. Comment was divided

among the four alternatives, which each garnering some support. For purposes of the NPRM, the Department decided not to propose any change from the current rule. Comment on the issue was again divided. Seven commenters favored allowing items obtained from any source to be counted for credit, including the firm that was the original proponent of the

amendments to the certification-related provisions of the DBE regulation. Those

proposals resulted from the Department's experience dealing with idea and another DBE, two prime contractors' associations, a prime contractor, and two State Departments of Transportation (DOTs). These commenters generally made the same arguments as had proponents of this view at the ANPRM stage. Thirteen commenters, among which were several recipients, a DBE contractors' association, and DBE contractors, favored the NPRM's proposed approach of not making any change to the existing rule, and they endorsed the NPRM's rationale. Sixteen commenters, including a recipient association and a number of DBE companies, supported disallowing credit for any items purchased or leased from a non-DBE source. They believed that this approach supported the general principle of awarding DBE credit only for contributions that DBEs themselves make on a contract.

DOT Response

The Department remains unconvinced that it is appropriate for a prime contractor to produce an item (*e.g.*, asphalt), provide it to its own DBE subcontractor, and then count the value of the item toward its good faith efforts to meet DBE goals. The item—*asphalt*, in this example—is a contribution to the project made by the prime contractor itself and simply passed through the DBE. That is, the prime contractor, on paper, sells the item to the DBE, who then charges the cost of the item it just bought from the prime contractor as part of its subcontract price, which the prime then reports as DBE participation. In the Department's view, this pass-through relationship is inconsistent with the most important principle of counting DBE participation, which is that credit should only be counted for value that is added to the transaction by the DBE itself.

As mentioned in the ANPRM and NPRM, the current rule treats counting of items purchased by DBEs from non-DBE sources differently, depending on whether the items are obtained from the DBE's prime contractor or from a third-party source. The Department's current approach is a reasonable compromise between the commonly accepted practice of obtaining items from non-DBE sources as part of the contracting process and maintaining the principle of counting only the DBE's own contributions for credit toward goals, which is most seriously violated when the prime contractor itself is the source of the items. This compromise respects

certification issues and certification appeal cases during the years since the last major revision of the DBE rule in 1999. The proposed amendments were intended to clarify issues that have arisen and avoid problems with which the dual, somewhat divergent, goals of accommodating a common way of doing business and avoiding a too-close

relationship between a prime contractor and a DBE subcontractor that distorts the counting of credit toward DBE goals. This compromise has been part of the regulation since 1999 and, with the exception of the proponent of changing the regulation and its prime contractor partners, has never been raised by program participants as a widespread problem requiring regulatory change. For these reasons, the Department will leave the existing regulatory language intact.

Terminations of DBE Firms

The NPRM proposed that a prime contractor who, in the course of meeting its good faith efforts requirements on a procurement involving a contract goal, had submitted the names of one or more DBEs to work on the project, could not terminate a DBE firm without the written consent of the recipient. The firm could be terminated only for good cause. The NPRM proposed a list of what constituted good cause for this purpose.

Over 40 comments addressed this subject, a significant majority of which supported the proposal. Two recipients said the proposal was unnecessary and a third expressed concern about workload implications. Several recipients said that they already followed this practice.

However, commenters made a variety of suggestions with respect to the details of the proposal. A DBE firm questioned a good cause element that would allow a firm to be terminated for not meeting reasonable bonding requirements, noting that lack of access to bonding is a serious problem for many DBEs. A DBE contractors' association said that a DBE's action to halt performance should not necessarily be a ground for termination, because in some cases such an action could be a justified response to an action beyond its control (*e.g.*, the prime failing to make timely payments). A DBE requested clarification of what being "not responsible" meant in this context. A number of commenters, including recipients and DBEs, suggested that a prime could terminate a DBE only if the DBE "unreasonably" failed to perform or follow instructions from the prime.

A prime contractors' association suggested additional grounds for good cause to terminate, including not

performing to schedule or not performing a commercially useful function. Another such association said the rule should be consistent with

proposing termination, and another recipient wanted to shorten that period from five to two days. A State unified certification program (UCP) suggested adopting its State's list of good cause reasons, and a consultant suggested that contracting officers, not just the DBE Liaison Officer (DBELO), should be involved in the decision about whether to concur in a prime contractor's desire to terminate a DBE. A recipient wanted to add language concerning the prime contractor's obligation to make good faith efforts to replace a terminated DBE with another DBE.

DOT Response

The Department, like the majority of commenters on this issue, believes that the proposed amendment will help to prevent situations in which a DBE subcontractor, to which a prime contractor has committed work, is arbitrarily dismissed from the project by the prime contractor. Comments to the docket and in the earlier stakeholder sessions have underlined that this has been a persistent problem. By specifying that a DBE can be terminated only for good cause—not simply for the convenience of the prime contractor—and with the written consent of the recipient, this amendment should help to end this abuse.

With respect to the kinds of situations in which "good cause" for termination can exist, the Department has modified the language of the rule to say that good cause includes a situation where the DBE subcontractor has failed or refused to perform the work of its subcontract in accordance with normal industry standards. We note that industry standards may vary among projects, and could be higher for some projects than others, a matter the recipient could take into account in determining whether to consent to a prime contractor's proposal to terminate a DBE firm. However, good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor (e.g., the failure of the prime contractor to make timely payments or the unnecessary placing of obstacles in the path of the DBE's work).

Good cause also does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that it can self-perform the work in question or substitute another DBE or non-DBE firm. This approach responds to commenters who were concerned about prime contractors imposing

normal business practices and not impede a prime contractor's

ability to remove a poorly performing subcontractor for good cause. A unreasonable demands on DBE subcontractors while offering recipients a more definite standard than simple

reasonableness in deciding whether to approve a prime contractor's proposal to terminate a DBE firm. We have also adopted a recipient's suggestion to permit the time frame for the process to be shortened in a case where public necessity (e.g., safety) requires a shorter period of time before the recipient's decision.

In addition to the enumerated grounds, a recipient may permit a prime contractor to terminate a DBE for "other documented good cause that the recipient determines compels the termination of the DBE subcontractor." This means that the recipient must document the basis for any such determination, and the prime contractor's reasons for terminating the DBE subcontractor make the termination essential, not merely discretionary or advantageous. While the recipient need not obtain DOT operating administration concurrence for such a decision, FHWA, FTA, and FAA retain the right to oversee such determinations by recipients.

Personal Net Worth

The NPRM proposed to make an inflationary adjustment in the personal net worth (PMW) cap from its present \$750,000 to \$1.31 million, based on the consumer price index (CPI) and relating back to 1989, as proposed in FAA authorization bills pending in Congress. The NPRM noted that such an adjustment had long been sought by DBE groups and that it maintained the status quo in real dollar terms. The Department also asked for comment on the issue of whether assets counted toward the PNW calculation should continue to include retirement savings products. The rule currently does include them, but the pending FAA legislation would move in the direction of excluding them from the calculation.

Of the 95 commenters who addressed the basic issue of whether the Department should make the proposed inflationary adjustment, 71—representing all categories of commenters—favored doing so. Many said that such an adjustment was long overdue and that it would mitigate the problem of a "glass ceiling" limiting the growth and development of DBE firms. A few commenters said that such adjustments should be done regionally or locally rather than nationally, to reflect economic differences among

recipient wanted a public safety exception to the time frame for a DBE's reply to a prime contractor's notice

areas of the country. A number of the commenters wanted to make sure the Department made similar adjustments annually in the future. A member of Congress suggested that the PNW should be increased to \$2.5 million, while a few recipients favored a smaller increase (e.g., to \$1 million). A few commenters also suggested that the Department explore some method of adjusting PNW other than the CPI, but they generally did not spell out what the alternative approaches might be.

The opponents of making the adjustment, mostly recipients and DBEs, made several arguments. The first was that \$1.31 million was too high and would include businesses owners who were not truly disadvantaged. The second was that raising the PNW number would favor larger, established, richer DBEs at the expense of smaller, start-up firms. These larger companies could then stay in the program longer, to the detriment of the program's aims. Some commenters said that the experience in their states was that very few firms were becoming ineligible for PNW reasons, suggesting that a change in the current standard was unnecessary.

With respect to the issue of retirement assets, about 28 comments, primarily from DBE groups and recipients, favored excluding some retirement assets from the PNW calculation, often asserting that this was appropriate because such funds are illiquid and not readily available to contribute toward the owners' businesses. Following this logic, some of the comments said that Federally-regulated illiquid retirement plans (e.g., 401k, Roth IRA, Keough, and Deferred Compensation plans, as well as 529 college savings plans) be excluded while other assets that are more liquid (CDs, savings accounts) be counted, even if said to be for retirement purposes. A number of these commenters said that a monetary cap on the amount that could be excluded (e.g., \$500,000) would be acceptable.

The 17 comments opposing excluding retirement accounts from the PNW calculation generally supported the rationale of the existing regulation, which is that assets of this kind, even if illiquid, should be regarded as part of an individual's wealth for PNW purposes. A few commenters also said that, since it is most likely wealthier DBE owners who have such retirement accounts, excluding them would help these more established DBEs at the expense of smaller DBEs who are less likely to be able to afford significant

retirement savings products. Again, commenters said that this provision, by effectively raising the PNW cap, would inappropriately allow larger firms to

additional guidance and instructions on how to make PNW calculations (*e.g.*, with respect to determining the value of a house or business).

DOT Response

To understand the purpose and effect of the Department's proposal to change the PNW threshold from the long-standing \$750,000 figure, it is important to keep in mind what an inflationary adjustment does. (Because of the passage of time from the issuance of the NPRM to the present time, the amount of the inflationary adjustment has changed slightly, from \$1.31 million to \$1.32 million.) The final rule's adjustment is based on the Department of Labor's consumer price index (CPI) calculator. This calculator was used because, of various readily available means of indexing for inflation, CPI appears to be the one that is most nearly relevant to an individual's personal wealth. Such an adjustment simply keeps things as they were originally in real dollar terms.

That is, in 1989, \$750,000 bought a certain amount of goods and services. In 2010, given the effects of inflation over 21 years, it would take \$1.32 million in today's dollars to buy the same amount of goods and services. The buying power of assets totaling \$750,000 in 1989 is the same as the buying power of assets totaling \$1.32 million in 2010. Notwithstanding the fact that \$1.32 million, on its face, is a higher number than \$750,000, the wealth of someone with \$1.32 million in assets today is the same, in real dollar or buying power terms, as that of someone with \$750,000 in 1989.

Put another way, if the Department did not adjust the \$750,000 number for inflation, our inaction would have the effect of establishing a significantly lower PNW cap in real dollar terms. A PNW cap of \$750,000 in 2010 dollars is equivalent to a PNW cap of approximately \$425,700 in 1989 dollars. This means that a DBE applicant today would be allowed to have \$325,000 less in real dollar assets than his or her counterpart in 1989.

The Department believes, in light of this understanding of an inflationary adjustment, that making the proposed adjustment at this time is appropriate. This is a judgment that is shared by the majority of commenters and both Houses of Congress. We do not believe that any important policy interest is served by continuing to lower the real dollar PNW threshold, which we believe would have the effect of further limiting the pool of eligible DBE owners beyond

stay in the program longer. Some of the commenters would accept exclusion of retirement accounts if an

what is intended by the Department in adopting the PNW standard.

The Department is using 1989 as the base year for its inflationary adjustment for two reasons. First, doing so is consistent with what both the House and Senate determined was appropriate in the context of FAA authorization bills that both chambers passed. Second, while the Department adopted a PNW standard in 1999, the standard itself, which was adopted by the Small Business Administration (SBA) before 1989, has never been adjusted for inflation at any time. By 1999, the real dollar value of the original \$750,000 standard had already been eroded by inflation, and the Department believes that it is reasonable to take into account the effect of inflation on the standard that occurred before as well as after the Department adopted it.

We appreciate the concerns of commenters who opposed the proposed inflationary adjustment. Some of these commenters, it appears, may not have fully understood that an inflationary adjustment simply maintains the status quo in real dollar terms. The concern that making the adjustment would favor larger, established DBEs over smaller, start-up companies has some basis, and reflects the longstanding tension in the program between its role as an incubator for new firms and its purpose of allowing DBE firms to grow and develop to the point where they may be in a better position to compete for work outside the DBE program. Allowing persons with larger facial amounts of assets may seem to permit participation of people who are less disadvantaged than formerly in the program, but disadvantage in the DBE program has always properly been understood as relative disadvantage (*i.e.*, relative to owners and businesses in the economy generally), not absolute deprivation. People who own successful businesses are more affluent, by and large, than many people who participate in the economy only as employees, but this does not negate the fact that socially disadvantaged persons who own businesses may well, because of the effects of discrimination, accumulate less wealth than their non-socially disadvantaged counterparts. Consequently, the concerns of opponents of this change are not sufficient to persuade us to avoid making the proposed inflationary adjustment.

We do not believe that it is practical, in terms of program administration, to have standards that vary with recipient or region. We acknowledge that one size

appropriate cap were put in place, however.

Finally, several commenters asked for a revised and improved PNW form with may not fit all to perfection, but the complexity of administering a national program with a key eligibility standard that varies, perhaps significantly, among jurisdictions would be, in our view, an even greater problem. Nor do we see a strong policy rationale for a change to some fixed figure (*e.g.*, \$1 million, \$2.5 million) that is not tied to inflation. We do agree, however, that an improved PNW form would be an asset to the program, and we will propose such a form for comment in the next stage NPRM on the DBE program, which we hope to issue in 2011. This NPRM may also continue to examine other PNW issues.

Whenever there is a change in a rule of this sort, the issue of how to handle the transition between the former rule and the new rule inevitably arises. We provide the following guidance for recipients and firms applying for DBE certification.

- For applications or decertification actions pending on the date this amendment is published, but before its effective date, recipients should make decisions based on the new standards, though these decisions should not take effect until the amendment's effective date.
- Beginning on the effective date of this amendment, all new certification decisions must be based on the revised PNW standard, even if the application was filed or a decertification action pertaining to PNW began before this date.
- If a denial of an application or decertification occurred before the publication date of this amendment, because the owner's PNW was above \$750,000 but not above \$1.32 million, and the matter is now being appealed within the recipient's or unified certification program's (UCP's) process, then the recipient or UCP should resolve the appeal using the new standard. Recipients and UCPs may request updated information where relevant. In the case of an appeal pending before the Departmental Office of Civil Rights (DOCR) under section 26.89, DOCR will take the same approach or remand the matter, as appropriate.

- If a firm was decertified or its application denied within a year before the effective date of this amendment, because the owner's PNW was above \$750,000 but not above \$1.32 million, the recipient or UCP should permit the firm to resubmit PNW information without any further waiting period, and the firm should be recertified if the

owner's PNW is not over \$1.32 million and the firm is otherwise eligible.

- We view any individual who has

program, in violation of 49 CFR 26.109(c). In addition to other remedies that may apply to such conduct, recipients should not certify a firm that has misrepresented this information.

The Department is not ready, at this time, to make a decision on the issue of retirement assets. The comments suggested a number of detailed issues the Department should consider before proposing any specific provisions on this subject. We will further consider commenters' thoughts on this issue at a future time.

Interstate Certification

In response to longstanding concerns of DBEs and their groups, the NPRM proposed a mechanism to make interstate certification easier. The proposed mechanism did not involve pure national reciprocity (*i.e.*, in which each state would give full faith and credit to other states' certification decisions, with the result that a certification by any state would be honored nationwide). Rather, it created a rebuttable presumption that a firm certified in its home state would be certified in other states. A firm certified in home state A could take its application materials to State B. Within 30 days, State B would decide either to accept State A's certification or object to it. If it did not object, the firm would be certified in State B. If State B did object, the firm would be entitled to a proceeding in which State B bore the burden of proof to demonstrate that the firm should not be certified in State B. The NPRM also proposed that the DOT Departmental Office of Civil Rights (DOCR) would create a database that would be populated with denials and decertifications, which the various State UCPs would check with respect to applicants and currently certified firms.

This issue was one of the most frequently commented-upon subjects in the rulemaking. Over 30 comments, from a variety of sources including DBEs, DBE organizations, and a prime contractors' association. Members of Congress and others supported the proposed approach. They emphasized that the necessity for repeated certification applications to various UCPs, and the very real possibility of inconsistent results on the same facts, were time-consuming, burdensome, and costly for DBEs. In a national program, they said, there should be national criteria, uniformity of forms and interpretations, and more consistent training of certification personnel. The proposed approach, they said, while not

misrepresented his or her PNW information, whether before or after the inflationary adjustment takes ideal, would be a useful step toward those goals.

An approximately equal number of commenters, predominantly recipients but also including some DBEs and associations, opposed the proposal, preferring to keep the existing rules (under which recipients can, but are not required to, accept certifications made by other recipients) in place. Many of these commenters said that their certification programs frequently had to reject out-of-state firms that had been certified by their home states because the home states had not done a good job of vetting the qualifications of the firms for certification. They asserted that there was too much variation among states concerning applicable laws and regulations (*e.g.*, with respect to business licensing or marital property laws), interpretations of the DBE rule, forms and procedures, and the training of certifying agency personnel for something like the NPRM proposal to work well. Before going to something like the NPRM proposal, some of these commenters said, DOT should do more to ensure uniform national training, interpretations, forms etc.

Commenters opposed to the NPRM proposal were concerned that the integrity of the program would be compromised, as questionable firms certified by one state would slip into the directories of other states without adequate vetting. Moreover, the number of certification actions each state had to consider, and the number of certified firms that each state would have to manage, could increase significantly, straining already scarce resources.

A smaller number of commenters addressed the idea of national reciprocity. Some of these commenters said that, at least for the future, national reciprocity was a valuable goal to work toward. Some of these commenters, including an association that performs certification reviews nationally for MBE and WBE suppliers (albeit without on-site reviews) and a Member of Congress, supported using such a model now. On the other hand, other commenters believed national reciprocity was an idea whose time had not come, for many of the same reasons stated by commenters opposed to the NPRM proposal. Some of the commenters on the NPRM proposal said that the proposal would result in *de facto* national reciprocity, which they believed was bad for the program.

Two features of the NPRM proposal attracted considerable adverse comment. Thirty-one of the 34 comments addressing the proposed 30-day window for "State B" to decide

effect, as having failed to cooperate with the DBE

whether to object to a home state certification of a firm said that the proposed time was too short. These commenters, mostly recipients, suggested time frames ranging from 45–90 days. They said that the 30-day time frame would be very difficult to meet, given their resources, and would cause States to accept questionable certifications from other States simply because there was insufficient time to review the documentation they had been given. Moreover, the 30-day window would mean that out-of-state firms would jump to the front of the line for consideration over in-state firms, concerning which the rule allows 90 days for certification. This would be unfair to in-state firms, they said.

In addition, 22 of 28 commenters on the issue of the burden of proof for interstate certification—again, predominantly recipients—said that it was the out-of-state applicant firm, rather than State B, that should have the burden of proof once State B objected to a home state certification of the firm. These commenters also said that it was more sensible to put the out-of-state firm in the same position as any other applicant for certification by having to demonstrate to the certifying agency that it was eligible, rather than placing the certification agency in the position of the proponent in a decertification action for a firm that it had previously certified. Again, commenters said, the NPRM proposal would favor out-of-state over in-state applicants.

A few comments suggested trying reciprocal certification on a regional basis (*e.g.*, in the 10 Federal regions) before moving to a more national approach. Others suggested that only recent information (*e.g.*, applications and on-site reports less than three years old) be acceptable for interstate certification purposes. Some states pointed to state laws requiring local licenses or registration before a firm could do business in the State: Some commenters favored limiting out-of-state applications to those firms that had obtained the necessary permits, while one commenter suggested prohibiting States from imposing such requirements prior to DBE certification. Some comments suggested limiting the grounds on which State B could object to the home state certification of a firm (*i.e.*, "good cause" rather than "interpretive differences," differences in state law, evidence of fraud in obtaining home state certification).

There was a variety of other comments relevant to the issue of interstate certification. Most commenters who addressed the idea of

the DOCR database supported it, though some said that denial/decertification

public. Some also said that having to input and repeatedly check the data base would be burdensome. One commenter suggested including a firm's Federal Taxpayer ID number in the database entry. One commenter suggested a larger role for the database: Applicants should electronically input their application materials to the database, which would then be available to all certifying agencies, making individual submissions of application information to the States unnecessary. Some commenters wanted DOT to create or lead a national training and/or accreditation effort for certifier personnel.

DOT Response

Commenters on interstate were almost evenly divided on the best course of action for the Department to take. Most DBEs favored making interstate certification less difficult for firms that wanted to work outside their home states; most recipients took the opposite point of view. This disagreement reflects, we believe, a tension between two fundamental objectives of the program. On one hand, it is important to facilitate the entry of DBE firms into this national program, so that they can compete for DOT-assisted contracting wherever those opportunities exist, while reducing administrative burdens and costs on the small businesses that seek to participate. On the other hand, it is important to maintain the integrity of the program, so that only eligible firms participate and ineligible firms do not take unfair advantage of the program.

The main concern of proponents of the NPRM proposal was that failing to make changes to facilitate interstate certification would leave in place unnecessary and unreasonable barriers to the participation of firms outside of their home states. The main concern of opponents of the NPRM proposal was that making the proposed changes would negatively affect program integrity. Their comments suggest that there is considerable mistrust among certification agencies and programs. Many commenters appear to believe that, while their own certification programs do a good job, other states' certification programs do not. Much of the opposition to facilitating interstate certification appears to have arisen from this mistrust, as certification agencies seek to prevent questionable firms certified by what they perceive as weak certification programs in other states from infiltrating their domains.

The Department does not believe that it is constructive to take the position that certification programs nationwide

data should be available only to certification agencies, not the general

are so hopelessly inadequate that the best response is to leave interstate barriers in place to contain the perceived contagion of poorly qualified, albeit certified, firms within the boundaries of their own states. To the contrary, we believe that, under a system like that proposed in the NPRM, if firms certified by State A are regularly rebuffed by States B, C, D, etc., State A firms will have an incentive to bring pressure on their certification agency to improve its performance.

The Department also believes that suggestions made by commenters, such as improving training and standardizing forms and interpretations, can improve the performance of certification agencies generally. In the follow-on NPRM the Department hopes to issue in 2011, one of the subjects we will address is improvements in the certification application and PNW forms, which certification agencies then would be required to use without alteration. DOT already provides many training opportunities to certification personnel, such as the National Transportation Institute courses provided by the Federal Transit Administration, presentations by knowledgeable DOT DBE staff at meetings of transportation organizations, and webinars and other training opportunities provided by Departmental Office of Civil Rights personnel. The Department will consider further ways of fostering training and education for certifiers (e.g., a DOT-provided web-based training course for certifiers). The Department also produces guidance on certification-related issues to assist certifiers in making decisions that are consistent with this regulation, and we will continue that practice.

While we will continue to work with our state and local partners to improve the certification process, we do not believe that steps to facilitate interstate certification should be taken only after all recipients achieve an optimal level of performance. The DBE program is a national program; administrative barriers to participation impair the important program objective of encouraging DBE firms to compete for business opportunities; provisions to facilitate interstate certification can be drafted in a way that permits "State B" to screen out firms that are not eligible in accordance with this regulation. Consequently, the Department has decided to proceed with a modified form of the NPRM proposal. However, the final rule will not make compliance with the new section 26.85 mandatory until January 1, 2012, in order to provide additional time for recipients and UCPs to take advantage of training

opportunities and to establish any needed administrative mechanisms to carry out the new provision. This will also provide time for DOCR to make its database for denials and decertifications operational.

As under the NPRM, a firm certified in its home state would present its certification application package to State B. In response to commenters' concerns about the time available, State B would have 60 days, rather than 30 as in the NPRM, to determine whether it had specific objections to the firm's eligibility and to communicate those objections to the firm. If State B believed that the firm was ineligible, State B would state, with particularity, the specific reasons or objections to the firm's eligibility. The firm would then have the opportunity to respond and to present information and arguments to State B concerning the specific objections that State B had made. This could be done in writing, at an in-person meeting with State B's decision maker, or both. Again in response to commenters' concerns, the firm, rather than State B, would have the burden of proof with respect, and only with respect, to the specific issues raised by State B's objections. We believe that these changes will enhance the ability of certification agencies to protect the integrity of the program while also enhancing firms' ability to pursue business opportunities outside their home states.

We emphasize that State B's objections must be specific, so that the firm can respond with information and arguments focused clearly on the particular issues State B has identified, rather than having to make an unnecessarily broad presentation. It is not enough for State B to say "the firm is not controlled by its disadvantaged owner" or "the owner exceeds the PNW cap." These are conclusions, not specific, fact-based objections. Rather, State B might say "the disadvantaged owner has a full-time job with another organization and has not shown that he has sufficient time to exercise control over the day-to-day operations of the firm" or "the owner's property interests in assets X, Y, and Z were improperly valued and cause his PNW to exceed \$1.32 million." This degree of specificity is mandatory regardless of the regulatory ground (e.g., new information, factual errors in State A's certification: See section 26.85(d)(2)) on which State B makes an objection. For example, if State B objected to the firm's State A certification on the basis that State B's law required a different result, State B would say something like "State B Revised Statutes Section xx.yyyy

provides only that a registered engineer has the power to control an engineering firm in State B, and the disadvantaged owner of the firm is not a registered engineer, who is therefore by law precluded from controlling the firm in State B."

On receiving this specific objection, the owner of the firm would have the burden of proof that he or she does meet the applicable requirements of Part 26. In the first example above, the owner would have to show that either he or she does not now have a full-time job elsewhere or that, despite the demands of the other job, he or she can and does control the day-to-day operations of the firm seeking certification. This burden would be to make the required demonstration by a preponderance of the evidence, the same standard used for initial certification actions generally. This owner would not bear any burden of proof with respect to size, disadvantage, ownership, or other aspects of control, none of which would be at issue in the proceeding. The proceeding, and the firm's burden of proof, would concern only matters about which State B had made a particularized, specific objection. This narrowing of the issues should save time and resources for firms and certification agencies alike.

The firm's response to State B's particularized objections could be in writing and/or in the form of an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility. The decision maker would have to be someone who is knowledgeable about the eligibility provisions of the DBE rule.

We recognize that, in unusual circumstances, the information the firm provided to State B in response to State B's specific objections could contain new information, not part of the original record, that could form the basis for an additional objection to the firm's certification. In such a case, State B would immediately notify the firm of the new objection and offer the firm a prompt opportunity to respond.

Section 26.85(d)(2) of the final rule lists the grounds a State B can rely upon to object to a State A certification of a firm. These are largely the same as in the NPRM. In response to a comment, the Department cautions that by saying that a ground for objection is that State A's certification is inconsistent with this regulation, we do not intend for mere interpretive disagreements about the meaning of a regulatory provision to form a ground for objection. Rather, State B would have to cite something in State A's certification that contradicted absence of a state law requiring such licensure. A number of commenters said

a provision in the regulatory text of Part 26.

The final rule also gives, as a ground for objecting to a State A certification, that a State B law "requires" a result different from the law of State (see the engineering example above). To form the basis for an objection on this ground, a difference between state laws must be outcome-determinative with respect to a certification. For example, State A may treat marital property as jointly held property, while State B is a community property state. The laws are different, but both, in a given case, may well result in each spouse having a 50 percent share of marital assets. This would not form the basis for a State B objection.

With respect to state requirements for business licenses, the Department believes that states should not erect a "Catch 22" to prevent DBE firms from other states from becoming certified. That is, if a firm from State A wants to do business in State B as a DBE, it is unlikely to want to pay a fee to State B for a business license before it knows whether it will be certified. Making the firm get the business license and pay the fee before the certification process takes place would be an unnecessary barrier to the firm's participation that would be contrary to this regulation.

The Department believes that regional certification consortia, or reciprocity agreements among states in a region, are a very good idea, and we anticipate working with UCPs in the future to help create such arrangements. Among other things, the experience of actually working together could help to mitigate the current mistrust among certification agencies. However, we do not believe it would be appropriate to mandate such arrangements at this time.

The Department believes that the DOCR database of decertification and denial actions would be of great use in the certification process. However, the system is not yet up and running. Consequently, the final rule includes a one-year delay in the implementation date of requirements for use of the database.

Other Certification-Related Issues

The NPRM asked for comment on whether there should be a requirement for periodic certification reviews and/or updates of on-site reviews concerning certified firms. The interval most frequently mentioned by commenters on this subject was five years, though there was also some support for three-, six-, and seven-year intervals. A number of commenters suggested that such reviews should include an on-site update only when the firm's circumstances had changed materially, in order to avoid burdening the limited resources of certifying agencies. Having a standardized on-site review form would reduce burdens, some commenters suggested. Other commenters suggested that the timing of reviews should be left to certifying agencies' discretion, or that on-site updates should be done on a random basis of a smaller number of firms.

that recipients should not have to automatically certify SBA-certified 8(a)

changed materially, in order to avoid burdening the limited resources of certifying agencies. Having a standardized on-site review form would reduce burdens, some commenters suggested. Other commenters suggested that the timing of reviews should be left to certifying agencies' discretion, or that on-site updates should be done on a random basis of a smaller number of firms.

The NPRM also asked about the handling of situations where an applicant withdraws its application before the certifying agency makes a decision. Should certifying agencies be able to apply the waiting period (e.g., six or 12 months) used for reapplications after denials in this situation? Comments on this issue, mostly from recipients but also from some DBEs and their associations, were divided. Some commenters said that there were often good reasons for a firm to withdraw and correct an application (e.g., a new firm unaccustomed to the certification process) and that their experience did not suggest that a lot of firms tried to game the system through repeated withdrawals. On the other hand, some commenters said that having to repeatedly process withdrawn and resubmitted applications was a burden on their resources that they would want to mitigate through applying a reapplication waiting period. One recipient said that, even in the absence of a waiting period, the resubmitted application should go to the back of the line for processing. Still others wanted to be able to apply case-by-case discretion concerning whether to impose a waiting period on a particular firm. A few commenters suggested middle-ground positions, such as imposing a shorter waiting period (e.g., 90 days) than that imposed on firms who are denied or applying a waiting period only for a second or subsequent withdrawal and reapplication by the same firm.

Generally, commenters were supportive of the various detail-level certification provision changes proposed in the NPRM (e.g., basing certification decisions on current circumstances of a firm). Commenters did speak to a wide variety of certification issues, however. One commenter said that in its state, the UCP arbitrarily limited the number of NAICS codes in which a firm could be certified, a practice the commenter said the regulation should forbid. In addition, this commenter said, the UCP inappropriately limited certification of professional services firms owned by someone who was not a licensed professional in a field, even in the firms, while another commenter recommended reviving the now-lapsed

DOT-SBA memorandum of understanding (MOU) on certification issues. A DBE association said that certifying agencies should not count against firms seeking certification (e.g., with respect to independence determinations) investments from or relationships with larger firms that are permitted under other Federal programs (e.g., HubZone or other SBA programs). One commenter favored, and another opposed, allowing States to use their own business specialty classifications in addition to or in lieu of NAICS codes.

One recipient recommended a provision to prevent owners from transferring personal assets to their companies to avoid counting them in the PNW calculation. Another said the certification for the PNW statement should specifically say that the information is "complete" as well as true. Yet another suggested that a prime contractor who owns a high percentage (e.g., 49 percent) of a DBE should not be able to use that DBE for credit. There were a number of suggestions that more of the certification process be done electronically, rather than on paper. A few comments said that getting back to an applicant within 20 days, as proposed in the NPRM, concerning whether the application was complete was too difficult for some recipients who have small staffs.

DOT Response

The Department believes that regularly updated on-site reviews are an extremely important tool in helping avoid fraudulent firms or firms that no longer meet eligibility requirements from participating in the DBE program. Ensuring that only eligible firms participate is a key part of maintaining the integrity of the program. We also realize that on-site reviews can be time- and resource-intensive. Consequently, while we believe that it is advisable for recipients and UCPs to conduct updated on-site reviews of certified companies on regular and reasonably frequent basis, and we strongly encourage such undated reviews, we have decided not to mandate a particular schedule, though we urge recipients to regard on-site reviews as a critical part of their compliance activities. When recipients or UCPs become aware of a change in circumstances or concerns that a firm may be ineligible or engaging in misconduct (e.g., from notifications of changes by the firm itself, complaints, information in the media, etc.), the recipient or UCP should review the firm's eligibility, including doing an on-site review.

that the information is "complete" as well as true and that a somewhat longer time period would be appropriate for recipients and UCPs to get back to

When recipients in other states (see discussion of interstate certification above) obtain the home state's certification information, they must rely on the on-site report that the home state has in its files plus the affidavits of no change, etc. that the firm has filed with the home state. It is not appropriate for State B to object to an out-of-state firm's certification because the home state's on-site review is older than State B thinks desirable, since that would unfairly punish a firm for State A's failure to update the firm's on-site review. However, if an on-site report is more than three years old, State B could require that the firm provide an affidavit to the effect that all the facts in the report remain true and correct.

While we recognize that reports that have not been updated, or which do not appear to contain sufficient analysis of a firm's eligibility, make certification tasks more difficult, our expectation is that the Department's enhanced interstate certification process will result in improved quality in on-site reviews so that recipients in various states have a clear picture of the structure and operation of firms and the qualifications of their owners. To this end, we encourage recipients and UCPs to establish and maintain communication in ways that enable information collected in one state to be shared readily with certification agencies in other states. This information sharing can be done electronically to reduce costs.

Firms may withdraw pending applications for certification for a variety of reasons, many of them legitimate. A withdrawal of an application is not the equivalent of a denial of that application. Consequently, we believe that it is inappropriate for recipients and UCPs to penalize firms that withdraw pending applications by applying the up-to-12 month waiting period of section 26.86(c) to such withdrawals, thereby preventing the firm from resubmitting the application before that time elapses. We believe that permitting recipients to place resubmitted applications at the end of the line for consideration sufficiently protects the recipients' workloads from being overwhelmed by repeated resubmissions. For example, suppose that Firm X withdraws its application in August. It resubmits the application in October. Meanwhile, 20 other firms have submitted applications. The recipient must accept Firm X's resubmission in October, but is not required to consider it before the 20 applications that arrived in the applicants with information on whether their applications were complete. We have added a regulatory text statement on the former point and

meantime. Recipients should also closely examine changes made to the firm since the time of its first application.

We agree with commenters that it is not appropriate for recipients to limit NAICS codes in which a firm is certified to a certain number. Firms may be certified in NAICS codes for however many types of business they demonstrate that they perform and concerning which their disadvantaged owners can demonstrate that they control. We have added language to the regulation making this point. We also agree that it is not appropriate for a recipient or UCP to insist on professional certification as a *per se* condition for controlling a firm where state law does not impose such a requirement. We have no objection to a recipient or UCP voluntarily using its own business classification system in addition to using NAICS codes, but it is necessary to use NAICS codes.

SBA has now gone to a self-certification approach for small disadvantaged business, the SBA 8(a) program differs from the DBE program in important respects, and the SBA-DOT memorandum of understanding (MOU) on certification matters lapsed over five years ago. Under these circumstances, we have decided to delete former sections 26.84 and 26.85, relating to provisions of that MOU.

DBE firms in the DBE program must be fully independent, as provided in Part 26. If a firm has become dependent on a non-DBE firm through participation in another program, then it may be found ineligible for DBE program purposes. To say otherwise would create inconsistent standards that would enable firms already participating in other programs to meet a lower standard than other firms for DBE participation.

We believe that adding a regulatory provision prohibiting owners from transferring personal assets to their companies to avoid counting them in the PNW calculation would be difficult to implement, since owners of businesses often invest assets in the companies for legitimate reasons. However, as an interpretive matter, recipients are authorized to examine such transfers and, if they conclude that the transfer is a ruse to avoid counting personal assets toward the PNW calculation rather than a legitimate investment in the company and its growth, recipients or UCPs may continue to count the assets toward PNW.

We agree that the certification for the PNW statement should specifically say extended the time period on the latter point to 30 days.

If a prime contractor who owns a high percentage of a DBE that it wishes to use on a contract, issues concerning

independence, affiliation, and commercially useful function can easily arise. For this reason, recipients should closely scrutinize such relationships. This scrutiny may well result, in some cases, in denying DBE credit or initiating decertification action.

We encourage the use of electronic methods in the application and certification process. As in other areas, electronic methods can reduce administrative burdens and speed up the process.

Accountability and Goal Submissions

The NPRM proposed that if a recipient failed to meet its overall goal, it would, within 60 days, have to analyze the shortfall, explain the reasons for it, and come up with corrective actions for the future. All State DOTs and the largest transit authorities and airports would have to send their analyses and corrective action plans to DOT operating administrations; smaller transit authorities and airports would retain them on file. While there would not be any requirement to meet a goal—to “hit the number”—failure to comply with these requirements could be regarded as a failure to implement a recipient’s program in good faith, which could lead to a finding of noncompliance with the regulation.

In a related provision, the Department asked questions in the NPRM concerning the recent final provision concerning submitting overall goals on a three-year, rather than an annual, basis. In particular, the NPRM asked whether it should be acceptable for a recipient to submit year-to-year projections of goals within the structure of a three-year goal and how implementation of the accountability proposal would work in the context of a three-year goal, whether or not year-to-year projections were made.

About two-thirds of the 64 comments addressing the accountability provision supported it. These commenters included DBEs, recipients, and some associations and other commenters. Some of these commenters, in fact, thought the proposal should be made

stronger. For example, a commenter suggested that a violation “will” rather than “could” be found for failure to provide the requested information. Another suggested that, beyond looking at goal attainment numbers, the accountability provisions should be broadened to include the recipient’s success with respect to a number of

implemented in a meaningful way. A recipient’s overall goal represents its estimate of the DBE participation it would achieve in the absence of discrimination and its effects. Failing to meet an overall goal means that the

program elements (e.g., good faith efforts on contracts, outreach, DBE liaison officer’s role, training and education of staff).

Commenters also presented various ideas for modifying the proposal. These included suggestions that the Department should add a public input component, provide more guidance on the shortfall analysis and how to do it, delay its effective date to allow recipients to find resources to comply, ensure ongoing measurement of achievements rather than just measuring at the end of a year or three-year period, ensure that there is enough flexibility in explaining the reasons for a shortfall, or lengthen the time recipients have to submit the materials (e.g., 90 days, or 60 days after the recipient’s report of commitments and achievements is due). One commenter suggested that an explanation should be required only when there is a pattern of goal shortfalls, not in individual instances. There could be a provision for excusing recipients who fell short of their goal by very small amount, or even if the recipient made 80 percent of its goal.

Opponents of the proposal—mostly recipients plus a few associations—said that the proposal would be too administratively burdensome. In addition, they feared that making recipients explain a shortfall and propose corrective measures would turn the program into a prohibited set-aside or quota program, a concern that was particularly troublesome in states affected by the *Western States* decision. Moreover, a number of commenters said, the inability of recipients to meet overall goals was often the result of factors beyond their control. In addition, recipients might unrealistically reduce goals in order to avoid having to explain missing a more ambitious target.

With respect to the reporting intervals for goals, 28 of the 39 commenters who addressed the issue favored some form of at least optional yearly reporting of goals, either in the form of annual goal submissions or, more frequently, of year-to-year projections of goals within the framework of a three-year overall goal. The main reason given for this preference was a concern that projects and the availability of Federal funding for them were sufficiently volatile that making a projection that was valid for a three-year period was problematic. This point of view was advanced especially by airports. Some other commenters favored giving recipients discretion whether to report annually

recipient has not completely remedied discrimination and its effects in its DOT-assisted contracting. In the Department’s view, good faith implementation of a DBE program by a recipient necessarily includes

or triennially. Commenters who took the point of view that the three-year interval was preferable agreed with original rationale of reducing repeated paperwork burdens on recipients. One commenter asked that the rule specify that, especially in a three-year interval schedule of goal submission, a recipient “must” submit revisions if circumstances change.

There was discussion in the NPRM of the relationship between the goal submission interval and the accountability provision. For example, if a recipient submitted overall goals on a three-year basis, would the accountability provision be triggered annually, based on the recipient’s annual report (as the NPRM suggested) or only on the basis of the recipient’s performance over the three-year period? If there were year-to-year projections within a three-year goal, would the accountability provision relate to accountability for the annual projection or the cumulative three-year goal? Commenters who favored year-to-year projections appeared to believe that accountability would best relate to each year’s projection, though the discussion of this issue in the comments was often not explicit. Some comments, including one from a Member of Congress, did favor holding recipients accountable for each year’s separate performance.

There was a variety of other comments on goal-related issues. Some commenters asked that the three DOT operating administrations coordinate submitting goals so that a State DOT submitting goals every three years would be able to submit its FHWA, FAA, and FTA goals in the same year. A DBE group wanted the Department to strengthen requirements pertaining to the race-neutral portion of a recipient’s overall goal. A commenter who works with transit vehicle manufacturers requested better monitoring of transit vehicle manufacturers by FTA. A group representing DBEs wanted recipients to focus on potential, and not just certified, DBEs for purposes of goal setting. The same group also urged consideration of separate goals for minority- and women-owned firms.

DOT Response

Under Part 26, the Department has always made unmistakably clear that the DBE program does not impose quotas. No one ever has been, or ever will be, sanctioned for failing to “hit the number.” However, goals must be

understanding why the recipient has not completely remedied discrimination and its effects, as measured by falling short of its “level playing field” estimate of DBE participation embodied in its overall goal. Good faith implementation

further means that, having considered the reasons for such a shortfall, the recipient will devise program actions to help minimize the potential for a shortfall in the future.

Under the Department's procedures for reviewing overall goals and the methodology supporting them, the Department has the responsibility of ensuring that a recipient's goals are well-grounded in relevant data and are derived using a sound methodology. The Department would not approve a recipient's goal submission if it appeared to understate the "level playing field" amount of DBE participation the recipient could rationally expect, whether to avoid being accountable under the new provisions of the rule or for other reasons.

For these reasons, the Department is adopting the NPRM's proposed accountability mechanism. We do not believe that the concerns of some commenters that this mechanism would create a quota system are justified: No one will be penalized for failing to meet an overall goal. Moreover, promoting transparency and accountability is not synonymous with imposing a penalty and should not be viewed as such. Understanding the reasons for not meeting a goal and coming up with ways of avoiding a shortfall in the future, while not creating a quota system, do help to ensure that recipients take seriously the responsibility to address discrimination and its effects.

Moreover, the administrative burden of compliance falls only on those recipients who fail to meet a goal, not on all recipients. Understanding what is happening in one's program, why it is happening, and how to fix problems is, or ought to be, a normal, everyday part of implementing a program, so the analytical tasks involved in meeting this requirement should not be new to recipients. We do not envision that recipients' responses to this requirement would be book-length; a reasonable succinct summary of the recipient's analysis and proposed actions should be sufficient though, like all documents submitted in connection with the DBE program, it should show the work and reasoning leading to the recipient's conclusions.

For example, a recipient might determine that its process for ascertaining whether prime bidders who failed to meet contract goals had made adequate good faith efforts was too

paragraphs (1) and (2) of section 26.45(f) and restoring the language of paragraphs (3), (4), and (5) of that section of the rule. We apologize for any confusion that this error may have caused.

The Department supports strong

weak, and that prime bidders consequently received contracts despite making insufficient efforts to find DBEs for contracts. In such a case, the recipient could take corrective action such as more stringent review of bidder submissions or meeting with prime bidders to provide guidance and assistance on how to do a better job of making good faith efforts.

We agree that there may be circumstances in which a recipient's inability to meet a goal is for reasons beyond its control. If that is the case, the recipient's response to this requirement can be to identify such factors, as well as suggesting how these problems may be taken into account and surmounted in the future. We also agree with those commenters who said that good-faith implementation of a DBE program involves more than meeting an overall goal. Factors like those cited by commenters are important as part of an overall evaluation of a recipient's success. This accountability provision, however, is intended to focus on the process recipients are using to achieve their overall goals, rather than to act as a total program evaluation tool. The operating administrations will continue to conduct program reviews that address the breadth of recipients' program implementation.

The Department believes that a clear, bright-line trigger for the application of the accountability provision makes the most sense administratively and in terms of achieving the purpose of the provision. Consequently, we are not adopting suggestions that the provision be triggered only by a pattern of missing goals, or an average of missing goals over the period of a three-year overall goal, or a shortfall of a particular percentage. Any shortfall means that a recipient has dealt only incompletely with the effects of discrimination, and we believe that it is appropriate in any such case that the recipient understand why that is the case and what steps to take to improve program implementation in the future.

The three-year goal review interval was intended to reduce administrative burdens on recipients. Nevertheless, we understand that some recipients, especially airports, may be more comfortable with annual projections and updates of overall goals. We have no objection to recipients making annual projections, for informational purposes, within the three-year overall

outreach efforts by recipients to encourage minority- and women-owned firms to become certified as DBEs, so that recipients can set and meet realistic goals. However, we caution recipients against stating or implying that

goal. It is still the formally submitted and reviewed three-year goal, however, and not the informal annual projections, that count from the point of view of the accountability mechanism. For example, suppose an airport has a three-year annual overall goal of 12 percent. For informational purposes, the airport chooses to make informal annual projections of 6, 12, and 18 percent for years 1-3, respectively (which, by the way, are not required to be submitted to the Department). The accountability mechanism requirements would be triggered in each of the three years covered by the overall goal if DBE achievements in each year were less than 12 percent.

The Department agrees that recipients should be accountable for effectively carrying out the race-neutral portion of their programs. If a recipient fell short of its overall goal because it did not achieve the projected race-neutral portion of its goal, then this is something the recipient would have to explain and establish measures to correct (e.g., by stepping up race-neutral efforts and/or concluding that it needed to increase race-conscious means of achieving its goal). We also agree that it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (e.g., firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance. Separate goals for various groups of disadvantaged individuals are possible with a program waiver of the DBE regulation, if a sufficient case is made for the need for group-specific goals.

In the section of the rule concerning goal-setting (49 CFR 26.45), the Department is also taking this opportunity to make a technical correction. In the final rule establishing the three year DBE goal review cycle, the Department inadvertently omitted from § 26.45(f)'s regulatory text paragraphs (3), (4), and (5), which govern the content of goal submissions, operating administration review of the submission, and review of interim goal setting mechanisms. It was never the intent of the Department to remove or otherwise change those provisions of section 26.45(f) of the rule. This final rule corrects that error by restructuring

minority- and women-owned firms can participate in recipients' contracts only if they become certified as DBEs. It would be contrary to nondiscrimination requirements of this part and of Title VI for a recipient to limit the opportunity

of minority- or women-owned firms to compete for any contract because the firm was not a certified DBE.

Program Oversight

The NPRM proposed to require recipients to certify that they have monitored the paperwork and on-site performance of DBE contracts to make sure that DBEs actually perform them. Comment was divided on this proposal, with 21 comments favoring either the proposal or stronger oversight mechanisms and 18 opposed.

Commenters who favored the proposal, including DBEs and some associations and recipients, generally believed that the provision would make it less likely that post-award abuse of DBEs by prime contractors would occur. One recipient noted that it already followed this approach with respect to ARRA grants. Some commenters wanted the Department to require additional steps, such as requiring recipients to make periodic visits to the job site and keeping records of each visit, to ensure that the DBELO did in fact have direct access to the organization's CEO concerning DBE matters, and to maintain sufficient trained staff to do needed monitoring. DBE associations wanted mandatory monitoring of good faith efforts (e.g., by keeping records of all contacts made by prime contractors) and terminations of DBEs by prime contractors, as well as to have certifications signed by persons higher up in the organization than the DBELO (e.g., the CEO). Another commenter sought further checking concerning counting issues. A consultant and a recipient suggested that recipient certifications should be more frequent than a one-time affair, (e.g., monthly or quarterly).

Commenters who opposed the NPRM proposal, most of whom were recipients, said that the workload the certification requirement would create would be too administratively burdensome, particularly for recipients with small staffs. The certification requirement could duplicate existing commercially useful function reviews. They also doubted the payoff in terms of improved DBE program implementation would be worth the effort. Some recipients said that they did monitor post-award performance and that the proposed additional paperwork requirement step would add little to the substance of their processes.

a DBE program, we believe that it is best to look at this question in terms of a performance standard. The Department's rule requires certain tasks (e.g., responding to applications for DBE eligibility, certification and monitoring of DBE performance on contracts) to be performed within certain time frames. If

One recipient noted that it would be very difficult to perform an on-site review of contract performance in the case of professional services consultants whose work was performed out of state.

One recipient suggested that a middle ground might be to have the recipient certify monitoring of a sample of contracts, since it lacked the staff for field monitoring of all contracts. A consultant suggested selecting contracts for monitoring based on a "risk-based analysis" of contracts or by focusing on contracts where prime contractors' achievements did not measure up to their commitments. One recipient suggested limiting the certification requirement to one commercially useful function review per year on a contract. A few recipients asked for guidance on what constituted adequate staffing for the DBE program.

DOT Response

The Department's DBE rule already includes a provision (49 CFR 26.37(b)) requiring recipients to have a monitoring and enforcement mechanism to ensure that work committed to DBEs is actually performed by DBEs. The trouble is that, based on the Department's experience, this provision is not being implemented by recipients as well as it should be. The FHWA review team that has been examining state implementation of the DBE program found that many states did not have an effective compliance monitoring program in place. DBE fraud cases investigated by the Department's Office of Inspector General and criminal prosecutions in the Federal courts have highlighted numerous cases in which recipients were unaware, often for many years, of situations in which non-DBE companies were claiming DBE credit for work that DBEs did not perform.

The Department believes that, for the DBE program to be meaningful, it is not enough that prime contractors commit to the use of DBEs at the time of contract award. It is also necessary that the DBEs actually perform the work involved. Recipients need to know whether DBEs are actually performing the work involved, lest program effectiveness suffer and the door be left open to fraud. Recipients must actually monitor each contract, on paper and in the field, to ensure that that they have this knowledge. Monitoring DBE compliance on a contract is no less important, and should be no more

a recipient has sufficient staff to meet these requirements, then its staffing levels are adequate. If not (e.g., applications for DBE certification are backlogged for several months), then staffing is inadequate.

Small Business Provisions

brushed aside, than compliance of with project specifications. This is important for prime contracts performed by DBEs as well as for situations in which DBEs act as subcontractors, and the monitoring and certification requirements will apply to both situations.

Consequently, the Department believes that the proposed requirement that recipients memorialize the monitoring they are already required to perform has merit. Its intent is to make sure that the monitoring actually takes place and that the recipient stands by the statement that DBE participation claimed on a contract actually occurred. This monitoring, and the recipient's written certification that it took place, must occur with respect to every contract on which DBE participation is claimed, not just a sample or percentage of such contracts, to make sure that the program operates as it is intended. It applies to contracts entered into prior to the effective date of this rule, since the obligation to monitor work performed by DBEs has always been a key feature of the DBE program.

With respect to concerns about administrative burden, the Department believes that monitoring is something that recipients have been responsible for conducting since the inception of Part 26. Therefore, we are not asking recipients to do something with which they can claim they are unfamiliar. Moreover, as the final rule version of this provision makes clear, recipients can combine the on-site monitoring for DBE compliance with other monitoring they do. For example, the inspector who looks at a project to make sure that the contractor met contract specifications before final payment is authorized could also confirm that DBE requirements were honestly met.

While we believe that more intensive and more frequent monitoring of DBE performance on contracts is desirable, we encourage recipients to monitor contracts as closely as they can. However, we do not, for workload reasons, want to mandate more pervasive monitoring at this time. We agree with commenters that it would be difficult to do on-site monitoring of contracts performed outside the state (e.g., an out-of-state consulting contract), and we have added language specifying that the requirement to monitor work sites pertains to work sites in the recipient's state. In reference to what constitutes adequate staffing of

The NPRM proposed that recipients would add an element to their DBE programs to foster small business participation in contracts. The purpose of this proposal was to encourage programs that, by facilitating small business participation, augmented race-neutral efforts to meet DBE goals. The

program element could include items such as race-neutral small business set-asides and unbundling provisions. The NPRM did not propose to mandate any specific elements, however.

The majority of commenters addressing this part of the NPRM—38 of 55—favored the NPRM's approach. Commenters approving the proposal were drawn from DBEs, associations, and recipients. Generally, they agreed that steps to create improved opportunities for small business would help achieve the objectives of the DBE program. Specific elements that various commenters supported included unbundling (which some commenters suggested should be made mandatory), prohibiting double-bonding, small business set-asides, expansions of existing small business development programs and mentor-protégé programs.

Commenters who did not support the NPRM proposal, most of whom were recipients, were concerned that having small business programs would draw focus from programs targeted more directly at DBEs. They were also concerned about having sufficient resources to carry out the programs they might include in a small business program element. One commenter thought that a small business program element would duplicate existing supportive services programs. Another thought unbundling would not work. A number of recipients thought it would be better for DOT to issue guidance on this subject rather than to create regulatory language. A recipient association characterized the proposal as burdensome and not productive.

Eight commenters addressed the issue of bonding and insurance requirements. A bonding company association

explained that both performance and payment bonds had an appropriate place in contracting and believed that subcontractor bonds were not duplicative of prime contractor bonds. A DBE wanted to prohibit prime contractors from setting bonding requirements for subcontractors. A recipient said the Department should treat prime contractors and subcontractors the same for bonding purposes. One DBE association said the combination of payment bonds, performance bonds, and retention was burdensome for subcontractors and

DOT Response

The Department already has programs in place concerning bonding and data reporting. There is not currently a direct, specific statutory mandate for a DBE program in FRA financial assistance programs, though the Department is considering ways of ensuring nondiscrimination in contracting in these programs. For

Another DBE association said that it was inappropriate to require bonding of the subcontractor when the prime contractor was already bonded for the overall work of the contract. This association suggested that a prime contractor could not demonstrate good faith efforts to meet a goal if it insisted on such a double bond.

DOT Response

DBEs are small businesses. Program provisions that help small businesses can help DBEs. By facilitating participation for small businesses, recipients can make possible more DBE participation, and participation by additional DBE firms. Consequently, we believe that a program element that pulls together the various ways that a recipient reaches out to small businesses and makes it easier for them to compete for DOT-assisted contracts will foster the objectives of the DBE program. Because small business programs of the kind suggested in the NPRM are race-neutral, use of these programs can assist recipients in meeting the race-neutral portions of their overall goals. This is consistent with the language that under Part 26, recipients are directed to meet as much as possible of their overall goals through race-neutral means.

It is important to keep in mind that race-neutral programs should not be passive. Simply waiting and hoping that occasional DBEs will participate without the use of contract goals does not an effective race-neutral program make. Rather, recipients are responsible for taking active, effective steps to increase race-neutral DBE participation, by implementing programs of the kind mentioned in this section of the NPRM and final rule. The Department will be monitoring recipients' race-neutral programs to make sure that they meet this standard.

In adopting the NPRM proposal requiring a small business program element, the Department believes that this element—which is properly viewed as an integral part of a recipient's DBE program—need not distract recipients from other key parts of recipients' DBE programs, such as certification and the use of race-conscious measures. There are different ways of encouraging DBE participation and meeting DBE overall goals, and recipients' programs need example, like all recipients of Federal financial assistance, FRA recipients are subject to requirements under Title VI of the Civil Rights Act of 1964. Existing programs, such as the FHWA supportive services program and various initiatives by the Department's Office of Small and Disadvantaged Business Utilization, are in place to

to address a variety of these means. Many of the provisions that recipients can use to implement the requirements of the new section (e.g., unbundling, race-neutral small business set-asides) are already part of the regulation or DOT guidance, and carrying out these elements should not involve extensive additional burdens.

With respect to bonding, the Department believes that commenters made a good point with respect to the burden of duplicative bonding. By duplicative bonding, we mean insistence by a prime contractor that a DBE provide bonding for work that is already covered by bonding or insurance provided by the prime contractor or the recipient. Like duplicative bonding, excessive bonding—a requirement, which according to participants in the Department's stakeholder meetings, is sometimes imposed to provide a bond in excess of the value of the subcontractor's work—can act as an unnecessary barrier to DBE participation. While we believe that additional action to address these problems may have merit, there was not a great deal of comment on the implications of potential regulatory requirements in these areas. Consequently, we will defer action on these issues at this time and seek additional comment and information in the follow-on NPRM the Department is planning to issue.

Miscellaneous Comments

Several commenters expressed general support for the DBE program and/or the NPRM, while two commenters opposed the DBE program in general. A large number of comments from an advocacy organization's members supported additional bonding assistance and more frequent data reporting. A commenter wanted to add DBE coverage for Federal Railroad Administration (FRA) grants. Commenters also suggested such steps as increasing technical assistance, using project labor agreements to increase DBE participation, an SBA 8(a) program-like term limit on participation in the DBE program, a better uniform reporting form, greater ease in complaining to DOT and recipients about noncompliance issues, and putting current joint check guidance into the rule's text.

assist DBEs in being competitive. Given the language of the statutes authorizing the DOT DBE program, we do not believe that a term limit on the participation of DBE companies would be permissible. The Department is working on improvements on all its DBE forms, and we expect to seek comment on revised forms in the follow-on NPRM we anticipate publishing. At this point, we

think that the joint check guidance is sufficient without codification, but we can look at this issue, among other certification issues, in the next round of rulemaking.

The Continuing Compelling Need for the DBE Program

As numerous court decisions have noted,¹ the Department's DBE regulations, and the statutes authorizing them, are supported by a compelling need to address discrimination and its effects. This basis for the program has been established by Congress and applies on a nationwide basis. Both the House and Senate FAA reauthorization bills contained findings reaffirming the compelling need for the program. We would also call to readers' attention the additional information presented to the House of Representatives in a March 26, 2009, hearing before the Transportation and Infrastructure Committee and made a part of the record of that hearing and a Department of Justice document entitled "The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-

¹ See for instance *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007), *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983 (9th Cir. 2005).

Owned Businesses" and the information and documents cited therein. This information confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.

Regulatory Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This is a nonsignificant regulation for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. Its provisions involve administrative modifications to several provisions of a long-existing and well-established program, designed to improve the program's implementation. The rule does

DBE credit to ensure that DBEs had done the work for which credit was claimed. The certification is for the purpose of ensuring accountability for monitoring which the regulation already requires.

Respondents: 1,050.

Frequency: 13,400 (i.e., there are about 13,400 contracts per year that have DBE participation, based on 2009 data).

Estimated Burden per Response: 1/2 hour.

not alter the direction of the program, make major policy changes, or impose significant new costs or burdens.

Regulatory Flexibility Act

A number of provisions of the rule reduce small business burdens or increase opportunities for small business, notably the interstate certification process and the small business DBE program element provisions. Small recipients would not be required to file reports concerning the reasons for overall goal shortfalls and corrective action steps to be taken. Only State DOTs, the 50 largest transit authorities, and the 30–50 airports receiving the greatest amount of FAA financial assistance would have to file these reports. The task of sending copies of on-site review reports to other certification entities fall on UCPs, which are not small entities, and in any case can be handled electronically (e.g., by emailing PDF copies of the documents). While all recipients would have to input information about decertifications and denials into a DOT database, this would be a quick electronic process that would not be costly or burdensome. In any case, this requirement will be phased in as the Department prepares to put the database online. The rule does not make major policy changes that would cause recipients to expend significant resources on program modifications. For these reasons, the Department certifies that the rule does not have a significant economic effect on a substantial number of small entities.

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under the Order and have determined that it does not have implications for federalism, since it merely makes administrative modifications to an existing program. It does not change the relationship between the Department and State or local governments, pre-empt State law, or impose substantial direct

Estimated Total Annual Burden: 6,700 hours.

Small Business Program Element (49 CFR 26.39)

Each recipient would add a new DBE program element, consisting of strategies to encourage small business participation in their contracting activities. No specific element would be required, and many of the potential elements are already part of the

compliance costs on those governments.

Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995, DOT has submitted the Information Collection Requests (ICRs) below to the Office of Management and Budget (OMB). Before OMB decides whether to approve these proposed collections of information and issue a control number, the public must be provided 30 days to comment. Organizations and individuals desiring to submit comments on the collections of information in this rule should direct them to the Office of Management and Budget, *Attention:* Desk Officer for the Office of the Secretary of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20503. OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

We will respond to any OMB or public comments on the information collection requirements contained in this rule. The Department will not impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. The Department intends to obtain current OMB control numbers for the new information collection requirements resulting from this rulemaking action. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

It is estimated that the total incremental annual burden hours for the information collection requirements in this rule are 47,450 hours in the first year, 83,370 in the second year, and 51,875 thereafter. The following are the information collection requirements in this rule:

Certification of Monitoring (49 CFR 26.37(b))

Each recipient would certify that it had conducted post-award monitoring of contracts which would be counted for

existing DBE regulation or implementing guidance (e.g., unbundling; race-neutral small business set-asides). The small business program element is intended to pull a recipient's small business efforts into a single, unified place in this DBE Program. This requirement goes into effect a year from the effective date of the rule.

Respondents: 1,050.

Frequency: Once (for a one-time task).

Estimated Burden per Response: 30

hours.

Estimated Total Annual Burden Hours: 31,500 (one time).

Accountability Mechanism (49 CFR 26.47(c))

If a recipient failed to meet its overall goal in a given year, it would have to determine the reasons for its failure and establish corrective steps.

Approximately 150 large recipients would transmit this analysis to DOT; smaller recipients would perform the analysis but would not be required to submit it to DOT. We estimate that about half of recipients would be subject to this requirement in a given year.

Respondents: 525 (150 of which would have to submit reports to DOT).

Frequency: Once per year.

Estimated Average Burden per Response: 80 hours + 5 for recipients sending report to DOT.

Estimated Total Annual Burden Hours: 42,750.

Affidavit of Completeness (49 CFR 26.45(c)(4))

When a firm certified in its home state seeks certification in another state ("State B"), the firm must provide an affidavit that the information the firm provides to State B is complete and is identical to that submitted to the home state. The calculation of the burden for this item assumes that there will be an average 2600 interstate applications each year to which this requirement would apply. This requirement takes effect a year from the effective date of this rule.

Respondents: 2,600.

Frequency: Once per year to a given recipient.

Estimated Average Burden per Response: 1 hour.

Estimated Total Annual Burden Hours: 2,600 hours.

Transmittal of On-Site Report (49 CFR 26.85(d)(1))

When a "State B" receives a request for certification from a firm certified in "State A," State A must promptly send a copy of that report to State B. This would involve simply emailing a PDF or other electronic copy of an existing report. This

firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE.

(b) You must list each type of work for which a firm is eligible to be certified by using the most specific NAICS code available to describe each type of work. You must make any changes to your current directory entries necessary to meet the requirement of this paragraph (a) by August 26, 2011.

requirement takes effect one year from the effective date of this rule.

Respondents: 52.

Frequency: An average of 50 per year per recipient.

Estimated Average Burden per Response: 1/2 hour.

Estimated Total Annual Burden Hours: 1,300.

Transmittal of Decertification/Denial Information (49 CFR 26.85(f)(1))

When a unified certification program (UCP) in a state denies a firm's application for certification or decertifies the firm, it must electronically notify a DOT database of the fact. The information in the database is then available to other certification agencies for their reference. The calculation of the burden of this requirement assumes that there would be an average of 100 such actions per year by each UCP.

Respondents: 52.

Frequency: An average of 100 per year per recipient.

Estimated Average Burden per Response: 1/2 hour.

Estimated Total Annual Burden Hours: 2,600.

Transmittal of Denial/Decertification Documents (49 CFR 26.85(f)(3))

When a UCP notes, from the DOT database, that a firm that has applied or been granted certification was denied or decertified elsewhere, the UCP would request a copy of the decision by the other state, which would then have to send a copy. The Department anticipates that this would be done by an email exchange, the response attaching a PDF or other electronic copy of an existing document. This requirement goes into effect a year from the effective date of the rule.

Respondents: 52.

Frequency: An average of 75 per year per recipient.

Estimated Average Burden per Response: five minutes for the request; 1/2 hour for the response.

Estimated Total Annual Burden

Hours: 2,625.

List of Subjects in 49 CFR Part 26

■ 5. Revise § 26.37 (b) to read as follows:

§ 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?

* * * * *

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant-programs—transportation, Mass transportation, Minority businesses, Reporting and record keeping requirements.

Issued this 11th day of January, 2011, at Washington, DC.

Ray LaHood,
Secretary of Transportation.

For the reasons set forth in the preamble, the Department amends 49 CFR Part 26 as follows:

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

■ 1. The authority citation for part 26 is amended to read as follows:

Authority: 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C. 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

■ 2. In section 26.5, add a definition of "Home state" in alphabetical order to read as follows:

§ 26.5 What do the terms used in this part mean?

* * * * *

"Home state" means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business.

* * * * *

■ 3. In § 26.11, add paragraph (a) to read as follows:

§ 26.11 What records do recipients keep and report?

(a) You must transmit the Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B to this part, at the intervals stated on the form.

* * * * *

■ 4. Revise § 26.31 to read as follows:

§ 26.31 What information must you include in your DBE directory?

(a) In the directory required under § 26.81(g) of this Part, you must list all

which the work was committed. This mechanism must include a written certification that you have reviewed contracting records and monitored work sites in your state for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of contract performance for other purposes (e.g., close-out reviews for a contract).

* * * * *

■ 6. Add § 26.39 to subpart B to read as follows:

§ 26.39 Fostering small business participation.

(a) Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

(b) This element must be submitted to the appropriate DOT operating administration for approval as a part of your DBE program by February 28, 2012. As part of this program element you may include, but are not limited to, the following strategies:

(1) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million).

(2) In multi-year design-build contracts or other large contracts (e.g., for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract or specific subcontracts

that are of a size that small businesses, including DBEs, can reasonably perform.

(3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.

(4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.

(5) To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

(c) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your DBE program.

■ 7. In § 26.45:

administration’s review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

(5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting

■ a. Revise paragraphs (e)(2), (e)(3), (f)(1), and (f)(2);

■ b. Redesignate paragraphs ((f)(3) and (f)(4) as (f)(6) and (f)(7), respectively; and

■ c. Add new paragraphs (f)(3), (4), and (5).

The revisions and addition read as follows:

§ 26.45 How do recipients set overall goals?

* * * * *

(e) * * *

(2) If you are an FTA or FAA recipient, as a percentage of all FT or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the three forthcoming fiscal years.

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.

(i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.

(ii) A project goal covers the entire length of the project to which it applies.

(iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.

(iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f)(1)(i) If you set your overall goal on a fiscal year basis, you must submit it to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency’s Web site.

(ii) You may adjust your three-year

mechanism. Such a mechanism

must: (i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and

(ii) Avoid imposing undue burdens on non-DBEs.

* * * * *

■ 8. In § 26.47, add paragraphs (c) and (d) to read as follows:

§ 26.47 Can recipients be penalized for failing to meet overall goals?

* * * * *

overall goal during the three-year period to which it applies, in order to reflect changed circumstances. You must submit such an adjustment to the concerned operating administration for review and approval.

(iii) The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.

(iv) While you are required to submit an overall goal to FHWA, FTA, or FAA only every three years, the overall goal and the provisions of Sec. 26.47(c) apply to each year during that three-year period.

(v) You may make, for informational purposes, projections of your expected DBE achievements during each of the three years covered by your overall goal. However, it is the overall goal itself, and not these informational projections, to which the provisions of section 26.47(c) of this part apply.

(2) If you are a recipient and set your overall goal on a project or grant basis as provided in paragraph (e)(3) of this section, you must submit the goal for review at a time determined by the FHWA, FTA or FAA Administrator, as applicable.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence you relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see 26.51(c)).

(4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating

(c) If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your DBE program in good faith:

(1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;

(2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to

enable you to meet fully your goal for the new fiscal year;

(3)(i) If you are a state highway agency; one of the 50 largest transit authorities as determined by the FTA; or an Operational Evolution Partnership Plan airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (c)(1) and (2) of this section to the appropriate operating administration for approval. If the operating administration approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

(ii) As a transit authority or airport not meeting the criteria of paragraph (c)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to FTA or FAA on request for their review.

(4) FHWA, FTA, or FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

(5) You may be regarded as being in noncompliance with this Part, and therefore subject to the remedies in § 26.103 or § 26.105 of this part and other applicable regulations, for failing to implement your DBE program in good faith if any of the following things occur:

(i) You do not submit your analysis and corrective actions to FHWA, FTA, or FAA in a timely manner as required under paragraph (c)(3) of this section;

(ii) FHWA, FTA, or FAA disapproves your analysis or corrective actions; or

(iii) You do not fully implement the corrective actions to which you have committed or conditions that FHWA, FTA, or FAA has imposed following review of your analysis and corrective actions.

(d) If, as recipient, your Uniform

reasonable, nondiscriminatory bond requirements.

(iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;

(v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;

(vii) You have determined that the listed DBE subcontractor is not a responsible contractor;

Report of DBE Awards or Commitments and Payments or other information coming to the attention of FTA, FHWA, or FAA, demonstrates that current trends make it unlikely that you will achieve DBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FHWA, FTA, or FAA, as applicable, may require you to make further good faith efforts, such as by modifying your race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

■ 9. In § 26.51, revise paragraphs (b)(1) and (f)(1) to read as follows:

§ 26.51 What means do recipients use to meet overall goals?

* * * * *

(b) * * *

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.

* * * * *

(f) * * *

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year, unless it becomes necessary in order meet your overall goal.

Example to paragraph (f)(1):
Your

overall goal for Year 1 is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year 1. However, if part way through Year 1, your DBE awards

(vi) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;

(vii) The listed DBE is ineligible to receive DBE credit for the type of work required;

(viii) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;

(ix) Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to

or commitments are not at a level that would permit you to achieve your overall goal for Year 1, you could begin setting race-conscious DBE contract goals during the remainder of the year as part of your obligation to implement your program in good faith.

* * * * *

■ 10. In § 26.53:

■ a. Redesignate paragraph (g) as paragraph (i);

■ b. Redesignate paragraphs (f)(2) and (3) as paragraphs (g) and (h), respectively;

■ c. Revise paragraph (f)(1); and

■ d. Add new paragraphs (f)(2) through (6) to read as follows:

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

* * * * *

(f)(1) You must require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

(2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the DBE firm.

(3) For purposes of this paragraph, good cause includes the following circumstances:

(i) The listed DBE subcontractor fails or refuses to execute a written contract;

(ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;

(iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

(4) Before transmitting to you its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and the reason for the request.

(5) The prime contractor must give the

DBE five days to respond to the prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), you may provide a response period shorter than five days.

(6) In addition to post-award terminations, the provisions of this section apply to preaward deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

* * * * *

■ 11. In § 26.67, revise paragraphs (a)(2)(i) and (iv), and in paragraphs (b), (c), and (d), remove "\$750,000" and add in its place "\$1.32 million".

The revisions read as follows:

§ 26.67 What rules determine social and economic disadvantage?

(a) * * *

(2)(i) 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.

* * * * *

(iv) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under section 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

* * * * *

■ 12. Revise § 26.71(n) to read as follows:

§ 26.71 What rules govern determinations concerning control?

* * * * *

this Part, the firm is eligible for certification.

* * * * *

§ 26.81 [Amended]

■ 14. Amend § 26.81(g) by removing the word "section" and adding in its place the word "part" and by removing the period at the end of the last sentence and adding the words "and shall revise the print version of the Directory at least once a year."

■ 15. In § 26.83, remove and reserve paragraph (e), revise paragraph (h), and add paragraphs (l) and (m) to read as follows:

(n) 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. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You must not require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. If your Directory does not list types of work for any firm in a manner consistent with this paragraph (a)(1), you must update the Directory entry for that firm to meet the requirements of this paragraph (a)(1) by August 28, 2011.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

§ 26.83 What procedures do recipients follow in making certification decisions?

* * * * *

(h) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of section 26.87. You may not require DBEs to reapply for certification or require "recertification" of currently certified firms. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, three years from the date of the firm's most recent

(3) If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

(4) A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

* * * * *

■ 13. Revise § 26.73(b) to read as follows:

§ 26.73 What are other rules affecting certification?

* * * * *

(b)(1) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.

(2) You must not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of

certification, or sooner if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section), a complaint, or other information concerning the firm's eligibility. If you have grounds to question the firm's eligibility, you may conduct an on-site review on an unannounced basis, at the firm's offices and jobsites.

* * * * *

(l) As a recipient or UCP, you must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

(m) Except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time. As a recipient or UCP, you may not apply the waiting period provided under § 26.86(c) of this part before allowing the applicant to resubmit its application. However, you may place the reapplication at the “end of the line,” behind other applications that have been made since the firm’s previous application was withdrawn. You may also apply the waiting period provided under § 26.86(c) of this part to a firm that has established a pattern of frequently withdrawing applications before you make a decision.

§ 26.84 [Removed]

- 16. Remove section 26.84.
- 17. Revise § 26.85 to read as follows

§ 26.85 Interstate certification.

(a) This section applies with respect to any firm that is currently certified in its home state.

(b) When a firm currently certified in its home state (“State A”) applies to another State (“State B”) for DBE certification, State B may, at its discretion, accept State A’s certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.

(2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A’s electronic directory or obtaining written confirmation from State A.

(c) In any situation in which State B chooses not to accept State A’s certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your

firm’s certification. This includes affidavits of no change (*see* § 26.83(j)) and any notices of changes (*see* § 26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A’s UCP or any other recipient concerning your application or status as a DBE firm.

(2) You must also provide to State B any notices or correspondence from states other than State A relating to your status as an applicant or certified DBE

in those states. For example, if you have been denied certification or decertified in State C, or subject to a decertification action there, you must inform State B of this fact and provide all documentation concerning this action to State B.

(3) If you have filed a certification appeal with DOT (*see* § 26.89), you must inform State B of the fact and provide your letter of appeal and DOT’s response to State B.

(4) You must submit an affidavit sworn to by the firm’s owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by § 26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

(d) As State B, when you receive from an applicant firm all the information required by paragraph

(c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (*see* § 26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by “State A” or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is good cause to believe that State A’s certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

- (i) Evidence that State A’s certification was obtained by fraud;
- (ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;
- (iii) State A’s certification was factually erroneous or was inconsistent with the requirements of this part;
- (iv) The State law of State B requires a result different from that of the State law of State A.
- (v) The information provided by the

applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, unless you have determined that there is good cause to believe that State A’s certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms. (4) If, as State B, you have determined that there is good cause to believe that State A’s certification is erroneous or should not apply in your State, you

must offer the firm an opportunity within 30 days of receiving the firm’s request.

(i) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B’s notice. The firm is not otherwise responsible for demonstrating its eligibility to State B.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B’s decision maker to discuss State B’s objections to the firm’s eligibility on both.

If the firm requests a meeting, as State B you must schedule the meeting to take place on State B.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B’s notice. The firm is not otherwise responsible for demonstrating its eligibility to State B.

(iv) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B’s notice. The firm is not otherwise responsible for demonstrating its eligibility to State B.

(v) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B’s notice. The firm is not otherwise responsible for demonstrating its eligibility to State B.

(vi) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B’s notice. The firm is not otherwise responsible for demonstrating its eligibility to State B.

(vii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B’s notice. The firm is not otherwise responsible for demonstrating its eligibility to State B.

(viii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B’s notice. The firm is not otherwise responsible for demonstrating its eligibility to State B.

(ix) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B’s notice. The firm is not otherwise responsible for demonstrating its eligibility to State B.

must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and

must offer the firm an opportunity within 30 days of receiving the firm’s request.

(ii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B’s notice. The firm is not otherwise responsible for demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.
 (v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.
 (vi) The firm's application for certification is stayed pending the outcome of this process.
 (vii) A decision under this paragraph (d)(4) may be appealed to the

Departmental Office of Civil Rights under s§ 26.89 of this part.
 (e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.
 (f)(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, you must make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. You must enter the following information:
 (i) The name of the firm;
 (ii) The name(s) of the firm's owner(s);
 (iii) The type and date of the action;
 (iv) The reason for the action.
 (2) As a UCP, you must check the DOCR Web site 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.
 (3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the requesting UCP within 7 days of receiving the request. As the UCP receiving the decision, you must then consider the information in the decision in

determining what, if any, action to take with respect to the certified DBE firm or applicant.

(g) You must implement the requirements of this section beginning January 1, 2012.

§ 26.87 [Amended]

■ 18. In § 26.87, remove and reserve paragraph (h).

§ 26.107 [Amended]

■ 19. In § 26.107, in paragraphs (a) and (b), remove "49 CFR part 29" and add in its place, "2 CFR parts 180 and 1200".

■ 20. In § 26.109, revise paragraph (a)(2) to read as follows:

§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

(a) * * *

(2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

APPENDIX Q.4.

**DBE REGULATORY PROGRAM UPDATES
FEDERAL REGISTER/VOL. 79, NO. 191/ Thursday,
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Part II

Department of Transportation

Office of the Secretary

49 CFR Part 26

Disadvantaged Business Enterprise: Program Implementation
Modifications; Final Rule

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 26****[Docket No. OST–2012–0147]****RIN 2105–AE08****Disadvantaged Business Enterprise: Program Implementation Modifications****AGENCY:** Office of the Secretary (OST), U.S. Department of Transportation (DOT).**ACTION:** Final rule.

SUMMARY: The U.S. Department of Transportation (DOT or Department) is amending its disadvantaged business enterprise (DBE) program regulations to improve program implementation in three major areas or categories. First, the rule revises the uniform certification application and reporting forms, creates a uniform personal net worth form, and collects data required by the Moving Ahead for Progress in the 21st Century Act (MAP–21), on the percentage of DBEs in each State. Second, the rule strengthens the certification-related program provisions, which includes adding a new provision authorizing summary suspensions under specified circumstances. Third, the rule modifies several other program provisions concerning such subjects as: Overall goal setting, good faith efforts, transit vehicle manufacturers, and counting for trucking companies. The revision also makes minor corrections to the rule.

DATES: This rule is effective November 3, 2014.

FOR FURTHER INFORMATION CONTACT: For questions related to this final rule or general information about the DBE rules/regulations, please contact Jo Anne Robinson, Senior Attorney, Office of General Law, Office of the General Counsel, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, Room W94–205, 202–366–6984, JoAnne.Robinson@dot.gov. DBE program points of contact for information related to other aspects of the DBE program, including certification appeals, programs to assist small and disadvantaged businesses, and information on the DBE program in specific operating administrations, can be found at <https://www.civilrights.dot.gov/disadvantaged-business-enterprise/about-dbe-program/dbe-program-points-contact>.

SUPPLEMENTARY INFORMATION: On September 6, 2012, the Department published in the **Federal Register** (77 FR 54952) a notice of proposed

rulemaking (NPRM) to improve implementation of the DBE program. The DBE program is designed to enable small businesses owned and controlled by socially and economically disadvantaged individuals to compete for federally-funded contracts let by State and local transportation agencies the receive funds from DOT (i.e., recipients). The proposed rule called for a 60-day comment period, with comments to be received by November 5, 2012. Subsequently, the comment period was extended to December 24, 2012, through a notice published October 25, 2012 (77 FR 65164). The Department received approximately 300 comments from State departments of transportation, transit authorities, airports, DBEs, non-DBE firms, and representatives of various stakeholder organizations. Several commenters suggested that the Department hold a public meeting or listening session on the proposed changes before issuing a final rule. The Department responded by scheduling a public listening session for October 9, 2013, as announced in a September 18, 2013 notice (78 FR 57336), to receive additional public input on the costs and benefits of certain proposed changes, among other things. The public comment period also was reopened and extended from the date of publication until October 30, 2013. However, due to the lapse in government funding on October 1, 2013, the October 9, 2013 listening session was canceled and rescheduled to December 5, 2013 (78 FR 68016; November 13, 2013). The public comment period was reopened and extended to December 26, 2013.

The Department received an additional 50 written comments during the reopened comment periods and received in-person oral testimony from 23 individuals at the listening session, which was held in Washington, DC. Over 500 individuals registered to participate in the listening session via Web conferencing made available by the Department. A transcript of the comments received at the listening session and through the Web conferencing was placed in the NPRM docket before it closed on December 26, 2013.

Many of the written comments the Department received were extensive and covered numerous proposed changes, as well as commentary on existing regulations that are not the subject of a proposed amendment. Commenters also suggested changes beyond the scope of what was proposed by the Department in the NPRM. The Department has made changes in this final rule to some of its proposals in response to comments

received during the entire comment period and at the listening session. With the exception of comments that are beyond the scope of the proposed rulemaking, or that failed to set forth any rationale or make suggestions, the Department discusses and responds to the comments on the major issues in the NPRM below.

Personal Net Worth (PNW) Form and Related Requirements*PNW Form*

The Department explained in the NPRM the reasons it believed creating a uniform personal net worth (PNW) form would clear the confusion that may exist when recipients or other entities that perform the certification function (i.e., certifying agencies) use the U.S. Small Business Administration's (SBA) Personal Financial Statement Form 413 as part of their evaluation of the economic disadvantage of an applicant for certification pursuant to the rule. For example, the SBA Form 413 requires each partner or stockholder with 20% ownership or more of voting stock to complete the form. This is not required by 49 CFR part 26 and has caused some confusion. We proposed a revision to 49 CFR 26.67 and offered a sample PNW form and accompanying instruction sheet (see the proposed Appendix G of the September 6, 2012, proposed rule). The Department proposed that a standard form be used by all applicants to the program. Recipients were encouraged to post the new form electronically in a screen-fillable format on their Web site to allow users to complete and print the form online.

The proposed PNW form differed in several respects from the SBA's form that the Department mentioned in its June 2003 revision to Part 26 as an appropriate form for use by our recipients in determining whether an applicant meets the economic disadvantage requirements. Most notably, the form's length increased when more columns and rows were added to give applicants space to fill in their answers. We also proposed that persons completing the form submit backup documentation such as current bank, brokerage, and retirement account statements, mortgage notes, and instruments of conveyance and encouraged recipients when reasonable questions or concerns arise to look behind the statement and the submissions. A related proposal involved requiring applicants to submit documentation for items excluded from the PNW calculation, such as net equity in the primary residence and the value

of the disadvantaged owner's interest in the applicant firm.

The Department invited comment on whether the spouse of an applicant owner should have to file a PNW statement even if the spouse is not involved in the business in question. We noted that the SBA requires the submission of a separate form from a non-applicant spouse if the applicant is not legally separated. However, the SBA requirement is linked to the agency's consideration of a spouse's financial situation in determining a person's access to credit and capital; the existing DOT rule does not take this into account except in cases involving individual determinations of social and economic disadvantage (e.g., Appendix E situations). Currently, certifiers are able to request relevant information on a case-by-case basis. The NPRM proposed adding language to 49 CFR 26.67 to recognize the authority of certifiers to request information concerning the assets of the disadvantaged owner's spouse where needed to clarify whether assets have been transferred to the spouse.

On a related subject, the Department asked for comment on whether the treatment of assets held by married couples should extend to couples who are part of domestic partnerships or civil unions where these relationships are formally recognized under State law.

Over 60 comments addressed issues related to the PNW form, a significant majority of which supported the idea of a DOT-developed PNW form, although some did advocate for the continued use of SBA Form 413. One commenter suggested that the Department mandate that the new form be used without modification and that regulatory provisions be added to address violations by Unified Certification Program (UCP) certifying agencies that revise the form. There were many comments regarding the propriety of including in the PNW form assets that are excluded from the calculation used to determine economic disadvantage under the terms of the existing regulations at 49 CFR 26.67(a). While the majority of the commenters supported creating a DOT form, many thought the proposed form was too burdensome, requested too much documentation, is complicated, and should not be used for those reasons. Similarly, other commenters objected to the form's length, with some likening it to a Federal income tax filing. Some commenters requested information on the methodology used to estimate the paperwork burden associated with completing the proposed DOT PNW form.

Commenters that addressed the question of requiring the spouse of an applicant who is not involved in operating the business to submit a PNW form included business owners, UCP recipients, and advocacy group representatives. Ten commenters favored such a requirement, citing the need to review the applicant's claim that his or her PNW statement accurately reflects community property interests and as a check on the transfer of assets as a means to circumvent the eligibility requirements. Twenty commenters opposed requiring a spousal PNW statement, citing paperwork burden concerns and pointing out that the existing regulation enables certifiers to obtain this information on a "case-by-case" basis. Many commenters believed the requirement would be intrusive and unwarranted and would complicate an already burdensome application. A commenter stated that a blanket requirement would be counter-productive and dissuade eligible DBE owners from participating in the program. However, the majority of commenters favored the collection of a PNW statement from a spouse if he or she has some role in the business (e.g., stockholder, corporate director, partner, officer, or key person), has funded or provided financial guarantees, or has transferred or sold the business to the applicant.

All of the commenters that responded to the Department's question of extending the treatment of assets of married couples to domestic partnerships or civil unions recognized under State law supported such an extension as a matter of fairness and equal treatment. Among the commenters was a coalition of nine organizations led by the National Gay & Lesbian Chamber of Commerce, a national not-for-profit advocacy organization dedicated to expanding the economic opportunities and advancements of lesbian, gay, bisexual and transgender-owned businesses across the country.

DOT Response: The Department has decided to finalize its own PNW form largely as proposed, but with certain changes in response to comments that argued that the proposed form was unnecessarily burdensome. We believe a more prudent approach than the proposal to require all persons to submit backup documentation in every instance (including items excluded under the regulations) is for recipients to request this information for any assets or liabilities noted on the PNW form on a case-by-case basis rather than mandatory submission by all applicants. A one-size fits all approach, in which

certifiers attempt to "substantiate" every line item regardless of magnitude or innocuousness is ill advised, administratively burdensome, and unduly restrictive. As argued by many commenters, that approach is unreasonable, onerous to applicants and sometimes excludes eligible firms. The final rule accomplishes two purposes: (1) Preserves recipient flexibility in seeking explanations for specific assets and liabilities and (2) shortens the form from 6 pages to a more manageable 3 pages, thereby streamlining the time it takes to complete it.

The DOT PNW form (attached as Appendix G) is the result of this balance of interests. As we proposed, this new form must be used without modification by certifiers and applicants whose economic disadvantaged status is relied upon for DBE certification. Section 26.67(a)(2)(i) and (ii) are amended to reflect this requirement. This is necessary to ensure that the requirements of this program are applied consistently by all certifying agencies. Language in the existing rule that requires requests for supporting documentation not be unduly lengthy, burdensome, or intrusive remains unchanged. We remind recipients that with regard to personal net worth, we intend for all information collection requests to serve a useful purpose that addresses a specific question regarding a value stated in the form and not in any way operate as authority to collect all possible documentation for each listed asset or a general requirement that business owners obtain appraisals of all assets. We urge recipients to exercise judgment and restraint when requesting reasonable supporting documentation. Personal net worth statements should not be requested for owners that are not claiming social and economic disadvantage. Nor should a personal net worth statement be requested from persons who are not listed as comprising 51% or more of the ownership percentage of the applicant firm.

The style and content of the form were carefully considered by the Department in this rulemaking. We are cognizant of concerns that too radical a departure from a form that certifiers are accustomed to using may cause some temporary confusion and corresponding administrative burdens. However, the Department believes that a standardized DOT PNW form accompanying the standard DBE Certification Application (also revised in this final rule) is a significant step in uniformity of practice. The DOT PNW form is modelled closely on SBA's Form 413, with differences tailored to DBE

program-specific needs, e.g., not to include the 49 CFR 26.67(a)(2)(iii) exclusions for ownership interest in the firm and equity in the primary residence on the front page.

The Department notes that the estimated burden hours contained in the proposed rule were based on the Department's experience in working with DBE and UCP agencies and our intent to produce a DBE-specific PNW form that includes the information typically needed to perform the certification function, but is not overly burdensome. Further, our proposed rule's estimate of 8 hours to complete the proposed PNW form is greater than the 1.5 hours SBA estimates for its form, which was designed to take into account the different purposes between the two programs and the fact that DBE applicants often need to supplement their form with supporting documentation. As discussed above, in response to comments, we have decided to lessen the requirements of the final form in today's final rule and believe that our original estimate, based on the form that will be now finalized, is reduced to 2 hours, slightly more than the SBA estimate for its form.

Another change we proposed and that we finalize today is that the instructions at the top of the form are customized for the DBE and ACDBE programs. Like SBA, we are requiring each owner to list on page 1 all assets (whether solely or jointly held) and specify liabilities. The categories of assets and liabilities we require mirror closely the SBA's categories but have minor differences. The Department's PNW form omits "sources of income and contingent liabilities," which is contained on SBA's form. On page 2, section 4 of the DOT PNW form, owners must report any equity line of credit balances on real estate holdings, how the asset was acquired (e.g. purchase, inherit, divorce, gift), and the source of market valuation. Owners must also detail in section 6, the nature of the personal property or assets, such as automobiles and other vehicles, their household goods, and any accounts receivable, placing a value on such items in the appropriate column. We added a column to this section asking whether any of these assets are insured. We envision recipients (again on a case-by-case basis) may wish to request copies of any insurance valuation on these assets listed as insured and copies of notes or liens. Sections 7 (value of other business investments) and 9 (transfer of assets) are unique to the Department's PNW form and require applicants to list these activities as described.

We have decided not to require submission of the PNW form by the spouse of a disadvantaged owner who is not involved in the operations of the business. We agree that such a requirement is unduly burdensome for the applicant and the certifier, needlessly intrudes into the affairs of individuals who are not participants in the program, and is not necessary since certifiers may request this information as needed on a case-by-case basis, but not as a routine matter.

We also agree with the commenters urging us to extend the treatment of assets held by married couples to include domestic partnerships and civil unions that are legally recognized under State law. To this end, we have added a definition of spouse that includes same-sex or opposite-sex couples that are part of a domestic partnership or civil union recognized under State law.

Concurrent with this final rule and as requested by many commenters, the Departmental Office of Civil Rights is making the final form available for distribution in a screen-fillable portable document (PDF) format, which recipients may post on their Web sites and distribute to applicants as part of the DBE certification application process.

Economic Disadvantage 49 CFR 26.67

Since 2007, the Department has, through guidance, recommended that recipients take account of evidence that indicates assets held by an individual suggest he or she is not economically disadvantaged even though the personal net worth falls below the \$1.32 million threshold that gives rise to a rebuttable presumption of economic disadvantage. The guidance reflects the Department's view that the purpose and intent of the economic disadvantage criteria is to more narrowly tailor the program to only reach those disadvantaged individuals adversely impacted by discrimination and the effects of discrimination and to accomplish the goal of remedying the effects of discrimination. The presumption is by regulation rebutted when the individual's personal net worth exceeds the \$1.32 million cap. We proposed in the NPRM to codify the existing guidance to recognize that the presumption also may be rebutted if the individual's personal net worth falls below the cap, but the individual is, in fact, too wealthy to be considered disadvantaged by any reasonable measure. To illustrate the point, the guidance notes that under some circumstances a person with a very expensive house, a yacht, and extensive real or personal property holdings may

be found not to be economically disadvantaged.

The Department also sought comment on whether a more bright-line approach would be preferable, such as whether someone with an adjusted gross income over one million dollars for two or three years on his or her Federal income tax return should not be presumed to be economically disadvantaged, regardless of their personal net worth (as defined by this program).

The Department received 42 comments on this issue. The difficulties potential applicants and recipients experience regarding economic disadvantage were expressed by many of the commenters and their views were not limited to whether the \$1.32 million personal net worth cap is reasonable. Commenters mentioned several difficulties with both the current rule, the proposed codification of the "accumulation of substantial wealth" guidance, and the alternative bright-line approach tied to the adjusted gross income of the disadvantaged owners. Most commenters comprised of recipients, DBEs, and general contractors opposed amending the regulations to include the ability to accumulate substantial wealth as a basis for rebutting the presumption of economic disadvantage. The opponents viewed the proposal as vague, subjective, and likely to result in arbitrary decisions.

Many of the opponents of this approach believed that, if the Department were to finalize criteria for personal net worth beyond the existing calculation, a measure similar to the bright-line approach with varying adjusted gross income numbers over varying numbers of years would be preferable because it provides a more objective measure of whether an applicant is economically disadvantaged. Several commenters thought that the existing bright line of \$1.32 million in personal net worth is sufficient. One commenter believes a bright-line approach helps certifiers because most are not accountants or tax experts. The Department also received comments specific to the application of the bright-line approach to S Corporations. Two commenters stated that using a bright-line approach was a false indicator for S Corporations in which the firm's income is passed through to DBE shareholders and thus is not a reflection of a shareholder's wealth. As defined by the U.S. Internal Revenue Service, S Corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes. One commenter did not

believe that a bright-line approach was appropriate for S Corporations and Limited Liability Corporations because owners of these entities recoup the profits on their personal returns in proportion to their ownership interests. The commenter went on to say that these entities distribute sufficient cash to their owners to enable them to pay income tax and this distribution does not increase the person's net worth.

DOT Response: As noted in the NPRM, the purpose of this proposed regulatory amendment is 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 continues to believe that this kind of tool must be available to ensure that the program truly benefits those for whom it is intended. We have seen in certification appeals upheld by the Federal courts the reasoned application of this standard based on specific facts and circumstances in the entire administrative record that support the decision. See *SRS Technologies v. United States*, 894 F. Supp 8 (D.D.C. 1995); *SRS Technologies v. United States*, 843 F. Supp. 740 (D.D.C. 1994).

We acknowledge the benefits of a bright-line approach (whether it is the adjusted gross income approach proposed in the NPRM or the current bright-line personal net worth cap that exist in the regulations) and the potential for manipulation to fall within the bright-line. The Department strongly believes that recipients must be able to look beyond the individual's personal net worth bottom line and consider his or her overall economic situation in cases where the specific facts suggest the individual is obviously wealthy with resources indicating to a reasonable person that he or she is not economically disadvantaged. Thus, the final rule incorporates the guidance but does not go beyond it as proposed. We have not included as factors "unlimited growth potential" or "has not experienced impediments to obtaining access to financing, markets, and resources." We believe that those additional criteria are unnecessary because the essence of what we intend is captured in the "ability to accumulate substantial wealth" standard as evidenced by the individual's income and the value of the various accumulated personal assets.

The Department, however, is sympathetic to the concerns raised by many commenters that the subjective

standard could lead to arbitrary decisions by recipients. To address this concern, we have included in the final rule specific factors recipients may consider in evaluating the economic disadvantaged status of an applicant or owner in this circumstance. Those factors include (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 (e.g., inheritance); (3) whether the earnings were offset by losses (e.g., winnings and losses from gambling); (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 fair market value of all assets exceed \$6 million. Similar factors are used by the Small Business Administration in its application of the economic disadvantage criteria to individuals seeking to participate in its Small Disadvantaged Business and 8(a) programs, which has long recognized the ability to accumulate substantial wealth as a basis for a finding of no economic disadvantage. The Federal courts have upheld consideration of income levels tied to the top 1–2% of high income wage earners in the United States to evaluate the economic disadvantaged status of a small business owner as reasonably based, not the subject of arbitrary decision making. *Id.* *SRS Technologies* cases cited above. As noted by the SBA, "... the average income for a small business owner is generally higher than the average income for the population at large and, therefore, what appears to be a high benchmark is merely reflective of the small business community." See preamble to the 2011 SBA Final Rule, 76 FR 8222–01.

We stress 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. Instead, today's final rule merely provides recipients who have a reasonable basis to believe that a particular owner should not be considered economically disadvantaged, despite their PNW, with the explicit authority to look at evidence beyond the PNW to determine whether that owner is truly economically disadvantaged. Further, the listed factors are simply intended to provide guidance to recipients about the kind of evidence they may look to in making this determination; it is not intended to be

a checklist. An adjusted gross income below \$350,000 may in appropriate circumstances indicate a lack of economic disadvantage. The determination should be based on the totality of the circumstances. Finally, as the final regulatory text clarifies, a recipient can only rebut the presumption of disadvantage under this standard through a proceeding that follows the same procedures as those used to remove a firm's eligibility under § 26.87. The Department believes that this procedural safeguard makes it unlikely that recipients will proceed in attempting to rebut the presumption of disadvantage in all but the most egregious cases.

Transfer of Assets 49 CFR 26.67

Under existing guidance contained in Appendix E, assets that individuals have transferred two years prior to filing their certification application may be counted when calculating their PNW. The Department proposed to codify the guidance by placing it in the rule text at § 26.67. The proposed rule essentially attributes to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to the submission of an application for certification or within two years of a participant's annual program review. This transfer rule would not apply to transfers to, or on behalf of, an immediate family member for that individual's education, medical expenses, or some other form of essential support or transfers to immediate family members that are consistent with the customary recognition of special occasions like birthdays, graduations, anniversaries, and retirements. We also proposed to expand the transfer rule to include transfers from the DBE owner to the applicant firm to ensure that such transfer are not used to enable the DBE owner to qualify for the program.

Most of the commenters, comprised largely of State departments of transportation and transit authorities, supported the proposed rule. Several commenters suggested there be no exception for transfers to a spouse and no exception where it can be demonstrated that the transfer was done to qualify for the program. Other commenters asked for clarification of certain terms (i.e., "transfer" or "essential support") or a narrowing of the exclusions. The few commenters that opposed the proposed rule provided little detail.

DOT Response: The Department is adopting the rule with a minor modification to the text. We see no reason to treat a spouse differently than other immediate family members regarding the exception. We agree with commenters that the exceptions would not apply if there is evidence indicating that a transfer to an immediate family member was in fact designed to enable the disadvantaged owner to evade the PNW threshold and thereby qualify for the program or remain in the program. The burden is on the applicant or the participant to demonstrate that the transfer is covered by the exception. In our experience with the Appendix E guidance, recipients have not had difficulty applying the transfer restrictions. However, we will through guidance provide clarification of terms used in the rule if needed based on specific facts and circumstances presented to the Department.

Certification Application Form

The Department proposed a revised nationwide uniform DBE Certification Application Form to replace the one in use since 2003. In the 2003 proposed rule (68 FR 35542) at that time, we urged commenters to think about what must be contained in the application and what might be reserved for an on-site review. The resulting application reflected the Department's goal of retaining the basic structure originating in the 1999 rule that was manageable and easy to follow for applicants who must fill out the form, while simultaneously being accessible and practical for the many recipients required to accept the form. We acknowledged a concern about keeping the application within reasonable limit, regarding its length and content, to prevent it from becoming too unwieldy and burdensome. We allowed recipients to supplement the form with written consent of the operating administration with a one to two page attachment containing the additional information collection requirements. We also required applicants to submit additional supporting documents not already required by the uniform application. We strongly suggested that the form be streamlined and that additional information should be sought during the on-site review rather than during the application process. As explained in the 2012 NPRM, the 2003 application was designed to be more streamlined and user-friendly, yet comprehensive enough to supply recipients with the necessary information to form their initial line of questioning prior to and during an on-site visit. In addition, the application was designed to further

assist recipients in making determinations as to an applicant's eligibility for the DBE program.

In the Department's view, the above objectives still hold true, especially now that we provide for interstate certification. Pursuant to the January 28, 2011, final rule revision, provisions for interstate certification were added requiring applicants to provide to State B a complete copy of their application form, all supporting documentation, and other information submitted to State A or other States wherein the firm is certified. The application, therefore, must serve the needs of both sets of certifiers by providing a window into a firm's eligibility. As required by 49 CFR 26.73, eligibility determinations are to be based on present circumstances.

The Department's proposed application form as presented in the NPRM was longer in length than the existing form because of extra space added for applicants to write in their answer. We first noticed the need for more room for answers in the course of processing denial and decertification appeals where information was sometimes handwritten and overflowing the strict margins of the old form. However, despite our intention to make the form more amenable for applicants to have the option to fully explain their responses directly on the form, commenters raised concerns about the length of the form.

DOT Response: In response to comments about length and more specific technical comments about various aspects of the proposed form, we have shortened the entry spaces and removed several details that in our experience were not useful to include in the application but may have been more suitable questions to pose during an on-site review, as needed. For example, in the banking information space, we removed the need to insert the bank's phone number and address, but added a space identifying the names of individuals able to sign checks on the account. Similarly, in the bonding entry, we removed the need to specify the binder number, and the contact information of the bonding agent/broker. These items may be useful to a certifier, but we want to limit the amount of things an owner would have to "look up" to complete its application. The new form also removes obsolete material from the roadmap for applicants (page 1) and page 2 (e.g., relating to the long-expired Small Business Administration (SBA)—DOT Memorandum of Understanding). The final application form contains new items that were in the proposed form we believe are important. First, the dates of

any site visits conducted by other UCPs (besides the home State) are important facts that will enable certifiers to determine if any other certifier has assessed the firm's eligibility as a DBE. If an entry here is checked, we encourage certifiers to obtain the site visit report and denial/decertification decisions from their UCP members or fellow certifiers in other States. Second, the new application offers ample space for a firm to provide a concise description of its primary activities, the products and/or services it provides, and the North American Industry Classification System (NAICS) codes it believes apply to the firm. This description will help certifiers prepare for their on-site visit but also assign NAICS codes and list the firm properly in the UCP online directory if certified.

One section of the old form that deserves more explanation as to why it was revised is the area where applicants are asked to specify by name, title, ethnicity, and gender the firm's management personnel who control several key areas, such as financial decisions, estimating and bidding, contract negotiation, field supervision, etc. In crafting the NPRM, we believed then, as we do now, that some of these entries could be reworded or broken down into sub-questions and we have incorporated these changes in the new form. For instance, "sets policy for company direction/scope of operations," "hire and fire field staff or crew," and "attend bid opening and lettings," are new entries that examine more broadly the authority and responsibilities and authority roles of the majority owner vis-à-vis others in the firm. A more descriptive parenthetical is offered for "office management," which now adds billing, accounts receivable/payable, etc. within the entry.

We have also added a feature we modelled after a few certifying agencies who supplemented their form with a chart for applicants to specify the frequency by which owners and key management personnel perform the relevant tasks. Applicants will now circle, in the appropriate rows, how often a person is involved in the functions identified as: "always", "frequently", "seldom", or "never." These types of responses are very common across all certifiers who often ask this question during the on-site review. At least one commenter opposed this addition believing that assessing the amount of time owners and others devote implies that if they do not go into the field and supervise operations they are not in charge of the firm; and small business owners

frequently spend time arranging office-related matters (insurance, banking, accounting, etc.) to keep a business operational. We believe at a minimum, certifiers need to understand who does what, where, and for how long, when they assess owners' control of their firm. It is our intent that this simple breakdown of the frequency of the tasks identified will aid certifiers as they prepare for their on-site review of the owners, enabling them to ask targeted questions concerning the owners' control of their firm. The Department does not intend for certifiers to treat the new frequency chart as independently determinative of a firm's eligibility; rather, it is a tool to narrow the areas of further inquiry.

The application checklist, a vital component of the process to becoming a DBE, has also been simplified and divided into mandatory and optional items. Items from the original checklist have been left largely intact. However, to ease the paperwork burden, some are now no longer mandatory for all applicants (e.g., trust agreements held by any owner claiming disadvantaged status, year-end balance sheets and income statements for the past 3 years (or life of firm, if less than 3 years)). The Department intends for recipients to request and collect only the information necessary to determine eligibility. Smaller businesses with simple structures should not be subjected to unnecessarily burdensome data requests. We re-emphasize here that an owner's affidavit of certification attests to the fact that the information submitted is true and correct. Applicants should not be penalized for not having (or being unable to produce) items from the optional documentation list. Recipients should base eligibility decisions on the information they receive from the applicant.

To help simplify the data collection, we also clarified that the request for all applicants to submit tax returns should be limited to Federal not State returns. Two items identified in the NPRM were added to the checklist—the résumés of key personnel for the firm and any firm requests for current year federal tax return filing extensions. Résumés of key personnel are frequently requested of the applicant or provided voluntarily and should be readily available.

Various miscellaneous comments focused on the role of the Department in the certification process, with commenters suggesting that we host an on-line system for applications. Such a system would be difficult for the Department to manage and not in keeping with the delegation of the certification function to recipients and

others through their UCPs. We will conspicuously post the uniform certification application, instructions, certification affidavit, and checklist on the Departmental Office of Civil Rights Web site, <https://www.civilrights.dot.gov>. A handful of commenters (including a member of Congress) spoke to the idea that newly established firms should only be required to complete a shorter more simplified form. In response, we note that newer firms may not have the level of documentation a larger firm will and can easily enter "n/a" (not applicable) in the entries provided. In the interest of uniformity, it is more beneficial to require all applicants to submit the standardized form. We remind certifiers that a firm lacking certain documentation or a history of providing a particular good or service is, under 49 CFR 26.73(b), not necessarily ineligible for certification.

Uniform Report of DBE Awards or Commitments and Payments, Appendix B

The Department proposed several changes to the Uniform Report of DBE Awards or Commitments and Payments (Uniform Report) designed to address concerns regarding the absence of data on women-owned DBE participation by race, confusing instructions, the differing needs of the various types of businesses/organizations participating in the program, and the collection of payments to DBEs on a "real time" basis. In response, we proposed to: (1) Create separate forms for general DBE reports and projects reports; (2) clarify the instructions; (3) collect information on minority women-owned DBEs; and (4) collect information on actual payments to DBEs on ongoing contracts performed during the reporting period (i.e., real time). The proposed forms in the NPRM kept the standard format but provided clearer instructions for completing some fields. We also proposed a surrogate for comparing DBE payments to the corresponding DBE commitments to respond to concerns raised by the Government Accountability Office (GAO) in its 2011 report on the adequacy of using DBE commitment data to determine whether a recipient is meeting its overall DBE goal. As we explained in the NPRM, the GAO criticized the existing form because it did not permit DOT to match recipients' DBE commitments in a given year with actual payments made to DBEs on the contracts to which the commitments pertained. The existing form provides information on the funds that are committed to DBEs in contracts let each year. However, the

"achievements" block on the form refers to DBE payments that took place during the current year, including payments relating to contracts let in previous years, but could not include payments relating to contracts let in the current year that will not be made until future years.

Thirty-six (36) commenters addressed some aspect of the proposed changes to the existing Uniform Report. The majority of commenters agreed that the Uniform Report needs changes. Six commenters expressed general support for the proposed revisions and six expressed general opposition. Three commenters asked for simplified reporting requirements.

The collection of data on women-owned DBEs based on race/ethnicity drew comments from four general contractors associations, two of which suggested that the Department is creating additional requirements beyond what Congress intended in MAP-21. One commenter expressed the view that the breakout of DBE participation data by gender and race does nothing to improve the program and serves no purpose. Another commenter stated that prime contractors should not be responsible for gathering and reporting the racial classification of the women-owned DBE firms used on a project and that the data should not be used by the Department to set separate goals for women based on race.

The proposal to collect actual "real time" payment data on ongoing contracts drew a number of comments, many of which were favorable. Supporters viewed the information as a better snapshot of DBE participation and more closely connected to the overall DBE goal in some instances than is obtained through the existing collection of payment data on completed contracts. Proponents of this view include the Transit Vehicle Manufacturers (TVMs) who would like to submit data only on current payments, as well as some recipients that undertake mega projects (e.g., design/build) that may not show DBE activity at the outset. Some opponents thought the opposite, preferring to report payments on completed contracts to payments on ongoing contracts because, in their view, one can make the final comparison between the contract goal and actual payments to DBEs. One opponent was more concerned with the potential for the Department to incorrectly judge the recipients' overall performance, based on the payment data on ongoing contracts since the data would be affected by project schedules, project delays, change orders, and weather, all factors that impact the

schedule of DBE work and therefore payments to DBEs on a project. Another commenter expressed grave concerns about reporting on the current payment status of all active federally-assisted projects, citing the significant resources required and the challenge presented for those with electronic or paper processes. Two commenters suggested that the Department define “ongoing contracts” and one commenter asked for a definition of “completed contract.”

To address concerns raised by the GAO about the lack of a match between DBE commitments in a given year and the actual payments to DBEs on the contracts pertaining to the commitments, the NPRM sought to provide options for connecting work committed to DBEs with actual payments to the committed DBEs that are credited toward the overall goal for a particular year. One option was to collect data in 3–5 year groupings and calculate the average amount of commitments and the average amount of payments, providing a reasonable approximation for comparing the extent to which commitments result in actual payments over a specified period of time. Alternatively, a proposed modification to the existing form that would track payments credited to contracts let over a 5-year period was described in the preamble in an attempt to reach the result the GAO recommended. However, we acknowledged that it would take several years to determine the extent to which commitments resulted in payments that enabled a recipient to meet the relevant overall DBE goal and that the collection and reporting of this data would involve greater resources by recipients that may yield information of limited use for program administration and oversight purposes. We invited the public to offer other ideas that would meet the accountability and program administration objectives of the Department.

Comments on this issue supported the idea but did not think the proposed options would produce current usable information. One commenter indicated that making programmatic changes 3 years after the data is collected seems irrelevant. A State department of transportation objected to the administrative burden of accumulating and reporting data over several years, diverting resources from the “good work” of the DBE program for this purpose. In fact, of the six commenters who registered disapproval, four did so because of the level of effort needed to maintain this data. Two of the opponents did not think the proposals sufficiently addressed the GAO’s

concerns. One commenter suggested that the Department establish a workgroup with external stakeholders to address the GAO’s concern.

DOT Response: The Department has decided to make final the revisions to the Uniform Report and the accompanying instructions to be used by all recipients for general reporting, project reporting, and reporting by TVMs. The proposed “general reporting” and “project reporting” forms published in the NPRM were identical in format and content. The difference between the proposed forms lies in the instructions for completing one part of the form (Section A) when reporting on a project versus general reporting on DBE participation achieved during a specified period of time. Thus, the same form will be used by recipients for the different purposes as is done currently. Recipients will be expected to use the revised form to report on activity in Federal Fiscal Year 2015 (October 1, 2014–September 30, 2015). For example, the first report for FHWA and FTA recipients using the revised form will be due June 1, 2015 for the period beginning October 1, 2014 through March 31, 2015. The second report will be due December 1, 2015 for the period April 1, 2015 through September 30, 2015. Federal Aviation Administration (FAA) recipients will use the revised forms when they submit the annual report that is due December 1, 2015. Each operating administration will provide technical assistance and guidance to their recipients to ensure they understand what is required in each field for general reporting, project reporting, and reporting by TVMs. Collecting data on DBE participation by minority women will enable the Department to more fully respond to Congressional inquiries.

Actual payment data on ongoing contracts collected in Section C of the report applies to work on federally-assisted contracts performed during the reporting period. Payment data collected in Section D on completed contracts applies to contracts that the recipient has determined to be fully performed and thereby completed. No more work is required to be performed under the completed contract. In both instances, the data on payments to DBEs provides a “snap shot” of monies actually paid to DBEs, compared to dollars committed or awarded to DBEs but not yet paid, during the reporting period. The payment data on completed contracts allows recipients and the Department to determine success in meeting contract goals, while the payment data on ongoing contracts, over time, may provide some indication of

how well yearly overall goals are being met.

The Department is sensitive to the concerns raised by commenters about the practicality of the proposals offered in response to the GAO report. The additional payment data for work performed during the reporting period on ongoing contracts may enable us to better assess the adequacy of the existing comparisons used to determine how well annual overall goals are being met through dollars expended with DBEs. Because most DOT-assisted contracts are multi-year contracts, payments made pursuant to those contracts will cross more than one fiscal year. However, in those cases where the yearly overall DBE goal does not change radically from year to year, the on-going payment data may provide a closer match than currently exists. For now, reliance on contractual commitments made during the fiscal year to determine the extent to which overall DBE goals for that fiscal year are met provides a reasonable proxy. The Department will continue to explore ways of addressing the GAO’s concern that are likely to produce “real time,” useful information that does not strain existing recipient resources.

MAP–21 Data Reports

MAP–21 reauthorized the DBE program and included Congressional findings on the continued compelling need for the program. Section 1101(b)(4) of the statute included a long-standing but not yet implemented statutory requirement that States notify the Secretary in writing of the percentage of small business concerns that are controlled by: (1) Women, (2) socially and economically disadvantaged individuals (other than women), and (3) individuals who are women and are otherwise socially and economically disadvantaged individuals. The statute also directs the States to include the location of the aforementioned small businesses. The Department proposed to implement this requirement through the State Unified Certification Programs (UCP) that maintain statewide directories of all small businesses certified as DBEs. The information required by MAP–21 would be submitted to the Departmental Office of Civil Rights, the lead agency in the Office of the Secretary responsible for overseeing DOT implementation of the DBE program. For those firms that fall into more than one of the three categories, we proposed that the UCP agencies include a firm in the category applicable to the owner with the largest stake in the firm who is also involved in controlling the firm. We sought

comment on whether the Uniform Report of DBE Awards or Commitments and Payments should be the vehicle used to report the MAP-21 information.

Five commenters directly addressed this proposal. Only one of the commenters, a DBE contractor advocacy organization, opposed the collection and reporting of this information, stating that it serves no purpose. Four commenters support reporting the MAP-21 information separately from the Uniform Report and the advocacy organization suggested that the information should be submitted near the beginning of the fiscal year (October 15) to be consistent with other MAP-21 reporting requirements, as it would also be helpful for the purposes of those recipients involved in the program to have that information early. One commenter thought it would be more efficient to include it with the Uniform Report and that it could provide useful comparative data.

DOT Response: The Department has decided to require each State department of transportation, on behalf of the UCP, to submit the MAP-21 information to the Departmental Office of Civil Rights each year by January 1st, beginning in 2015. Most State departments of transportation are certifying agencies within the UCP; those who are not certifying agencies are, nonetheless, members of the UCP and share in the responsibility of making sure the UCP complies with DOT requirements. We agree that the information should not be reported on the Uniform Report; instead, it should be reported in a letter to the Director of the Departmental Office of Civil Rights. As indicated in the NPRM, to carry out this requirement, the UCPs would go through their statewide unified DBE directories and count the number of firms controlled, respectively, by: (1) White women, (2) minority or other men, and (3) minority women, and then convert the numbers to percentages, showing the calculations. The information reported would include the location of the firms in the State; it would not include ACDBEs in the numbers.

Certification Provisions

Size Standard 49 CFR 26.65

The Department proposed to adjust the statutory gross receipts cap from \$22.41 million to \$23.98 million for inflation and to clarify that the size standard that applies to a particular firm is the one appropriate to the firm's primary industry classification. To qualify as a small business, the average annual gross receipts of the firm

(including its affiliates) over the previous three fiscal years shall not exceed this cap. Of the 23 comments received from State departments of transportation, UCPs, transit authorities, and representatives of DBEs and general contractors, most supported the increase in the size standard and a few suggested it be made effective immediately. Those that opposed the change (and some of the supporters) asked that the Department clarify what is meant by "primary industry classification."

DOT Response: The Department is amending the gross receipts cap for the financial assistance programs in 49 CFR Part 26 as proposed to \$23.98 million to ensure that the opportunity of small businesses to participate in the DBE program remains unchanged after taking inflation into account. Under MAP-21 Section 1101(b)(2)(A) the Secretary of Transportation is instructed to make the adjustment annually for inflation. With this adjustment, if a firm's gross receipts, averaged over the firm's previous three fiscal years, exceed \$23.98 million, then it exceeds the small business size limit for participation in the DBE program. We remind recipients that firms are not eligible as DBEs if they exceed the relevant NAICS code size limitation for the type(s) of work the firm seeks to perform in DOT-assisted contract, which may be lower than \$23.98 million and may not constitute the primary business of the firm. The term "primary industry classification" is currently defined in the DBE program regulations at 49 CFR 26.5. To avoid any confusion on the application of SBA size standards to the various NAICS codes in which a firm may be certified, we have clarified the text of § 26.65(a) so that it is not limited to the firm's primary industry classification.

Ownership 49 CFR 26.69

The Department proposed several changes to the rules that govern ownership of a DBE to provide greater clarity and specificity to aid recipients in addressing situations in which non-disadvantaged individuals or firms are involved with the DBE and to address concerns raised by the decision of the court in *The Grove, Inc. v. U.S. Department of Transportation*, 578 F. Supp. 2d 37 (D.D.C., 2008).

This discussion focuses on the proposed changes most commented upon. Specifically, the NPRM proposed to explicitly prohibit a non-disadvantaged owner's prior or superior rights to profits (§ 26.69(c)(3)); proposed clarifications relating to funding streams and sources of capital used to acquire an ownership interest in the firm

(§ 26.69(c)(1)); provided further specificity through examples on what constitutes capital contributions not commensurate with the DBE's value (including new examples of arrangements in which ownership fails to meet the "real, substantial, and continuing" requirements in the existing rule) (§ 26.69(c)(2)); and proposed to require that disadvantaged owners be entitled to at least 51% of dividends and other distributions (including liquidations) (§ 26.69(c)(4)). The NPRM further proposed to require that spousal renunciations be contemporaneous with applicable capital contributions or other transfers of marital or joint assets. Finally, the NPRM proposed to require close scrutiny of assets (including ownership interests in applicant firms) that disadvantaged owners obtain or other seller-nonbank financed transactions. This last proposed change would, among other specified conditions, generally require prevailing market (arm's length) terms with full recourse to the disadvantaged owners and/or to assets other than the ownership interest or an interest in the firm's profits.

The ownership proposals drew comments (33 in all) from State departments of transportation, transit authorities, UCPs, associations of minority business owners, other business owners, trade associations, counsel for DBE firms, a former DOT official, and a member of Congress. None expressed specific views on every proposal although several expressed either blanket approval or blanket reservations. Twenty commenters exclusively supported the proposals while thirteen expressed concerns with at least some of the changes.

A clear majority of recipients and UCPs supported most changes as providing clarity and ensuring program integrity. Private parties and trade associations, with some exceptions, expressed concern that the proposals overreached—by being too stringent, subjective, or burdensome to administer. More than a few commenters suggested that the proposals, if adopted, would discourage legitimate DBE participation, lead to inconsistent certification results across jurisdictions, or trap worthy but unsophisticated owners.

A transportation company opined that the "substantial and complex revisions and additions" to § 26.69 would require firm owners to attend "a workshop to understand the criteria;" would require recipients to employ staff with real estate, accounting, business management, and finance expertise; and would require the Department to

conduct nationwide training in a classroom setting. Some State transportation departments similarly objected that the careful scrutiny conditions would increase recipient time spent evaluating financial records and require hiring outside experts at added expense. A former Department official noted that this provision could create unwarranted barriers to program entry because in situations involving non-bank financing, “the list of five items required in the proposed § 26.69(k) could be quite difficult to produce.”

Regarding the proposed change to the spousal renunciation rule, a transit authority proposed that DOT scrap the rule as “unduly burdensome” and allow spousal renunciations that occur at least two years after the use of marital assets to acquire an ownership interest in an applicant firm, provided that “the transfer was not made solely for the purposes of obtaining DBE certification.” DBE firm counsel and at least one State department of transportation objected to the renunciation rule as unduly burdensome, requiring excessive owner sophistication regarding certification standards, and discriminatory against DBEs in community property states. One trade association “enthusiastically” supported the ownership changes, however, particularly the new marital assets rule, and a transportation department urged that DOT provide new guidance regarding when a spouse’s transfer is considered to be for the purpose of obtaining certification. Another transportation department feared that the renunciation rule would lead to fewer women owners qualifying for the DBE program; it requested that DOT generally “explain more specifically what types of documents” are sufficient to substantiate a firm’s capitalization, including the source of funds. Finally, an association of women contractors criticized the renunciation proposal as a Catch-22 (renunciation indicates “forethought to DBE creation”) that may be contrary to State law and current certification rules.

DOT Response: The Department carefully considered, evaluated, and weighed comments on both sides. We adopted some provisions as proposed (e.g., § 26.69(c)) and rejected others due to stakeholder concerns and possible unintended consequences.

We retain the existing marital asset provision of § 26.69(i) as currently written and do not adopt the proposed change to require spousal renunciation contemporaneous with the transfer. To adopt such a change might unnecessarily inhibit applicants from

allocating marital assets in such a way so that a disadvantaged spouse can establish and fund their business using marital funds. The current rule has adequate protections in place to prevent a non-disadvantaged spouse from retaining ownership of marital assets used to acquire ownership of an applicant firm or of an ownership interest in the firm. As long as the non-disadvantaged spouse irrevocably renounces and transfers all rights in the assets/ownership interest in the manner sanctioned by State law in which either spouse or the firm is domiciled (as the rule currently provides), we see no reason to require a renunciation at the time of the transfer. Recipients should not view a firm’s submission of renunciation contemporaneous with its application as precluding eligibility.

Regarding the careful scrutiny conditions in the proposed changes in § 26.69(k), we think it prudent not to finalize the revisions pending further study and review. Our proposal would have required careful scrutiny of situations where the disadvantaged owners of the firm obtain interests in a business or other assets from a seller-financed sale of the firm or in cases where a loan or proceeds from a non-financial institution was used by the owner to purchase the interest. The goal was to guard against seller-financed acquisitions (whether stock or assets) intended to disguise a non-disadvantaged owned business as a DBE firm. We agree with commenters that as written, the proposed language imposing mandatory conditions on transactions would be difficult for recipients to implement and has the potential of unfairly limiting the range of legitimate arrangements.

The Department adopts a revision we proposed to § 26.69(c)(3), which currently requires that a firm’s disadvantaged owners must “share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.” This concept has proven difficult for certifiers to implement because of the tendency to interpret the phrase “profits commensurate with their ownership interests” to mean that the disadvantaged owners must be the highest paid persons in the firm, and to tie in § 26.71(i)’s mandate to “consider remuneration” differences between disadvantaged owners and other participants in the firm. We clarify here in this preamble and in the final rule for ownership purposes of § 26.69, the disadvantaged owners should be entitled to the profits and loss commensurate with their ownership

interests; 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 of certification. This added provision is meant to be broad and is not absolute. There may be circumstances, particularly in franchise situations, where such an arrangement may be acceptable.

Control 49 CFR 26.71

Regarding control, the NPRM proposed clarifications to the rules concerning the involvement of non-disadvantaged individuals in the affairs of the firm by establishing more stringent requirements to ensure the disadvantaged owner(s) in control of the company. To that end, the Department proposed to delineate some situations, circumstances, or arrangements (through examples) in which the involvement of a non-disadvantaged individual who is a former employer of the disadvantaged owner(s) may indicate a lack of control by the disadvantaged owner(s) and consequently may form the basis for denying certification. The examples included situations where the non-disadvantaged former employer controls the Board of Directors, contrary to existing requirements in 49 CFR 26.71(e); provides critical financial, bonding, or license support that enables the former employer to significantly influence business decisions; and loan arrangements or business relationships that cause dependence that prevents the disadvantaged owner from exercising independent judgment without great economic risk. In such cases, the recipient must determine that the relationship between the non-disadvantaged former employer and the disadvantaged individual or concern does not give the former employer “actual control or the potential to control” the DBE. The NPRM sought comment on whether there should be a presumption that non-disadvantaged owners who ostensibly transfer ownership and/or control to a disadvantaged person and remain involved with the firm in fact continue to control the firm.

Most of the commenters that addressed these proposed changes, many of whom were State departments of transportation, supported the change. Specific control-related comments included a UCP objecting to the proposed § 26.71(e) change as presuming misconduct and discouraging mentor-protégé relationships and spin-offs; and DBE counsel criticizing the proposed presumption as unnecessary and

antithetical to valid business and personal reasons for a non-disadvantaged person remaining associated with a DBE firm. A former DOT official likewise opined that the presumption could create unintentional barriers to entry “for the very firms that are intended to benefit from the program.” That official stated his view that when there is a legitimate business reason for the transfer, the firm should not be ineligible, even if DBE certification “may have been part of the motivation.” A member of Congress recommended that the Department hold “additional stakeholder input sessions,” particularly concerning paperwork and other burdens on DBE firms, applicants, and UCP/recipient staff.

DOT Response: As indicated in the NPRM, control is essential to program integrity designed to ensure that the benefits of the program reach the intended beneficiaries. The Department has decided to finalize the presumption of control by non-disadvantaged owners who remain involved in the company after a transfer. We emphasize that the presumption is rebuttable. Mentor-protégé relationships that conform to the guidance provided at 49 CFR 26.35 would rebut the presumption. Similarly, some of the explanations for continued involvement by the non-disadvantaged previous owner offered by one of the commenters may also rebut the presumption. For example, remaining with the firm to maintain contacts with previous customers, remaining temporarily to assist with the transfer, or maintaining a small ownership interest or minimal participation in the firm with no control of the company may rebut the presumption. Also, we have removed the phrase “actual control or the potential to control” to avoid muddying the concept; “control” is the issue.

We have removed the examples from the final rule because, upon further reflection, we believe they describe conduct that the rule itself prohibits or they are not helpful and may cause more confusion.

Prequalification 49 CFR 26.73

The Department proposed to revise the current provision at 49 CFR 26.73 to disconnect prequalification requirements (e.g., State or local conditions imposed on companies seeking to bid on certain categories of work) from certification requirements. As stated in the NPRM, the proposed change has the effect of not allowing prequalification to be used as a criterion for certification under any circumstances. This change would not prohibit the use of prequalification

requirements that may exist for certain kinds of contracts. However, the prequalification status of a firm would not be relevant to an evaluation of whether the firm meets the requirements for certification as a DBE (e.g., size, social and economic disadvantaged status of the owners, ownership, and control). We noted that prequalification requirements may not exist for doing business in all modes of transportation (e.g., highways versus transit).

Only a few commenters addressed this proposed change, with most in favor because they agree it has no relevance to certification. The opponents of the change (mostly general contractors) read this proposal as eliminating the prequalification requirements imposed under State law (e.g., Pennsylvania) for DBEs while such requirements continue to exist for non-DBEs.

DOT Response: The Department has decided to finalize the rule as proposed. In doing so, we reiterate that this change has no effect on existing State laws that require all contractors and subcontractors performing work on contracts let by State departments of transportation or other government entities to be prequalified. Under the final rule, the certifying entities in a State UCP are not permitted to consider whether a firm seeking certification as a DBE is or is not prequalified. Certifiers are to analyze only the factors relevant to DBE eligibility (Subpart D of the rule) and not incorporate other recipient business requirements like prequalification status in decisions pertaining to the applicant’s eligibility for certification in the DBE program, except as otherwise provided in the rules. Thus, a firm, once certified as a DBE, must satisfy any other applicable requirements imposed by the State on persons doing business with the State or in the State.

Certification Procedures 26.83

The Department proposed a variety of changes to the certification procedures that are set out at 49 CFR 26.83.

Additional Information Requirements

The Department proposed several changes to strengthen the process by which recipients evaluate the eligibility of a firm to be certified as a DBE and remain certified as a DBE. These proposed changes were intended to enable recipients to better assess the extent to which disadvantaged individuals own and control the kind of work the firm is certified to perform by: (1) Requiring key personnel be interviewed as part of the mandatory

on-site review; (2) requiring the on-site visit be performed at the firm’s principal place of business; (3) clarifying what should be covered in a review of the legal structure of a firm; (4) requiring the review of lease and loan agreements, bank signature cards, and payroll records; (5) obtaining information on the amount of work the firm has performed in the various NAICS codes in which the firm seeks certification; (6) clarifying that the applicant (the firm, its affiliates, and the disadvantaged owners) must provide income tax returns (Federal only) for the last three years; and (7) expressly authorizing the certifying agency to request clarification of information contained in the application at any time during the application process.

Most of the commenters (primarily State departments of transportation) supported the idea of interviewing key personnel, though several noted (as did the opponents) the increased administrative burden it may place on agency staff and suggested it be made an optional practice instead of an across-the-board requirement. Opponents questioned the need for such interviews and expressed concern about the focus on the involvement of the disadvantaged owner “in the field,” which is part of the rationale given by the Department for requiring key personnel interviews.

The proposal to request information on the amount of work performed in the NAICS code assignments requested by an applicant generated a fair number of comments opposed to the idea. The reasons for the opposition included concerns about the burden such a requirement would impose, the discriminatory impact it may have, the extent to which it contradicts or conflicts with the requirements of 49 CFR 26.73(b)(2), and the means to be used to determine the “amount” of work. Nearly all those who commented on this provision argued that the proposal to require three years of tax returns should only apply to Federal returns; State returns were viewed as unnecessary or not useful. Lastly, some commenters representing DBEs thought the proposal expressly authorizing certifiers to request clarification of information in the application at any time was too open-ended and needed to be limited.

DOT Response: The Department has decided to modify its proposed amendment to 49 CFR 26.83(c)(1) to leave it to the discretion of recipients whether key personnel identified by the recipient should be interviewed as part of the on-site review, to eliminate the proposal that applicants provide

information about the amount of work the firm has performed in the NAICS codes requested by the firm, and to only require Federal tax returns for the past 3 years. It is not the intent of the Department to create unnecessary administrative burdens for applicants or certifiers. We agree that the focus on the amount of work a DBE performs in a given NAICS code could be misinterpreted and applied in a way that adversely impacts newly formed start-up companies. In the DBE program, there is no requirement that a DBE perform a specific percentage of work for NAICS code assignment purposes. We are adopting the other proposed changes in § 26.83(c)(1).

By finalizing in the rule (§ 26.83(c)(4)) what is currently implied—that certifiers may seek clarification from applicants of any information contained in the application material—we are not conferring *carte blanche* authority to certifiers to request additional information beyond that which is currently allowed and subject to prior approval from the concerned operating administration pursuant to 49 CFR 26.83(c)(7). In the context of this rule change, the word “clarification” is to be given its commonly understood dictionary meaning—to be free of confusion or to make reasonably understandable. In other words, if the application material is unclear, confusing, or conflicting, the certifying agency may ask the applicant to clarify information already provided.

Certification Reviews

Under the current rule, recipients may conduct a certification review of a firm three years from the date of the most recent certification or sooner if appropriate in light of changed circumstances, a complaint, or other information affecting the firm’s eligibility. The Department proposed to remove the reference to three years and instead clarify that a certification review should occur whenever there has been a change in the DBE’s circumstances (i.e., a notice of change filed by the DBE), whenever a recipient becomes aware of information that raises a genuine question about the continued eligibility of a firm, or after a specified number of years set forth in the UCP agreement. The important point here is that a recipient may not, as a matter of course, require all DBEs reapply for certification every three years or go through a recertification process every three years that essentially requires a DBE resubmit a new application and all the accompanying documentation to remain certified. As the rule currently states, “Once you have certified a DBE,

it shall remain certified until and unless you have removed its certification, in whole or in part through the procedures of § 26.87.”

DOT Response: Only a handful of commenters addressed this proposal. They uniformly supported it. The Department is finalizing the change as proposed.

Annual Affidavit of No Change

The Department proposed to require the submission every year of several additional documents to support the annual affidavit of no change DBEs currently file with recipients on the anniversary date of their certification. The additional documentation would include an updated statement of personal net worth, a record of any transfers of assets by the disadvantaged owner for less than fair market value to a family member within the preceding two years, all payments from the firm to the officers, owners, or directors, and the most recent Federal tax return.

Commenters were evenly divided among those who support the proposed change (mostly recipients) and those who oppose the change (mostly DBEs). Some commenters suggested the recipients be given the discretion to request the additional information if questions are raised about a DBE’s status and others thought the Department should develop a uniform affidavit to be used by all.

DOT Response: The Department has decided to retain the existing rule and expressly provide for the submission of updated Federal tax information with the annual affidavit of no change, in addition to other documentation supporting the firm’s size and gross receipts, which is currently required in 49 CFR 26.83(j) (“The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm’s size and gross receipts.”). We are not adopting the proposal to annually require the submission of documentation beyond that which is currently required. We agree that the yearly submission of the additional documentation proposed in the NPRM would be unduly burdensome for DBEs and certifiers alike, is contrary to the basic premise underlying the “no change affidavit,” and begins to look like a reexamination of eligibility. Recipients have sufficient authority under current rules to request information from a DBE in individual cases if there is reason to believe the DBE may no longer be eligible to remain certified. See 49 CFR 26.83(h). With

respect to the affidavit itself, the Department has developed a model affidavit for use by recipients that is posted on the Department’s Web site and sees no need, at this time, to require its use instead of other forms suitable for this purpose developed by recipients.

Certification Denial 49 CFR 26.86

We proposed to clarify the effect of an appeal to the Department of a certification denial decision on the start of the waiting period that limits when an applicant may reapply for certification. The proposed rule adds language that states the appeal of a denial of certification does not extend (or toll the start of) the waiting period. In other words, the waiting period begins to run the day after the final decision at the State level, regardless of whether the firm appeals that decision to the Department.

The Department received comments from State departments of transportation, one State UCP, and representatives of general contractors and DBEs. The opponents of the proposal argued that the appeal process should be allowed to resolve issues concerning applicant eligibility before the applicant is allowed to reapply, so that certifiers are not wasting time or expending resources better spent elsewhere reviewing another application from the same applicant that may present the same issues that are before the Department for decision on appeal. In contrast, supporters of the proposed change simply agreed without further comment, presumably accepting the change as clarifying in nature.

DOT Response: The Department believes that an applicant who appeals the denial of its application for certification should not have to wait until the appeal has been decided before it can reapply at the end of the waiting period. In many instances, the deficiency that is the subject of the appeal may be cured reasonably quickly. There are, further, various cases in which the waiting period expires before the Department can render a decision. There should be no penalty or disincentive to appealing an adverse certifier decision; the Department intends that an appellant be no worse off than an applicant who does not appeal.

Decertification 49 CFR 26.87(f)

The Department proposed revisions to the grounds on which recipients may remove a DBE’s certification to protect the integrity of the DBE program. The NPRM proposed to add three grounds for removal: (1) The certification

decision was clearly erroneous, (2) the DBE has failed to cooperate as required by 49 CFR 26.109, and (3) the DBE has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the program. The second and third grounds for removal are not new; the proposed revision simply places them among the existing list of five grounds for removal. As explained in the NPRM, the first ground revises the existing standard by replacing “factually erroneous” with “clearly erroneous” to address “situations in which a mistake [of fact or law] was committed, in the absence of which the firm would not have been certified.” The Department also sought comment on whether the suspension or debarment of a DBE should result in automatic decertification, should cause an evaluation of the DBE for decertification purposes, or should prompt some other action.

Recipients were universally supportive of the proposal to add additional grounds for removal of a DBE from the program. Representatives of DBEs and general contractors also registered support. An organization representing a caucus of women-owned businesses in Chicago and a DBE from Alabama opposed the changes. The focus of the opposition centered on the appropriateness of allowing removal for failing to timely file an annual no change affidavits or notice of change (i.e., failure to cooperate) or removal for not performing a commercially useful function (i.e., a pattern of conduct). One commenter suggested there be a higher standard of proof (i.e., willful disregard) applied to situations that involve not filing an annual no change affidavit in recognition of the fact that many DBEs have multiple certifications and may inadvertently fail to timely file required documents.

Most of the nineteen commenters on the question concerning the relationship between decertification and suspension and debarment proceedings were recipients (i.e., State Departments of Transportation, transit authorities, organizations that represent State DOTs) that overwhelmingly supported either the automatic decertification of a DBE that is suspended or debarred for any reason or the automatic decertification of a DBE that is suspended or debarred for conduct relevant or related to the DBE program. Five commenters opposed automatic decertification, suggesting instead that suspension and debarment should trigger an immediate evaluation of the DBE or should be a factor considered by the recipient based on the circumstances. One commenter

suggested different treatment for suspensions and debarments: A debarment would result in permanent decertification, while a suspended DBE that is decertified could reapply at the end of the waiting period.

DOT Response: The Department has decided to make final the additional grounds for removal from the program. Two of the changes essentially represent a cross reference to existing regulations that permit removal for failure to cooperate and for a pattern of conduct indicating involvement in attempts to subvert the intent or requirements of the program. In the NPRM preamble discussion of this proposed change, we noted that the failure to cooperate covers such things as failing to send in affidavits of no change or notices of change and accompanying documents when needed. To be clear, the failure to cooperate is triggered when a DBE program participant fails to respond to a legitimate, reasonable request for information. If a DBE is notified by a recipient that it has not submitted the annual no change affidavit as required by the regulations, we would expect the DBE to respond promptly to such a request for information. Its failure to submit the requested information would be grounds for initiating a removal proceeding. Removal proceedings should not be initiated simply because the DBE failed to file the affidavit on its certification anniversary date, even though the information has been provided; nor should removal proceedings be continued once the DBE submits the requested information.

When a DBE is suspended or debarred based on a Federal, State, or local criminal indictment or conviction, or based on agency fact based proceedings, for conduct related to the DBE program (i.e., the DBE or its owners were indicted or convicted for perpetrating a fraud on the program related to the eligibility of the firm to be certified or fraud associated with the use of the DBE as a pass through or front company), the Department believes the DBE should be automatically decertified from the DBE program. Under those circumstances, recipients should not be required to initiate a separate § 26.87 decertification proceeding to remove a DBE. The suspension and debarment process affords the DBE an opportunity to be heard on the evidence of misconduct related to the DBE program that is relied upon to support the denial of bidding privileges. The same evidence would be relied upon to support decertification of the DBE, making further proceedings unnecessary. The Department believes that suspensions or debarments unrelated to the DBE program and

consequently not bringing into question the DBE’s size, disadvantage, ownership, control, or pattern of conduct to subvert the requirements of the program should not result in automatic removal from the DBE program. In those cases, recipients are advised to take appropriate action to note in the UCP directory the suspended or debarred status of the DBE. Because suspension or debarment actions are not permanent, we see no reason to make a decertification action permanent. Recipients must accept an application for certification from a previously suspended or debarred firm once the action is over.

Summary Suspension of Certification

The Department proposed to require the automatic or mandatory suspension of a DBE’s certification without a hearing when a recipient has reason to believe that one or more of the disadvantaged owners needed to meet the ownership and control requirements is incarcerated or has died. As we indicated in the NPRM, a disadvantaged owner is considered necessary to the firm’s eligibility if without that owner the firm would not meet the requirement of 51 percent ownership by disadvantaged individuals or the requirement that disadvantaged owners control the firm. Other material changes affecting the eligibility of the DBE to remain certified—like the sale of the firm to a new owner, the failure to notify the recipient of a material change in circumstances, or the failure to file the annual no change affidavit as currently required—may be the subject of a summary suspension (at the discretion of the recipient) but such action would not be automatic. During the period of suspension, the recipient must take steps to determine whether proceedings to remove the firm’s certification should be initiated. While suspended, the DBE may not be counted toward contract goals on new contracts executed after the suspension but could continue to perform and be counted on contracts already underway. The recipient would have 30 days from receipt of information from the DBE challenging the suspension to determine whether to rescind the suspension or commence decertification proceedings through a UCP certifying entity.

Of the comments received from a combination of State departments of transportation, transit and airport authorities, and groups representing DBEs and prime contractors, almost all commenters supported this proposal as a much-needed program improvement. A group representing women-owned small businesses opposed the proposal,

arguing that suspending a DBE jeopardizes contracts that are a part of the assets of the company and consequently affects the valuation of the DBE. The group also suggested that there be some recognition of estate plans that provide for the child of the disadvantaged owner, who also may be a member of a presumptive group, to take over the firm. In such a case, the commenter posits that the DBE should remain certified if the heir submits an application within six months of the death of the disadvantaged owner. A State department of transportation did not agree that incarceration of the disadvantaged owner should result in an automatic suspension; instead, the State DOT believes the DBE should be removed from the program immediately.

There were several commenters that raised questions or suggested further clarification was needed in certain areas. For example, should the length of the period of incarceration or the reason for the incarceration matter in determining whether the DBE is suspended? Should suspended DBEs be entered in the Department's ineligibility database? A commenter also suggested that a failure to file the annual no change affidavit should not be grounds for summary suspension of a DBE, and recipients should be given more time to consider the DBE's response (60–90 days) before lifting the suspension or commencing decertification proceedings. Similarly, a State DOT suggested the automatic suspension include sale of a firm to a non-disadvantaged owner and when a DBE is under investigation by a recipient for dubious practices on its own contracts. A suspension under these circumstances would prevent the DBE from being listed on other contracts pending review or investigation. One commenter asked that we include a hold harmless provision if no decertification proceeding commenced or results.

DOT Response: The Department is adopting the proposed summary suspension provision. The fundamental premise underlying the summary suspension provision is that when a dramatic change in the operation of the DBE occurs that directly affects the status of the company as a DBE, swift action should be taken to address that situation to preserve the integrity of the program without compromising the procedural protections afforded DBEs to safeguard against action by recipients based on ill-founded or mistaken information. A recipient must have sufficient evidence of facts or circumstances that form the basis for its belief that a suspension of certification is in order. In cases where the recipient

learns that a disadvantaged owner whose participation is essential to the continued certification of the firm as a DBE is no longer involved in the company due to incarceration or death, suspending the certification for a short period of time (30 days from the date the DBE receives notice of the suspension) strikes an appropriate balance between program integrity and fairness concerns. It does not matter how long the disadvantaged owner is incarcerated or the reason for the incarceration. What matters is that the company appears to be no longer owned and/or controlled by disadvantaged individuals as determined by the certifying authority. If a recipient determines after hearing from the DBE that the period of incarceration has ended or will end in 30 days, the recipient will lift the suspension (i.e., reinstate the DBE's certification) without initiating removal proceedings. Similarly, when an essential disadvantaged owner dies, his or her heirs who are also members of groups presumed to be disadvantaged are not presumed to be able to demonstrate sufficient ownership or control of the company. DBE certification is not transferable and does not pass to an owner's heirs. A short suspension of the DBE's certification until the heirs submit sufficient evidence to support a continuation of the firms' DBE status seems appropriate. The sooner the evidence of continued eligibility is provided by the DBE, the shorter the period of suspension if the certifying authority agrees that the firm remains eligible.

Under the current rules, disadvantaged owners have an affirmative obligation to notify recipients within 30 days of any material change in circumstances that would affect their continued eligibility to participate in the program and to annually affirm there have been no material changes. The Department does not agree that the authority to suspend one's certification should not be exercised when a DBE fails to abide by these requirements that are essential to ensuring that only eligible DBEs are certified as such and allowed to participate in the program.

Contrary to some of the comments, the summary suspension authority is not and should not be triggered by any violation of DBE program rules by a DBE. The Department also does not believe it appropriate or consistent with fundamental fairness to suspend a DBE while an investigation is pending since it would appear to prejudice the outcome of any investigation, assuming the reasons for the investigation are relevant

to DBE program certification. Likewise, automatic decertification assumes that the likelihood or risk of error is small compared to the interest in protecting the integrity of the program such that there is little to be gained from hearing from the DBE to safeguard against inadvertent errors.

Lastly, suspensions are temporary actions taken until more information is obtained from the affected DBE. Consequently, suspensions should not be entered into the Department's ineligibility database, which is reserved for initial certification denial decisions and decertification actions taken by recipients after the DBE has been accorded a full hearing or an opportunity to be heard. We have taken steps to ensure that suspensions do not interfere with the ability of the DBE to continue working on a contract entered into before the suspension took effect. Thus, in this respect, a suspension is accorded the same treatment as the decertification of a DBE that occurs after a DBE has executed a contract. The same rationale applies. The Department is not persuaded that existing contracts that may be considered company assets will be placed in jeopardy if recipients are granted suspension authority.

Certification Appeals 49 CFR 26.89

The Department proposed clarifying amendments to the regulations governing appeals of certification decisions. The amendment would require appellants include in their letter of appeal a statement that specifies why the certification decision is erroneous, identifies the significant facts that were not considered by the certifying agency, or identifies the regulatory provision that was improperly applied. The amendment also would make clear that the Department's decision on appeal is based on the entire administrative record including the letter of appeal. The Department received a handful of comments on this proposed amendment; all of the comments supported the clarifications. The commenters included a State transportation department, a UCP certifying agency, and several individuals and organizations that represent DBEs and ACDBEs.

DOT Response: The Department is finalizing the substance of the proposal with a slight modification to the rule text. The entire administrative record includes the record compiled by the certifying agency from whom the appeal is taken, the letter of appeal from the appellant that contains the arguments for reversing the decision, and any supplemental material made a part of the record by the Department in its

discretion pursuant to 49 CFR 26.89(e). We hope that this minor, technical, clarifying change will dispel the notion that the Department is not to consider any information outside of the record created by the recipient, including the appellant's letter of appeal which necessarily comes after the recipient has created its record. The purpose of the appeal is to provide the appellant an opportunity to point out to the Department, through facts in the record and/or arguments in the appeal letter, why the certifying agency's decision is not "supported by substantial evidence or inconsistent with the substantive or procedural provisions of [Part 26] concerning certification." It is not an opportunity to add new factual information that was not before the certifying agency. However, it is completely within the discretion of the Department whether to supplement the record with additional, relevant information made available to it by the appellant as provided in the existing rule.

Other Provisions

Program Objectives 49 CFR 26.1

In the NPRM, the Department proposed to add to the list of program objectives: Promoting the use of all types of DBEs. This minor technical modification is intended to make clear that application of the DBE program is not limited to construction contracting; the program covers the various kinds of work covered by federally funded contracts let by DOT recipients (e.g., professional services, supplies, etc.). All of the commenters that addressed this modification supported it.

DOT Response: For the reasons expressed in the NPRM, the Department made this change in the final rule.

Definitions

The Department proposed to add six new definitions to the rule for terms used in existing provisions. The words or phrases to be defined for purposes of the DBE program include "assets;" "business, business concern, or business enterprise;" "contingent liability;" "days;" "liabilities;" and "transit vehicle manufacturer (TVM)." We also proposed to modify the existing definition of "immediate family member," "primary industry classification," "principal place of business," and the definitions of "socially and economically disadvantaged individual," and "Native American" to be in sync with the U.S. Small Business Administration use of those two terms. We invited comment on whether the definition of TVM

should include producers of vehicles to be used for public transportation purposes that receive post-production alterations or retrofitting (e.g., so-called "cutaway" vehicles, vans customized for service to people with disabilities). We also wanted to know if the scope of the existing definition of "immediate family member" is too broad. It currently includes grandchildren.

Most commenters supported all or some of the proposed definitions. We did not include an actual definition of "non-disadvantaged individual" and consequently have not added that term to 49 CFR 26.5. The definitions that generated some opposition or suggested changes were those for TVMs, immediate family member, and Native American. We focus only on these three terms for discussion. One of the few TVMs that provided comments expressed puzzlement over the Department's request for comment on whether producers of "cutaway" vehicles should be included in the TVM definition. According to the commenter, such companies, including its company that performs this type of manufacturing work, are indeed TVMs.

One commenter suggested we remove the word "immediate" from the term "family member" so that recipients may determine on a case-by-case basis whether an individual is considered an immediate family member. Another commenter thought grandparents and in-laws should be excluded, while a different commenter suggested we include "sons and daughters-in-law." We also were asked to include "live-in significant others" to recognize domestic partnerships or civil unions. Regarding the definition of Native American, one commenter did not think it should be limited to recognized tribes.

DOT Response: The Department has modified the definition of TVM to include companies that cutaway, retrofit, or customize vehicles to be used for public transportation purposes. We do not think a change to the current approach of specifying in the rule who is considered an "immediate family member" in favor of leaving that determination to the certifying agency to decide case-by-case is the right policy choice. However, the Department has decided to modify the existing definition of "immediate family member" to keep it in sync with the existing definition of that term in Part 23. The revised definition includes brother-in-law, sister-in-law, or registered domestic partner and civil unions recognized under State law. In addition, we are including a definition for the term "spouse" that covers domestic partnerships and civil unions

because we agree such relationships should be recognized in the DBE program.

We are finalizing the changes to the definition of Native American to incorporate the requirement that an American Indian be an enrolled member of a federally or State-recognized Indian tribe to make it consistent with the SBA definition. By statute, the term "socially and economically disadvantaged individuals" has the meaning given the term in section 8(d) of the Small Business Act and relevant subcontracting regulations issued pursuant to that Act. As explained in the SBA final rule:

This final rule clarifies that an individual must be an enrolled member of a Federally or State recognized Indian Tribe in order to be considered an American Indian for purposes of the presumptive social disadvantage. This definition is consistent with the majority of other Federal programs defining the term Indian. An individual who is not an enrolled member of a Federally or State recognized Indian Tribe will not receive the presumption of social disadvantage as an American Indian. Nevertheless, if that individual has been identified as an American Indian, he or she may establish his or her individual social disadvantage by a preponderance of the evidence, and be admitted to the [DBE program] on that basis.

(76 FR 8222-01)

Record Keeping Requirements 49 CFR 26.11

The Department proposed to establish record retention requirements for certification related records to ensure that recipients maintain documents needed to conduct certification reviews when necessary. All records documenting a firm's compliance with Part 26 must be retained in accord with the record retention requirements in the recipient's financial assistance agreement. Only six commenters expressed a view about this proposed change. Three of the commenters supported the change, two commenters requested clarification on the kind of records to be retained and for how long, and one commenter was neutral.

DOT Response: The regulatory text of the final rule identifies the minimal records that must be retained. They include the application package for all certified DBEs, affidavits of no change, notices of change, and on-site reviews. Recipients are encouraged to retain any other documents that may be relevant in the event of a compliance review. The uniform administrative rules for Federal grants and cooperative agreements and sub-awards to State, local and Indian tribal governments establish a three-year record retention requirement subject to exceptions set out at 49 CFR 18.42. We

have modified the final rule to include a three year retention period as a default for records other than the minimal records specified in the rule. The 3 year retention period applied to other records may be modified as provided by applicable Federal regulations or the grant agreement, whichever is longer.

DBE Program Requirement

The current rule regarding the application of the DBE program requirement to recipients of the various operating administrations of DOT has been the source of confusion for some. The Department proposed modifications to the rule to eliminate the confusion so that recipients will be clear about their obligation to establish a program and the corresponding obligation to establish an overall DBE participation goal. For FTA and FAA recipients, you must have a DBE program if in any Federal fiscal year the cumulative value of DBE program eligible contracts you will award will exceed \$250,000 in Federal funds. In other words, when you add all the eligible Federally funded contracts you expect to award with Federal funds, the aggregate of total Federal funds to be expended will exceed \$250,000. For FHWA, the proposed modification makes clear that under FHWA's financial assistance program, its direct, primary recipients must have an approved DBE program plan, and sub-recipients are expected to operate under the primary recipient's FHWA-approved DBE program plans.

Comments generally were supportive of the proposed changes, particularly those related to the FTA and FAA clarification of the \$250,000 threshold requirement. Some of the State departments of transportation that commented requested further clarification of the FTA and FAA requirements and had questions about the proposed change applicable to FHWA recipients. For example, a State department of transportation asked that we identify or define what is an eligible contract and that we specify whether the \$250,000 threshold applies to the total Federal dollars spent in contracts or the total Federal dollars received in a fiscal year. One commenter also asked that we reconsider requiring subrecipients of FHWA funds operate under the primary recipient's approved DBE program. Lastly, in situations where funding on a project is provided by more than one operating administration, a commenter suggested that the Department specify how that situation will be handled rather than direct recipients to consult the relevant DOT agencies for guidance.

DOT Response: The Department has finalized the proposed revisions. Where more than one operating administration is providing funding for a project or a contract, recipients should consult the OA providing the most funding for the project or contract and the OA, in turn, will coordinate with the DOT agencies involved to determine how to proceed. The final rule applies the \$250,000 amount to the total Federal dollars to be expended by an FTA or FAA recipient in contracts funded in whole or in part with Federal assistance during the fiscal year. The rule expressly excludes from this calculation expenditures for transit vehicle purchases.

The following examples illustrate how this provision works:

A. The Hypothetical Area Transit System (HATS) receives \$500,000 in FTA assistance. It spends \$300,000 of this amount on bus purchases. It is spending \$800,000 in local funds plus the remaining \$200,000 in FTA funds to build an addition to its bus garage. Because HATS is spending less than \$250,000 in FTA funds on contracting, exclusive of transit vehicle purchases, HATS is not responsible for having a DBE program.

B. The Your County Regional Airport receives \$400,000 in FAA financial assistance. It uses \$100,000 to purchase land and expends \$300,000 of the FAA funds for contracts concerning a runway improvement project, as well as \$500,000 in local funds. The airport must have a DBE program.

In the first example, even though HATS does not have to have a DBE program, it still must comply with Subpart A requirements of 49 CFR Part 26, such as nondiscrimination (§ 26.7) and assurances (§ 26.13). Compliance with these requirements, like compliance with Title VI of the Civil Rights Act is triggered by the receipt of any amount of DOT financial assistance. In both examples, eligible contracts are federally funded prime contracts.

The requirement that subrecipients of funds from FHWA operate under the direct recipients' approved DBE program is consistent with the way FHWA administers its financial assistance program regarding other Federal requirements imposed as a condition of receiving financial assistance. Through official guidance, the Department describes how subrecipients would administer contract goals on their contracts under the umbrella of the primary recipient's DBE program and overall goals. The continued validity of that guidance is not affected by this rule change.

Overall Goal Setting 49 CFR 26.45

The Department proposed several changes to the regulations governing overall goal setting. They include: (1) Codifying the elements of a bidders list that must be documented and supported when a bidders list is used to establish the base figure for DBE availability under Step One in the goal setting analysis; (2) disallowing the use of prequalification or plan holders lists (and other such lists) as a means of determining the base figure and consider extending the prohibition to bidders lists; (3) establishing a standard for when Step Two adjustments to the base figure should not be made; (4) specifying that in reviewing recipient's overall goal submission, the operating administrations are to be guided by the goal setting principles and best practices identified by the Department; (5) clarifying that project goals may reflect a percentage of the value of the entire project or a percentage of the Federal share; and (6) strengthening and streamlining the public participation requirements for goal setting.

The overwhelming majority of the comments received on the proposed changes to 49 CFR 26.45 were directed at the proposal to disallow use of prequalification lists and other such lists, including the bidders list, to establish the relative availability of DBEs (Step One of the goal setting analysis). Over 100 commenters, many of them general contractors who submitted form letters of objection, representatives of general contractors, and a few State departments of transportation, expressed the view that both prequalification lists and bidders lists are viable data sources for identifying qualified DBEs that are ready, willing, and able to perform on federally funded transportation contracts and that disallowing the use of these data sources would produce unrealistic overall goals that are not narrowly tailored as required by the United States Supreme Court to satisfy constitutional standards. Supporters of the proposal expressed the view that such lists underestimate availability and the true continuing effects of discrimination, represent the most conservative approach, and limit DBE opportunities by restricting consideration of all available DBEs. Other commenters, recognizing the limitations and the benefits of such lists, suggested that the lists should not be the exclusive source of data relied upon to capture the pool of available DBEs. One commenter supported retaining use of the prequalification list but supported getting rid of the bidders list which it

believed is worse than the prequalification list.

Commenters opposed to identifying the elements of a true bidders list (including successful and unsuccessful DBE and non-DBE prime contractors and subcontractors) suggested it might be difficult to compile such a list (i.e., capturing the unsuccessful firms—both DBEs and non-DBEs—bidding or submitting quotes on projects). Despite that concern, of the few commenters that addressed this proposal, most commenters supported it, which reflects the longstanding view of the Department, as set forth in the official tips on goal setting, of what a true bidders list should contain. With regard to the Step Two adjustment, nine of the twelve commenters opposed the change out of a belief that it effectively eliminates adjustments based on past participation by DBEs.

Commenters were almost evenly divided over the proposal to eliminate from the public participation process the requirement that the proposed overall goal be published in general circulation media for a 45-day comment period. Those objecting to this change were mostly representatives of general contractors and some State departments of transportation who viewed this process as more valuable than the stakeholder consultation process. There was universal support among the commenters for posting the proposed and final overall DBE goal on the recipient's Web site.

DOT Response: The Department is retaining the bidders list as one of the approaches recipients may use to establish the annual overall DBE participation goal. To be acceptable, the bidders list must conform to the elements that we finalize in this final rule by capturing the data that identifies the firms that bid or quote on federally assisted contracts. This includes successful and unsuccessful prime contractors, subcontractors, suppliers, truckers, other service providers, etc. that are interested in competing for contracts or work. Recipients that use this method must demonstrate and document to the satisfaction of the concerned operating administration the mechanism used to capture and compile the bidders list. If the bidders list does not capture all available firms that bid or quote, it must be used in combination with other data sources to ensure that it meets the standard in the existing regulations that applies to alternative methods used to derive a base figure for the DBE availability estimate (e.g., it is “designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.”).

Prequalification lists and other such lists (i.e., plan holders lists) may be used but must be supplemented by other data sources on DBE availability not reflected in the lists. Looking only to prequalified contractors lists or similar lists to determine availability may serve only to perpetuate the effects of discrimination rather than attempt to remediate such discrimination. Thus, to summarize, a recipient may use a bidders list that meets the requirements of the final rule as the sole source in deriving its Step One base figure. However, if its bidders list does not meet these requirements, that list can still be used in determining the overall goal, but must be used in conjunction with other sources. Under no circumstances, though, may a recipient use a prequalification or plan holders list as the sole source used to derive the overall goal.

The purpose of the Step Two analysis in overall goal setting is to consider other available evidence of discrimination or its effects that may impact availability and based on that evidence consider making an appropriate adjustment to derive an overall goal that reflects the level of DBE participation one would expect in the absence of discrimination. The amendment made to the regulations through this final rule does not eliminate the discretion recipients have to make a Step Two adjustment based on past DBE participation or other evidence like econometric data that quantifies the “but for discrimination” effects on DBE availability. It recognizes, however, that where there are circumstances that indicate an adjustment is not necessary because, for example, the base figure and the level of past DBE participation are close or the DBE participation level reflects the effects of past or current noncompliance with DBE program regulations, then the evidence would not support making the adjustment. That said, it is incumbent upon recipients to explain to the operating administration why the adjustment is appropriate.

Instead of mandating publication of the proposed overall goal for a 45-day comment period, the Department decided to leave that decision to the discretion of the recipient. The proposal to eliminate this aspect of the existing public participation requirement was designed to reduce the administrative burden, expense, and delay associated with the publication requirement that is borne by recipients and often leads to few, if any, comments (i.e., not much value added). To the extent that some recipients view this as a worthwhile exercise, we see no reason to restrict

their ability to allow additional comment through this process. In response to one commenter, we have reduced the comment period from 45 days to 30 days. Those recipients that choose to publish their overall goal for comment, in addition to engaging in the required consultation with stakeholders, must complete their process well before the deadline for submitting the overall goal documentation to the operating administration for review. As stated in the NPRM, the Department believes meaningful consultation with stakeholders is an important, cost-effective means of obtaining relevant information from the public concerning the methodology, data, and analysis that support the overall DBE goal. Once again, all public participation must be completed before the overall goal submission is provided to the operating administration. Failure to complete the publication process by those recipients that choose to conduct such a process should not delay review by the operating administration.

Transit Vehicle Manufacturers 49 CFR 26.49

The Department proposed to clear up confusion that exist about the goal setting and reporting requirements that apply to Transit Vehicle Manufacturers (TVMs). Specifically, the proposed rule clarifies how TVMs are to determine their annual overall DBE goals, when TVMs must report DBE awards and achievements data, and which portion of the DBE regulations apply to TVMs. Under the proposed rule, the goal setting methodology used by TVMs must include all federally funded domestic contracting opportunities made available to non-DBEs, not just those that apply to DBEs, and only the portion of the Federal share of a procurement that is available for contracts to outside firms is to be included. In other words, the DBE goal represents a percentage of the work the TVM will contract to others and not perform in house since work performed in-house is not truly a contracting opportunity available to the DBEs or non-DBEs. The Department sought comment on whether and how the Department should encourage more of the manufacturing process to be opened to DBEs and other small businesses.

With respect to reporting awards and achievements, the Department proposed to require TVMs continuously report their contracting activity in the Uniform Reports of DBE Awards/Commitments and Payments. In addition, the Department removed any doubt that the TVMs are responsible for implementing regulatory requirements similar to DOT

recipients. There is one notable exception: TVMs do not participate in the certification process (i.e., TVMs do not perform certification functions required of recipients and are not required to be a member of a UCP), and post-award requirements need not be followed in those years when a TVM is not awarded or performing as a transit vehicle provider. Lastly, the NPRM included a provision requiring recipients to document that only certified TVMs were allowed to bid and submit the name of the successful bidder consistent with the grant agreement.

Only 12 commenters addressed various aspects of the proposed changes to the TVM provisions. Three recipients supported the proposals as a whole, while others raised questions about the recommended changes and/or questioned existing requirements for which no change was proposed (e.g., suggested requiring the application of TVM provisions to all kinds of highway contracts or opposed the requirement that only certified TVMs are permitted to bid). One commenter rejected specific areas of the proposed changes. There was an additional comment submitted by the owner of a TVM who commented that it needed the services that the DBE program provides, rather than being forced into being a provider of those services.

DOT Response: The Department is confident that the proposed changes will strengthen compliance with TVM provisions and oversight of TVMs by exempting manufacturers from those regulations that are not applicable to this industry. Many of the proposed changes simply clarify the intent and practical application of existing TVM provisions. For example, the existing regulations require compliance, prior to bidding, to confirm a TVM's commitment to the DBE program before it is awarded a federally-assisted vehicle procurement. This is a long-standing requirement. The proposal introduces measures that help ensure pre-bid compliance (e.g., viewing the FTA certified TVM list and submitting the successful bidder to FTA after the award). The proposed changes also confirm that TVM regulatory requirements are nearly identical to that of transit recipients. For this reason, the FTA requires DBE goals from both transit recipients and TVMs as a condition of receiving Federal funds in the case of recipients and as a condition of being authorized to submit a bid or proposal on FTA-assisted transit vehicle procurements, in the case of TVMs.

In order to provide appropriate flexibility in implementing this

provision, we must emphasize, to FTA recipients in particular, that overly prescriptive contract specifications on transit vehicle procurements—which, in effect, eliminate opportunities for DBEs in vehicle manufacturing—counter the intent of the DBE program and unduly restrict competition. Moreover, after request for proposals (RFPs) are released, FTA recipients should allow TVMs a reasonable timeframe to submit bids. To do otherwise limits the TVMs' ability to locate and utilize ready, willing, and able DBEs on FTA-assisted vehicle procurements. To lessen any administrative burdens, the FTA will continue posting a list of certified (i.e., compliant) TVMs to the FTA TVM Web page. Recipients may also request verification that a TVM has complied with the regulatory requirement by contacting the appropriate FTA Regional Civil Rights Officer—via email. FTA will respond to this request within 5 business days—via email.

Means Used To Meet Overall Goals 49 CFR 26.51

In the NPRM, we proposed to modify the rule that sets forth examples of what constitutes race-neutral DBE participation to remove as one of the examples “selection of a DBE subcontractor by a prime contractor that did not consider the DBE's status in making the award (e.g., a prime contractor that uses a strict low-bid system to award subcontracts).” We explained that it is impossible for recipients to determine if a prime contractor uses a strict low-bid system, and moreover, that such a system conflicts with the good faith efforts guidance in Appendix A that instructs prime contractors not to reject a DBE's quote over a non-DBE quote if the price difference is not unreasonable. Although not stated explicitly in the preamble, the proposed regulatory text made clear that the Department's proposal was simply to eliminate the statement “*or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts)*” from the regulatory text (emphasis added). Thus, as proposed, the Department only intended to remove this example for contracts that had a DBE goal.

Commenters, including general contractors and State departments of transportation, overwhelmingly opposed the proposed change for a variety of reasons. General contractors and organizations that represent contractors viewed this proposal as a major policy shift away from the use of

race-neutral measures to obtain DBE participation, contrary to existing regulations and relevant court decisions. One commenter actually referred to the proposal as eliminating the use of race and gender means of obtaining DBE participation through the elimination of this one example. One commenter questioned the impact this change would have in those States where DBE contract goals are not established because the overall goal can be met through race-neutral means alone. Another commenter mistakenly thought the proposed change would not allow DBE participation that exceeds a contract goal to be considered race-neutral participation as currently provided in Departmental guidance. Supporters of the proposal agreed with the explanation provided by the Department.

DOT Response: The Department believes that most of the opposition to this proposal stems from a misunderstanding of what the Department intended to change. The intent of the Department in the NPRM was to remove the proposed example only for contracts that had a DBE goal, not for contracts that were race-neutral. Thus, the Department did not propose nor is finalizing removing the other two examples of race-neutral DBE participation or to remove the third example for race-neutral contracts. The Department understands how the preamble to the NPRM could have led to this confusion, as it was not explicit. Certainly, had the Department proposed to remove, as an example of race-neutral participation, the “selection of a DBE subcontractor by a prime contractor that did not consider the DBE's status in making the award” in contracts that had no DBE goals, the Department would have, effectively, been eliminating the very concept of race-neutral participation.

Thus, instead of the drastic change that concerned many commenters, the revised final rule simply removes as an example of race-neutral DBE participation in contracts that have DBE goals the use of a strict low bid system to award subcontracts. The Department continues to believe that it is difficult for recipients to determine if a prime contractor uses a strict low bid system and that use of such a system when contract goals are set runs counter to the Department's good faith effort guidance in Appendix A.

However, this final rule does not mean DBE participation obtained in excess of a contract goal may never be considered race-neutral DBE participation. When DBE participation is obtained as a prime contractor

through customary competitive procurement procedures, is obtained as a subcontractor on a contract without a DBE goal, or is obtained in excess of a contract or project goal, the use of a DBE under those circumstances properly may be characterized as race-neutral DBE participation. This revision to our rule does not represent a policy shift from the existing requirement that recipients meet the maximum feasible portion of the overall goal through the use of race-neutral means of facilitating DBE participation. Indeed, if a recipient is able to meet its overall DBE participation goal without using race-conscious measures (i.e., setting contract goals), the recipient is obligated to do so under the existing regulations. The revision to 49 CFR 26.51(a) does not change that requirement.

Good Faith Efforts To Meet Contract Goals 49 CFR 26.53

Responsiveness vs. Responsibility

The NPRM proposed eliminating the “responsiveness vs. responsibility” distinction for when good faith efforts (GFE) documentation, which includes specific information about DBE participation, must be submitted on solicitations with DBE contract goals. The “responsiveness” approach requires all bidders or offerors to submit the DBE participation information and other GFE documentation required by 49 CFR 26.53(b)(2) at the time of bid submission. By contrast, the “responsibility” approach allows all bidders or offerors to submit the required information at some point before a commitment to perform the contract is made to a particular bidder or offeror (e.g., before contract award). The proposed change to the rule would have removed the current discretion recipients have to choose between the two approaches and require, with one exception, the submission of all information about DBEs that will participate on the contract and the evidence of GFE made to obtain DBE participation on the contract when the bid or offer is presented.

The NPRM also put forward an alternative approach that would allow a short period of time (e.g., 24 hours) after the bid submission deadline during which the apparent successful bidder or offeror would submit its GFE documentation. Under the alternative, the GFE documentation would have to relate to the pre-bid submission efforts; no post-bid efforts would be acceptable. The Department also asked for comment as to whether the one-day period should be extended to three days.

The exception to the across-the-board responsiveness approach or the alternative approach (all of which apply to sealed bid procurements) would be in a negotiated procurement, where in the initial submission the bidders or offerors may make a contractually binding commitment to meet the DBE contract goal and provide specific DBE information and GFE documentation before final selection for the contract is made. Negotiated procurement would include alternate procurement practices such as Design Build procurements in which it is not always possible to commit to specific DBEs at the time of bid submission or contract award.

The Department received many comments on this proposal. The majority of the responses opposing the revisions were submitted by prime contractors, prime contractor associations and some State departments of transportation. Over one hundred form letters of opposition from contractors were received. Those opposing the revision cited the nature of the construction industry and recipient procurement processes as a main reason for opposition. The majority of these comments concentrated on the administrative burden of providing GFE documentation that includes DBE commitments at the time of bid. Commenters stated that because of the nature of bidding on construction contracts, such as hectic timeframes, fixed deadlines, and electronic bidding forms, it was not possible to submit DBE commitments and other GFE documentation at the time of bid. Other reasons given for disapproval included the belief that the proposed rule would limit the use of DBEs on contracts, and it would be difficult for DBEs to negotiate with multiple bidders as opposed to only the identified lowest bidder. In addition, some commenters believed it would not be possible to implement the “responsiveness” approach on “design build projects” because the design and scope of work for the project is not known at the time of bid.

The Department received comments in favor of the proposal, primarily from minority and women advocacy organizations, regional transit authorities, and some State departments of transportation that already required DBE documentation as a matter of responsiveness. Those in support of the revision primarily stated that the current practice of allowing each recipient to decide whether DBE information should be collected as a matter of responsiveness or responsibility has led to abuses of the DBE program, such as facilitating “bid

shopping” practices. A member of Congress supported this proposal stating that the current practice of allowing each recipient to decide whether DBE information should be collected as a matter of responsiveness or responsibility has led to abuses of the DBE program, without more specifics.

There were alternatives suggested by some organizations. Most of the suggestions can be grouped into three general categories: (1) Leave the “responsiveness/responsibility” distinction as is; (2) allow a short time frame for GFE documentation that includes DBE information to be submitted (1–3 days); and (3) allow a longer time frame for that information to be submitted (3–14 days). Many who opposed eliminating the “responsive/responsibility” distinction had less opposition if good faith efforts documentation could be submitted by the apparent low bidder sometime after bid submission. Most opponents expressed a need for a longer timeframe to review the quotes. In addition, general contractor organizations overwhelmingly stated that the good faith efforts documentation should only be submitted by the apparent successful bidder. There were additional comments that opposed the proposal, but they did not offer any suggestions for a different timeframe.

After the Department reopened the comment period in September 2013 and convened a listening session on December 5, 2013, to hear directly from stakeholders about the specific costs and benefits of this proposed regulatory change, general contractors overwhelmingly continued to express strong opposition to the proposal. According to the contractors, the problems presented by the proposal include, among others: (1) A failure of the Department to understand the complexities and challenges of the bidding process; (2) increased burdens placed on the limited resources available to DBEs to develop multiple quotes and engage in time-consuming negotiations before bids are due; (3) adverse impact on the willingness of general contractors to consider new, unfamiliar DBEs because of limited vetting time; (4) increased risk to prime contractors from incomplete or inaccurate DBE quotes likely to result in less DBE participation; (5) a reduction in, or elimination of, second tier subcontracting opportunities for DBEs; and (6) a deterrent to the use of DBEs in creative methods due to concerns about disclosure of confidential, proprietary information. Moreover, the American Road & Transportation Builders Association (ARTBA) and the

Associated General Contractors of America (AGC) challenged the claim of “bid shopping” as the basis for the proposed change, demanding a full explanation of the problem (if it exists) and the data relied upon to justify the proposal.

Based on a survey of 300 ARTBA members, 42% of the contractors indicated they would bid on less Federal-aid work if this (and other) proposed change is made permanent; that they would have to increase bid prices to cover additional costs (\$25,000–\$100,000 per bid); that they would have to add staff; and that the estimated cost of complying annually across the industry is in the range of \$2.5 million–\$11 billion. Forty-three percent (43%) of the members indicated that DBE plans (i.e., DBE commitments) currently are required by their State departments of transportation at the time of bid; and 37% currently submit good faith efforts documentation with their bid. The AGC acknowledged that some States currently require listing DBEs at the time of bid, but it asserts that those contacted universally responded that the bidding process is costly, burdensome, and results in lower DBE utilization.

The few State departments of transportation that submitted written comments during the reopened comment period supported allowing recipients the flexibility to permit submission of good faith efforts documentation at least 7–10 days after bids are due. Those with electronic bidding systems cited costs associated with modifying those systems to conform to changes in the rules as one more burden straining already limited resources. One State department of transportation supported the proposed change requiring good faith efforts documentation at bid opening.

A few DBEs submitted a form expressing support for the requirement that good faith efforts documentation be submitted with the bid, while others saw the change as creating an unnecessary burden that would tax resources and may result in shutting out DBEs. Before adopting an across-the-board approach, one commenter urged the Department to look carefully at other States that follow the “responsiveness” approach to assess whether it creates opportunities or closes doors. Given prime contractor opposition, the commenter thought there should be more of a factual predicate to support this proposed change.

DOT Response: For years the Department has been concerned about claims of “bid shopping” engaged in by some prime contractors to the detriment

of DBE and non-DBE subcontractors, suppliers, truckers, etc. and the adverse impact it has on the principle of fair competition. The meaning and practice of bid shopping is well understood within the construction industry and among public contracting entities. It occurs when a general contractor discloses the bid price of one subcontractor to a competing subcontractor in an attempt to obtain a lower bid than the one on which the general contractor based its bid to the owner. Variations include “reverse auctions” (where the subcontractors compete for the job by lowering prices) and “bid peddling” (subcontractors offering to reduce their bid to induce the contractor to substitute the subcontractor after award).

In 1992, when the Department proposed a similar change in the DBE program regulations, it believed then, as it does now, that requiring the submission of good faith efforts documentation that includes DBE information at the time bids are due (as a matter of responsiveness) is a reasonable means of reducing the bid shopping problem. Contrary to the current claims made by general contractors, the Department’s interest in revisiting this issue represents neither a “startling” change in direction for the DBE program nor a lack of understanding of the procurement process for transportation construction projects. At the same time, the Department acknowledged later in 1997 and 1999 when we finalized that proposed rulemaking, as it does now, that the responsiveness approach may be more difficult administratively for prime contractors and recipients, even though that approach was, and is, being used in some places.

One of the hallmarks of the DBE program is the flexibility afforded recipients to tailor implementation of some aspects of the program to respond to local conditions or circumstances. Indeed, the DBE program regulations cite among the objectives, the desire “to provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.” 49 CFR 26.1(g). Flexibility is recognized in many ways: For recipients, overall and contract goals are set based on local conditions, taking into account circumstances specific to a particular recipient or a particular contract; and for prime contractors, they cannot be penalized or denied a contract for failing to meet the goal, as long as documented good faith efforts are made. At what point in the procurement process the good faith efforts documentation must be

submitted is yet another example of the flexibility that the Department should not undo without more information.

To the extent that bid shopping exists, it works to the detriment of all subcontractors, DBEs and non-DBEs alike, and drives up the cost of projects to the taxpaying public. However, absent sufficient data regarding the impact of each approach on deterring bid shopping and its effects or data on the costs/benefits of each approach when implemented consistent with the rule, as well as the potential burdens argued by those opposed to the change, the Department is not prepared, at this time, to finalize the proposal to adopt an across-the-board approach. Before taking that step, we think it prudent to examine closely the “responsiveness” approach used by many recipients to determine its impact on mitigating bid shopping and on providing greater or lesser opportunities for DBE participation. We intend to undertake such a review which may lead to proposed regulatory action in the future.

While we are retaining the discretion of recipients to choose between a responsiveness or responsibility approach, we think there should be some limit to how long after bid opening bidders or offerors are allowed to submit GFE documentation that includes specific DBE information to reduce the opportunity to bid shop where it exists. This would have the effect of reducing the burden on prime contractors and recipients who use a responsibility approach from the burden allegedly caused by the proposal, while at the same time minimizing opportunities for bid shopping by restricting the amount of time truly needed to gather the necessary information. From the comments, the time period permitted by recipients that use the responsibility approach can run the gamut from 3 to 30 days. These comments present timelines similar to those found in a review the Department recently conducted of the DBE Program Plans for all 50 states, Puerto Rico and the District of Columbia.¹ The results of this analysis are available in the docket for this rulemaking.² This analysis shows that: (1) 30 of the State departments of transportation report that they use the responsiveness approach, although the Department notes that some variations on the responsiveness approach—a combination of responsiveness and responsibility—may actually be used by

¹ For purposes of this discussion, Puerto Rico and the District of Columbia are considered “States,” thus the totals add up to 52.

² See DOT Docket ID Number OST–2012–0147.

some of these recipients; (2) 20 State departments of transportation used the responsibility approach; and (3) two State departments of transportation (Puerto Rico and Florida) have completely race-neutral programs and thus do not set DBE contract goals. Of the 20 responsibility States, 17 States have a set period of time bidders or offerors are given to submit the required information, which ranges from 3 to 15 days, while three States have no set time for all contracts.³ The results of this review are generally consistent with the survey conducted by ARTBA indicating that 43% of the 300 members responding stated that their State departments of transportation required submission of DBE utilization plans with the bid. We note that the term "DBE utilization plan" is not used anywhere in the DBE program regulations.

We think it reasonable ultimately to limit the time to a maximum of 5 calendar days to protect program beneficiaries and overall program integrity.⁴ The Department believes 5 calendar days is reasonable because it is more than or equal to the time permitted by five of the responsibility states and, by definition, all of the responsiveness states. Moreover, many of the DOT recipients that commented on establishing a time limit recommended between one (1) to 7 days. Allowing a longer time frame, such as between 7 and 14 days, is too long; it increases opportunities for bid shopping to occur. However, in the final rule we have provided some time for recipients that use this revised responsibility approach to transition to the shorter time frame by January 1, 2017. The transition period is intended to provide time to put in place any necessary system modifications. Until then, recipients will be permitted up to 7 calendar days to require the submission of DBE documentation after bid opening when using a responsibility approach. The Department believes this will allow for a smoother transition to the new approach, while seemingly without encountering the administrative difficulties and added costs pointed to by some of the commenters opposed to the proposed change.

Based on the comments, there is some confusion about how the document

requirements of § 26.53(b) apply to design-build contracts. It bears repeating what the Department said in 1999 on this subject, because it remains the case today:

On design-build contracts, the normal process for setting contract goals does not fit the contract award process well. At the time of the award of the master contract, neither the recipient nor the master contractor knows in detail what the project will look like or exactly what contracting opportunities there will be, let alone the identity of DBEs who may subsequently be involved. In these situations, the recipient may alter the normal process, setting a project goal to which the master contractor commits. Later, when the master contractor is letting subcontracts, it will set contract goals as appropriate, standing in the shoes of the recipient. The recipient will exercise oversight of this process.

(64 FR 5115). The proposed change would not have applied to design-build contracts.

NAICS Codes

The Department proposed changes to the information to be included with bids or offers by requiring the bidders or offerors to provide the recipient with information showing that each DBE signed up by the bidder or offeror is certified in the NAICS code(s) for the kind of work the DBE will be performing. This proposed change was intended to help bidders or offerors identify firms that can qualify for DBE credit in the work area involved in the contract. This information would be submitted with the bidder's or offeror's DBE participation data.

The Department received 26 comments regarding the NAICS codes, 15 against the proposal and nine in favor of it. The comments submitted included State departments of transportation, prime contractors and contractor associations. The opponents of this proposal included mostly prime contractors and contractor associations, and a few State departments of transportation. The opponents' comments focused on a concern that the legal risk associated with including a DBE who could not perform a commercially useful function would fall on the prime contractor, meaning that the prime contractor could be the subject of investigations and charges brought by the DOT Inspector General and others, when it is the certifying agencies that should bear this responsibility. Other comments indicated that adding NAICS codes would not add any value to the process. The proponents of the proposal included advocacy groups and some State departments of transportation. Proponents believe that the NAICS code

requirement will add clarification to the process and ensure that the recipient can complete the work.

DOT Response: Under existing regulations, DBEs must be certified in the type of work the firm can perform as described by the most specific available NAICS code for that type of work. Certifiers (i.e., recipients or other agencies that perform the certification function) also may apply a descriptor from a classification scheme of equivalent detail and specificity that reflects the goods and services provided by the DBE (49 CFR 26.71(n)). It is the responsibility of the DBE to provide the certifier with the information needed to make an appropriate NAICS code assignment. In the new certification application form, firms are asked to describe their primary activities and the product(s) or services(s) they provide and to list applicable NAICS codes they seek. If the firm enters into new areas of work since it was first certified, it is the firm's responsibility to provide the certifier the evidence of how they qualify for the new NAICS codes. It is then incumbent upon the certifying agency to determine that the NAICS code to be assigned adequately describes the kind of work the disadvantaged owners have demonstrated they can control and it is the responsibility of the recipient of DOT funds to determine that the DBE's participation on a particular contract can be counted because the DBE is certified to perform the kind of work to be performed on that contract.

The Department has decided to make final this proposed rule change. In doing so, the Department does not intend to shift responsibility for the accuracy of NAICS code assignments from the certifier to the contractor. When a DBE submits a bid to a recipient as a prime contractor or a quote to a general contractor as a subcontractor, it is the responsibility of the DBE to ensure that the bid or quote shows that the NAICS code in which the DBE is certified corresponds to the work to be performed by the DBE on that contract. It would be in the best interest of the contractor to also have this information when it is considering DBEs interested in competing for contract opportunities where a contract goal has been set. This enables the contractor to make a reasonable determination whether it has made good faith efforts to meet the goal through the DBEs listed. Ultimately, the recipient is responsible for ensuring the DBE is certified to do the kind of work covered by the contract before DBE participation can be counted. Including this information in the bid documents should assist all parties concerned in

³ Under 49 CFR 26.53(c), all GFE documentation must be submitted before committing to the performance of the contract by the bidder or offeror (i.e., before contract award).

⁴ Due to the definition of "days" adopted in this final rule, bidders or offerors will have 5 calendar days (i.e., not business days) to submit the necessary information. Thus, if a bid is submitted on Thursday, the apparent low bidder would have until Tuesday to submit the information.

complying with DBE program requirements. Thus, it is the responsibility of the certifier to ensure that DBEs are certified only in the appropriate NAICS codes; it is the responsibility of the DBE to provide that NAICS code to the prime while the prime is putting together a bid; and it is the responsibility of the prime to provide those codes to the recipient when providing the other DBE information. It is not the responsibility of the prime to vouch for the accuracy of that certification.

Replacement of a DBE

The NPRM proposed that in the event that it is necessary to replace a DBE listed on a contract, a contractor must document the GFE taken to obtain a replacement and may be required to take specific steps to demonstrate GFE. The specific steps would include: (1) A statement of efforts made to negotiate with DBEs for specific work or supplies, including the names, address, telephone numbers, and emails of those DBEs that were contacted; (2) the time and date each DBE was contacted; (3) a description of the information provided to DBEs regarding the plans and specifications for portions of the work to be performed or the materials supplied; and (4) an explanation of why an agreement between the prime contractor and a DBE was not reached. The prime contractor would have to submit this information within 7 days of the recipient's agreement to permit the original DBE to be replaced, and the recipient must provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated. Failure to comply with the GFE requirements in the rule would constitute a material breach of contract, subject to termination and other remedies provided in the contract.

Twenty-eight commenters opposed this modification to the rules. They included prime contractors, State departments of transportation, and contractor associations. Essentially, the opponents were of the view that prime contractors should not be responsible for looking beyond the original commitment for DBE replacements. Others felt that the 7 day timeframe to replace a DBE is not long enough. Some opponents suggested changing the proposal so that it is desirable to replace a DBE with a DBE, but not mandatory. Some prime contractors also stated that there is a need to be compensated for the delays to replace a DBE. Those in favor of the proposal included five commenters representing State departments of transportation, transit authorities, and DBE advocacy groups.

These commenters felt that contractors should make efforts to replace a DBE and failure to carry out the requirement to do so is a breach of contract.

DOT Response: When the Department amended the regulations in 2011 (the first phase of its recent focus on program improvements), we required prime contractors that terminate DBEs make GFE to find a replacement to perform at least the same amount of work under the contract to meet the contract goal established for the procurement. Thus, this GFE obligation currently exists and is not new. We agree that the GFE guidance in Appendix A used by recipients to assess the efforts made by bidders and offerors before contract award can also be used to evaluate efforts made by the contractor to replace a DBE after contract award. There is no need to separately identify steps that a recipient may require when a contractor is replacing a DBE. However, there is nothing that prevents a contractor from taking any of the steps included in the proposed amendment to the rules. Indeed, recipients may consider, as part of their evaluation of the efforts made by the contractor, whether DBEs were notified of subcontracting opportunities, whether new items of work were made available for subcontracting, what information was made available to DBEs, and what efforts were made to negotiate with DBEs.

The GFEs made by the contractor to obtain a replacement DBE should be documented and submitted to the recipient within a reasonable time after obtaining approval to terminate an existing DBE. To avoid needless delay and ensure timely action, we think 7 days is reasonable, but we have modified the rule to allow recipients to extend the time if necessary at the request of the contractor.

The existing regulations currently require a contract clause be included in prime contracts and subcontracts that make the failure by the contractor to carry out applicable requirements of 49 CFR Part 26 a material breach of contract, which may result in the termination of the contract or such other remedy as the recipient deems appropriate. See 49 CFR 26.13(b). Consequently, a contractor that fails to comply with the requirements for terminating or replacing a DBE would be in breach of contract, subject to contract sanctions that include termination of the contract. We need not replicate the provisions of § 26.13. We also will not prescribe what the appropriate contract sanctions or administrative remedies must be. However, we have revised § 26.13 to

incorporate the list of remedies we proposed as other possible contract remedies recipients should consider. Many of the suggestions are sanctions currently used by some recipients. They include withholding progress payments, liquidated damages, disqualifying the contractor from future bidding, and assessing monetary penalties.

Copies of Quotes and Subcontracts

The Department proposed to require the apparent successful bidder/offeror, as part of its GFE documentation, provide copies of each DBE and non-DBE subcontractor quote it received in situations where the bidder/offeror selected a non-DBE firm to do work sought by a DBE. This information would help the recipient determine whether there is validity to any claims by a bidder/offeror that a DBE was rejected because its quote was too high. The contractor who is awarded the contract also would be required to submit copies of all DBE subcontracts.

There were 15 organizations that commented on the proposal regarding quotes and 19 commenters on the proposal regarding subcontracts. Commenters were almost evenly divided in their support for, or opposition to, requiring the submission of quotes under the limited circumstances set out in the proposed rule. A State department of transportation noted that the submission of quotes was already being implemented in its program. One supporter suggested this requirement should apply only when the DBE contract goal is not met. Opponents raised concerns about the burden imposed and questioned the benefit to be derived since the comparison of quotes is not viewed as a useful exercise. Regarding the submission of subcontracts, the commenters overwhelming opposed making this a requirement because of the burden. One commenter suggested that the proposal appears to duplicate an existing requirement of the Federal Highway Administration (FHWA) and another commenter questioned the steps that would be taken to protect confidential or proprietary information.

DOT Response: The GFE guidance in Appendix A, in its current form, instructs prime contractors to consider a number of factors when negotiating with a DBE and states that the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Thus, the reasonableness of a DBE's quote as compared to a non-DBE's quote is often

an issue cited by a prime contractor in selecting a non-DBE over a DBE. The Department believes that requiring a bidder/offeree to provide, as part of the GFE documentation, subcontractor quotes received by the bidder/offeree in those instances where a DBE's quote was rejected over a non-DBE's quote will assist recipients in determining the validity of claims made by the bidder/offeree that the DBE's quote was too high or unreasonable and has therefore decided to finalize this proposal. Further, we stress that only the quote would need to be submitted in these situations, not any additional information and only in instances where a non-DBE was selected over a DBE, thus limiting the burden of this requirement.

The Department recognizes that requiring the submission of DBE subcontracts may pose unnecessary burdens on contractors and recipients. Thus, the Department has decided to modify its proposal to only require that DBE subcontracts be made available to recipients upon request when needed to ensure compliance with the requirements of 49 CFR Part 26.

Good Faith Efforts Applied to Race-Neutral DBE Participation

We sought comment on whether some of the good faith efforts provisions of the rule concerning contracts with DBE goals should apply to DBEs on contracts that do not have a DBE goal. For example, the rules that restrict termination of DBEs and that impose good faith efforts obligations to replace DBEs that are dropped from a contract or project would apply regardless of whether the DBE's participation resulted from race-conscious or race-neutral measures.

Of the 28 commenters that responded to this question, only 3 expressed support and all three supporters were DBEs or organizations representing DBEs. Three commenters also were conflicted, unsure of whether the proposal would result in benefits to DBEs. The general contracting community, many State departments of transportation, and some transit agencies expressed opposition because they believe DBEs should be treated no different than non-DBEs on contracts with no DBE goals (the primary means of obtaining measurable DBE participation through race- and gender-neutral measures), and to do otherwise is to essentially convert what began as race-neutral conduct into race-conscious conduct.

DOT Response: The Department agrees with the points raised by the commenters opposing this change

(specifically, that no distinction should be made between DBEs and non-DBEs when race-neutral measures are used to obtain participation) and has decided to maintain the status quo. The restrictions on terminating and replacing a DBE selected by a bidder or offeror to meet a contract goal are intended to hold the contractor to the good faith efforts commitment made to win the contract. No comparable commitment is made when DBE contract goals are not set.

Trucking 49 CFR 26.55(d)

The Department proposed to change the counting rule for trucking to allow 100% of a DBE's trucking services to be counted when the DBE uses its own employees as drivers but leases trucks from a non-DBE truck leasing company. This proposed change gives DBEs the same ability as non-DBEs to use their own drivers and supplement their fleets with leased trucks without sacrificing any loss of DBE credit because the trucks may be leased from a non-DBE leasing company. Consistent with the current prohibition on counting materials, supplies, equipment, etc., obtained from the prime contractor or its affiliates (49 CFR 26.55(a)(1)), trucks leased from the prime contractor would not be counted. As noted in the NPRM, this proposed rule change applies to counting only; it would not immunize companies from scrutiny due to potentially improper relationships between DBEs and non-DBEs that raise certification eligibility or fraud concerns.

More than 25 comments were received on this proposed change, mostly in favor of the modification. There were several commenters that believed the proposed rule would invite more fraud for an area that is one of the top means of obtaining DBE participation on Federal-aid contracts. Additional comments included expanding the definition of "employees" to expressly include those drivers that are hired by DBEs from the union hall on an as-needed basis to fulfill contracts, clarifying what constitutes ownership of trucks, eliminating the current option allowed under the rule that permits credit for trucks and drivers leased from non-DBEs, eliminating the need to obtain written consent from the operating administrations on the option chosen by the recipient; and reinforcing the restriction on not allowing a DBE to count trucks purchased or leased from the prime contractor.

DOT Response: The Department did not propose any changes in the NPRM to the existing rule that allows a DBE that leases trucks (and also leases the

drivers) from a non-DBE firm to receive credit for the value of transportation services provided by the non-DBE firm up to the amount of credit provided by trucks owned by DBEs that are used on the contract. This option was added to the DBE program rules in 2003 (68 Fed. Reg. 35542-02) to recognize the practical reality of leasing in the trucking business and to respond to concerns about reduced opportunities for DBEs caused by the 1999 version of the counting rule. As indicated in the 2003 final rule, a recipient may choose the one-for-one option to credit trucks and drivers leased from non-DBEs or it may limit credit to fees and commissions for work done with non-DBE lessees, consistent with the 1999 version of the rule. If a recipient chooses to count the use of trucks and drivers leased from a non-DBE firm, as provided in the existing rule, the recipient's choice should be reflected in the recipient's DBE program plan, which is subject to approval by the cognizant operating administration (OA) to ensure appropriate safeguards are taken by the recipient to prevent fraud. Contrary to the way some commenters are reading the existing rule, it does not contemplate obtaining OA consent on a transaction-by-transaction basis.

The modification to the rule that the Department makes final today simply clarifies that trucks that are leased by a DBE from a non-DBE for use by the DBE's employees should be treated no differently than other equipment a DBE may lease to conduct its business. The value of the transportation services provided by the DBE would not be adversely impacted by the fact that the equipment used by the DBE's employees is leased instead of owned. This is consistent with the existing counting rule and with the basic principle that DBE participation should be counted for work performed with a DBE firm's own forces. The term "employee" is to be given its commonly understood dictionary meaning, and "ownership" includes the purchase of a truck or trucks through conventional financing arrangements.

Regular Dealer 49 CFR 26.55(e)

The Department proposed to codify guidance issued in 2011 on how to treat the services provided by a DBE acting as a regular dealer or a transaction expeditor/broker for counting purposes (i.e., crediting the work of the DBE toward the goal). The guidance makes clear that counting decisions involving a DBE acting as a regular dealer are made on a contract-by-contract basis and not based on a general description or designation of a DBE as a regular

dealer. The Department also invited an open discussion of the regular dealer concept in light of changes in the way business is conducted. Specifically, we sought comment on: (1) How, if at all, changes in the way business is conducted should result in changes in the way DBE credit is counted in supply situations?; (2) what is the appropriate measure of the value added by a DBE that does not play a traditional regular dealer/middleman role in a transaction?; and (3) do the policy considerations for the current 60% regular dealer credit actually influence more use of DBEs as contractors that receive 100% credit?

The Department received over 50 comments from prime contractors, DBEs, and recipients, many of which emphasized the need for additional clarification of, or changes to, the terminology used to describe regular dealers, middlemen, transaction expeditors, and brokers. The comments were evenly divided over whether the guidance should be codified in the regulations. Those in support agreed that the determination of whether or not a DBE is functioning as a regular dealer as defined in the existing rule should be based on the role performed by the DBE on the contract, which may vary from contract to contract. Those opposed to the contract-by-contract approach, represented mostly, but not exclusively, by prime contractors, argued that the approach reflected in the guidance is burdensome and that once a recipient determines at certification that a DBE is a supplier, a wholesaler, a manufacturer, a transaction expeditor, a middleman, or a broker, the credit allowed under the rules should be applied. To do otherwise creates inconsistency, uncertainty, and exposes the prime and the DBE to risks associated with fraud investigations in this area. It is the responsibility of the certifier, they argue, to ensure that a DBE certified as a supplier, for example (and thereby acting as a regular dealer), is, in fact, a supplier and not a transaction expeditor. Indeed, several commenters expressed the view that certifiers should be allowed to certify a DBE as a "regular dealer." Followed to its logical conclusion, once certified, how the work to be performed by the DBE is counted would be automatic without regard to what the DBE is actually doing on the contract.

Many comments addressed the changing business environment where the best method of delivering supplies ordered from a non-DBE manufacturer may in fact be drop-ship rather than delivery by the DBE regular dealer using its own trucks. One commenter stated that the requirement that a DBE own

and operate its own distribution equipment directly conflicts with industry practice and creates a greater burden and challenge to DBEs. Similarly, some maintain the requirement for an inventory or store front is outdated. The way business is conducted today, they argue, services provided by wholesalers or e-Commerce businesses do not require an inventory or a store open to the public. Several commenters indicated that they would be comfortable with the elimination of the distinct categories and only have a single distinction of a goods supplier from a non-DBE manufacturer with a set percentage of dollars that could be counted or only using fees and commissions as the amount that can be counted as done currently for transaction expeditors and brokers. To encourage greater use of DBE contractors to meet contract goals, one commenter suggested placing a cap (e.g., no more than 50%) on how much of a contract goal could be met using DBE suppliers.

There were suggestions that the Department eliminate altogether regular dealers and brokers from the rule. Others countered that any proposal to eliminate counting regular dealer participation toward contract goals would severely reduce the pool of ready, willing, and able DBEs given how often the regular dealer credit is used to meet contract goals; such a proposal, they maintain, should result in a corresponding reduction in goals. Other commenters believe that it is important to keep the regular dealer concept and consider increasing the counting percentage due to the value added services they provide. Still others thought a complete overhaul of the regular dealer provisions in the rule is needed to recognize decades of changes in the construction industry, and no modifications to the rule should be made until further analysis is done.

DOT Response: The Department has decided to codify the guidance on the treatment of counting decisions that involve DBEs functioning as regular dealers. This guidance is consistent with the basic counting principles set out in the rule that apply regardless of the kind of work performed by the DBE. Specifically, the counting rules apply to a specific contract in which a DBE participates based on the value of work actually performed by the DBE that involves a commercially useful function on that contract. Throughout 49 CFR 26.55 there are numerous references to "a contract," "the contract," or "that contract." In other words, counting is by definition a "contract-by-contract" determination made by recipients after

evaluating the work to be performed by the DBE on a particular contract.

The Department appreciates the thought that went into the varied comments received on the questions we posed and the overall interest in the subject. In the context of this discussion, it is important to reiterate that certification and counting are separate concepts in the DBE rule. This applies regardless of the type of work the DBE is certified to perform. It is also important to note that DBEs must be certified in the most specific NAICS code(s) for the type of work they perform and that there is no regular dealer NAICS code. Regular dealer is a term of art used in the context of the DBE program. That said, the Department believes that more analysis and discussion is needed to make informed policy decisions about appropriate modifications to the regulations governing regular dealers, transaction expeditors, and brokers. We think it more appropriate at this point to develop additional guidance to address different business scenarios rather than promulgate regulatory requirements or restrictions beyond those that currently exist. We will continue the conversation through future stakeholder meetings.

Ethics and Conflicts of Interest

The Department sought comment on whether Part 26 should be amended (or guidance issued) to add provisions concerning ethics and conflicts of interest to help play a constructive role in empowering DBE officials in resisting inappropriate political pressures. At the same time, the Department questioned whether such a provision would be effectual and whether the provision could be drafted so as not to be overly detailed. The Department also welcomed suggestions about ethics and conflicts of interest.

Less than 25 commenters elected to address this subject; the significant majority of commenters expressed support for adding ethics and conflict of interest provisions to enable DBE certification officials and others to resist inappropriate pressures. An advocacy group commended the Department for initiating a discussion about ethics. A State transportation department suggested including applicable penalties and offering protection via the Whistleblower Protection Act. An airport sponsor supported adding provisions that clarify the roles of staff who administer the selection process.

A State transit authority did not believe that effective guidance could be provided in the regulation without being overly detailed and burdensome. Moreover, the commenter recognized

that while adding such provisions would play a constructive role, they would not totally eradicate inappropriate pressure. A State transportation department directed the Department to professional codes of conduct for the fields of law and engineering as examples. An advocacy group and a DBE noted that a code of ethics might provide recipients with a “safety net” when responding to undue pressure. Another State transportation department supports the provision if DOT takes quick action against known abusers of ethics. A DBE commenter recommended a workgroup approach be utilized to prepare draft language.

DOT Response: There was general support among the commenters for establishing a code of ethics of some kind to insulate or protect DBE program administrators from undue pressure to take actions inconsistent with the intent and language of the DBE program rules. However, very few of the commenters made suggestions on the details of such a code or on the kind of provisions that might be added to address specific concerns. As indicated in the NPRM, recipients and their staffs are subject to State and local codes of ethics that govern public employees and officials in the performance of their official duties and responsibilities, including the responsibilities they carry out in administering the DBE program as a condition of receiving Federal financial assistance. Of course, grant recipients are subject to the common grant rules which prohibit participating in the selection, award, or administration of a contract supported by Federal funds if a conflict of interest would be involved. Because we lack sufficient information, at this point, to determine the extent to which widespread problems exist or how best to approach the issue—through regulations or guidance—the Department thinks it best to hold off on adopting ethics rules for the DBE program to supplement existing State and local ethics codes. Instead, the Department may engage stakeholders in a further discussion to aid in identifying appropriate next steps.

Appendix A—Good Faith Efforts Guidance

The Department proposed several revisions to Appendix A to Part 26—Guidance Concerning Good Faith Efforts to clarify and reinforce the GFE obligation of bidders/offerors and to provide additional guidance to recipients. We proposed to add more examples of the types of actions recipients may consider when evaluating the bidders’/offerors’ GFE to obtain DBE participation. The proposed

examples included conducting market research to identify small business contractors and suppliers and establishing flexible timeframes for performance and delivery schedules that encourage and facilitate DBE participation. We reinforced concepts that we have emphasized in communicating with recipients over the years: Namely, that a contractor’s desire to perform work with its own forces is not a basis for not making GFE and rejecting a replacement DBE that submits a reasonable quote; and reviewing the performance of other bidders should be a part of the GFE evaluation. The Department also proposed to add language specifying that the rejection of a DBE simply because it was not the low bidder is not a practice considered to be a good faith effort.

There were 25 comments collected that opposed the suggestion that flexible timeframes and schedules be established to facilitate DBE participation. The comments received were submitted by prime contractors, contractor associations, and State departments of transportation. These organizations stated that a “flexible timeframe” was unrealistic and went against the nature of the construction industry. Other organizations stated the need to further quantify what constitutes an “unreasonable quote” when making GFE to replace a DBE. There were two organizations that supported these provisions. U.S. Representative Judy Chu agreed that there can be no definitive checklist, but suggested that best practices be collected and disseminated to clarify the issue. One State department of transportation agreed that the bidder cannot reject a DBE simply due to price.

In the NPRM, we also proposed in Appendix A that DOT operating administrations may change recipients’ good faith efforts decisions. There were a few comments regarding this proposal, all in opposition. The commenters included a DBE, prime contractor, a State department of transportation, and a contractors association. The prime contractor noted that operating administrations should be involved throughout the good faith efforts review process and not after the recipient has made a decision. There were no comments in support of this proposal.

DOT Response: It is important to reiterate and reinforce that Appendix A is guidance to be used by recipients in considering the good faith efforts of bidders/offerors. It does not constitute a mandatory, exclusive, or exhaustive checklist. Rather, a good faith efforts evaluation looks at the “quality,

quantity, and intensity of the different kinds of efforts that the bidder has made.” The proposed revisions to the guidance made by the Department are based on experience gained since the development of the guidance in 1999 and are intended to incorporate clarifications and additional examples of the different kinds of activities to consider. We have modified the final guidance in keeping with the existing purpose and intent. The guidance also seeks to indicate what reasonably may not be viewed as a demonstration of good faith efforts. In this regard, rejecting a DBE only because it was not the low bidder is not consistent with the longstanding idea that a bidder/offeror should consider a variety of factors when negotiating with a DBE, including the fact that there may be additional costs involved in finding and using DBEs, as currently stated in the existing guidance. Similarly, the inability to find a replacement DBE at the original price is not, without more, sufficient to demonstrate GFE were made to replace the original DBE. As currently stated under the existing guidance, a firm’s price is one of many factors to consider in negotiating in good faith with interested DBEs.

The Department has decided to make no change to the current role of the operating administrations with respect to the GFE determinations made by recipients. It is the responsibility of recipients to administer the DBE program consistent with the requirements of 49 CFR Part 26, and it is the responsibility of the operating administrations to oversee recipients’ program administration to ensure compliance through appropriate enforcement action if necessary. Such action includes refusing to approve or provide funding for a contract awarded in violation of 49 CFR 26.53(a). The proposed change may confuse the relative roles and responsibilities of the recipients and the operating administrations and consequently has been removed from the final rule.

Technical Corrections

The Department is amending the following provisions in 49 CFR Part 26 to correct technical errors:

1. Section 26.3(a)—Include a reference to the Highway and Transit funds authorized under SAFETEA-LU and MAP-21.
2. Section 26.83(c)(7)—Remove the reference to the DOT/SBA MOU since the MOU has lapsed.
3. Section 26.89(a)—Amend to recognize that the DOT/SBA MOU has lapsed.

Regulatory Analyses and Notices

Executive Orders 12866 and 13563 (Regulatory Planning and Review)

This final rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Order. It does not create significant cost burdens, does not affect the economy adversely, does not interfere or cause a serious inconsistency with any action or plan of another agency, does not materially alter the impact of entitlements, grants, user fees or loan programs; and does not raise novel legal or policy issues. The final rule is essentially a streamlining of the provisions for implementing an existing program, clarifying existing provisions and improving existing forms. To the extent that clearer certification requirements and improved documentation can forestall DBE fraud, the rule will result in significant savings to State and local governments. This final rule does not contain significant policy-level initiatives, but rather focuses on administrative changes to improve program implementation. The Department notes that several commenters, particularly general contractors and their representatives, argued that the NPRM should have been designated as “significant.” Although the Department continues to believe that the designation of the NPRM was correct based on the intent of this rulemaking, we note that, as discussed above, we have decided to not finalize at this time many of the provisions that those commenters argued were significant changes to the DBE program.

Executive Order 12372 (Intergovernmental Review)

The final rule is a product of a process, going back to 2007, of stakeholder meetings and written comment that generated significant input from State and local officials and agencies involved with the DBE program in transit, highway, and airport programs.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), we have evaluated the effects of this final rule on small entities and anticipate that this action will not have a significant economic impact on a substantial number of small entities. The underlying DBE rule does deal with small entities: All DBEs are, by definition, small businesses. Also, some FAA and FTA recipients that implement

the program are small entities. However, the changes to the rule are primarily technical modifications to existing requirements (e.g., improved forms, refinements of certification provisions) that will have little to no economic impact on program participants. Therefore, the changes will not create significant economic effects on anyone. In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), I certify that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (Federalism)

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. As noted above, there is no substantial compliance cost imposed on State and local agencies, who will continue to implement the underlying program with administrative improvements proposed in the rule. The proposed rule does not involve preemption of State law. Consequently, we have analyzed this proposed rule under the Order and have determined that it does not have implications for federalism.

National Environmental Policy Act (NEPA)

The Department has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency’s NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.c.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway Administration’s implementing procedures, “[p]romulgation of rules, regulations, and directives.” 23 CFR 771.117(c)(20). The purpose of this

rulemaking is to make technical improvements to the Department’s DBE program, including modifications to the forms used by program and certification-related changes. While this rule has implications for eligibility for the program—and therefore may change who is eligible for participation in the DBE program—it does not change the underlying programs and projects being carried out with DOT funds. Those programs and projects remain subject to separate environmental review requirements, including review under NEPA. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Paperwork Reduction Act

According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. This action contains additional amendments to the existing information collection requirements previously approved under OMB Control Number 2105–0510. As required by the Paperwork Reduction Act, the Department has submitted these information collection amendments to OMB for its review. The Department will announce the finalization of this information collection request in a separate **Federal Register** notice following OMB approval. The NPRM contained estimates of the burden associated with the additional collection requirements proposed in that document. Various commenters stated that the Department understated the proposed burden for the collections associated with the application form and personal net worth form. As discussed above in the relevant portions of the preamble, the Department is sensitive to those concerns and has revised those collections to minimize what information must be submitted and to simplify other aspects of the forms. For each of these information collections, the title, a description of the entity to which it applies, and an estimate of the annual recordkeeping and periodic reporting burden are set forth below.

1. Application Form

Today’s final rule modifies the application form for the DBE program. In the NPRM, the Department explained that its estimate of 8 total burden hours per applicant to complete its DBE or

ACDBE certification application with supporting documentation was based on discussions the Department has had with DBEs in the past. The comments and the Department's response to those comments are discussed above in the preamble.

The number of new applications received each year by Unified Certification Program members is difficult to estimate. There is no central repository for DBE certification applications and we predict that the frequency of submissions at times vary according to construction season (high applications when the season is over), the contracting opportunities available in the marketplace, and the number of new transportation-related business formations or expansions. To get some estimate however, the Department contacted recipients during the process of developing the NPRM. The agencies we contacted reported receiving between 1–2 applications per month, 5–10 per month, or on the high end 80–100 per month. There are likely several reasons for the variance. Jurisdictions that are geographically contiguous to other states (such as Maryland) and/or have a high DBE applicant pool may receive a higher number whereas jurisdictions in remote areas of the country with smaller numbers of firms may have lower applicant requests for DBE certification. These rough numbers likely do not include requests for expansion of work categories from existing firms that are already certified.

Frequency: Once during initial DBE or ACDBE certification.

Estimated Average Burden per Response: 8 hours.

Number of Respondents: 9,000–9,500 applicants each year.

Estimated Total Annual Burden Hours: 72,000–76,000 hours per year.

2. PNW Form

A small business seeking to participate in the DBE and ACDBE programs must be owned and controlled by a socially and economically disadvantaged individual. When a recipient determines that an individual's net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is said to have been conclusively rebutted. In order to make this determination, the current rule requires recipients to obtain a signed and notarized statement of personal net worth from all persons who claim to own and control a firm applying for DBE or ACDBE certification and whose ownership and control are relied upon for the certification. These personal net worth statements must be accompanied by appropriate supporting

documentation (e.g., tax returns). The form finalized in this rule would replace use of an SBA form suggested in current regulations.

As discussed above in the preamble, we estimate that compiling information for and filling out this form would take approximately 2 hours, slightly longer than that for the SBA form currently in use. As explained in further detail in the above preamble, the Department has chosen not to finalize its proposal to require a PNW form with each annual affidavit of no change. Thus, the number of respondents who must submit a PNW form is the same as the number of applications.

Frequency: Once during initial DBE certification. For the DBE/ACDBE programs, information regarding the assets and liabilities of individual owners is necessary for recipients of grants from the Federal Transit Administration, the Federal Aviation Administration, and the Federal Highway Administration, to make responsible decisions concerning an applicant's economic disadvantage under the rule. All persons who claim to own and control a firm applying for DBE or ACDBE certification and whose ownership and control are relied upon for the certification will complete the form.

Estimated Average Burden per Response: 2 hours.

Number of Respondents: 9,000–9,500 applicants each year.

Estimated Burden: 18,000–19,000 hours per year for applications.

3. Material With Annual Affidavits of No Change

Each year, a certified firm must submit an affidavit of no change. Although the Department proposed that DBE would need to submit various additional documentation with the affidavit (e.g., an updated PNW statement and records of transfers) today's final rule only requires that the owner and the firm's (including affiliates) most recent completed IRS tax return, IRS Form 4506 (Request for Copy or Transcript of Tax Return) be submitted with the affidavit. Collection and submission of these items during the annual affidavit is estimated to take approximately 1.5 hours.

Estimated Average Burden per Response: 1.5 hours.

Respondents: The approximately 30,000 certified DBE firms.

Burden: Approximately 45,000 hours per year.

4. Reporting Requirement for Percentages of DBEs in Various Categories

The final rule implements a statutory requirement calling on UCPs to annually report the percentages of white women, minority men, and minority women who control DBE firms. To carry out this requirement, the 52 UCPs would read their existing Directories, noting which firms fell into each of these three categories. The UCPs would then calculate the percentages and email their results to the Departmental Office of Civil Rights. It would take each UCP an estimated 3 hours to comb through their Directories, and another three minutes to calculate the percentages and send an email to DBE@DOT.GOV.

Estimated Average Burden per Response: 3 hours, 3 minutes.

Respondents: 52.

Burden: Approximately 158.5 hours.

5. Uniform Report of DBE Commitments/Awards and Payments

As part of this rulemaking, the Department is reinstating the information collection entitled, "Uniform Report of DBE Commitments/Awards and Payments," OMB Control No. 2105–0510, consistent with the changes proposed in this final rule. This collection requires that DOT Form 4630 be submitted once or twice per year by each recipient having an approved DBE program. The report form is collected from recipients by FHWA, FTA, and FAA, and is used to enable DOT to conduct program oversight of recipients' DBE programs and to identify trends or problem areas in the program. This collection is necessary for the Department to carry out its oversight responsibilities of the DBE program, since it allows the Department to obtain information from the recipients about the DBE participation they obtain in their programs.

In this final rule, the Department modified certain aspects of this collection in response to issues raised by stakeholders: (1) Creating separate forms for routine DBE reporting and for transit vehicle manufacturers (TVMs) and mega projects; (2) amending and clarifying the report's instructions to better explain how to fill out the forms; and (3) changing the forms to better capture the desired DBE data on a more continuous basis, which should also assist with recipients' post-award oversight responsibilities.

Frequency: Once or twice per year.

Estimated Average Burden per Response: 5 hours per response.

Number of Respondents: 1,250. The Department estimates that

approximately 550 of these respondents prepare two reports per year, while approximately 700 prepare one report per year.

Estimated Burden: 9,000 hours.

List of Subjects in 49 CFR Part 26

Administrative practice and procedure, Airports, Civil Rights, Government contracts, Grant-programs—transportation; Mass transportation, Minority Businesses, Reporting and recordkeeping requirements.

Issued this 19th day of September 2014, at Washington, DC.

Anthony R. Foxx,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation amends 49 CFR part 26 as follows:

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

1. The authority citation for part 26 continues to read as follows:

Authority: 23 U.S.C. 304 and 324; 49 U.S.C. 2000d, et seq., 49 U.S.C. 47107, 47113, 47123; Section 1101(b) and divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405, and 23 U.S.C. 403.

2. In § 26.1, redesignate paragraphs (f) and (g) as paragraphs (g) and (h), and add new paragraph (f) to read as follows:

§ 26.1 What are the objectives of this part?

(f) To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.

3. In § 26.3, amend paragraphs (a)(1) and (2) by adding a sentence to the end of each to read as follows:

§ 26.3 To whom does this part apply?

(a) * * * (1) * * * Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405.

(2) * * * Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B

of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405.

- 4. Amend § 26.5 by: a. Adding in alphabetical order definitions for "Assets", "Business, business concern or business enterprise", "Contingent Liability", and "Days"; b. Removing the definition of "DOT/SBA Memorandum of Understanding"; c. Revising the definition of "immediate family member"; d. Adding in alphabetical order definition for "Liabilities"; e. Revising the definitions of "primary industry classification", "principal place of business", and "socially and economically disadvantaged individual"; and f. Adding in alphabetical order definitions for "Spouse" and "Transit vehicle manufacturer (TVM)".

The additions and revisions read as follows:

§ 26.5 What do the terms used in this part mean?

Assets mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

Business, business concern or business enterprise means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

Contingent Liability means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal

holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

Liabilities mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

Primary industry classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: http://www.census.gov/eos/www/naics/.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;

(ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;

(iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

(3) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

Spouse means a married person, including a person in a domestic partnership or a civil union recognized under State law.

Transit vehicle manufacturer means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.

* * * * *

■ 5. In § 26.11, add paragraphs (d) and (e) to read as follows:

§ 26.11 What records do recipients keep and report?

* * * * *

(d) You must maintain records documenting a firm’s compliance with the requirements of this part. At a minimum, you must keep a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. These records must be retained in accordance with applicable record retention requirements for the recipient’s financial assistance agreement. Other certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient’s financial assistance agreement, whichever is longer.

(e) The State department of transportation in each UCP established pursuant to § 26.81 of this part must report to the Department of Transportation’s Office of Civil Rights, by January 1, 2015, and each year thereafter, the percentage and location in the State of certified DBE firms in the UCP Directory controlled by the following:

(1) Women;

(2) Socially and economically disadvantaged individuals (other than women); and

(3) Individuals who are women and are otherwise socially and economically disadvantaged individuals.

■ 6. Revise § 26.13, to read as follows:

§ 26.13 What assurances must recipients and contractors make?

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance: The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient’s DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to

the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance: The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

(1) Withholding monthly progress payments;

(2) Assessing sanctions;

(3) Liquidated damages; and/or

(4) Disqualifying the contractor from future bidding as non-responsible.

§ 26.21 [Amended]

■ 7. In § 26.21, paragraph (a)(1) add the word “primary” before the word “recipients”, and in paragraphs (a)(2) and (3), remove the word “exceeding” and add in its place the words “the cumulative total value of which exceeds”.

■ 8. In § 26.45, revise paragraphs (c)(2), (c)(5); (d) introductory text, (e)(3), (f)(4), and (g) to read as follows:

§ 26.45. How do recipients set overall goals?

* * * * *

(c) * * *

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted (successful and unsuccessful) on your DOT-assisted prime contracts or subcontracts in the past three years. Determine the number of all businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all businesses to derive a base figure for the relative availability of DBEs in your market. When using this approach, you must establish a mechanism (documented in your goal submission) to directly capture data on DBE and non-DBE prime and

subcontractors that submitted bids or quotes on your DOT-assisted contracts.

* * * * *

(5) *Alternative methods.* Except as otherwise provided in this paragraph, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market. The exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of paragraph (c)(2) of this section, is not an acceptable alternative means of determining the availability of DBEs.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at your overall goal. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

* * * * *

(e) * * *

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.

(i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.

(ii) A project goal covers the entire length of the project to which it applies.

(iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.

(iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

(f) * * *

(4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated or that your method for calculating goals is inadequate, the operating administration may, after

consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the operating administration will be guided by goal setting principles and best practices identified by the Department in guidance issued pursuant to § 26.9.

* * * * *

(g)(1) In establishing an overall goal, you must provide for consultation and publication. This includes:

(i) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to paragraph (f) of this section. You must document in your goal submission the consultation process you engaged in. Notwithstanding paragraph (f)(4) of this section, you may not implement your proposed goal until you have complied with this requirement.

(ii) A published notice announcing your proposed overall goal before submission to the operating administration on August 1st. The notice must be posted on your official Internet Web site and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your official Internet Web site.

(2) At your discretion, you may inform the public that the proposed overall goal and its rationale are available for inspection during normal business hours at your principal office and for a 30-day comment period. Notice of the comment period must include addresses to which comments may be sent. The public comment period will not extend the August 1st deadline set in paragraph (f) of this section.

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■ 9. Revise § 26.49 to read as follows:

§ 26.49 How are overall goals established for transit vehicle manufacturers?

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(1) Only those transit vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufacturers, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation are eligible to bid.

(2) A TVM's failure to implement the DBE Program in the manner as prescribed in this section and throughout 49 CFR part 26 will be deemed as non-compliance, which will result in removal from FTA's certified TVMs list, resulting in that manufacturer becoming ineligible to bid.

(3) FTA recipient's failure to comply with the requirements set forth in paragraph (a) of this section may result in formal enforcement action or appropriate sanction as determined by FTA (e.g., FTA declining to participate in the vehicle procurement).

(4) FTA recipients are required to submit within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in the grant agreement.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal.

(1) In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by the transit vehicle manufacturer's own forces.

(i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBE firms; and

(ii) You must exclude from this base figure funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.

(iii) In establishing an overall goal, the transit vehicle manufacturer must

provide for public participation. This includes consultation with interested parties consistent with § 26.45(g).

(2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) Transit vehicle manufacturers awarded must comply with the reporting requirements of § 26.11 of this part including the requirement to submit the Uniform Report of Awards or Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements.

(d) Transit vehicle manufacturers must implement all other applicable requirements of this part, except those relating to UCPs and DBE certification procedures.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

(f) As a recipient you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

■ 10. In § 26.51, revise paragraph (a) to read as follows:

§ 26.51 What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

* * * * *

■ 11. In § 26.53, revise paragraph (b), redesignate paragraph (f)(1) as (f)(1)(i) and add paragraph (f)(1)(ii), revise paragraphs (g) and (h), and add paragraph (j) to read as follows:

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

* * * * *

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders or offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and

(v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and

(3)(i) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(A) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(B) No later than 7 days after bid opening as a matter of responsibility. The 7 days shall be reduced to 5 days beginning January 1, 2017.

(ii) Provided that, in a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient.

* * * * *

(f)(1) * * *

(ii) You must include in each prime contract a provision stating:

(A) That the contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the

contractor obtains your written consent as provided in this paragraph (f); and

(B) That, unless your consent is provided under this paragraph (f), the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

* * * * *

(g) When a DBE subcontractor is terminated as provided in paragraph (f) of this section, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement. The good faith efforts shall be documented by the contractor. If the recipient requests documentation under this provision, the contractor shall submit the documentation within 7 days, which may be extended for an additional 7 days if necessary at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

(h) You must include in each prime contract the contract clause required by § 26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that section you deem appropriate if the prime contractor fails to comply with the requirements of this section.

* * * * *

(j) You must require the contractor awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.

■ 12. In § 26.55, revise paragraph (d)(5), redesignate paragraph (d)(6) as (d)(7), and add new paragraph (d)(6) and paragraph (e)(4) to read as follows:

§ 26.55 How is DBE participation counted toward goals?

* * * * *

(d) * * *

(5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases

trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

Example to paragraph (d)(5): DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks equipped with drivers from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.

(6) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Example to paragraph (d)(6): DBE Firm X uses two of its own trucks on a contract. It leases two additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the trucks leased from Firm Z. DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

* * * * *

(e) * * *

(4) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) on a contract-by-contract basis.

* * * * *

■ 13. In § 26.65, revise paragraph (a), and in paragraph (b), remove “in excess of \$22.41 million” and add in its place “in excess of \$23.98 million”.

The revision reads as follows:

§ 26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size

standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.

* * * * *

■ 14. Revise § 26.67 to read as follows:

§ 26.67 What rules determine social and economic disadvantage?

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) 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.

(ii) 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. To meet this requirement, you must use the DOT personal net worth form provided in appendix G to this part without change or revision. Where necessary to accurately determine an individual’s personal net worth, you may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner’s spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner’s spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.

(iii) In determining an individual’s net worth, you must observe the following requirements:

(A) Exclude an individual’s ownership interest in the applicant firm;

(B) Exclude the individual’s equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included

in the equity calculation and not as a separate liability on the individual’s personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(C) Do not use a contingent liability to reduce an individual’s net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(iv) Notwithstanding any provision of Federal or State law, you must not release an individual’s personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other State to which the individual’s firm has applied for certification under § 26.85 of this part.

(b) *Rebuttal of presumption of disadvantage.* (1) An individual’s presumption of economic disadvantage may be rebutted in two ways.

(i) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section shows that the individual’s personal net worth exceeds \$1.32 million, the individual’s presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

Example to paragraph (b)(1)(i): An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than \$1.32 million. However, the person’s assets collectively (e.g., high income level, a very expensive house, a yacht, extensive real or personal property holdings) may lead a reasonable person to conclude that he or she is not economically disadvantaged. The recipient may rebut the individual’s presumption of economic disadvantage under these circumstances, as provided in this section, even though the individual’s PNW is less than \$1.32 million.

(ii)(A) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section

demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, as a certifying agency, you may consider 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.

(B) You must have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her PNW remains above that amount.

(c) *Transfers within two years.* (1) Except as set forth in paragraph (c)(2) of this section, recipients must attribute to an individual claiming disadvantaged

status any assets which that individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients must not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of appendix E of this part.

■ 15. In § 26.69, revise paragraphs (a) and (c) to read as follows:

§ 26.69 What rules govern determinations of ownership?

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must 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.

* * * * *

(c)(1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

(4) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

Examples to paragraph (c): (i) An individual pays \$100 to acquire a majority interest in a firm worth \$1 million. The individual's contribution to capital would not be viewed as substantial.

(ii) A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute \$100 and \$10,000, respectively, to acquire a firm grossing \$1 million. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1).

(iii) The disadvantaged owner of a DBE applicant firm spends \$250 to file articles of incorporation and obtains a \$100,000 loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature.

* * * * *

■ 16. In § 26.71, revise paragraphs (e) and (l) to read as follows:

§ 26.71 What rules govern determinations concerning control?

* * * * *

(e) Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

* * * * *

(1) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the nondisadvantaged individual remains involved with the firm in any capacity, there is a rebuttable presumption of control by the non-disadvantaged individual unless the disadvantaged individual now owning the firm demonstrates to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned and/or controlled the firm.

* * * * *

§ 26.73 [Amended]

■ 17. In § 26.73, in paragraph (g), remove the words “unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified” and in paragraph (h), remove “26.35” and add in its place “26.65”.

■ 18. In § 26.83, revise paragraphs (c), (h), and (j), to read as follows:

§ 26.83 What procedures do recipients follow in making certification decisions?

* * * * *

(c)(1) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(i) Perform an on-site visit to the firm’s principal place of business. You must interview the principal officers and review their résumés and/or work histories. You may interview key personnel of the firm if necessary. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely

upon the site visit report of any other recipient with respect to a firm applying for certification;

(ii) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing

(iii) Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards;

(iv) Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records;

(v) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.

(vi) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(vii) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.

(viii) Require potential DBEs to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this part.

(2) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the written approval of the concerned operating administration, for supplementing the form by requesting specified additional information not inconsistent with this part.

(3) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by State law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(4) You must review all information on the form prior to making a decision about the eligibility of the firm. You may request clarification of information

contained in the application at any time in the application process.

* * * * *

(h)(1) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of § 26.87 of this part, except as provided in § 26.67(b)(1) of this part.

(2) You may not require DBEs to reapply for certification or undergo a recertification process. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (i) of this section or relating to suspension of certification under § 26.88), a complaint, or other information concerning the firm’s eligibility. If information comes to your attention that leads you to question the firm’s eligibility, you may conduct an on-site review on an unannounced basis, at the firm’s offices and job sites.

* * * * *

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm’s owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm’s circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm’s size and gross receipts (e.g., submission of Federal tax returns). If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under § 26.109(c).

* * * * *

■ 19. In § 26.86, remove and reserve paragraph (b) and add a sentence to the end of paragraph (c) to read as follows:

§ 26.86 What rules govern recipients’ denials of initial requests for certification?

* * * * *

(c) * * * An applicant’s appeal of your decision to the Department

pursuant to § 26.89 does not extend this period.

* * * * *

■ 20. In § 26.87, revise paragraphs (f) and (g) to read as follows:

§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?

* * * * *

(f) *Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information relevant to eligibility that has been concealed or misrepresented by the firm;

(4) A change in the certification standards or requirements of the Department since you certified the firm;

(5) Your decision to certify the firm was clearly erroneous;

(6) The firm has failed to cooperate with you (see § 26.109(c));

(7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see § 26.73(a)(2)); or

(8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

* * * * *

■ 21. Add § 26.88 to read as follows:

§ 26.88 Summary suspension of certification.

(a) A recipient shall immediately suspend a DBE's certification without adhering to the requirements in § 26.87(d) of this part when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

(b)(1) A recipient may immediately suspend a DBE's certification without adhering to the requirements in § 26.87(d) when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by § 26.83(i) of this part or fails to timely file an affidavit of no change under § 26.83(j).

(2) In determining the adequacy of the evidence to issue a suspension under paragraph (b)(1) of this section, the recipient shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

(c) The concerned operating administration may direct the recipient to take action pursuant to paragraph (a) or (b) this section if it determines that information available to it is sufficient to warrant immediate suspension.

(d) When a firm is suspended pursuant to paragraph (a) or (b) of this section, the recipient shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

(e) Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under § 26.87 of this part to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

(f) While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward a recipient's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long

as the DBE is performing a commercially useful function under the existing contract.

(g) Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to the recipient information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the recipient must either lift the suspension and reinstate the firm's certification or commence a decertification action under § 26.87 of this part. If the recipient commences a decertification proceeding, the suspension remains in effect during the proceeding.

(h) The decision to immediately suspend a DBE under paragraph (a) or (b) of this section is not appealable to the US Department of Transportation. The failure of a recipient to either lift the suspension and reinstate the firm or commence a decertification proceeding, as required by paragraph (g) of this section, is appealable to the U.S. Department of Transportation under § 26.89 of this part, as a constructive decertification.

■ 22. In § 26.89, revise paragraphs (a)(1) and (3), (c), and (e) to read as follows:

§ 26.89 What is the process for certification appeals to the Department of Transportation?

(a)(1) If you are a firm that is denied certification or whose eligibility is removed by a recipient, including SBA-certified firms, you may make an administrative appeal to the Department.

* * * * *

(3) Send appeals to the following address: U.S. Department of Transportation, Departmental Office of Civil Rights, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

* * * * *

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late

filing of the appeal or in the interest of justice.

* * * * *

(e) The Department makes its decision based solely on the entire administrative record as supplemented by the appeal. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may also supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, State, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

* * * * *

■ 23. Revise appendix A to part 26 to read as follows:

Appendix A to Part 26—Guidance Concerning Good Faith Efforts

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix.

The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an

adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. (1) Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

(2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract

goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. (1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

(2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in § 26.53(b)(2)(vi), you must also require the

contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

■ 24. Revise appendix B to part 26 to read as follows:

**Appendix B to 49 CFR Part 26—
Uniform Report of DBE Awards or
Commitments and Payments Form**

**INSTRUCTIONS FOR COMPLETING THE
UNIFORM REPORT OF DBE AWARDS/
COMMITMENTS AND PAYMENTS**

Recipients of Department of Transportation (DOT) funds are expected to keep accurate data regarding the contracting opportunities available to firms paid for with DOT dollars. Failure to submit contracting data relative to the DBE program will result in noncompliance with Part 26. All dollar values listed on this form should represent the DOT share attributable to the Operating Administration (OA): Federal Highway Administration (FHWA), Federal Aviation Administration (FAA) or Federal Transit Administration (FTA) to which this report will be submitted.

1. Indicate the DOT (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.
2. If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If you are an FTA recipient, indicate the Grant/Project numbers covered by this report. If more than ten attach a separate sheet.
3. Specify the Federal fiscal year (i.e., October 1–September 30) in which the covered reporting period falls.
4. State the date of submission of this report.
5. Check the appropriate box that indicates the reporting period that the data provided in this report covers. For FHWA and FTA recipients, if this report is due June 1, data should cover October 1–March 31. If this report is due December 1, data should cover April 1–September 30. If the report is due to the FAA, data should cover the entire year.
6. Provide the name and address of the recipient.
7. State your overall DBE goal(s) established for the Federal fiscal year of the report being submitted to and approved by the relevant OA. Your overall goal is to be reported as well as the breakdown for specific Race Conscious and Race Neutral projections (both of which include gender-conscious/neutral projections). The Race Conscious projection should be based on measures that focus on and provide benefits only for DBEs. The use of contract goals is

a primary example of a race conscious measure. The Race Neutral projection should include measures that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.

Section A: Awards and Commitments Made During This Period

The amounts in items 8(A)–10(I) should include all types of prime contracts awarded and all types of subcontracts awarded or committed, including: professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts and should be rounded to the nearest dollar.

Line 8: Prime contracts awarded this period: The items on this line should correspond to the contracts directly between the recipient and a supply or service contractor, with no intermediaries between the two.

8(A). Provide the *total dollar amount* for all prime contracts assisted with DOT funds and awarded during this reporting period. This value should include the entire Federal share of the contracts without removing any amounts associated with resulting subcontracts.

8(B). Provide the *total number* of all prime contracts assisted with DOT funds and awarded during this reporting period.

8(C). From the total dollar amount awarded in item 8(A), provide the *dollar amount* awarded in prime contracts to certified DBE firms during this reporting period. This amount should not include the amounts sub contracted to other firms.

8(D). From the total number of prime contracts awarded in item 8(B), specify the *number* of prime contracts awarded to certified DBE firms during this reporting period.

8(E&F). This field is closed for data entry. Except for the very rare case of DBE-set asides permitted under 49 CFR part 26, all prime contracts awarded to DBEs are regarded as race-neutral.

8(G). From the total dollar amount awarded in item 8(C), provide the *dollar amount* awarded to certified DBEs through the use of Race Neutral methods. See the definition of Race Neutral in item 7 and the explanation in item 8 of project types to include.

8(H). From the total number of prime contracts awarded in 8(D), specify the *number* awarded to DBEs through Race Neutral methods.

8(I). Of all prime contracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the dollar amount in item 8(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.

Line 9: Subcontracts awarded/committed this period: Items 9(A)–9(I) are derived in the same way as items 8(A)–8(I), except that these calculations should be based on subcontracts rather than prime contracts. Unlike prime contracts, which may only be awarded, subcontracts may be either awarded or committed.

9(A). If filling out the form for general reporting, provide the total dollar amount of subcontracts assisted with DOT funds awarded or committed during this period. This value should be a subset of the total dollars awarded in prime contracts in 8(A), and therefore should never be greater than the amount awarded in prime contracts. If filling out the form for project reporting, provide the total dollar amount of subcontracts assisted with DOT funds awarded or committed during this period. This value should be a subset of the total dollars awarded or previously in prime contracts in 8(A). The sum of all subcontract amounts in consecutive periods should never exceed the sum of all prime contract amounts awarded in those periods.

9(B). Provide the total number of all subcontracts assisted with DOT funds that were awarded or committed during this reporting period.

9(C). From the total dollar amount of subcontracts awarded/committed this period in item 9(A), provide the total dollar amount awarded in sub contracts to DBEs.

9(D). From the total number of subcontracts awarded or committed in item 9(B), specify the number of sub contracts awarded or committed to DBEs.

9(E). From the total dollar amount of subcontracts awarded or committed to DBEs this period, provide the amount in dollars to DBEs using Race Conscious measures.

9(F). From the total number of subcontracts awarded or committed to DBEs this period, provide the number of sub contracts awarded or committed to DBEs using Race Conscious measures.

9(G). From the total dollar amount of subcontracts awarded/committed to DBEs this period, provide the amount in dollars to DBEs using Race Neutral measures.

9(H). From the total number of subcontracts awarded/committed to DBEs this period, provide the number of sub contracts awarded to DBEs using Race Neutral measures.

9(I). Of all subcontracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the dollar amount in item 9(C) by the dollar amount in item 9(A) to derive this percentage. Round percentage to the nearest tenth.

Line 10: Total contracts awarded or committed this period. These fields should be used to show the total dollar value and number of contracts awarded to DBEs and to calculate the overall percentage of dollars awarded to DBEs.

10(A)–10(B). These fields are unavailable for data entry.

10(C)–H). Combine the total values listed on the prime contracts line (Line 8) with the corresponding values on the subcontracts line (Line 9).

10(I). Of all contracts awarded this reporting period, calculate the *percentage* going to DBEs. Divide the total dollars awarded to DBEs in item 10(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.

Section B: Breakdown by Ethnicity & Gender of Contracts Awarded to DBEs This Period

11–17. Further breakdown the contracting activity with DBE involvement. The Total Dollar Amount to DBEs in 17(C) should equal the Total Dollar Amount to DBEs in 10(C). Likewise the total number of contracts to DBEs in 17(F) should equal the Total Number of Contracts to DBEs in 10(D).

Line 16: The “Non-Minority” category is reserved for any firms whose owners are not members of the presumptively disadvantaged groups already listed, but who are either “women” OR eligible for the DBE program on an individual basis. All DBE firms must be certified by the Unified Certification Program to be counted in this report.

Section C: Payments on Ongoing Contracts

Line 18(A–E). Submit information on contracts that are currently in progress. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.

18(A). Provide the total dollar amount paid to all firms performing work on contracts.

18(B). Provide the total number of contracts where work was performed during the reporting period.

18(C). From the total number of contracts provided in 18(A) provide the total number of contracts that are currently being performed by DBE firms for which payments have been made.

18(D). From the total dollar amount paid to all firms in 18(A), provide the total dollar

value paid to DBE firms currently performing work during this period.

18(E). Provide the total number of DBE firms that received payment during this reporting period. For example, while 3 contracts may be active during this period, one DBE firm may be providing supplies or services on all three contracts. This field should only list the number of DBE firms performing work.

18(F). Of all payments made during this period, calculate the percentage going to DBEs. Divide the total dollar value to DBEs in item 18(D) by the total dollars of all payments in 18(B). Round percentage to the nearest tenth.

Section D: Actual Payments on Contracts Completed This Reporting Period

This section should provide information only on contracts that are closed during this period. All dollar amounts are to reflect the entire Federal share of such contracts, and should be rounded to the nearest dollar.

19(A). Provide the total number of contracts completed during this reporting period that used Race Conscious measures. Race Conscious contracts are those with contract goals or another race conscious measure.

19(B). Provide the total dollar value of prime contracts completed this reporting period that had race conscious measures.

19(C). From the total dollar value of prime contracts completed this period in 19(B), provide the total dollar amount of dollars awarded or committed to DBE firms in order

to meet the contract goals. This applies only to Race Conscious contracts.

19(D). Provide the actual total DBE participation in dollars on the race conscious contracts completed this reporting period.

19(E). Of all the contracts completed this reporting period using Race Conscious measures, calculate the percentage of DBE participation. Divide the total dollar amount to DBEs in item 19(D) by the total dollar value provided in 19(B) to derive this percentage. Round to the nearest tenth.

20(A)–20(E). Items 21(A)–21(E) are derived in the same manner as items 19(A)–19(E), except these figures should be based on contracts completed using Race Neutral measures.

20(C). This field is closed.

21(A)–21(D). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above.

21(C). This field is closed.

21(E). Calculate the overall percentage of dollars to DBEs on completed contracts. Divide the Total DBE participation dollar value in 21(D) by the Total Dollar Value of Contracts Completed in 21(B) to derive this percentage. Round to the nearest tenth.

23. Name of the Authorized Representative preparing this form.

24. Signature of the Authorized Representative.

25. Phone number of the Authorized Representative.

**Submit your completed report to your Regional or Division Office.

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